THE LAW'S REMEDIAL NORMS

In recent years the nature of remedial norms, in particular the nature of final court orders, has received significant attention, following a long absence of theoretical interest. Largely in response to the recent work of Stephen Smith, the authors consider some of the pressing theoretical issues concerning remedial norms, and argue, first, that Smith is correct in claiming that there is no legal duty on a wrongdoer to pay a sum of money damages to the victim of his wrong prior to any court order. Second, prior to a court order a wrongdoer does owe her victim a moral duty of repair, a duty which while morally recognised is not legally enforced; the authors characterise this moral duty as a Kantian duty of virtue. Complying with this duty is encouraged by the rules governing costs and settlement. Third, the authors argue that prior to the award of a formal court order, the relationship between the plaintiff victim and the defendant wrongdoer can only fruitfully be revealed through recognising that their relationship is governed by the trilateral structure of litigation in which the court norms in relation to each of them are clearly set out. Finally, the authors argue, *pace* Smith, that the Razian theory of authority is entirely adequate for explaining the authority of the court when it issues orders.

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I. Introduction

1 In recent years the nature of remedial norms, in particular the nature of final court orders, has received significant attention, following a long absence of theoretical interest. The literature has two basic strands.

* The authors are grateful to Elise Bant, Stephen Smith, Robert Stevens and an anonymous reviewer for comments and suggestions.

2 The first strand tries to make sense of the normative relationship between a wrongdoer, such as a party who breaches a contract or one who commits a tort, and the victim of the wrong, in the interval between the breach of duty and a final disposal of their legal dispute by the issuance of a court order in the plaintiff's favour.[1] However, it is beyond the scope of any one article to go through all the ideas and arguments that this work has generated. Rather, our purpose here is to highlight certain issues which we feel most significantly shape our understanding of the remedial norms at work. By "remedial norms" we mean to cover those legal rules, rights, duties, powers and liabilities which constitute the law's response to the breach of a primary duty. What is a "primary" duty? The term "primary duty" originated in English-speaking jurisprudence with the British legal theorist John Austin,[2] and it is a duty *in law* such as the duty in tort law not to batter another, or a duty acquired under a contract.[3] As to this first strand of the emerging literature, our focus will be on the issue that has drawn perhaps the greatest amount of attention, which is whether or not a defendant who commits a tort or breaches a contract (which gives rise to a claim for damages for consequential loss) is under a distinct "secondary" or "inchoate" duty to compensate the plaintiff for that loss which arises *immediately* upon his breach of duty, that is, prior to the issuance of a court order.

3 The second strand comprises a smaller and even more recent literature which aims to analyse the nature and justification of courts issuing orders. Here, focusing on the work of Stephen Smith,[4] we aim to give an account of final court orders, such as an order against a defendant to pay damages, drawing upon both Immanuel Kant's theory of law and Joseph Raz's theory of authority, an account which, it is

1 For the purposes of this article, in all our examples we shall assume that the defendant, *D*, actually commits a breach of civil duty giving rise to a cause of action in *P* which will, if properly adjudicated, result in a judgment of the court in *P*'s favour and an order against *D*.

2 See n 5 below.

3 We believe that the subsequent analysis *can* be extended to apply to the remedial norms that arise in relation to breaches of equitable duties and in cases of unjust enrichment, but to raise them here would overly complicate the article. Moreover, the literature's most sustained attention has been on a common law wrongdoer's duty to pay damages, so engaging with this literature requires us, in the first instance, to focus upon that.

4 We have had the privilege of access to the first five chapters of Steve Smith's unpublished manuscript, tentatively titled *Private Law Remedies: Foundations, Scope, Structure*. We shall only address Smith's published work, Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) and Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727, with the caveat that these are not Smith's final views, which he continues to refine.

submitted, clears up some of the puzzles thrown up by the recent literature.

II. Does a defendant owe a "secondary" duty to pay damages for consequential loss immediately upon his commission of a breach of duty?

4 We first turn to Austin's own words. He said, "Those [rights] which I call primary do not arise from injuries, or from violations of other rights and duties" and "[t]hose which I call secondary … arise from violations of other rights and duties".[5] Austin's two-tiered structure of "primary" and "secondary" rights remains a powerful one, especially in English judicial thought, where the primary-secondary distinction is often regarded as an important distinction. As recently as 2001, the House of Lords (as it then was) reiterated that there *is* such a thing as a "secondary" obligation to compensate[6] and to pay damages.[7] In turn, the ubiquity of Austin's terminology in judicial language can largely be attributed to a single judge, Lord Diplock,[8] who frequently employed the primary-secondary distinction in his judgments.[9] In *Lep Air Services Ltd v Rolloswin Investments Ltd*,[10] his Lordship held that:[11]

> … [on the termination of a contract by X, and by the acceptance of a repudiation by Y, X's] primary [contractual] obligations come to an end … But for his primary obligations there is *substituted by operation of law* a *secondary* obligation to pay to [Y] a sum of money to compensate him for the loss … sustained as a result of [X's] failure to perform the primary [contractual obligations]. [emphasis added]

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5 John Austin, *Lectures on Jurisprudence: Vol II* (Robert Campbell ed) (John Murray, 5th Ed, 1885) at p 763.

6 *Alfred McAlpine Construction Ltd v Panatown* [2001] 1 AC 518 at 534, *per* Lord Clyde.

7 *Alfred McAlpine Construction Ltd v Panatown* [2001] 1 AC 518 at 595, *per* Lord Millett.

8 See Brice Dickson, "The Contribution of Lord Diplock to the General Law of Contract" (1989) 9(4) OxJLS 441. See also Bernard Rudden, "Correspondence" (1990) 10(2) OxJLS 288, which suggests that Pothier's Robert J Pothier, *Traité des Obligations* (Debure l'aîne, 1764) had a hand in the affair as well, as it speaks of *obligations primitives* and *secondaires*, which in William D Evans's translation became the terms "primary" and "secondary" rights.

9 In the seminal "fundamental breach" case of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, Lord Diplock had recourse to Austin's distinction in order to refute the basis of a contrasting doctrine of fundamental breach as a "rule of *law*", holding instead that the doctrine was a "rule of *construction*": Pearlie Koh & Andrew Phang Boon Leong, "Regulation of Terms" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong ed) (Academy Publishing, 2012) at para 07.048.

10 [1973] AC 331.

11 *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331 at 350, *per* Lord Diplock.

This view was echoed by Lord Reid in the same case.[12] This two-tiered structure, however, is not peculiar to English legal thought. Across the Atlantic, and predating Lord Diplock's statement, the American jurist Oliver Wendell Holmes Jr advanced a similarly two-tiered account of the normative picture, *viz* the "option" theory of contract.[13] Responding to his contemporary, the English jurist Frederick Pollock, who argued that there was no immediate duty to pay damages in cases of contractual non-performance,[14] Holmes insisted that it was not that the promisor *actually* (if implicitly) made a joint promise to perform *or* pay damages in the alternative; rather, the law simply imposed a legal duty to pay damages upon a breach.[15]

5 Those in favour of a duty to pay damages which arises upon *D*'s breach can be divided into two camps, one more or less aligned with Austin and Holmes, who hold that by operation of law a duty to compensate arises immediately upon the breach and those, by contrast, who agree that *D* has such a duty immediately upon the breach, but do not regard it as a "secondary" duty in Austin's sense. Rather, this camp, who might be called "continuation" theorists, argues that the primary obligation (such as a contractual obligation to deliver goods) continues to exist after a breach occurs, but is juridically altered so as to legally require a different performance, that is, a duty to compensate modelled upon a notion of repair.[16] For the purposes of this article, we do not have to distinguish the two camps, for the question at issue is: On whatever theoretical justification, does the wrongdoer come under an immediate duty to pay damages?

