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BOOK REVIEWS

Rights, Wrongs, and Injustices: The Structure of Remedial Law. By STEPHEN A. SMITH. [Oxford University Press, 2019. xxi + 337 pp. Hardback £80. ISBN 978-0-19-922977-2.]

Stephen Smith's new book, *Rights, Wrongs, and Injustices*, is filled with deep insights into the workings of private law. It is brilliant, and I believe it will become a classic in its field. The book begins with a fundamental question: what is a remedy? It then proceeds to several related questions. Why does the law provide remedies? On what grounds are remedies issued? And, what kinds of remedies are available? The answers will sometimes prove controversial, but they are also compelling.

On Smith's account, remedies are judicial rulings and they are issued because they provide people with distinctive reasons for action. They are issued on one of three grounds: proof that a defendant is unwilling to comply with a plaintiff's substantive rights (a rights-threat); proof the defendant wronged the claimant (a wrong); and proof of an unfair loss or gain (an injustice). In turn, remedies take more than one form. Notably, they may be replicative, in which case they replicate a private party's pre-existing substantive duties, such as a specific performance order. Or, they may be creative, in which case they impose new duties on defendants, such as exemplary damages.

One of the book's notable conclusions is that creative orders cover very wide swaths of private law remedies. If the book is right, even compensatory damages and restitutionary remedies involve creative orders. This is a striking claim, yet for those who disagree it is not a trivial claim to refute. *Rights, Wrongs, and Injustices* offers a detailed analysis of the law of remedies, and in the process it sheds new light on torts, contracts, unjust enrichment and equity. Smith's doctrinal analysis is thorough and carefully done, and it is complemented by more abstract insights from legal theory.

I will focus here on a jurisprudential puzzle that lies at the centre of the book. *Rights, Wrongs, and Injustices* calls for a new understanding of the authority in court orders. I think the book is right that the authority in court orders is distinctive, but wrong in its analysis of what grounds that authority. To be clear, this doesn't undercut Smith's arguments in the rest of the book. A different perspective on the authority of court orders may even support the book's argument as a whole. Even so, *Rights, Wrongs, and Injustices* shows that court orders are far more important for understanding private law than many of us have realised. It is worth thinking through whether Smith captures the basis of their authority.

Smith contends that the authority in court orders is a different kind of authority from the authority of the law's duty-imposing rules. On his view, court orders produce new reasons for action, different from the pre-existing reasons for action that arise from legal rules. This claim plays a central role in the book's explanation of replicative orders (court orders that replicate a party's substantive duties), as it helps explain why replicative orders are not redundant. In the process, Smith also offers a new perspective on how we think about legal authority.

Smith separates the authority of legal rules ("declarative authority") from the authority of judicial orders ("directive authority"). On his view, courts announce a state of affairs when declaring a legal rule. But courts command someone when they issue an order; they direct that person to act in a certain way. Accordingly,

Smith does not think that legal rules are something that one obeys. Orders, by contrast, *are* something that one obeys. As he argues (at p. 116, emphasis in original):

> If duty-imposing rules are of the form "everyone has a duty to X" – as I have argued – then the question of whether to obey them does not arise. It is not possible to obey or disobey a statement that something exists. For the addressees of duty-imposing rules, the question that they raise is whether they should be *accepted*.

In contrast, court orders work differently. As Smith suggests: "Orders call for obedience, not acceptance" (p. 117).

We thus have an argument for the view that replicative orders create new reasons for action, independent from the reasons provided by legal rules. As Smith indicates (p. 117): "It is because of this difference [between types of authority] that ordering a defendant to do X can provide a new reason to do X even where the defendant already has a rule-based duty to do X. A defendant who rejects or is otherwise unmotivated by the court's claim to declarative authority may accept its claim to directive authority."

I'm not sure that Smith's claims about obedience are right. It is not hard to find cases in which rule-based authority is described in terms of obedience. Suppose someone says to me: "Look at this sign: these are my house rules. If you come into my house you must obey these rules." The sign arguably involves a kind of declarative authority, yet it also appears to implicate obedience. If I break the rules, it would be reasonable for the house owner to say: "You disobeyed my rules, why did you do that?" Or, the owner might say: "You disobeyed me." It is unclear why legal rules could not operate in a similar way, whether we focus on disobeying the rules or, for that matter, disobeying the state.

There is also ample evidence that legal actors and scholars sometimes understand the law's duty-imposing rules as rules that should be obeyed. There is an entire literature on duties to obey the law, and this literature is not focused on court orders. It is commonplace to think that disobeying the law (or the state) is a basis for liability of various types, and a plausible case could be made that this view reflects the legal perspective on the authority of legal rules.

