

# Rights and Remedies: A Complex Relationship

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|      |   |    |
|------|---|----|
| I.   | DEFINITION .....  | 33 |
| II.  | HOW DO WE KNOW WHAT RIGHTS WE HAVE? .....                                 | 36 |
| III. | PRIVATE RIGHTS, ACTION RIGHTS, AND COURT-ORDERED RIGHTS.....              | 40 |
| A.   | PRIVATE RIGHTS .....  | 40 |
| B.   | ACTION RIGHTS .....   | 41 |
| C.   | COURT-ORDERED RIGHTS.....   | 42 |
| D.   | RIGHTS AND REMEDIES: PRELIMINARY OBSERVATIONS ABOUT COURT-ORDER LAW ..... | 43 |
| IV.  | THE CONTENT OF COURT-ORDER LAW.....                                       | 45 |
| A.   | ACTIONS RIGHTS TO REPLICATIVE ORDERS.....                                 | 47 |
| B.   | ACTIONS RIGHTS TO TRANSFORMATIVE ORDERS .....                             | 49 |
| C.   | REFUSING TO MAKE AN ORDER .....   | 55 |
| D.   | CREATIVE ORDERS .....   | 57 |
| i.   | ORDERS OF CONVENIENCE.....  | 57 |
| ii.  | SYMBOLIC ORDERS .....   | 58 |
| iii. | CO-ORDINATING ORDERS: REMEDIES WITHOUT RIGHTS .....                       | 60 |
| V.   | CONCLUSION.....   | 62 |

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This essay explores the relationship between rights and remedies in the common law, focusing in particular on those rights and remedies that common law courts invoke when they are resolving private disputes. I will defend two main theses—one descriptive and one explanatory—about the nature of this relationship. The descriptive thesis is that the relationship is complex. Rights and remedies, I will argue, are related in five different ways: (1) remedies sometimes directly replicate rights; (2) remedies sometimes transform rights into near substitutes; (3) remedies sometimes create entirely new rights; (4) remedies are sometimes given where plaintiffs have no rights; and (5) some rights are not protected by remedies at all. The explanatory thesis is that the reason the relationship between rights and remedies is complex is that the question of how citizens should behave towards one another is different than the question of what courts should do on proof that a citizen has misbehaved.

## **I. DEFINITION**

Even within a strictly private law context, the term ‘rights’ can mean many things. When private law scholars talk about the relationship between rights and remedies, however, what they usually mean by ‘rights’—and what I will mean in this essay—are rights that citizens hold against one another and that arise from everyday or “ordinary” events such as agreeing to sell goods, inheriting land, attaining the age of majority or transferring money by mistake (a “non-ordinary” event is a legal event, in particular a court order—see below). Familiar examples are usually assumed to include contracting parties’ rights to the performance of contractual obligations, landowners’ rights to possession of their land, and the rights of individuals who mistakenly transfer money to the return of that money. For reasons explained later, I will describe such rights as “ordinary private rights” or just “private rights” when it is important to distinguish them from other kinds of legal rights.

The term “remedy,” though it might appear more precise, can also mean different things.<sup>1</sup> Private law writers often use the term when referring to a particular kind of private law right, namely rights that correspond to duties that have a “remedial” function or aim; examples include tortfeasors’ duties to compensate their victims and contract breakers’ duties to pay their co-contractors sums stipulated in agreed damages clauses. Writers who describe duties to return mistakenly transferred money as a remedy are likewise using the word in this functional sense. When private law scholars talk about the relationship between rights and remedies, however, what they usually mean by “remedy”—and what I will mean in this essay—is a court order.<sup>2</sup> Most writers narrow this definition further by excluding certain court orders from consideration; for example, procedural orders are usually ignored. To keep this essay to a reasonable length, I will follow suit, focusing exclusively on orders made as part of a final judgment that command a defendant to do or not do something (e.g., orders to pay an agreed sum,

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<sup>1</sup> See P. Birks, “Rights, Wrongs, and Remedies” (2000) 20 *Oxford J Legal Stud.* 1.

<sup>2</sup> The distinction between remedies as remedial rights and remedies as court orders is complicated for two reasons. The first is that court orders sometimes (but not always) affirm remedial duties. Let me explain. Remedial rights are private rights because they arise from ordinary events, i.e., not from a court order. They are distinguished from other private rights by the fact that the events from which they arise are, broadly speaking, a “problem” of some kind, for example a tort, a breach of contract, an unjust enrichment. The remedial right itself is, again broadly, a right that the problem be cured. Court orders, for their part, sometimes direct defendants to perform remedial duties, for example a court may order a defendant to make restitution. An order to make restitution is thus remedial in two senses: it is remedial in the sense that it commands the defendant to do what he should have done, and it is remedial in the sense that what he should have done is to remedy a problem, namely an unjust enrichment. Many court orders, however, are not like this: many orders command defendants to perform non-remedial duties, for example orders to perform a contract. Although a court order to perform a contract is remedial in the sense of directing the defendant to do what he should have done, the thing that the defendant should have done is not itself a remedial duty. The duty to perform a contract arises because one has made a contract, not because one is responsible for remedying a problem. The second source of confusion is that it is sometimes assumed that all or some of what I have called remedial rights only come into existence once a court has made an order (e.g., that there is no duty to return a mistaken payment until a court so orders). As will become clear below, I reject this view, but if it is right, then the distinction I have just explained is really a distinction between two kinds of court orders, namely orders that require defendants to perform private duties (e.g., perform a contract) and orders that require defendants to remedy problems (e.g., make restitution). Most books and courses on “remedies” do not distinguish between these different senses of the term.

orders to pay damages, orders to vacate land, specific performance orders, injunctions, etc.).<sup>3</sup>

As the above comments suggest, part of my reason for focusing on the relationship between private rights and court orders is that it is this relationship that most lawyers and writers have in mind when they talk about the relationship between rights and remedies.<sup>4</sup> The main reason, of course, is simply that the relationship is important and, in my view anyway, little understood.<sup>5</sup> It may also be worth mentioning that narrowing “rights” to mean “private rights” and “remedies” to mean “court orders” avoids two problems that often thwart attempts to make sense of the rights/remedies relationship. The first problem is that if “rights” are left at large then even if “remedies” are confined to court orders, it becomes difficult to distinguish remedies from rights because court orders themselves, or at least their legal effects, can be described in the language of rights. As I will explain below, it is useful to think of court orders as giving rise to rights (“court-ordered rights”) and, at the same time, to think of citizens as having rights to court orders (“action rights”). If “rights” are narrowed to “private rights” it remains possible to distinguish them from both court-ordered rights and action rights. The second difficulty is that if “remedies” are left at large (so as to include remedial rights) then even if rights are confined to private rights, some remedies will turn out to be private rights. Remedial rights are a kind of private right. Needless to say, if both terms are left at large, the potential for confusion multiplies.

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<sup>3</sup> Thus, “court orders,” as used in this essay, do not include, unless indicated otherwise, declaratory orders, constitutive orders, (i.e., self-executing orders, e.g., vesting orders, divorce decrees), orders that assist in the preparation for a trial (e.g., search orders), and “enforcement” orders (e.g., attachment of earnings orders, charging orders). A complete explanation of the relationship between rights and remedies would need to examine some, if not all, of these orders.

<sup>4</sup> This essay was written for a panel (at a conference bearing the same title as this book) titled “The Relationship Between Rights and Remedies.”

<sup>5</sup> Although most common law lawyers accept without question that private rights and court orders are closely related, and, further, that understanding this relationship is crucial to understanding private law (hence the practice of beginning courses on contracts by examining the orders that courts make in contract cases), few writers have attempted to explain in any systematic fashion the relationship between private rights and court orders. A notable recent exception is R. Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005).