6 In order to address that question in its purest form, we intend to focus on damages for consequential loss, *eg*, damages for economic losses flowing from damage to property or economic losses consequent upon a breach of contract. Why the focus on damages for *consequential*

12 Lord Reid said, "If the party fails to deliver, somehow that [primary contractual] obligation disappears and by operation of law is replaced by an obligation to pay money": *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331 at 345.

13 Nathan B Oman, "Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law" (2011) 39 Fla St U L Rev 137 at 145.

14 *Holmes-Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874–1932* (Mark DeWolfe Howe ed) (Harvard University Press, 2nd Ed, 1961) at p 233, cited in Nathan B Oman, "Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law" (2011) 39 Fla St U L Rev 137 at 146–147.

15 "I don't think a man promises to pay damages in contract any more than in tort … He commits an act that makes him liable for them if a certain event does not come to pass, just as his act in tort makes him liable *simpliciter*": cited in Nathan B Oman, "Why There is No Duty to Pay Damages: Powers, Duties, and Private Law" (2011) 39 Fla St U L Rev 137 at 147.

16 Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1730–1731.

loss? This turns on the distinction between what Zakrzewski and Smith call "replicative" and "creative" court orders,[17] a distinction which we find sound and thus rely upon. In short, a "replicative" order is one which *replicates* a duty that the defendant already clearly owes to the plaintiff. Two examples suffice. Where a plaintiff seller brings an action on the price against the defendant buyer, the order that the court gives (assuming for the purposes of this example that the plaintiff does not also bring a claim for consequential loss for breach of contract) is simply an order that the defendant pay the price, that is, the debt under the contract of sale; the order then merely replicates the duty the defendant already had to pay the price.[18] Similarly, where the court makes an order of specific performance against a defendant vendor of land, the defendant is ordered to do the very thing required under the original contract for the sale of land.

7 By contrast, a "creative" order is one which imposes upon the defendant a new duty which he never had to discharge prior to the order. In Smith's taxonomy, orders for the payment of damages for consequential loss are considered creative orders. This is because they do not replicate a duty the defendant had prior to the court's order. If this is correct, then it follows that the defendant had no legal duty, arising immediately on his breach of a primary legal duty, to pay compensation to the defendant for consequential loss. It is the supposed implausibility of the defendant owing such a duty which largely animates Smith's position in the debate. One of the features that Smith points out is that it seems very unlikely that a defendant could properly calculate the amount he should pay as damages for consequential loss, even with the co-operation of the plaintiff. It seems that only a court could authoritatively fix the amount of such damages, and Smith points out that the rules governing assessment of consequential damages are rules which are best understood as directed to the court,[19] not to the defendant. If this line of thought is correct, a defendant in this position could not, in the absence of a court order fixing the amount of damages, discharge a legal obligation to pay damages prior to the court's order. Hence, such a defendant could not be under a legal obligation to do so.

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17 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 6–19; Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) at pp 64–83.

18 Although the duty is *now* owed *to* the court, a point to which we shall return at paras 22–30 below.

19 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at p 23; Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1749.

8 What complicates matters are cases involving damages for non-consequential loss which look, at first glance at least, as if they might be determined in amount by the plaintiff and defendant prior to any award of the court. Consider, for example, two other sorts of damages claims. If *D* commits a trespass to goods, damaging *P*'s car, then it might seem obvious that *D* could discharge an obligation to compensate *P* if *P* provides, say, three estimates for the cost of repair, and *D* pays the price of the middle estimate, which P accepts; similarly if *P*'s claim is for what have been called "vindicatory" (or "substitutive") damages.[20] Vindicatory damages are not damages for any loss suffered by *P*, but rather "vindicate" his rights by (economically) valuing the infringement of the right itself. For example, if *D* takes *P*'s car and uses it for a holiday in circumstances where *P* had no intention to use the car, and then returns it in good shape with a full tank of petrol, *P* may not be able to establish any consequential loss. Nevertheless, *D* is liable to a claim in damages which vindicates *P*'s title to the car, which will be measured by the (economic) "value" or rather "disvalue" of the infringement of the right. Typically, this will be the market value of hire of the car for the period *D* wrongfully took possession of it.[21] As with the case of trespass to goods, this sum may be fairly easy to calculate and, again, if *P* presented his claim in terms of the cost of hire to *D*,[22] it would seem fairly straightforward that *D* could discharge a duty to pay damages by tendering that sum. We shall say more about the relationship between such a duty to pay damages and the concept of settlement of claims further on, but the immediate point is that, in contrast to these two cases, the case of damages for consequential loss is – at least in

20 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 19 and 33; Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1728 and 1753–1756. See also Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) ch 4 at p 73.

21 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at pp 63–68 and 79–84.

22 If *P* presents his claim in terms of the cost of hire to *D*, the law – whether in the UK or in Singapore – will be on his side. In *Chartered Electronics Industries Pte Ltd v Comtech IT Pte Ltd* [1998] 2 SLR(R) 1010 ("*Chartered Electronics*") at [18], the Singapore Court of Appeal cited with approval Greer LJ's holding in the seminal English case of *J & E Hall Ltd v Barclay* [1937] 3 All ER 620 at 623:

> The normal measure of damages for conversion is the market value of the goods converted … This is a well settled principle which is based on the premise that: 'Where you have been dealing with goods which can be readily bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar article in the market'.

Chartered Electronics has since been affirmed recently in *Fairmacs Shipping & Transport Services Pte Ltd v Harikutai Engineering Pte Ltd* [2015] 1 SLR 904 at [24]–[25].

determining the amount *D* must pay to discharge any such duty – much less straightforward.

9 Smith argues that the positive law seems to give no grounds for saying that there *is* a duty to pay damages arising upon the breach of a duty.[23] Whilst noticing, in our view correctly, that the positive law is not framed to give a clear answer as to whether an order is replicative or creative,[24] features of the positive law clearly give support to the view that there is no such duty.

10 In the first place, there is no liability for failing to pay damages prior to a court order. "A refusal to pay damages until ordered to do so by a court is never a source of liability."[25] If there *were* such a legal duty – and the logical implication of the Austinian-Holmesian view as well as the "continuation" view is that there *is* such a duty – presumably it should give rise to a legal liability for failing to discharge it. Similarly, a defendant cannot escape liability to the plaintiff's cause of action by transferring money by way of damages, unless of course the plaintiff accepts the payment as full settlement of the claim. Unless the plaintiff so accepts the money, his cause of action and right to an award of the full amount of the claim will continue in juridical existence. At most, the defendant will have a right to set off the amount paid against the amount awarded in damages. As Donaldson MR said in *Edmunds v Lloyds Italico & l'Ancora Compagnia di Assicurazione e Riassicurazione SpA*[26] ("*Edmunds*"):[27]

> On the facts of this particular appeal, the position is that, after the action had been begun, sums were tendered in full settlement of the claims for damages and interest. The plaintiff retained these sums, but made it quite clear that they would only be accepted in settlement of the claim for damages. In other words, there was an offer of settlement

23 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 21–26; Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1741–1749.

24 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 3, 19 and 21.

25 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at p 21. This is not of course to say that the law does not encourage settlement. See n 53 below.

26 [1986] 1 WLR 492.

27 *Edmunds v Lloyds Italico & l'Ancora Compagnia di Assicurazione e Riassicurazione SpA* [1986] 1 WLR 492 at 495D–495G. See also Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at p 24 and Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1741–1743.