Yet *Rights, Wrongs, and Injustices* also makes a deeper point about theories of authority. It considers what the underlying basis might be for differentiating declarative authority and directive authority in terms of reasons for action. It is one thing to differentiate types of authority, and another to seek their justifications; here, too, there is cause for doubt.

Smith suggests that the best-known contemporary theory of authority, Joseph Raz's theory, is actually a justification for declarative authority. Known as the "service" conception, Raz's understanding indicates authority is justified in light of how it assists its subjects (J. Raz, *The Morality of Freedom* (Oxford 1986)). As Smith summarises it (pp. 120–21): "Authorities are justified, in this view, when their subjects are more likely to comply with reasons that already apply to them if they follow the authority's 'pronouncements' (to use a neutral term) than if they try to act on those reasons directly."

Smith notes, however, that Raz's approach has been challenged, as "it has difficulty explaining how there could be an obligation to *obey* the law" (p. 121). He draws an analogy from the world of cooking (at p. 121):

> For example, if I want to make a soufflé, I would be well-advised to follow the advice of a soufflé-making expert. The reasons that I have to make a good soufflé (e.g. to please my family) will more likely be satisfied if I follow

> the expert than if I try to work out by myself how to make a soufflé. However, it would be odd to conclude from this observation that I have a duty to "obey" the soufflé-making expert.

For Smith, this critique is valid when applied to commands (and court orders), which are meant to be obeyed.

In turn, Smith finds that "relationship theories" can justify the authority in court orders. Relationship theories build on a particular relationship between the parties to an authority relation, such as the consent of the governed or a sharing of benefits. For example, we may have an obligation to obey another person's command because we consented to that other person having authority over us. Thus, a private in the army may have an obligation to obey a superior officer, in light of the private's consent to that authority relationship. Smith suggests that a relationship theory could make sense of the authority in court orders.

The book then draws two key conclusions. First, the authority of the law's duty-imposing rules can be justified by the service conception – a conception that is concerned with the acceptance of rules. Second, relationship theories are incapable of explaining declarative authority because they do not indicate when we should accept a statement that something exists. Accordingly, such theories cannot justify the authority of legal rules. I think both of these conclusions are incorrect, at least some of the time. More to the point, a single background relationship between state and citizen may justify the authority of both the law's duty-imposing rules and of court orders.

To begin with the first conclusion, many duty-imposing rules are subject to obedience, or at least they are understood in that way by the parties who declare them and by the parties who must follow them. While some rules are solely meant to be accepted, other rules are meant to be obeyed, and it is unclear why the law's duty-imposing rules aren't an example. If we accept this perspective instead of Smith's view, the service conception may have some difficulty justifying a duty to obey the law's duty-imposing rules for the same reason it may have trouble with court orders. But I will focus here on the book's second conclusion: the conclusion that relationship theories don't support the authority of duty-imposing rules.

It is true that relationship theories fare poorly at accounting for declarative authority if such authority is defined in Smith's terms. As he argues (at p. 123): "Imagine that I tell you that 'I agree that I will accept that I am bound by whatever duties you say that I am bound by'. The next day you tell me that I have a duty to kill a close friend. Clearly, I would not actually accept that I have such a duty." This example is persuasive given its premises: relationship theories are not well-suited for justifying acceptance of a proposition; at most they support reasons to act *as if* one has accepted a proposition.

Yet, once again, we do not have to think of duty-imposing rules as something to be accepted rather than obeyed. If I agree that I am bound by a set of rules – whether or not I end up accepting them on the merits – this may be enough to support an obligation to obey those rules. It is a more complex question whether any disobedience will just be disobedience with respect to a set of rules, or if it will also be disobedience with respect to their author. Yet, in either event, an obligation to obey duty-imposing rules can sometimes result from a background relationship.

To make this more concrete, imagine that you are going to play a game of cards with some friends, but unfortunately no one is certain of the precise rules that govern this game. You agree collectively that your friend Susan will resolve any disputes over the rules and fill in any gaps where the rules are uncertain. According to the rules she declares, whenever someone wins a round of cards, the other players

must pay money to the winner. If your friend Jim loses a round according to these rules and refuses to pay his share, will it make sense to say that he has disobeyed the rules? I think that it will, and that this example involves more than just acceptance of a proposition.

It is also helpful to compare one of Smith's primary examples – the parent-child relationship. Here is Smith's illustration (at p. 119):

> Consider parents who have established a rule to the effect that "at Christmas everyone in the family must visit our relatives." If one of the children is unwilling to comply with the rule, the parents might well respond, at first anyway, by trying to explain why the rule expresses a valid obligation.
>
> Parents offer such explanations in the hope that the child will accept that the rule does what it purports to do, namely, to state a valid obligation. But if the child continues to refuse to comply with the rule, the parents will often switch to a different kind of authority embodied in orders: "Get in the car."

For Smith, the shift to giving an order is telling. Even so, is it plausible that what grounds the authority of parents to make rules for their children is non-relational while what grounds their authority to give them orders is relational?