## II. HOW DO WE KNOW WHAT RIGHTS WE HAVE?

It would appear self-evident that to explain the relationship between rights and remedies we need to do three things: (1) identify the rights that we have; (2) identify the remedies that are given when those rights are infringed or threatened; and (3) compare the rights with the remedies. As a methodology, this seems fairly straightforward, but in practice it immediately gives rise to two problems. The first, which I have already addressed, is that the words ‘rights’ and ‘remedies’ have multiple meanings. The second is that we are not sure what rights we have or even—and this is the real problem—how we ought to determine what rights we have. It is relatively easy to identify remedies: we just look at the orders that courts actually make. If a court orders a defendant to pay a sum of money, then the remedy in the case is an order to pay the sum. Rights are different: although a right may be created *by* an act, for example by a vote in the legislature or a judgment, a right is not the act itself. A right is a concept, not a thing. This is why writers argue about what rights we have and, at a deeper level, about the kinds of evidence that establish those rights.

Most writers refer to either or both of two very different kinds of evidence when they argue about whether a particular right exists. The first is evidence of what courts *say*. Thus, legal writers often argue that a particular right exists because courts say that such a right exists. The second is evidence of what courts *do*; specifically, what orders they make. Thus, legal writers often argue that a particular right exists because the courts have made orders that enforce or protect that right. Arguments of this second kind differ according to whether they assume that remedies are exact replicas of rights (e.g., contractual promisees have a right that contractual promises be performed only because, and insofar as, courts are willing to order promisors to perform) or whether they accept a less direct relationship (e.g., contractual promisees have a right that contractual promises be performed if the courts are willing to order non-performing promisors to pay damages, even if only nominal). But whichever version is adopted, this second kind of argument raises an obvious problem for writers who want to incorporate it into a larger story about the relationship between rights and remedies. The argument assumes that we already know what that relationship is.

It is possible, of course, that we do, or at least that we could, already know the relationship between rights and remedies. It is possible,

in other words, that the relationship could be determined without knowing anything about the actual rights and remedies that we have. This would be the case if the relationship between rights and remedies was determined by the general nature of legal systems. For example, it might be a conceptual truth that, in every legal system, legal remedies must be exact duplicates of legal rights. It should be evident from what I have already intimated about the complexity of the rights/remedies relationship that I am doubtful about the possibility of making conceptual arguments of this kind. I cannot prove, of course, that such arguments are impossible, and, even if I could, this is not the place for an extended discussion of the general nature of law. Instead, what I will do in the remainder of this section is to briefly describe two common—though radically different—ways of interpreting the evidence just described (and so of determining what rights we have). I will then contrast these two ways, again in brief outline, with the approach taken in this essay. Because the evidence over which these approaches disagree is evidence of what courts say and do, it will be useful to have some examples of what courts say and do on the table. I will begin, then, by briefly describing two well-known cases in which there appears to be a difference between what the courts say about the plaintiffs' rights and the remedies they gave to protect those rights.

In *Cohen v. Roche*, the defendant, an auctioneer, sold the plaintiff a set of Hepplewhite chairs, but then never delivered the chairs.<sup>6</sup> The court agreed with the plaintiff that the defendant had a legal obligation to deliver the chairs and that he had failed to fulfill this obligation. Although the court did not say so explicitly, it appears to have been assumed that the defendant was still in possession of the chairs, and therefore that delivery was physically possible. The court nonetheless refused the plaintiff's request that it order the defendant to deliver the chairs; instead, the court awarded the plaintiff damages, explaining that the chairs were merely "ordinary Hepplewhite furniture."<sup>7</sup> In the second case, *Woollerton and Wilson Ltd v. Richard Costain Ltd.*, the defendant

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<sup>6</sup> [1927] 1 KB 169.

<sup>7</sup> *Ibid.* at p. 179. Although he could have done this, the plaintiff in *Cohen* did not seek an order of specific performance. Rather, he sought an order of "delivery up" of goods, the basis for the order being that that property in the chairs had passed to the plaintiff when the contract was made and thus the defendant was, aside from any contractual wrong, wrongfully detaining the plaintiff's property. The case is authority, however, on the availability of both delivery up and specific performance because the court held that delivery up was available only in circumstances in which specific performance would be available.

contractors had installed a construction crane on a property where they were erecting a building.<sup>8</sup> The crane occasionally swung over the neighbouring plaintiff's airspace. The plaintiff took the defendants to court, seeking an injunction to prevent the defendants from allowing the crane to encroach on his airspace. The court held that the swinging crane constituted a trespass onto the plaintiff's property and formally granted an injunction, but then substantively denied the plaintiff's request by suspending the injunction for the period of construction. In explaining its decision, the court noted that the swinging of the crane caused no injury or inconvenience to the plaintiff, and that its removal would effectively put an end to the building project.

Scholars writing about cases like *Cohen* and *Woollerton* have usually adopted one of two views about the relationship between the rights that the plaintiffs enjoyed prior to coming to court and the remedies that the courts did (or did not) grant them. In one camp, writers who adopt what I will call a "formalist" view of rights assume that the courts' refusal to order delivery in *Cohen* and their decision to suspend the injunction in *Woollerton* tells us very little about the plaintiffs' rights prior to the judgment. According to the formalist, the defendant in each case had a legal duty, up to the moment of judgment, to do the very thing the plaintiff requested the court order him to do (i.e., deliver the chairs, take down the crane).<sup>9</sup> We know this, according to the formalist, because the courts in these cases (and in many others) said clearly that such duties existed. In this view, then, it is perfectly coherent to say that a citizen has a legal duty to do X, notwithstanding that no court is willing to order him to do X.

In the other camp, writers who adopt what I will call a "realist" view read the same facts very differently. According to the realist, regardless of what the courts may have said they were doing, their refusal to order delivery of the chairs in *Cohen* and removal of the crane in *Woollerton* shows that the defendants in these cases did not have legal duties to do these things. For the realist, the correct description of the defendant's legal obligation in *Cohen* is that it was a disjunctive obligation *either* to do what he had promised (to deliver the chairs) or to

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<sup>8</sup> [1961] 1 WLR 683.

<sup>9</sup> The formalist might go further and argue that the defendant's duty in *Woollerton* to take down the crane continued in force after the judgment because the injunction, having been suspended, did not take effect, and so did not replace the existing duty, until the suspension was lifted.



pay damages for non-delivery. As for *Woollerton*, the defendants simply had no duty at all. The fact that the court suspended the injunction shows, in this view, that the defendants did no wrong by encroaching on the plaintiff's airspace. For the realist, then, our rights are defined in terms of the remedies available to us.

The position taken in this essay is that neither of these views is correct, or, more charitably, that each is half correct. Agreeing with the formalists, I will argue that the defendant in *Cohen* had, up to the moment of the court order, a legal duty to deliver the chairs. On the other hand, I will argue that the realists are correct to suppose that the defendant in *Woollerton* had no duty, even prior to the court order, to take down the crane. The substantive justifications for these interpretations are presented later. For the moment, it is sufficient to note that these justifications presume that the task of determining what rights we have is more complex than is assumed by either the formalists or the realists. It is more complex because to understand what rights we have, we need to consider what courts say (as the formalists stress) and what courts do (as the realists stress) and, furthermore, what makes sense of what courts say and do.<sup>10</sup> In particular, we need to consider why, and when, it might be reasonable for courts to refuse to make an order notwithstanding that the defendant had a legal duty to do the very thing the court was asked to order the defendant to do.

Having just said that the task of determining our rights is more complex than is often assumed, let me conclude this section by noting that most people, including most lawyers, intuitively think about rights in just this (complex) way. Save for the occasional legal philosopher (or legal economist), it would be difficult to find anyone who thinks that a contracting party like the vendor in *Cohen* should feel at liberty to send their co-contractor a sum of money in lieu of performance. Contractual promises, it is widely assumed, are meant to be performed.<sup>11</sup> Similarly, it would be difficult to find many people who would think that the

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<sup>10</sup> I discuss this methodology in more detail in Chapter 1 of *Contract Theory* (Oxford: Oxford University Press, 2004).