> upon one basis and a counter offer on another. Neither offer was accepted and, if sued, the plaintiff would have been obliged to repay the money which he had received. However, the existence of this potential cross-claim cannot be used as a defence to the claim for damages, because, at best, it only constitutes an equitable set-off …
>
> Mr Reeder's argument assumes that the payment extinguished the right to give judgment for any damages and that the judgment is to be treated as if it were a judgment for interest only. But it was not a judgment for interest only. It was a judgment for damages and interest. This was as it should have been, since the defendants have no defence to the claim for the sums due under the reinsurance contracts. The defendants' only right, which is quite sufficient to enable justice to be done, is to resist any attempt to levy execution on the judgment without giving credit for the sums retained by the plaintiff.

Moreover, the issue raised by the absence of any legal requirement to plead a failure to pay damages and the rule that prepayment, unless accepted in settlement, does not extinguish the plaintiff's cause of action, is not merely a legal-conceptual one, but a legal-historical one.

11 As Oman has pointed out,[28] in his correspondence with Holmes, Pollock argued that there was simply no such thing as a duty to pay damages either before, during or after a trial. Pollock based his argument on the pleading requirements for the action of assumpsit. Under the stringent common law writ system, a failure to plead every element of the legal wrong would result in the claim being struck out. Pollock noticed that in an action for assumpsit, it was necessary to plead that *D* had promised to do something and had failed to do so. By contrast, it was not necessary for *P* to plead that *D* had – further – failed to pay damages. If, therefore, *D* was supposed to have a secondary duty to compensate *P* independently of a court order, *P* should be required to plead the fact that *D* failed to pay as an element of *P*'s cause of action.

12 Smith makes a similar point, noting that the prepayment rule is not a mere technicality. On the contrary, the rule is a direct implication of the fundamental distinction in the English law of obligations: that between an action to *enforce* existing rights (an action to enforce a contractual debt, for example) and an action to obtain *redress* for wrongs (*eg*, an action for damages for personal injury). This fundamental distinction between rights and wrongs, however, may have been obscured by the abolition of writs in the nineteenth century.[29] We can, however, preserve the core insight of this distinction. Historically

28 Nathan B Oman, "Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law" (2011) 39 Fla St U L Rev 137 at 145–148.

29 Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1742.

speaking, actions for damages were initiated by "trespass" writs. Once an action under a "trespass" writ was initiated, the defendant had no option but to come to court[30] (under the "*praecipe*" writs which initiated actions to enforce existing rights, a defendant *could* avoid appearing in court by fulfilling the claim put forward by the plaintiff).[31] And Smith perceptively points out that the simplest explanation for this divergence is that under an action for damages, the plaintiff simply had *no right to damages*.[32] Crucially, "there was no demand that the defendant could satisfy because the plaintiff was not seeking to enforce a right but rather to obtain redress for a wrong".[33]

13 The other main reason Smith advances for the claim that there is no duty to pay damages is that if there was the correct – and, may we also say, *appropriate* – *form* of a court order following the plaintiff's successful prosecution of his cause of action would or should be a *declaration* of the amount of damages the defendant had to pay, not an award of damages, that is, an *order* or *judgment*[34] that the defendant pay the plaintiff a certain sum. Smith correctly points out the practical difficulties facing a defendant who wished to discharge his obligation to pay damages.[35] Besides the fact that it would be difficult to determine

30 John H Baker, *An Introduction to English Legal History* (LexisNexis, 4th Ed, 2002) at p 60:

> Whereas a *praecipe* writ ordered the defendant to accede to a demand or justify himself, a trespass writ brought the defendant directly to court to explain why he had done wrong … [the trespass writ] embodied a complaint rather than a demand.

31 John H Baker, *An Introduction to English Legal History* (LexisNexis, 4th Ed, 2002) ("Baker") at p 57. In Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727, Smith cites the third edition of Baker but since the fourth is now available, we prefer that edition.

32 Another possible reason why this historical insight has been obscured is because in contemporary private law thinking, damages are "as of right" – which is one of the first things first-year law students learn about damages.

33 Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1742; see also Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 25–26.

34 James E Penner, *The Law of Trusts* (Oxford University Press, 10th Ed, 2016) at para 1.5:

> [E]quity required particular individuals to comply with the Chancellor's decrees and indeed, this was reflected in the actual wording of the rulings: Chancery rulings were formulated explicitly as orders, *e.g.* 'this court doth order the defendant to give the claimant possession of …', whereas common law rulings [called 'judgments'] merely expressed that a certain state of affairs shall happen as in 'It is this day adjudged that the plaintiff shall recover against the defendant £100'.

35 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.

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the amount of damages owing given the court's discretion in fixing damage awards, it is likely that most of the salient facts are known to the plaintiff, not the defendant, and the plaintiff has no duty (morally or legally) to co-operate with the defendant intent on determining those facts[36] and applying the rules of assessment of damages to them. On the general moral principle that "ought" implies "can", it seems unrealistic – and perhaps also unreasonable – to say that the defendant has a legal duty which she could not discharge. The only way to salvage the idea that the defendant had such a legal duty would be to describe it as "inchoate": a duty which is owed the moment the wrong arises, but is crystallised by the court order. This brings us back to the question pertaining to the appropriate "form" of a court order, and Smith's reasoning on this point is subtle and powerful. As Smith points out, a critical objection to the "inchoate duties" argument is that the normal and appropriate way for courts to specify uncertain duties is by making declarations instead of issuing orders. The point is this: declarations are properly the individualised, specified counterparts of general legal rules, *not orders*. In support of this point, Smith draws upon Hart's critique of Austin's command theory of law: it is part of the essence of a legal rule that – unlike a mere command – it declares what all *sui juris* subjects of the law ought to do. Put simply, legal rules are normative propositions: it is part of the meaning of legal rules that the actions they stipulate are morally obligatory from the law's point of view (although the law might, of course, be mistaken).[37] This normative dimension of general legal rules is, in turn, reflected in its individualised, specified counterpart: declarations, such as judicial declarations that a defendant *does* owe (say) a duty of care to a plaintiff.[38] Going back to orders, Smith points out that orders – such as an award for damages – are basically commands.[39] Unlike declarations – which necessarily have a moral, normative dimension – commands simply "tell defendants what the authority wants them to do, not [necessarily, we may add] what they morally ought to do".[40]

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cfm?abstract_id=2009539> (accessed November 2016) at pp 15–16; Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1743–1744.

36 A point to which we shall return to at paras 17–21 below.

37 Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1746.

38 A good example is Lord Denning MR's holding in *Nettleship v Weston* [1971] 3 WLR 370 at 377–378: "[The defendant] is plainly liable for the damage done to the lamp post. She is equally liable for the injury done to Mr Nettleship. She owed a duty of care to each."

39 Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1747.

40 Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1747.

14 Smith thinks – and we agree – that the upshot of this normative distinction between "declarations" and "commands" is that it makes nonsense of the idea of an "inchoate duty" to pay damages.[41] The idea is this: the very concept of an inchoate duty to pay damages necessarily means that, prior to a court order which "crystallises" the inchoate duty, the defendant has not shown that he is unwilling to perform whatever the duty entails. However, courts routinely *order* a defendant *to do* something, not *declare* that he has had such a duty thereby implying he has failed to fulfil it. An order cannot – or should not – be seen as "crystallising" an inchoate duty because *if that were the case*, it implies – without any proof – that the defendant is unwilling to comply with his legal duties. Furthermore, the "inchoate duties" view of what the law is doing is inconsistent with other areas of the law, such as the law governing requests for injunctions to prevent future wrongs, where courts hesitate to order defendants to comply with legal duties in advance of clear proof that the defendants are unwilling to do so voluntarily.