Parents' authority over their children is often justified by a relationship theory (see Evan Fox-Decent, "Fiduciary Authority and the Service Conception" in A.S. Gold and P.B. Miller (eds.), *Philosophical Foundations of Fiduciary Law* (Oxford 2014), 373–74). Such a view could be wrong (I am not making an argument *from* authority), but it is well within the mainstream. And, if such a view were accepted, would it not be odd if some parts of parental authority (the parents' rules) had to be hived off and justified on different grounds from other parts (the parents' orders)? It seems reasonable, whether or not correct, to think that parents' declarative and directive authority spring from the same source.

The service conception may not be well-suited for justifying the authority in court orders, as Smith suggests. But relationship theories do seem capable of explaining the law's declarative authority, at least some of the time. If that is right, a legal system's declarative and directive authority may both be justified by the same kind of theory – a relationship theory. Where does that leave us? I'm not troubled if it turns out that the law's rules and its commands are authoritative for the same relationship-based reason, and I don't think that Smith should be, either. It is entirely possible that the law's declarative and directive authority are justified by a single relationship between state and citizen, and yet still possible that each type of authority produces different reasons for action. Some examples may help to illustrate.

One possibility emphasises the indefinite audience for legal rules and contrasts this with the specificity of a court order. Compare an invitation you receive to a social event. If the invitation was sent generically to every person who lives in your town, this will have a different social meaning from an invitation specifically addressed to you. As far as your right to attend goes, the significance of each invitation is identical, and the reason why the inviter gets to send the invitation will also be identical. In the former case, however, the audience is indefinite, and the inviting party may not even know whom they invited. As a beneficiary of the invite, it is very possible that your reasons for action will differ depending on whether you received a personal invitation rather than a generic letter sent to you and all of your neighbours.

The law's mandates are more than invitations, but a shift to a direct order could make a difference when it comes to our reasons for action, precisely because legal orders commonly address us as particular individuals. Not all orders have this

feature – think of an order like "keep moving!" that is yelled at a crowd – but at least in the legal context, orders tend to pick out specific people. On average, court orders may differ from the law's duty-imposing rules along this dimension, with concomitant changes in citizens' reasons for action.

Another possibility is that the parties possessing authority vary in some respect once we shift from rules to orders. One might think that the authority in the case of a legal rule is the state, while the authority in the case of a judicial order is the judge herself (or the judge in addition to the state). That might not seem like a major difference, but it could help make sense of a phenomenon that Smith emphasises – some citizens respect legal rules while not respecting court orders and vice versa. If judges receive a different level of respect in comparison to the state, then this is understandable. Note also that it is characteristic of orders that their violation wrongs the party giving the order (see David Owens, *Shaping the Normative Landscape* (Oxford 2012), 86). If violating a duty-imposing rule wrongs a different party from violating an order (assuming that it wrongs anyone to violate such a rule), this too could differentiate each exercise of authority.

Lastly, there is an option that Smith himself proposes: court orders may be designed to supplement duty-imposing substantive rules. In doing so, they might serve in several roles: "(1) as rule-reminders; (2) as rule substitutes; and (3) as rule specifications" (p. 110). Smith thinks there is a grain of truth to each of these rule-supplementing theories, but that none will cover the full range of court orders. That seems right, but it is not clear why it should be a concern. While we need to explain a substantial percentage of cases in order to have a convincing account of what motivates the use of court orders, it is not evident that we need a single explanation.

We might seek a unifying account of the authority of court orders that explains their motivation in all or nearly all cases. Then again, pluralism may be required to adequately explain substantive private law (see e.g. Andrew S. Gold, *The Right of Redress* (Oxford 2020), ch. 5; Hanoch Dagan, "Pluralism and Perfectionism in Private Law" (2012) 112 Colum.L.Rev. 1409). This same conclusion could carry over to remedial settings. It should not surprise us if the most convincing account of the authority of court orders is a pluralist account.

All of these thoughts, however, are just a beginning. *Rights, Wrongs, and Injustices* has opened up a new and very significant area of research for private law theory. The book's analysis of court orders and how they fit into private law is meticulous and illuminating; the questions raised above leave this analysis intact. If anything, these questions suggest how much further inquiry this book invites. *Rights, Wrongs, and Injustices* will merit sustained attention for many years to come.

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Protecting Personal Information: The Right to Privacy Reconsidered. By Andrew Monti and Raymond Wacks. [Oxford: Hart Publishing, 2019. 192 pp. Hardback £45. ISBN 978-1-5099-2485-1.]

Since the late nineteenth century, the "right to be let alone" has powerfully captured the instinct that individuals wish to be afforded a zone of privacy, from which they could exclude the prying eyes of others. In their seminal article ("The Right to