<sup>11</sup> Of course if a contractual promise is itself a disjunctive promise to perform or pay then performance means performing or paying. It seems unlikely, however, that many contractual promises are understood in this way. The argument sometimes made to the effect that if contracting parties were given full information and the opportunity to fine-tune their promises at no cost that they would normally agree to disjunctive obligations of this kind (see S. Shavell, "Is Breach of Contract Immoral?" (2006) 56 *Emory LJ* 439) addresses a different point.

defendant in *Woollerton* had done something wrong by letting their crane encroach over the plaintiff's airspace. More precisely, it would be difficult to find many people, lawyers included, who agree with the final result in *Woollerton* and yet who would maintain that the defendant had acted wrongly. They might think the defendant should ask before letting their crane swing over the plaintiff's airspace (which the defendant did), but, this done, if anyone deserves censure in *Woollerton*, it is the plaintiff.

### III. PRIVATE RIGHTS, ACTION RIGHTS, AND COURT-ORDERED RIGHTS

Attempts to understand the rights/remedies relationship are often hampered by a failure to distinguish the different kinds of rights that are implicated in a decision to award a court order. By way of background to the discussion of particular court orders that follows, this section introduces a framework for distinguishing the three most important categories of such rights.

#### A. PRIVATE RIGHTS

As mentioned already, "ordinary private rights" (or just "private rights") are the rights that citizens hold against other citizens prior to any judgment by a court.<sup>12</sup> These are "private" rights because they are rights that citizens hold against each other, not the state, and they are "ordinary" private rights because they arise from ordinary events, such as making contracts, attaining the age of majority, or transferring money by mistake (rather than from court orders). Familiar examples are usually assumed to include contractual promisees' rights to the payment of contractual debts, transferors of mistaken payments' rights to return of their payments, landowners' rights to exclusive possession of their land, and trust beneficiaries' rights to execution of the trust.<sup>13</sup>

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<sup>12</sup> Throughout this essay, "citizens" refers not just to real persons, but also to "legal persons" such as corporations and the state (insofar as the state is regarded in law to be acting as an ordinary citizen).

<sup>13</sup> To avoid complications at this stage, I have deliberately not included examples of private "secondary" duties (i.e., duties that arise from wrong, e.g., a duty to pay damages) or private duties that courts never order to be performed (e.g., a duty to take care not to injure others). The issue concerning secondary duties is not whether they are private duties—they clearly are—but whether they are ordinary private duties or

## B. ACTION RIGHTS

In the typical private lawsuit, the plaintiff will assert, *inter alia*, that the defendant has infringed or threatened to infringe the plaintiff's private rights. Exceptional cases aside, however, the reason that plaintiffs bring lawsuits is not merely to get a court to agree that their rights have been infringed, but to get a court to order the defendant to do or not do something. To this end, plaintiffs will typically argue not just that their rights have been infringed or threatened, but also that the court must, as a matter of law, grant them a particular order. When plaintiffs make arguments of this kind, they are asserting what I will call a "cause-of-action right" (or just "action right"). A cause of action is the set of facts that a plaintiff must prove to obtain a particular court order,<sup>14</sup> and a cause-of-action right is the right to the order that the plaintiff obtains once those facts are proven. In most cases, the relevant facts include that the defendant infringed or threatened to infringe the plaintiff's private rights, together with other facts. Thus, to obtain a court order that a defendant pay a contractual debt, the plaintiff must establish that the defendant is under a valid contractual obligation to pay the debt and that the limitation period has not expired. An action right is therefore a right held by a plaintiff who has established certain facts, which is subsequently acted on by the court before whom those facts were established, in the form of an order.

Action rights are typically rights to the award of a specific order. For example, the action right that a contractual creditor obtains, on proof of the debt, etc., is to a court order that the debtor pay the debt; other examples include action rights to orders that the recipient of a mistaken payment make restitution of the payment, action rights to orders that a neighbour committing a nuisance cease the nuisance, and action rights to orders that trespassers vacate land. These orders are available "as of right" if the facts that constitute the cause of action are proven.

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"court-ordered" private duties, that is to say, duties that arise only insofar as a court orders them to be performed. As for so-called "unenforceable" duties, such as the duty to take care, the issue is whether these should be regarded as legal duties at all. My own views are that: (1) some (but only some) secondary duties are created by courts; and (2) not all legal duties are enforceable.

<sup>14</sup> A cause of action is "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment": *Read v. Brown* [1889] 22 QBD 128 (CA) 131, *per* Lord Escher.

Some action rights are more complex. For example, a plaintiff may have an action right that a court merely consider making a certain order or orders, perhaps joined to a right that, if the “discretionary” order is not made, the court must make a different order. The various rules that, if we are to take them at face value, give courts discretion regarding the content or availability of a court order are probably best understood as giving rise to action rights of this kind. According to the conventional description of the law governing specific performance, for example, a plaintiff never has a right to an order of specific performance. At most, a plaintiff may have a right (assuming proof of a breach, etc.) that the court consider, on specified grounds, the possibility of ordering specific performance, and a right, if the order is not made, to an award of damages.

### C. COURT-ORDERED RIGHTS

When a court makes an order, the order itself gives rise to a third kind of right, which I will call a “court-ordered private right” (or just “court-ordered right”). Court-ordered rights often (but not always—see below) have the same content as the private rights that plaintiffs enjoy prior to coming to court. For example, plaintiffs who establish that the defendant owes them a contractual debt are normally granted an order directing the defendant to pay the debt. The content of the order replicates the content of the defendant’s private duty to pay the debt. Yet even in such cases, the plaintiff’s (new) court-ordered rights are distinct from the plaintiff’s (old) private rights. The legal effect of an order to pay an outstanding contractual debt is to extinguish the debt and to replace it with a judgment debt.<sup>15</sup> If the creditor wants a bailiff’s assistance to enforce the debt, it is the existence of the order, not the facts that gave rise to it, that must be proven.

Court-ordered rights are private rights because they are rights that citizens hold against other citizens. They differ from ordinary private rights because of how they are created (by a court order rather than an ordinary event) and how they are enforced (by seizure and sale of goods, etc., rather than court orders). To keep this distinction clear, I will refer to court-ordered private rights simply as “court-ordered rights.”

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<sup>15</sup> “[T]he original debt is gone, *transit in rem judicatum*, a fresh debt is created with different consequences”: *Re European Central Railway Co* (1876) 4 Ch D 33, at pp. 37–38.

#### **D. RIGHTS AND REMEDIES: PRELIMINARY OBSERVATIONS ABOUT COURT-ORDER LAW**

The above framework makes clear that the relationship between rights (i.e., private rights) and remedies (i.e., court-ordered rights) is determined by the law that governs action rights. As action rights are rights to court orders, I will call this body of law the law of court orders, or just “court-order law.” Court-order law is composed of the rules that stipulate what plaintiffs must prove if they wish to obtain a court order, and what those orders will look like. Up to this point, I have said nothing about the content of court-order law. In theory, it could have very little content of any kind. This would be the case if the “rubber-stamp” view of court orders is correct. The rubber-stamp view supposes that court orders merely confirm, or rubber-stamp, whatever private rights plaintiffs bring with them to court.<sup>16</sup> According to the rubber-stamp view then, the entirety of court-order law consists of a single rule to the effect that courts must, on proof that a defendant owes the plaintiff a legal duty, order the defendant to perform that duty.

The rubber-stamp view is tested against the positive law in the next section. Before turning to that task, however, it is useful to consider whether we might reasonably expect the law to fit the rubber-stamp view. Of course the law may not look anything like we would reasonably expect it to look. At the same time, if we are trying to understand the law, this is an important question. Understanding the law means making sense of it, and making sense of the law (or anything else) involves trying to find an intelligible order within it. The most obvious way to do this is to show that the law lines up, even if only approximately, with what we think it should look like, or at least with how we can imagine others (e.g., judges and other lawmakers) reasonably thinking it should look like.