15 And to supplement what we feel is Smith's fatal critique of the "inchoate duties" view, we propose to ask this question: if defendants *do* have an inchoate duty to pay damages, why then does the law not provide a mechanism for a party who has breached her "primary" duties to apply to court and ask the court to specify or crystallise her duty, such that she can – *at her initiative* – legally discharge her duty to pay damages? If *D does* have a "secondary" or "inchoate" duty to compensate *P*, it seems peculiar that the legal system will neither allow nor help *D* to do so, but the salient point here is that if the correct form of the award to crystallise a pre-existing yet inchoate duty to pay damages would be, as Smith argues, a declaration and not an order, then it would seem that defendants just as much as plaintiffs should be entitled to such a declaration. Why would one restrict an application for a *declaration* to only one person interested in the resolution of the legal issue, that is, to *P*?

16 The obvious reason why defendants are not able to bring applications to a court to obtain a declaration of the amount of damages they must pay, unlike the case of a trustee or others entitled to invoke an "originating summons" procedure,[42] is that *D*'s committing a breach of

41 Note here that we are only expressing a scepticism regarding the idea of an inchoate duty to *pay damages*, not regarding inchoate duties *generally*.

42 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 5 r 4:

> Proceedings (*a*) in which the sole or principal question at issue is or is likely to be, one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or some other question of law; or (*b*) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating

(*cont'd on the next page*)

duty is not a *cause of action* in, or for, *D*. From a philosophical point of view, we can give this thought a Kantian framing. As Ripstein argues,[43] individuals not only have rights, but from a Kantian perspective their rights represent their "means", that is, that which is theirs to employ as agents. *P*'s right to bodily security is a reflection of the fact that *P*'s body is his to use or not use as he wishes. His right to his body reflects his independence from the choices of others in respect of how he uses it. In consequence, when *D* injures *P* physically, the right *P* has to seek authoritative redress against *D* is, in like fashion, *P*'s "means" as well. In the same way that *P* can license *D* to touch him, or waive an unauthorised touching after the fact, it is for *P* to decide whether to prosecute his rights of redress for violation of his primary right to bodily security against *D*.

III. A Kantian conception of settlement

17 And this Kantian thought brings us to the subject of the nature of settlement. As we have seen, Smith places some emphasis on the practical difficulties facing defendants who wish to unilaterally discharge an "inchoate" obligation to pay damages (assuming that this is a coherent idea), and then goes on to invoke the principle of "'ought' implies 'can'" to radically undermine the thought that there *could* be such an inchoate legal duty in the face of such practical difficulties. But we think the point raised by Smith can and should be taken further, not being one which turns essentially just on matters of practicality, but more substantially and more foundationally on a Kantian understanding of private law dispute resolution.

18 Whilst, strictly speaking, not all settlements can be explicated as contracts explained in terms of offer, acceptance, and consideration,[44] as indicated in the quotation from Donaldson MR's judgment in *Edmunds*,[45] they typically are. And the point here is that neither *P* nor *D* have any legal duty to reach a settlement any more than any two persons have a duty to enter into a contract. It is important to emphasise that this is not merely the point that for *X* to discharge a duty (say, a "secondary" duty to pay damages) it may involve the co-operation of another. Many contracts require *X*'s co-operation for *Y* to fulfil her

summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or for any other reason considers the proceedings more appropriate to be begun by writ.

See also Pt 8 of the English Civil Procedure Rules 1998 (1998 No 3132).

43 Arthur Ripstein, "Civil Recourse and the Separation of Wrongs and Remedies" (2011) 39 Fla St U L Rev 163 at 169–179.

44 See, *eg*, *Moore v Vestry of Fulham* [1895] 1 QB 399.

45 See para 10 above.

obligation of performance. But in the contractual context, parties to a contract normally have a *duty* to co-operate in this respect. To give but one example, where a buyer of goods under a contract of sale refuses to take delivery of the goods when tendered by the seller, this counts as a breach of contract[46] giving rise to a claim for damages, and may amount to a repudiatory breach.[47] In the case of a "duty" to pay damages, however, it has never been maintained that either *P* or *D* has a *legal* duty to enter a settlement, even though the rules of civil procedure concerning costs may encourage it.[48]

19 From the Kantian perspective just rehearsed, this makes perfect sense. A person's legal powers to enter into binding agreements is just as much a part of her means as is her rights to her body and to her property. It is up to her to choose how to dispose of them. Moreover, the case of settlement brings out another feature of the Kantian perspective on the law. As is well known, in his *Metaphysics of Morals*[49] Kant draws a fundamental distinction between "right" and "virtue". Kantian "right" concerns those norms – legal norms – which can be coercively enforced. It is not concerned with why individuals comply with those norms, but just that they do. Kantian "virtue", on the other hand, is concerned with individuals properly treating others not merely as means, but as ends. It is the outworking of the categorical imperative. The paradigmatic instance of people treating others not only as means but also as ends is in the realm of contract, where people serve each other's interests, not by one party's making unilateral choices for the other as to how she will use her means, but allowing each the free choice to be served by the other in exchange for her own choice to use her means to serve that other. Although taken, obviously, in the shadow of the law, the decision to enter into a contract itself[50] is to be morally assessed not in terms of enforceable right, but as a matter of virtue.[51]

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46 Sale of Goods Act (Cap 393, 1999 Rev Ed) s 37(1), which is *in pari materia* with the English Sale of Goods Act 1979 (c 54) s 37(1).

47 Sale of Goods Act (Cap 393, 1999 Rev Ed) s 37(2).

48 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 22A; Civil Procedure Rules (1998 No 3132) (UK) r 26.4 and Pt 36.

49 Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans & ed) (Cambridge University Press, 1996). For a magisterial modern treatment, see Arthur Ripstein, *Force and Freedom* (Harvard University Press, 2009).

50 As distinguished from the legal duties which flow *from* the creation of a valid contract.

51 The plaintiff and the defendant are entitled to agree to settle, but virtue does not demand, indeed it cannot require, a breach of what Kant calls "the duty of rightful honour". See Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans & ed) (Cambridge University Press, 1996) at p 29, para 6:237. Where a party feels that the proposed terms of settlement are unfair to him, then he must not accept them as a matter of virtue, though if he does, he will be bound as a matter of right – this is another aspect of acting in accordance with right/virtue outside of the purview of the court.

20 Settlement, then, allows *P* and *D* – by acting virtuously – to avoid the authoritative resolution of their dispute as a matter of right.[52] Thus, the view that *D* is fulfilling some sort of "secondary" or "inchoate" obligation to pay damages when she reaches a settlement with *P* is unsatisfactory as an explanatory theory of what *P* and *D* are normatively doing. Rather, the parties escape legality altogether, not as to the validity of their contract of settlement, of course, but *as to the terms* upon which *D*'s legal liability is resolved.

21 To say this, of course, is not to say that when *P* and *D* settle they need be motivated only, or even at all, by motivations of Kantian virtue, that is, motivations to heal the breach in their normative relations by allowing *D* to make amends in some way, including, normally, by making compensation for losses suffered by *P* that are the consequence of the breach, or which represent the infringement of the right in the case of vindicatory damages. People also settle to avoid the expense, delay and uncertainty of litigation. This may motivate them more than any desire to heal the normative breach between them. The point is that settlement is mostly clearly and accurately justified as a matter of law and morality under the Kantian framework, in which the "duty" to heal the breach in their normative relations is conceived of as a duty of virtue. Further to this point, there may be good reasons in some cases why settlement will not be chosen by one or both of the parties because they positively seek the authoritative *legal* resolution of the breach in their normative relations. In the case of the plaintiff, this may be because she seeks the authoritative vindication of her rights. This may be especially so where the law is not certain as to whether those rights actually exist. On the other side, a defendant may refuse to settle for exactly the opposite reason, that is, in order to get the authoritative ruling of the court that he has no case to answer because the plaintiff has no genuine cause of action.

IV. The nature of court orders: A trilaterally structured account

22 We now turn to the examination of the nature of court orders. In order to do so, we first have to elaborate the battery of norms that characterise the position of *P* and *D* following *D*'s wrong but prior to the final resolution of the dispute by the court. The essential feature of this account is taking seriously the relations not only between *P* and *D* but between *P*, *D*, *and the court*. Before outlining this trilaterally structured

52 And might we also add *forcible* – forcible in the sense that even if the appellate court gets the law wrong and both parties are as a result worse off than if they had reached a settlement, the result is nevertheless binding upon them.

account, five points can be made about the character of legal norms.[53] First, legal systems are systems of norms.[54] Second, norms are standards which guide our behaviour; legal and moral norms – as *practical* norms intended to influence subjects' practical reasoning – are standards with legal and moral consequences.[55] Third, norms are reasons for action.[56] Fourth, legal norms are exclusionary second-order reasons *as well as* protected first-order reasons.[57] Fifth, the legal system consists of "general" and "specific" norms.[58] The former are typically legal rules, such as the rule that contractual duties must be discharged; such rules typically apply to all *sui juris* subjects of the law. Conversely, specific norms are personalised and *recipient-specific*, court orders being the obvious example.[59]

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53 Inasmuch as these are contested within the wider jurisprudential debate, we do not propose to examine their validity here, and for our purposes think it safe to assume that by and large these points are sound.

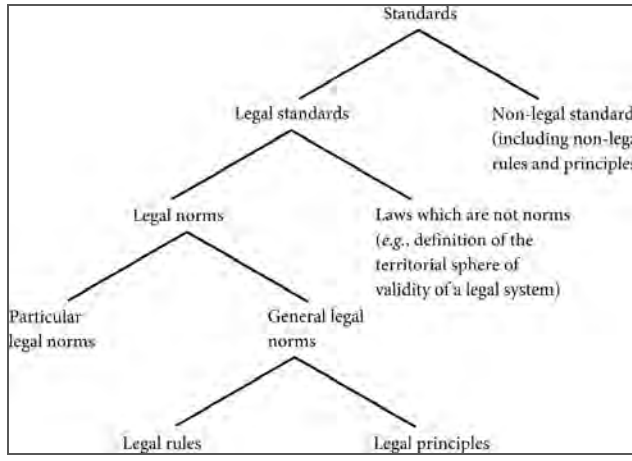
54 See Joseph Raz, "Legal Systems As Systems of Norms" in Joseph Raz, *The Concept of a Legal System* (Clarendon Press, 1980) at pp 121–167. See also Andrei Marmor, "Introduction" in Andrei Marmor, *Philosophy of Law* (Princeton University Press, 2011) at p 1.

55 James E Penner, "The Elements of a Normative System" in James E Penner, *The Idea of Property in Law* (Oxford University Press, 1997) at p 7.

56 Joseph Raz, "On Reasons for Action" in Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) at pp 15–48.

57 Joseph Raz, "On Reasons for Action" in Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) at pp 15–48. See also Nicole Roughan, "Understanding Authority" in Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press, 2013) at p 23.

58 See, *eg*, Raz's diagrammatic summary in Joseph Raz, "Legal Principles and the Limits of Law" (1972) 81(5) Yale LJ 823 at 824, fn 4, where he classifies legal norms into "general" and "particular", reproduced here:



59 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at p 7.

23 As Birks points out, Blackstone's characterisation of remedial norms is sequential in nature, and we think that this idea of a sequence represents the normative picture most accurately:[60] (a) a person going about his daily business has certain rights; (b) those rights may be violated, so that he thereby suffers a wrong; (c) If he suffers a wrong, the law will grant him an action, which will be (d) the instrument by which he will obtain his remedy.[61] For Blackstone, the law's immediate response to a wrong is neither a "right" nor a "remedy". The wrong gives rise to an "action" and, subsequently, an "action" to a "remedy".[62] We submit that the essence of this sequential understanding of remedial norms has much to commend it, as will become clear from the exposition below.

24 It seems right to say that when a breach of duty occurs, *D* is under a *liability* to (a) an adverse ruling; and (b) a court order, sequentially. Liability in this context is "the condition in which an individual is placed after a breach of his contract, or a violation of any obligation resting upon him".[63]

25 *P*'s substantive right is infringed when a breach occurs. This confers on *P* an action right: a right *to* a court order, that is, the judicial command itself.[64] The conferral of an action right can be explicated from the legal process: *P will* obtain the ruling and court order if she proves the elements of her cause of action. It is therefore a contingent right; in order to obtain it, *P* must exercise her power of bringing an action against *D*.

60 Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20(1) OxJLS 1 at 4: "the key to Blackstone's scheme is that it is in the nature of a sequence".

61 Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20(1) OxJLS 1 at 5. See also William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press, 1979).

62 Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20(1) OxJLS 1 at 13.

63 *Lattin v Gillette* (1892) 95 Cal 317 at 319, *per* Harrison J, cited in Wesley N Hohfeld, "Some Fundamental Legal Conceptions As Applied in Judicial Reasoning" (1913) 23(1) Yale LJ 16 at 54.

64 Zakrzewski identifies four possible referents of the term "court order": (a) the event; (b) the command or statement; (c) the order document; and (d) the rights that are generated, and takes "court order" to mean the jural relationship between plaintiff and defendant (Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) at p 46):

> [A] court order is not necessarily the words that the judge utters or the official document … defining remedies as certain court orders is equivalent to saying that remedies are certain jural relationships … Remedies *are* the rights that arise from … the making of certain judicial commands and statements.

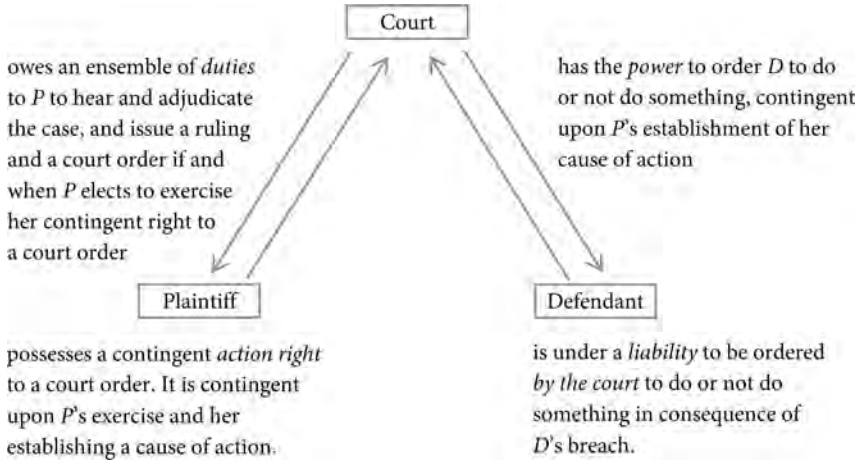
For our purposes, we take court orders to be the judicial command to the defendant.