What then might one reasonably expect court-order law to look like? Two observations come to mind. The first is that it would be

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<sup>16</sup> The realists described earlier hold the rubber-stamp view. In theory it is possible to hold the rubber-stamp view without adopting the realist methodology, but in practice this stance is difficult to maintain given that courts regularly announce rights, such as the right to delivery in *Cohen*, which they then refuse to enforce directly. To reconcile a formalist methodology with the rubber-stamp view it must be assumed, implausibly in my view, that when judges in cases like *Cohen* refer to legal duties which they then refuse to enforce, they are not actually talking about “legal” duties but about something else.

surprising if the rubber-stamp view was completely inaccurate. Whatever else courts are meant to do, they are meant to provide or “deliver” justice. This is not an awkward way of saying that courts should act justly; courts should of course act justly, but so should everyone else. The idea of delivering justice is that courts should ensure, so far as possible, that justice is done or achieved in society. If one then asks what justice itself requires, the obvious place to start—at least for a court dealing with an interpersonal dispute—is with the rules of private law. The actions prescribed by the rules of private law are meant to be the same actions that justice would prescribe (or at least this is what, legally, courts are meant to presume). If this is correct, it suggests that the courts’ basic role, when they make orders, should be to ensure that the rights articulated in private law are affirmed in their orders.

The other observation is that it would be surprising if the law fit the rubber-stamp view perfectly. The rules that govern private rights are directed at citizens; they tell citizens how they should behave in their interactions with one another. By contrast, the rules that make up court-order law are directed at courts. Action rights are rights against courts, and the rules that govern action rights are rules that tell courts how they should behave.<sup>17</sup> The law of court orders is fundamentally a branch of public law.<sup>18</sup>

For the aforementioned reasons, it is possible that the courts’ role, even viewed from a public law perspective, should be (merely) to rubber-stamp private rights. But this seems unlikely for three reasons. First, courts are public institutions, funded by taxpayers’ money. As with any public institution, the courts should care about how they spend public funds. It may be, as some have argued, that cost considerations are irrelevant when asking what justice requires of citizens in their interactions with other citizens, but cost is clearly relevant when

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<sup>17</sup> This is not to deny that citizens often regard the existence of a court-order rule as a reason to comply with their private law obligations. I may decide to pay a contractual debt because I know that if I don’t pay a court is likely to order me to do so. This merely shows that among the considerations I take into account when deciding how to act are others’ legal duties. I might also decide to pay the debt because my uncle, who acted as guarantor, has a legal obligation to pay if I don’t pay. In neither case are the relevant rules directed at me.

<sup>18</sup> The idea that rights held against state actors are public law rights is fairly conventional, but it is not accepted by all writers. The important point is that rules that impose duties on courts are different in kind from rules that impose duties on citizens.

considering how the state should go about delivering justice. Justice is a public good, but so are roads, education, health care, and so on.

Second, private law rules and court orders are differently situated within the law's institutional structure; specifically, they are differently situated with respect to the law's "enforcement" mechanisms. Citizens who fail to comply with private law duties are liable to have courts make orders against them. By contrast, defendants who fail to comply with court orders are liable to be thrown in jail or to have their property seized and sold. The legal system could be arranged differently; for example, the law could require that plaintiffs seeking to "enforce" court orders must return to the court for a new order, perhaps with a different content, before execution or contempt charges could be initiated. Absent such a costly and time-consuming arrangement, however, the question of when and how courts should make orders is closely tied to the question of when and how plaintiffs ought to be able to invoke the state's coercive powers.

The third reason to query the rubber-stamp view is that court orders and private law rules are distinctive techniques for guiding conduct. Private law rules are abstract statements about what citizens should do in circumstances of such-and-such a kind. The availability of court orders may be governed by legal rules, but orders themselves are not scaled-down rules. Court orders are personalized directives, issued by a court, that command a specific individual to do a specific thing. The specificity of court orders means they can do things general rules cannot do (and vice versa), while the fact that court orders are issued by courts means they can, and usually do, carry meanings that rules do not.

#### IV. THE CONTENT OF COURT-ORDER LAW

Anyone making arguments about the content of court-order law runs immediately into the difficulty that there is no agreement as to which legal rules are court-order rules. Indeed, the question is almost never raised; court-order law is not a recognized legal field. Judges occasionally make clear that they regard a particular rule as directed at them, rather than at citizens, or that they regard a particular legal duty as arising prior to, rather than at the moment of, their judgment.<sup>19</sup> In most

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<sup>19</sup> For example, Lord Diplock famously said that the breach of a contract gives rise, at the moment of a breach, to a duty (a "secondary" duty) to pay monetary compensation for losses suffered: *Photo Production Ltd. v. Securicor Transport Ltd.* 1980] AC 827 (HL), at p. 847.

cases, however, these are statements about the law, not of the law.<sup>20</sup> It is their accuracy we want to test. There are some legal rules that require courts to determine whether other rules are part of private law or court-order law (or, what amounts to the same thing, to determine when a particular duty arises). Conflict of laws rules, for example, require courts to apply a distinction between substantive law and procedural law that roughly parallels the distinction between private law and court-order law.<sup>21</sup> But such rules are rare and rarely conclusive.<sup>22</sup>

For these reasons, it is difficult to say much about court-order law without invoking broader—and contested—ideas about the nature of private rights and action rights. This is not the place to defend a general theory of private rights. The main focus in what follows is on the action-right side of the law, that is to say, on identifying reasons that courts might make, or refuse to make, court orders. Thus, my approach, for the most part, will be to start with provisional and fairly conventional assumptions about the kinds of private rights that exist, and then to ask whether, and how, we can explain the orders that courts make (or don't make) in cases where these rights have (or have not) been infringed or threatened. If a plausible explanation exists, then we can be reasonably confident that the assumed private right (or lack of right) exists.

The discussion is organized around four ways in which court orders might be related to the private rights that plaintiffs bring with them to court: (1) the order replicates the plaintiff's private rights ("replicative orders"); (2) the order transforms the plaintiff's private rights ("transformative orders"); (3) no order is made at all (despite proof of a rights-infringement or threat); and (4) the order creates new private rights ("creative orders"). To keep the discussion at a reasonable length, I will say nothing about the difficult question of why so much of court-order law appears to give courts discretion over the content or availability of court orders.

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<sup>20</sup> By this I mean that these statements are typically obiter; the results in the cases in which they are made does not depend on their truth.

<sup>21</sup> *Tolofson v. Jensen* (1994) 120 DLR (4th) 289 (SCC) 321.

<sup>22</sup> For example, Canadian and British courts disagree as to whether the rules governing the quantification of damages are procedural or substantive: see *Tolofson v. Jensen* *ibid.*, and *Harding v. Wealands* [2006] UKHL 32, [2006] 3 WLR 83 (HL). I discuss these and similar rules in "The Law of Damages: Rules for Citizens or Rules for Courts?" in D. Saidov & R. Cunnington, eds., *Contract Damages: Domestic and International Perspectives* (Oxford: Hart Publishing, 2008), at pp. 50–52.



### A. ACTIONS RIGHTS TO REPLICATIVE ORDERS

Replicative orders are orders that confirm or “replicate” already-existing duties that defendants owe to plaintiffs. They do this by commanding defendants to do the very thing they should have done already. Although this essay rejects the view—the rubber-stamp view—that regards all orders as replicative, it accepts that many, probably most, court orders are like this. Uncontroversial examples (it is suggested) include orders to pay an agreed sum (i.e., to pay a contractual debt), injunctions to cease a nuisance, orders to vacate another’s land, orders to execute a trust, and orders to return money paid by mistake.<sup>23</sup> In each of these examples, the duty ordered by the court is the same duty whose breach triggered the action right to the order.

At first blush, it might be thought obvious why courts would make replicative orders. Citizens are meant to perform their private law duties. Usually they do this, but sometimes they don’t. Replicative court orders, it would seem, are made in order to encourage citizens who have failed to comply with their duties to rectify that failure. Courts make replicative orders, in other words, simply because they want citizens to do what the private law requires them to do. The question, however, is how replicative orders manage to do what this explanation supposes they do. An order, after all, is just that—an order. Court orders do not literally compel performance. Nor is a court order a sanction: such sanctions as the law imposes (e.g., imprisonment for contempt) only come later, when the order is not performed. Of course, many citizens will do what the law has asked them to do simply because the law asks them. But the kinds of citizens against whom court orders are made would not appear to fall into this camp: court orders are only made against citizens who have already infringed or threatened to infringe another’s rights.<sup>24</sup> Replicative court orders, in other words, appear to merely ask defendants to do things that they have already shown themselves unwilling to do.