26 However, *P*'s action rights do not correlate with any duties upon *D* outside of those duties, rights or liabilities that *D* acquires as a participant in the legal process, such as a duty to disclose, or a right to disclosure from *P*.[65] It is also a mistake to think that *D*'s liability to a court order correlates with *P*'s power to bring an action. As Lord Esher observed:[66]

> A lawsuit may be a suit in equity, or an action at law. In either case the question to be determined by it is – what were the rights of the parties before the suit or action was commenced? The lawsuit does not create the right; it determines what that right was and is. What is called a 'right of action' is not the power of bringing an action. Anybody can bring an action, though he has no right at all.

27 When the court issues its final order that *D* pay *P* damages, that order establishes a court-ordered right *de novo* which is held by the court itself. A court-ordered right is a right *to* the fulfillment of whatever is specified in the court order. If the court order stipulates that *D* is to pay *P* $10,000, the court has the right that *D* comply, that is, to pay *P* $10,000. At the same time, the order *de novo* creates an enforcement right which *P* holds against the court. *P*'s enforcement right is – similar to her action right – a contingent one. It is a power to call on the State's coercive mechanism if *D* fails to comply with the court order. The correlative liability in this case is owed by the State to *P* to see to it that the order *is* complied with. In diagrammatic form, when a breach of legal duty occurs:

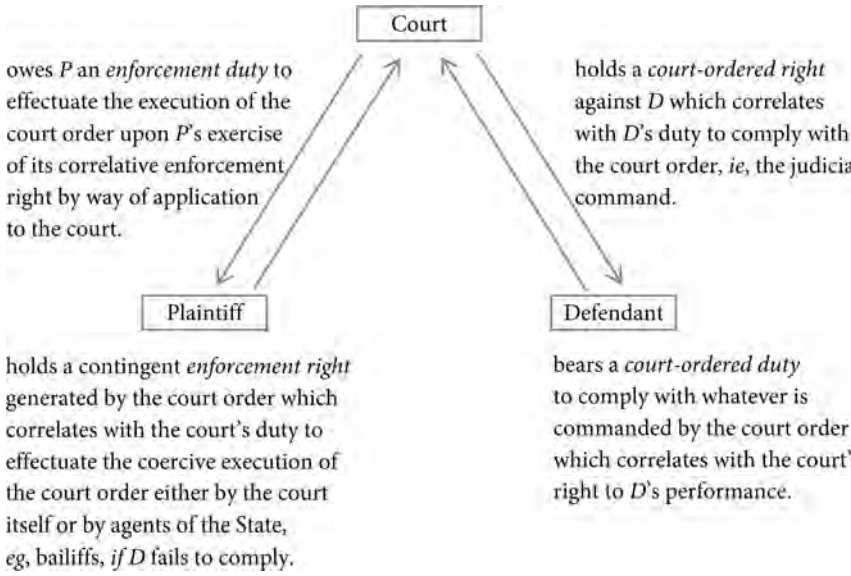
28 Before a court order is issued:



65 Assuming these rights are invokable by *P* and *D* themselves, *ie*, they are not merely the obtaining by *P* or *D* from the court an order for disclosure.

66 *Attorney General v Sudeley* (1896) 1 QB 354 at 359, *per* Lord Esher.

After a court order is issued:



29 The trilaterally structured account[67] can, first, account for why there is no possibility of a defendant-initiated discharge of her purported duty to compensate. The straightforward answer is that – on the trilaterally-structured account – there is no prior legal duty to compensate at all. *D*'s liability is contingent first on *P*'s election to commence a civil suit and secondly on her successful establishment of a cause of action. There is nothing to discharge prior to *P*'s pursuit of her action right.

67 *Cf* Benjamin C Zipursky, "Philosophy of Private Law" in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules L Coleman, Kenneth Einar Himma & Scott J Shapiro eds) (Oxford University Press, 2004) at p 635: "A private right of action involves a triangle of relationships. A plaintiff has a claim against the state to its assistance in changing the legal relations of the defendant". We agree with Zipursky that it would be a mistake to think that "the right of action is correlative to a duty on the part of the defendant to pay" (at p 635). We also agree (partly) with Zipursky when he says (at p 636) that:

> … the right is … a power to act through the state (albeit, against the defendant). Being the holder of a private right of action against a defendant for a damages remedy to be paid to oneself is different from being the legally designated beneficiary of an obligation of a defendant. This is because a legal power to act so as to alter a third party's legal status so that it becomes obligated to pay a certain person or to act for the benefit of a certain person is distinct from the status of being the beneficiary of the changed legal relation. This is so even if the status of the beneficiary and the status of the power-holder overlap.

30 Secondly, the trilateral structure also accounts for why *P* cannot obtain damages for *D*'s failure to pay damages. This is because *D*'s non-payment is not a breach of a correlative right held by *P*. *D*'s non-payment before a court order is issued infringes nothing, because there is no prior legal duty to pay damages. Contrariwise, *D*'s non-payment following a court order infringes the *court's* right to *D*'s compliance, not *P*'s enforcement right.[68] Finally, the trilateral structure also accommodates the outcome-centric form of court orders. Contrary to accounts which view *P*'s and *D*'s rights and duties as correlated, the trilateral account rejects such *P*-*D* correlativity. As such, it is a natural implication of the trilateral account that court orders *say nothing* pertaining to *P*'s and *D*'s legal rights and duties *inter se*, that is, outside the context of the legal process.

V. The moral nature of court orders

31 On the trilaterally structured account, the issuance of court orders creates *de novo* court-ordered duties upon *D* to comply with whatever is specified in the order. This point, coupled with an observance of the form of court orders which merely command *D* to do something, raises the issue of the law's authority, in particular the court's authority, to issue orders.[69] If court orders, are, as Smith says, "equivalent to the order[s] of a gunman",[70] they begin to look like exercises of naked power by the State, and this is morally problematic because it appears to disregard the moral and even rational agency of those subject to court orders. Smith, in particular, is acutely concerned with what he sees as the non-moral nature of court orders. In this final part of the article, we raise some objections to Smith's claims on this score.

32 At the outset we must be clear on the point that, whilst we agree with Smith that there is no secondary or inchoate duty, that is, a legal duty arising on *D*'s commission of a breach of private duty, to pay

68 Of course, the court's right is not like that of a private party; it is the court's right that *D* pay *P* according to the order. The court has no "personal" interest in *D*'s doing so, such as would give rise to a claim for damages by the court against *D*; the court's interest is to ensure, at *P*'s behest, that the order is complied with as an authoritative directive of the law.

69 As Raz acknowledges, Robert Paul Wolff identified a challenge which demands a justificatory response from those who seek to defend the legitimacy of authority: that if there *is* an authority which is said to be legitimate, then its subjects are duty-bound to obey it whether they agree with it or not, yet such a duty would be inconsistent with the subjects' autonomy. See Joseph Raz, "Introduction" in *Authority* (Joseph Raz ed) (Blackwell, 1990) at p 4. See also Robert Paul Wolff, *In Defense of Anarchism* (Harper & Row, 1970).

70 Stephen Smith, "Rights, Remedies, and Causes of Action" in *Structure and Justification in Private Law: Essays for Peter Birks* (Charles Rickett & Ross Grantham eds) (Hart Publishing, 2008) at p 408.

damages, we disagree that *D* has no moral duty to heal the breach in the normative relations between *P* and *D* caused by *D*'s breach of duty, a moral duty that is reflected in, if not actually replicated by, the court order to pay damages.

33 Smith's argument against a view such as ours has several strands. In the first place, Smith seems to believe that a Razian account of the moral authority of the law is inapt to explain the authority of courts when they issue orders. This reflects Smith's oft-made claim that whilst the authority of legislators to make laws[71] is a kind of moral authority, the authority of courts to issue orders is not moral but *practical*:[72]

> [A]lthough orders are, like rules, authoritative pronouncements, they differ from rules in that they are not intended to provide moral guidance. Orders are basically commands: rather than telling citizens what they ought, morally, do, they (merely) direct that certain things shall happen. Orders, we might say, are meant to be practically, rather than morally, authoritative.

According to Smith, the Razian framework "appears to be aimed directly at explaining the kind of moral authority that legal rules are meant to possess"[73] for two reasons. First, Smith argues that when rule-makers promulgate a legal rule it is part of the meaning of such rules that the actions they require are, in the law's view, morally obligatory.[74] But because orders are a matter of practical, not moral, authority, Smith suggests Raz's framework cannot account for the action-commanding force of court orders. It seems to us that this mischaracterises Raz's theory of authority.

34 First, to say that legislative authority is moral while action-commanding authority is practical implies that *only* action-commanding authority is practical in the Razian sense, whilst legislative authority is

71 Understood broadly as embracing not only the paradigmatic case of elected legislatures, but also common-law courts in their law-making function.

72 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 2–3. See also pp 13, 14 and 20 and Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1747.

73 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at p 11.

74 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 8 and 10–11; Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1746.

non-practical. Second, it implies that legislative authority requires moral justification which action-commanding authority does not so require, or if does, it is of a different kind of moral authority. As to the first point, on any conventional understanding of Raz's notion of authority, *both* legislative and action-commanding authorities are practical in nature. Rules and orders both tell us what to do and not do. In contrast, we submit that legal authority – both in the authority to issue rules and to issue court orders – is *practical* in nature while the ground for its authority lies in its moral and epistemic capability,[75] as set out in Raz's Dependence Thesis ("DT") and Normal Justification Thesis ("NJT"). These theses jointly specify the conditions under which an authority could be said to be legitimate instead of merely *de facto*:[76]

> (a) DT: authoritative directives should be based, among other factors, on pre-existing first-order reasons which already apply to the subjects of those directives.
>
> (b) NJT: the normal and primary way to establish that a person should be (morally) acknowledged to have authority over another involves showing that the alleged subject is likely better, or only able, to comply with reasons which already apply to her (*other than* the alleged authoritative directives) if she accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if she tries to follow the first-order reasons which apply to her directly.

35 Raz's framework is applicable not only to the legitimacy of legal rules, but also to the State's deployment of power in the form of court orders, understood as commands: "orders and commands are among the expressions typical of practical authority".[77] Court orders are legitimate if and when they satisfy the conditions laid down in the DT and the NJT. They satisfy the DT if they direct defendants to do or not do something

75 It is beyond the scope of this paper to provide a full rehearsal of Raz's theory and the way in which an authority's justification is related to the authority's expertise and ability to solve co-ordination problems. See Joseph Raz, "Legitimate Authority" in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) at p 8 and James E Penner, "Legal Reasoning and the Authority of Law" in *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Lukas H Meyer, Stanley L Paulson & Thomas W Pogge eds) (Oxford University Press, 2003) at p 71.

76 Joseph Raz, "Authority, Law, and Morality" in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994) at p 198. See also Joseph Raz, "The Justification of Authority" in Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) at pp 42–57.

77 Joseph Raz, "Authority and Reason" in Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) at p 37. Note here that Raz in the later chapter, "The Justification of Authority", clearly has in mind the *practical* nature of law's authority. The word "practical" in the quotation this footnote references is, therefore, to be understood in Razian terms.

based on the relevant "dependent" reasons which already apply anyway. Dependent reasons which plausibly form the basis of a court order include first-order reasons such as *D*'s moral duty to compensate, if that is the morally appropriate way of repairing the normative breach in *P*'s and *D*'s relations. The court that issues such an order fulfils the NJT if the court is best placed to issue an order that properly reflects the sort of payment *D* should make, and which *P* should accept, as one which serves to vindicate the right of *P*'s which *D* infringed, and which restores or repairs their normative relations. In this context it is also pertinent to point out that even with the best will in the world, *P* and *D* may not be able to restore or repair the breach in their normative relations on their own – *D* may be willing to offer more in damages that P is willing conscientiously to accept, for example; a rare case, perhaps, but a perfectly imaginable one. In such a case the court fulfils the NJT in another way, because by authoritatively issuing an order stating what *D* must pay to heal the breach, it solves the co-ordination problem caused by *P*'s and *D*'s inability to settle in a way that only it can do.[78]

36 Recalling the earlier distinction between "creative" and "replicative" orders,[79] we can apply the Razian NJT to justify such orders which reflects their distinctive natures. To the extent that some court orders are indeed *creative*, that is, to the extent that they are not within the defendant's sphere of moral competence/obligation to have done what the order stipulates prior to its issuance, the defendant is morally entitled to say, "It was not my moral obligation to have come up with it myself." In turn, the legitimacy of "replicative" orders can be justified on two bases. First, "replicative" orders help the defendant (*eg*, in insolvency cases) to order his affairs. On this basis, it is in *D*'s best interests to obey such court orders because it helps *D* better manage his obligations towards others. Secondly, "replicative" orders help *D* to overcome akrasia, that is, weakness of the will. This is pertinent in cases of strategic behavior, for example, when *D* chooses not to pay his overdue phone bills by betting on the chances that the telecommunications company would not take the trouble to sue him. Replicative orders can help defendants in such ways because it changes the modality of reasons for action. In the case of akrasia, a defendant who has yet to be hauled to court by the telecommunications company might well think, "I know I ought to pay up … but maybe I could get

78 Or rather, as only it can do as a matter of law. Non-legal officials such as mediators or arbitrators might also be called in aid. Smith understands that Razian authority can be justified on the basis that the authority can solve co-ordination problems, but does not see this as a possible justification for a court award of damages. Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at p 11.

79 See paras 6–7 above.

away with not paying up." If the company hauls him to court, and the court issues an order directing the weak-willed defendant to pay up, he will then think, "Now that the court has ordered me, I have to pay up."

37 Smith is troubled by what he sees as the coercive and non-moral nature of final court orders,[80] likening them to orders of a gunman. However, the finality of court orders (especially when the legal process is exhausted) and their concomitant demand to be obeyed no matter what (*eg*, even if the apex court gets the law wrong), leaves room for *D* to question or reject the moral soundness of the judgment, but nevertheless to accept that complying with the order is necessary to bring the dispute to an end. And there is an opposite side to this coin: complying with/obeying a court order allows *D* to maintain that he has discharged his moral obligations to the plaintiff even if both *D* and *P* are in a state of uncertainty about what was in fact morally required on *D*'s part.

38 A second strand in Smith's claim that an order to pay damages does not reflect or replicate a prior moral duty of the defendant's to make amends to the plaintiff and repair the normative breach between them is his claim that, like a criminal defendant who has no legal or moral duty to punish himself, the civil defendant has no legal or moral duty to pay damages to the plaintiff. This is framed in terms of the vindication of the plaintiff's rights. The idea is that, in the same way as a criminal is not under a duty to vindicate her victim's rights by punishing herself, a civil law defendant is likewise under no duty to vindicate the plaintiff's rights by paying damages.[81]

39 Smith has one argument which is, at first glance, compelling, though we think ultimately misguided, and one argument which we think is fairly clearly unpersuasive. We will deal with the latter first.

40 Consider this example.[82] Jones, a law professor, negligently causes Mick Jagger to sustain a fractured ankle. In consequence, Mick

80 It is important to note that what is troubling Smith is the coercive *and* non-moral nature of orders, not its coercive aspect *per se*. General legal rules are no less coercive but they do not bother Smith because they claim to aim at helping those subject to such rules better conform with the objective demands of morality.