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<sup>23</sup> I would also include within this list many kinds of damages orders—but not, as will become clear in a moment, all damages orders.

<sup>24</sup> Similarly, it is unclear what role a replicative order plays for those citizens who care about the law only insofar as it threatens them with a sanction. Court orders, to repeat, are not sanctions. As the law is currently arranged, sanctions are not imposed until after a court order has been made, but sanctions clearly could be imposed without first making an order.

To understand how court orders, even replicative orders, might encourage citizens to do what they should have done already, we need to recall the point made earlier that court orders are not just scaled-down rules. Court orders are a distinctive technique for guiding behaviour. In particular, they are distinctive in two ways that matter for the present discussion. First, court orders are framed in relatively precise terms. This is important because private law rules, like all rules, are framed in general terms, and so are necessarily vague or imprecise in certain respects. Reasonable citizens may reasonably disagree as to whether a private law rule applies in a particular situation. Court orders provide a solution to this problem. Like any communication, court orders must be interpreted, but their specificity usually leaves little room for debate over the content of the defendant's duty. For citizens who are unsure of their legal duties or who misunderstand those duties, court orders can therefore make clear what they ought to do. Stated differently, the fact that a defendant lost in court does not show that the defendant was unwilling to do what the law requires: it may only show that the defendant was unsure or mistaken about the law. In such a case, replicative court orders can make a difference.<sup>25</sup>

The second way in which replicative court orders can make a difference arises from the fact that they are personalized directives. The rules that set out private law duties are directed to the population at large; they are propositions stating how citizens generally should behave. As a consequence, they are relatively easy to ignore. It is also relatively easy to rationalize a rule—to convince oneself that the rule does not really apply to oneself. Orders are different. Because of their specificity and because they are addressed at particular individuals, orders are difficult to ignore or rationalize away. For many citizens, then, court orders function something like the voice of their conscience: they are a reminder—a clear and public reminder—that the law expects the addressee to act in a certain way. For citizens who accept, in a general way, the law's authority, yet nonetheless sometimes fail to act on that acceptance, particularly when the law's wishes are expressed in general rules, court orders can serve a

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<sup>25</sup> This is true both for citizens who comply with the law out of a sense of obligation and for citizens who comply with the law merely because they fear whatever sanctions the law will impose if they do not comply. Both groups want to know what the law expects them to do; the first group because it wants to comply with that expectation and the second group because it wants to know when the law is going to apply sanctions.

useful purpose. For what might be called “law akratics,”<sup>26</sup> court orders bring home their duty in a clear and public way.<sup>27</sup>

Of course, many citizens do not accept, even in a general way, the law’s authority. Many citizens, like Holmes’ famous “bad men,” only care about the law insofar as it is likely to impose a sanction on them. But even for these citizens, personalized directives serve a useful purpose. In the same way that citizens who accept in principle an obligation to obey the law sometimes need a public reminder before they will act on this principle, citizens who care only about the law’s sanctions sometimes need a reminder that those sanctions are imminent.<sup>28</sup>

If this were all there were to say about court orders, we would expect courts only to make replicative orders. To understand why this is not the case, we need to consider why courts might sometimes want to make different orders or even to refuse to make an order at all.

## **B. ACTIONS RIGHTS TO TRANSFORMATIVE ORDERS**

There are many situations in which courts appear unwilling to make orders that replicate private duties, yet they are nonetheless willing to make orders that appear to be near substitutes for those duties. In particular, there are a range of cases in which courts refuse to order defendants to perform their private duties, and instead order them to pay

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<sup>26</sup> Akratics are individuals who lack the willpower to do what they know they ought to do. Law akratics are citizens who lack the will to follow the law even when they think this is the right thing to do.

<sup>27</sup> This explanation of court orders applies equally to orders made by parents, teachers, coaches and other authorities. Parents typically set general rules (“everyone must use their knife and fork at the table”); they also usually impose sanctions (“go to your room”). But they typically do not move immediately from rule to sanction. Rather, when an order is broken or about to be broken, the typical parental reaction is to issue an order (“Johnny, use your knife”). It is typically only when the order does not work that parents resort to warnings and sanctions.

<sup>28</sup> This is distinct from the idea that court orders induce performance by warning defendants that, unless they do as ordered, the court will impose a sanction by seizing their property, etc. Of course, in practice, court orders often function precisely as warnings. They function in this way because defendants know that, as the law is currently arranged, sanctions are not imposed in civil matters until and insofar as defendants fail to comply with court orders. But this does not explain why court orders are made. If courts wanted merely to warn citizens that sanctions will be imposed if they fail to perform their legal duties, they could just say so. If they wanted to make the warning firmer, they could announce a clear rule that sanctions would be applied in the case of non-performance.

plaintiffs sums of money equal to the cost of engaging third parties to perform those duties.<sup>29</sup> The most obvious example is where the plaintiff sues for the breach of a non-monetary obligation in a still-live (i.e., not terminated) contract. Suppose that a builder fails to fulfill a minor obligation in a building contract. The owner, as is her right, continues to demand performance of the obligation, but the builder does nothing. Eventually the owner goes to court. If the owner seeks specific performance, the court will probably refuse and instead grant an order that the defendant pay damages in an amount equal to the cost of paying someone else to do the work. In other words, the court will order the defendant to pay the “cost of cure.”<sup>30</sup>

Holmes famously suggested that the courts’ unwillingness to order specific performance in such cases showed that the defendant merely had a disjunctive duty to do what he had promised or to pay a sum of money to the plaintiff.<sup>31</sup> This interpretation should be rejected for two reasons. The first, which has been developed at length by others, is that everything else we know about contractual obligations (i.e., everything aside from the specific performance rules) is inconsistent with the Holmesian view.<sup>32</sup> Contracting parties can create disjunctive obligations if they wish, but they rarely have this intention. Courts, accordingly, regularly describe contractual obligations as obligations to do what the parties promised to do. Most importantly, the private law makes clear in various ways (e.g., the existence of the tort of inducing breach of contract) that it does not regard contractual obligations as disjunctive.

The second reason, which is central to this essay’s concerns, is that it is perfectly understandable that courts might refuse to order specific performance of a valid contractual obligation, and instead order a

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<sup>29</sup> I discuss this topic in more detail in “Substitutionary Damages” in C. Rickett, ed., *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008).

<sup>30</sup> If the plaintiff has suffered consequential losses because of the breach (e.g., loss of profits), the plaintiff will also be awarded damages equal to such losses. The basis on which such damages are awarded is different from the basis on which cost of cure damages are awarded. It should also be kept in mind that if the plaintiff has not paid in advance, and if the cost of substitute performance is the same as the contract price, then, unless the plaintiff suffers consequential losses, the only order available is nominal damages. In this case, the court is not refusing to award cost of cure, but simply recognizing that the cost of cure is zero.

<sup>31</sup> O.W. Holmes, “The Path of the Law” (1897) 10 *Harvard LR* 457, at p. 462.

<sup>33</sup> The main exception is where the duty is to deliver ascertained goods. In such cases, the defendant can, however, frustrate efforts to execute on his behalf by hiding, destroying or transferring the goods to a third party.

monetary near-substitute. In practice, specific performance means specific performance of a non-monetary obligation. There are well-known institutional disadvantages associated with orders to pay non-monetary obligations. First, it is easier to determine if a monetary obligation has been fulfilled than a non-monetary obligation. Although some non-monetary obligations are relatively straightforward (e.g., delivery of goods), by definition non-monetary obligations are more complex than monetary obligations. Issuing a non-monetary order thus always raises the risk that the parties will end up in court again, arguing over whether the order was performed.

Second, monetary orders are simpler to enforce. Assuming the defendant has assets, it is possible to force the execution of a monetary duty. In practice, the common law does just this, allowing disappointed plaintiffs to take their monetary orders to a judge or other legal official who executes the judgment by ordering or authorizing the sale and seizure of the defendant's property, the garnishment of the defendant's wages, etc. For obvious reasons, it is rarely possible to force execution of a non-monetary duty.<sup>33</sup> All that can be done to defendants who refuse to comply with non-monetary orders is to punish them, which the common law does by allowing courts to imprison or fine them. These are serious consequences, so it is not surprising that courts require strict proof that the defendant acted intentionally, with awareness of the facts, etc. Determining if this is the case may require significant court time. Further social costs will be incurred if a contemnor is imprisoned.

Finally, because monetary orders can be enforced by execution against defendants, the courts can be reasonably certain that when they make monetary judgments, defendants will get the very thing—money—that the order says they should get. Plaintiffs themselves might sometimes prefer non-monetary orders in the hope that, if they are not performed, the defendant may end up in jail. Courts, however, should not support such preferences.

These institutional advantages of monetary orders would count for little if substituting a monetary obligation for a non-monetary obligation amounted to denying the plaintiff's rights or imposing an unfair burden on the defendant. It is important, therefore, that when courts refuse such orders they almost always award the plaintiff, in addition to damages for

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<sup>33</sup> The main exception is where the duty is to deliver ascertained goods. In such cases, the defendant can, however, frustrate efforts to execute on his behalf by hiding, destroying or transferring the goods to a third party.

consequential losses, a sum equivalent to the cost of obtaining alternate performance from a third party (“cost of cure”).<sup>34</sup> An order to pay cost of cure damages in lieu of specific performance or other non-monetary order gives the plaintiff the means to obtain substitute performance from a third party. Such awards are in substance substitute specific performance.<sup>35</sup>

The main exceptions to the principle that courts will not order specific performance are consistent with this explanation. Orders compelling a defendant to perform a monetary contractual obligation are, as we have seen, available as of right. Though not technically “specific performance,” an order to pay a contractual debt is in substance an order to do the very thing promised under the contract. None of the arguments against specific performance apply where the obligation is monetary, and so it should be no surprise that courts never refuse such orders (save where the limitation period has expired). Specific performance is also routinely awarded for the breach of obligations to deliver unique goods or land, for negative obligations (e.g., obligations not to compete), and for relatively simple positive obligations that only the defendant can perform (e.g., constructing a right-of-way through the defendant’s land, doing earthworks on the defendant’s land). These exceptions have two features. First, they are relatively easy to supervise. Second, damages are an “inadequate” substitute precisely because they cannot be used to obtain substitute performance. There are no substitutes for unique goods or land and a plaintiff cannot hire a third party to perform a defendant’s negative obligation or to construct a roadway on the defendant’s land. In *Cohen v. Roche*, the plaintiff could obtain similar chairs elsewhere. The court did

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<sup>34</sup> The exceptions, though rare, are important. I discuss them in the next section.

<sup>35</sup> Cost of cure awards are also granted in cases where the plaintiff terminated the contract for breach. These are not transformative awards because there is no duty to perform once the contract has been terminated. One possibility is that these are creative awards, i.e., that the duty to pay the cost of cure is created by the order. It seems more plausible, however, to view these as replicative awards: the award confirms a duty to pay cost of cure that arose at termination. Contracting parties do not terminate for breach because they are no longer interested in the promised performance; they terminate because they have lost confidence in the breaching party. Against this background, it seems both natural and appropriate for the law to interpret the act of termination as transforming the breaching party’s duty to perform into a duty to pay for substitute performance. Having revealed himself unwilling to perform, the breaching party is required, if the innocent party so chooses, to pay for substitute performance. The act of termination thus functions like a transformative order: it transforms the duty to perform a contractual promise into a duty to pay for substitute performance. I discuss these and other issues arising from transformative orders in more detail in “Substitutionary Damages,” *supra* note 29 at p. 93.

not act inconsistently, therefore, in simultaneously affirming the defendant's contractual duty and yet refusing to order him to perform it. Damages were a perfectly adequate and, from the court's perspective, much simpler means of ensuring the plaintiff obtained what was promised.

This explanation for why courts sometimes do, and sometimes don't, affirm contractual obligations is not unique to contractual obligations. I just noted that courts are normally willing, for good reasons, to affirm negative contractual obligations. They take the same approach to negative extra-contractual obligations; injunctions are normally awarded with respect to obligations not to commit a trespass, obligations not to commit a nuisance, and so on.<sup>36</sup> I also noted that courts regularly transform positive non-monetary contractual obligations into monetary obligations; again, we see the same pattern when we turn to extra-contractual obligations. If a defendant has erected a structure or done other work on the plaintiff's land without permission, the courts will sometimes issue a mandatory injunction commanding that the structure be removed, the work undone, etc. It is not uncommon, however, for courts in such cases to instead award damages measured at the cost of paying a third party to remove the structure, etc. Whether such an order is made at the plaintiff's request or because the court is unwilling to order the injunction, it is transformative. The defendant's duty, prior to the order, is to remove the structure, etc.; once the order is made, the duty is to pay

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<sup>36</sup> The main exception to the principle that specific performance is awarded whenever damages are inadequate (in the sense just explained) is that specific performance is never awarded for personal obligations, for example an obligation to work as a servant or an obligation to paint a portrait. The usual explanation for the law's refusal to specifically enforce personal obligations is that, alongside the supervision problem, such orders would subject the defendant to a kind of servitude. At first blush, this sounds odd. Affirming a contractual obligation, personal or otherwise, appears to do nothing more than hold the defendant to what he agreed to do. Admittedly, the law does not allow citizens to sell themselves into slavery or to bind themselves into other relationships with "servile incidents," but few personal obligations fall into this category. The explanation appears less odd, however, when it is kept in mind that it is the order, not the underlying obligation, that is the rule's focus. A court order directing a named defendant to paint the plaintiff's portrait is different from a general rule that "contractual obligations should be performed." Once an order is made, the source of duties described in the order is no longer the contract, but the order: the plaintiff is meant to comply with the order because the state has made the order. The idea that the state should not be able to force its citizens into labour runs deep in Western societies. Whatever their legal explanation, orders to perform personal obligations unavoidably smack of servitude, if not to the defendant, then at least to the state.

damages set at the cost of obtaining substitute performance.<sup>37</sup> The order transforms the duty to undo the trespass into a duty to pay for substitute performance.

Transformative orders are also routinely made in cases where the defendant converts the plaintiff's property, that is, where the defendant unlawfully took or kept possession of the plaintiff's property. In the common law, the plaintiff has no right to an order commanding the defendant to return the property. The only order available as of right is to damages, measured at the value of the property together with a sum equal to the plaintiff's consequential losses. Some writers, echoing Holmes' views on contract, have suggested that the lack of anything resembling the civil law *vindicatio* shows that the common law does not recognize property rights in chattels. The better explanation is that the common law takes the same approach to obligations to return property as it takes to contractual obligations. In each case, the private law recognizes the obligation, but the law of court orders, reflecting different concerns, directs courts to make substitutionary awards. Consistent with this interpretation, the courts will normally order defendants to return chattel property if the property is unique or has special value to the plaintiff. Further, and echoing the rules regarding specific performance of obligations to transfer title to land, court orders commanding trespassers to vacate land are available as of right.<sup>38</sup>

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<sup>37</sup> What if the plaintiff refuses to allow the defendant to enter her property? Such a refusal seems analogous to termination of a contract for breach and should be interpreted in the same way: the refusal terminates the duty to undo the trespass and transforms it into a duty to pay for substitute performance. In such cases, an order to pay for cost of cure damages is a replicative award.

<sup>38</sup> These observations cast doubt on the orthodox view that the duty to make restitution is a duty to return (merely) the value of the enrichment (not the actual thing), even where the enrichment is in the form of chattel property. The obvious way to reverse an enrichment arising through the receipt of property is to return the property to its original owner. It is true that courts do not normally order defendants to return property transferred to them by mistake; instead they order monetary restitution. But then neither do courts normally order thieves to return property they have stolen or order vendors to hand over property that they have contractually promised to deliver. Moreover, the explanations for why courts do not order thieves to return property or vendors to deliver goods apply equally to unjust enrichment cases. The institutional disadvantages of non-monetary orders are the same whether the underlying obligation is contractual or restitutionary. Consistent with this explanation, courts are willing to order specific restitution where the transferred property is unique or has special value to the plaintiff.