81 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 9–10, 18–19 and 30–35; Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1727, 1747–1749 and 1753–1756.

82 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 26–27 presents a structurally identical but less vivid example.

Jagger is unable to go on tour with the Rolling Stones for a period of three months. Mick Jagger suffers economic loss to the tune of $10m. Given Jones has the financial wherewithal of a typical law professor, his liability to Mick will ruin him. Now let us say it was Mick who negligently broke Jones's ankle, causing Jones to be laid up for three months. Given the terms of Jones's contract regarding medical leave, Jones is not out of pocket a penny. Moreover, being laid up and relieved of teaching for a term allows Jones to write a couple of papers he wouldn't otherwise, so his career is actually advanced by the injury. Mick will not be liable to Jones for any consequential loss at all. Smith thinks, and we agree, that it is very difficult to say that Jones's liability to Mick can plausibly be the reflection of a moral obligation on Jones to compensate Mick to this extent. Therefore, the court's award of damages cannot replicate or be a reflection of whatever duty Jones owes Mick because of his negligent wrong.[83]

41 We think Smith draws the wrong lesson from this example. In our view, the intuition the example generates is that the damage award in this case is unjust. It is beyond the scope of this paper to say why this is so, although we give a sketch of a Kantian argument in a footnote.[84] Our point here is that it is hard to see how such an award could be just, that is, morally justified, if it is so out of line with our moral intuitions, if our intuition is that Jones's legal liability is, morally speaking, out of all proportion to the wrong he committed. Smith, though not explicitly, himself provides resources for saying that the award is unjust: if an award of damages is properly to vindicate the right of the plaintiff, just like a criminal fine or other punishment does, it must be *proportionate* to the violation of the right if it is to vindicate that right in a just manner. If it does not, then it is unjust, both morally and legally. In view

83 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 26–27.

84 The basic Kantian thought is that, with respect to one's own means, one should be free from the choice of others. By using your means as my own, I usurp them, which is a wrong. By damaging your means, I do not usurp them, but I must compensate you for the loss I cause. The point about the Mick Jagger example is that the quantification of economic loss is determined not by some objective standard about the value of the infringement of the right when I damage his ankle, but by the choices of a multitude of people with respect to their means, *viz*, to use their means to pay Mick Jagger large amounts under a series of contracts or, from the other end, Mick's choice to use his means to generate this massive revenue. Why should my liability to Mick turn on how the other people choose to use their means in favour of Mick? That would seem to make my liability, which is about my interference with Mick's means, turn on the choices of others with respect to their means, albeit in relation to Mick's. Market positions, as determined by individual's choices as to their means, do not necessarily or even regularly reflect morally significant evaluations of the value of any person's means, or the value of the right to those means.

of this, Smith's claim that a damages award does not replicate or reflect a pre-existing moral duty of the defendant seems to turn on a bad example, because in this case the law seems out of line with justice.

42 The other argument, which aims to show that damage awards are the civil law analogue to court-ordered punishments in the criminal law,[85] advances again the idea that damages awards are orders, not declarations, that is, crystallisations or specifications of pre-existing duties. Smith's argument is that if a damages award is seen to "replicate" or reflect a duty the defendant already had, then the defendant's wrong is not really repaired, or, which is the same thing, the plaintiff's right is not truly vindicated. In particular, Smith feels that the "replicative" view of damages carries with it a deeply unsettling implication, which is this: the logical implication of the "replicative" view is that – in the law's eyes – the wrongfulness of the defendant's act ceases to have legal significance within the context of litigation. The idea is that if a damages award merely "replicates" what the defendant had to do anyway (that is, a pre-litigation duty), then the defendant's wrong becomes just another category of duty-creating events, like entering into a contract. This means that, from the *law's* point of view, the fact that a legal *wrong* occurred is normatively no different from the fact that a defendant, for example, promised to pay a sum of money. If this were indeed the law's view we would be forced – Smith thinks – to accept the implausible conclusion that a claim to enforce a contractual debt and a claim for damages is legally and normatively indistinguishable: they would both be merely claims to enforce existing duties to pay money. If such a distinction between right and wrong is elided it leads to a further, troubling implication: it is as if by making damage awards, the court is seeking to retroactively *erase* or "*undo*" the defendant's wrong. (This is because, as Smith says, "If the wrong can be retroactively undone, then it is no longer significant".)[86] Smith, understandably, does not feel that we should accept this implication either, because wrongs obviously cannot be retroactively undone.

43 However, we feel that Smith's conclusions are unpersuasive. If the purpose of a defendant's duty is to repair the breach of normative relations with the plaintiff occasioned by his wrong, that purpose is just that, to repair the breach, not to pretend that the wrong never occurred. In our view, Smith's problematic conclusions stem from an assumption that *only* the authoritative award of damages by the court can effect such a repair. But if that is so, it is hard to see why a contract of settlement,

85 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at pp 3, 19, 21 and 30–35.

86 Stephen Smith, "Duties, Liabilities, and Damages" (2011–2012) 125 Harv L Rev 1727 at 1753.

that is, a private arrangement between the parties, could serve as a defence for the defendant to the plaintiff's cause of action any more than a mere prepayment of damages does. Settlements show that by (successfully) pursuing duties of virtue, the breach can, on the parties' own initiative, be repaired by the defendant paying an appropriate sum. If the rules of law, including the rules as to damages, are just, then they must reflect what is necessary to repair the breach in the normative relations between the defendant and the plaintiff. We know that defendants have a moral obligation to repair such a breach. To that extent, the rules of damages must be reflective of that obligation if they are not to depart from the very concept of repair in operation here, that is, the repair of private, that is, person-to-person, legal normative relations. The fact that the defendant's pre-award duty to compensate is a duty of virtue – which is not legally enforceable – does not diminish the fact that it is a moral duty, or that the enforceable award of damages cannot reflect it.

44 One final point: we do not see that there is a mutually exclusive relationship between the defendant's failure to comply with a moral duty to repair the breach in normative relations and the acknowledgement of his wrong, which is expressed by the court issuing an order, rather than making a declaration, that is, that the court would register the former (if it were to recognise such a moral duty as a legal duty) with a declaration, and the latter with an order. As Smith acknowledges, a civil order of damages is not normally taken to be a moral *censure* of the defendant.[87] We must draw a distinction between moral censure and the mere recognition that the defendant failed to comply with his pre-court order moral duties. The court's award of damages, its order to the defendant, not only vindicates the plaintiff's right but also is framed as an order because the defendant did fail, whether or not he deserves moral blame for that, to repair the breach in normative relations with the plaintiff of which he was the cause, and which he had a moral obligation to do.

VI. Conclusion

45 Remedial norms are tricky, and it is good that they are finally getting the theoretical attention they deserve. Our examination of them, largely in response to the work of Stephen Smith, reveals the following:

87 Stephen Smith, "Why Courts Make Orders (and What This Tells Us about Damages)" (2011) 64 CLP 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009539> (accessed November 2016) at p 35.

(a) Smith is right that there is no legal duty on a wrongdoer, *D*, to pay a sum of money in damages to the victim of his wrong, *P*.

(b) There is a moral duty of repair upon *D*, which is morally recognised but not legally enforced, and which we characterise as a Kantian duty of virtue. Complying with this duty is encouraged by the rules governing costs and settlement.

(c) Prior to the award of a formal court order, the relationship between *P* and *D* can only fruitfully be revealed through recognising that their relationship is governed by the trilateral structure of litigation in which the court norms in relation to *P* and *D* are clearly set out.

Finally, we have argued that the Razian theory of authority is entirely adequate for explaining the authority lying behind court orders, something doubted by Smith.