### C. REFUSING TO MAKE AN ORDER

If a plaintiff establishes in court that the defendant is in breach of a private law duty, the court will almost always grant the plaintiff a court order requiring the defendant to perform the duty or a court order for the defendant to pay for substitute performance. It is rare for courts to refuse entirely to order defendants, either directly or indirectly, to do what the private law requires them to do. This is no surprise: while the question of what courts should do is different than the question of what citizens should do, the courts' main task is to see that justice is done. To refuse entirely to support a duty that the private law—and so presumably justice—requires appears straightforwardly inconsistent with this task.

There appear to be two situations where this nonetheless happens. The first is where the limitation period governing the private duty has expired. Although exceptions exist, the general rule is that a limitation period extinguishes the plaintiff's right to a court order (i.e., the plaintiff's action right), not the plaintiff's right to performance of the duty (i.e., the plaintiff's private right). The familiar explanations for why the law does this are broadly consistent with the account of court orders defended in this essay. Given the cost of running trials, it is reasonable for the state to require plaintiffs to bring their cases while evidence is fresh. It is also reasonable to impose a limit on the time that plaintiffs can hold the threat of a law suit over a defendant's head. Neither of these considerations applies to private rights.

The other situation where it appears, at first blush anyway, that courts are unwilling to make an order is more interesting. This is where the court refuses to order specific performance of an unperformed contractual duty, or where it refuses to order an injunction to prevent an ongoing or threatened tort (e.g., where a court refuses an injunction to stop a trespass), and where the court refuses, in addition, to order cost of cure damages, either because substitute performance is impossible (as where an injunction is refused) or because the cost of cure is "unreasonable" (as is sometimes said in contract cases).<sup>39</sup> The case of

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<sup>39</sup> In some contract cases where specific performance is refused, cost of cure is not awarded for the simple reason that alternative performance is available at the same price as the contract price. Thus, a cost of cure award will not typically be awarded for an ordinary contract to deliver goods, because the plaintiff can obtain performance for the contract price. In short, substitute performance is free. The discussion above

*Woollerton and Wilson Ltd v. Richard Costain Ltd.*, mentioned earlier, is an example.<sup>40</sup> The court in *Woollerton* found that the defendant was trespassing by allowing its crane to pass over the plaintiff's airspace, but the court then refused to support that duty by awarding either a replicative or transformative order.<sup>41</sup>

*Woollerton* is puzzling because the court appears to acknowledge that the defendant is acting wrongly, but then, when it comes time to make an order, the court refuses to support that conclusion in any way. The usual explanation for the result in this and similar cases is, roughly, that an injunction would be wasteful and/or unfair to the defendant because the cost of performance is out of all proportion to its value. This explanation, however, is not so much a reason for refusing an injunction as for denying that the defendant owed a duty to the plaintiff at all. Whether the defendant performs because he has been ordered to perform or merely because he is under a private law duty to perform, the waste and unfairness issues are the same. The defendant may be more likely to perform if ordered, but from the law's perspective this should not matter. Private law rules are meant to be followed. If the defendant is truly trespassing, then he should stop what he is doing. Yet the arguments for refusing court orders in cases like *Woollerton* apply equally to the underlying private law duties. The real issue in *Woollerton* is not whether the defendant should be *ordered* to remove the crane, but, simply, whether the defendant should remove the crane, order or not.<sup>42</sup>

For this reason it is suggested that the best interpretation of cases like *Woollerton* is that, despite what courts say, the defendant is not in breach of a private duty. This is the only way of making sense of the fact that no one who supports these decisions, in particular the courts, actually

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is concerned solely with cases where cost of cure is refused because it is thought to be unreasonable.

<sup>40</sup> [1961] 1 WLR 683. Contract examples include *Tito v. Waddell* [1977] Ch 106 and *Ruxley Electronics and Construction Ltd v. Forsyth* [1995] 3 WLR 118 (HL).

<sup>41</sup> In such cases, the courts will order damages for consequential losses (if such losses are proven—if not, then nominal damages), but such orders are not replacements or substitutes for the primary duty. Damages for consequential loss are available even if the court orders specific performance of the primary duty.

<sup>42</sup> By contrast, in cases where courts award cost of cure as a substitute for specific relief, the reasons for refusing specific relief (e.g., the risk of further litigation, etc.) count against ordering specific performance, but they do not count against the private duty. A court that refuses specific performance of an obligation to paint a house wants the obligation performed.

believes that the defendants should perform their alleged duties. The no-duty interpretation makes explicit what the law implicitly accepts.<sup>43</sup>

## D. CREATIVE ORDERS

The strongest challenge to the rubber-stamp view of court orders is raised by orders that create entirely new duties. It seems clear that courts sometimes grant such orders. It is difficult to be certain how often this happens, however, because even more than in the case of replicative or transformative orders, it is rarely self-evident that an order is creative. In most cases, we can only draw this conclusion on the basis of controversial arguments about the kinds of rights that it makes sense to think are private rights and the kinds it makes sense to think are created by court orders. Rather than attempt to provide an exhaustive list, this section will focus on identifying some of the main categories of creative orders.

### i. ORDERS OF CONVENIENCE

An uncontroversial, but also not very interesting, example of a creative order is an order to pay damages for future consequential losses that is given in lieu of an injunction. Thus, a court might (as we have

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<sup>43</sup> A final puzzle raised by cases like *Woollerton* is why, if there is no duty, the courts are willing to order the defendant to pay damages for any consequential losses arising from the relevant act or omission. The point requires more discussion, but it is tentatively suggested that the damage orders in such cases are not damages for losses caused by a wrong. Although it is generally true that citizens only incur private duties to pay damages if they have committed a legal wrong, there are exceptions. Necessity cases are the best example. In the famous American case of *Vincent v. Lake Erie*, 109 Minn. 456, 124 N.W. 221 (1910), the court held that the defendant owner who had tied his boat to the plaintiff's dock during a storm did no wrong, but nevertheless incurred a duty to pay compensation for the damage that he caused to the dock. Writers have struggled to explain why this duty arose, but few disagree with the court's conclusion or with their premise that the defendant did no wrong. What this and similar cases demonstrate is that in exceptional circumstances the law will hold citizens liable for injuries that they have caused through their non-wrongful acts. The law's willingness to order compensatory damages in cases such as *Woollerton* appears to rest on a similar basis. Though not "necessity" cases in a strict sense, these cases have a similar structure. The defendant's use of the plaintiff's airspace in *Woollerton* was similar to the defendant's use of the plaintiff's dock in *Vincent*. I discuss this issue in more detail in "Unjust Enrichment: Nearer to Tort than Contract" in R. Chambers, C. Mitchell, & J. Penner, eds., *The Philosophical Foundations of Unjust Enrichment Law* (Oxford: Oxford University Press, 2009) at p. 181.

seen) refuse an injunction to restrain the defendant from swinging a crane over the plaintiff's airspace, and instead confine the plaintiff to an award of damages designed to compensate for any inconvenience arising from the crane swinging in future.<sup>44</sup> As a matter of private law, a duty to pay damages for inconvenience (or other loss or injury) cannot arise until the inconvenience occurs. It seems clear, then, that when such damages are awarded in lieu of an injunction, the duty to pay them arises at the moment of the order, not before.

The decision to refuse an injunction in such cases raises interesting theoretical issues, while the assessment of 'future losses' often raises difficult practical questions. But there is no particular mystery as to why courts are willing to award damages for future harms in cases where they have refused to issue an injunction. If they do not make such awards, they run the risk of condemning the plaintiffs to return to court every time they suffer a fresh loss.

## ii. SYMBOLIC ORDERS

A second fairly clear example of a creative court order is an order to pay punitive damages. It is possible to imagine a punitive private law duty. Such a duty could be created by, for example, a rule that required anyone who committed a particularly egregious tort to pay, immediately on commission of the tort, a sum equal to, say, three times the value of whatever losses the victim suffered. But one merely has to describe this possibility to see what an odd duty this would be. It is part of our very concept of punishment that the wrongdoer is named and punished not by a general rule but by an order of a court or similar body. You cannot punish yourself. On the other hand, there is nothing odd in the idea that courts might create, by their orders, a punitive duty. This is precisely how court orders to pay fines are understood in criminal law. When a criminal wrongdoer is ordered to pay a fine to the state it is assumed without question that the duty to pay is created by the order. Paying a fine to the state and paying punitive damages to a plaintiff are not the same thing. That is why punitive damages are controversial. But they have a similar structure: in each case the order creates the duty.

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<sup>44</sup> If the crane has already entered the plaintiff's airspace then damages are also available for past inconveniences. Awards of this kind are not creative.

Punitive damages are relatively rare in Anglo-Canadian common law.<sup>45</sup> They may provide clues, however, for where to find other examples of creative orders. In broad terms, the reason for classifying punitive damages as creative is that the symbolic function of such awards—the fact that they are intended to publicly denounce the defendant—can only be achieved by a public pronouncement, such as a court order. The question, then, is whether there are other awards that have a similar or related symbolic function. One example appears to be orders to pay nominal damages. As is widely recognized, such awards function basically as declarations: the point of the order is not to ensure that defendants get what they are owed; it is to vindicate the plaintiffs' rights in the purely formal sense of publicly proclaiming that right and the defendant's breach of it. It is possible that the private law could contain a rule to the effect that, say, anyone who breaches a contract must, at a minimum, pay \$1 to their victim, but, like a duty to pay punitive damages, this would be a very odd duty. A private payment of \$1 does not serve the symbolic, public, function that an order to pay nominal damages serves. The court order announces, by its existence, the court's conclusion that the plaintiff's rights were infringed.

A second possible example is an award of damages for pain and suffering. It is widely recognized that quantifying damages for pain and suffering raises special problems, but it is sometimes thought that these problems are merely evidentiary. It is indeed difficult to attribute and quantify pain and suffering, but this seems more a reflection, rather than the source, of the underlying issues raised by such awards. No one supposes that awarding grieving parents a sum of money for the pain and suffering caused by the loss of a child is "compensation" for that pain or that it can somehow undo or repair the pain. It is difficult to even express this possibility in words because pain and suffering is not a loss, injury, or anything else that could possibly be undone, even metaphorically, by an award of damages. Pain and suffering is something individuals endure. This is why the amounts awarded for pain and suffering are—and are acknowledged to be—arbitrary. Most common law jurisdictions have established rough guidelines for certain categories of pain and suffering awards, e.g., so much for a lost child, an arm, etc., (though considerable discretion remains), but no one supposes these figures are determined by

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<sup>45</sup> It is sometimes argued that there exist other awards that, while not described as punitive damages, are in substance punitive. Some writers regard gain-based awards, or at least some gain-based awards, in this way. This is not my view, but if it is right, then gain-based awards are creative orders.

applying a rule or at least a rule of the kind that one could imagine being directed at citizens. If someone went through the case law dealing with pain and suffering awards and blacked-out the actual figures attached to the awards, it would be impossible to calculate from what else was said what those figures should be. If the duty to pay damages for pain and suffering were a private law duty, it would, absent these figures, be impossible to determine in advance. Not surprisingly, private law theorists have had great difficulty explaining awards for pain and suffering.<sup>46</sup> Judges themselves regularly acknowledge the sums are symbolic, and the terms in which judges describe the governing law suggests they regard the rules as directed at themselves, not citizens.<sup>47</sup>

### iii. CO-ORDINATING ORDERS: REMEDIES WITHOUT RIGHTS

A final and particularly interesting category of creative orders is composed of what I will provisionally call “co-ordinating orders.” Coordinating orders are made in a variety of situations, but probably the clearest examples are made in the context of family law disputes over things like the division of matrimonial property, maintenance, and various matters related to child-rearing, such as child support, custody, and access. These orders are similar to punitive and (some) pain and suffering awards in that courts are usually given wide latitude as to their content. The relevant legislation (the most obvious examples in this category all derive from legislation) typically directs the courts to take into account one or more broad factors (e.g., “the best interests of the child”) and then, in its discretion, to fashion the most appropriate order. Unlike punitive orders, pain and suffering awards, and every other order discussed in this essay, however, plaintiffs may obtain coordinating orders without proving that their rights were infringed or even threatened.<sup>48</sup> The *Divorce Act*, for example, states that a court may “on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as

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<sup>46</sup> See e.g., A. Ripstein, “As If It Had Never Happened” (2007) 48 *William & Mary LR* 1957; B. Chapman, “Wrongdoing, Welfare and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice,” in D. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995).

<sup>47</sup> E.g., *H West & Son Ltd. v. Shephard* [1964] AC 326 (HL) 364 (Lord Pearce); *Heil v. Rankin* [2001] QB 272 (CA) 294 (Lord Woolf MR).

<sup>48</sup> I am not suggesting that all orders made in family law contexts are of this kind.

the court thinks reasonable for the support of the other spouse.”<sup>49</sup> The court is directed not to order such payments as the defendant should have made already, but simply to order such payments “as the court thinks reasonable.”

It is fairly straightforward to explain why, in cases of this kind, the only rights that are in issue are rights that the courts create by their orders. The defining feature of cases in which coordinating orders are made is that it is not possible to devise a rule that can describe, in advance of the order, how the parties should behave. The problem is not merely that the evidence is complex and difficult to prove. It is that even when the evidence is known, there is no clear answer. A court attempting to decide which of two separated parents should have primary responsibility for raising a child must usually consider things like the parents’ relationships with the child and each other, each parent’s financial resources, the nature of the accommodation that would be provided, where the child’s school is located, the role of other relatives, where the child’s friends live, how old the child is, and so on. It is impossible to devise a rule that lists all these factors and then explains what weight should be given to each using a common metric. The most that can be done is to offer rough guidelines, and then to leave the final decision to a judge or other decision-maker.

It should not be surprising, therefore, that some commentators object to the very idea of judges making the kinds of decisions that give rise to coordinating orders. Making decisions on the basis of incommensurable factors about how citizens should lead their lives might be thought a quintessentially political task (think of decisions about whether to give money to the arts or education, roads or health, etc.). It is of course not feasible to leave to politicians the task of resolving the kinds of individual disputes that coordinating court orders resolve. Perhaps some institution other than a court could do this (and in some cases disputes of this kind have been removed from the courts), but as the law now stands courts are regularly required to make orders in cases where the only rights at stake between the parties are the rights that the courts create by those orders.

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<sup>49</sup> *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.); s. 15.(2); see also s. 16(1) of the same act, and the *Family Relations Act*, R.S.B.C. 1996, c. 128.

## V. CONCLUSION

Imagine that one day a boy comes to his mother with a complaint. His older brother, the boy says, had agreed to help him with his homework, but then reneged on the promise. The mother investigates and confirms the story. The boy asks his mother to do something. As might be expected, the brothers are not on the best of terms at this point. The mother's response is to order the older brother to find his old school notes and give them to his younger brother. The mother also orders the older brother to do the dishes (which had been the younger brother's responsibility). If we were to apply the rubber-stamp theory to this story, we would have to conclude that the older brother had no duty to help his younger brother with his homework. His only duty was to hand over his old school notes and do the dishes. Needless to say, this is not the most natural explanation. The more natural explanation—and the explanation that any parent would themselves give—is that the older brother indeed had an obligation to help his younger brother with his homework. The only reason the mother did not order that the promise be performed is that had she done so the brothers would almost certainly have been back before her, fresh complaints in hand, within minutes. Specific performance was impractical, so the mother ordered what seemed to her a close substitute. It is possible that common law courts operate on different principles. This essay has argued that they do not.