Rightless Remedies

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Stephen A. Smith, *Rights-Threats, Wrongs and Injustices: The Common Law Causes of Action*, 27 **N.Z.U.L. Rev.** 1033 (2017), available at SSRN.

It is a familiar quip that a right without a remedy is no right at all. A recent article by Stephen A. Smith shows, however, that there is such a thing as a remedy with no right—something I might call a "rightless remedy." *In Rights-Threats, Wrongs and Injustices: The Common Law Causes of Action*, Smith explicates a category of judicial orders (i.e., remedies) that are not tied to any underlying legal right or wrong. In doing so, Smith tells us something important about both rights and remedies.

To appreciate Smith's insights, it is first important to understand his taxonomy. The phrase "cause of action" can mean many things, but to Smith and other scholars writing in this area, a "cause of action" is a set of facts that justify a judicially-administered remedy. Understood as such, a cause of action is not necessarily co-extensive with substantive law. The substantive law contains instructions for citizens (e.g., "do not hit others,") but cause-of-action law (sometimes called "remedial law") contains instructions for courts (e.g. "if a person proves to you that she has been hit, order the hitter to pay her damages"). Causes of action will usually track the substantive law closely, and for that reason we often take it for granted that, where a wrong has been committed, a court will issue a remedy. But there are certainly situations in which remedial law does not authorize judicial intervention, even when a wrong has been committed (such as, for example, when a court declines to issue an injunction because it will impose an undue hardship on the defendant). Far less common (or even ignored until Smith showed otherwise) are situations in which a remedy issues where no wrong has been committed—but that is an issue we will get to in a bit.

Smith's project is to explain, as a categorical matter, the circumstances in which courts will issue a remedy. Two of these—rights-threats and wrongs—are easily recognizable to legal scholars and practitioners. When your neighbor threatens to cut down your tree (i.e., threatens to infringe one of your rights), a court will put down this threat by ordering your neighbor not to do so. Relatedly, if your neighbor cuts down your tree before you can make it to court (i.e., commits a legal wrong), a court will order the neighbor to pay you damages. Neither of these grounds for relief upsets our common understanding of remedial law. But Smith's third ground—injustice—introduces a new variation of remedial law.

An injustice, in Smith's telling, is a judicially administered remedy that is not based on a rights-threat or a wrong. Smith offers several examples, but a useful one for our purposes is restitution in the case of defectively transferred funds. If I mistakenly transfer money to your account, a court will order you to return the money—even though you have done nothing wrong. One might counter that retaining money mistakenly transferred to you is wrongful, but Smith convincingly shows why that is false. There is no underlying duty to return such money because people who receive such money often have no knowledge of it, or even if they do, have no way to determine with any certainty—short of judicial intervention—to whom to return the money. Thus, in the case of mistakenly transferred funds, the traditional role of the court is not to enforce an underlying duty through a remedy, but simply to correct

the injustice by ordering the money be returned.

Having shown that a remedy in injustice cases is, to use my term, a "rightless remedy," Smith turns to the question of why such a phenomenon should exist in private law. Part of the reason is contained in the point above: people frequently cannot be expected to have sufficient knowledge to comply with such a duty. Thus, if society wishes the money to be returned (to continue with the example from above), it can only accomplish this by a judicial order.

Perhaps. Or perhaps not. Instead of an order, we could accomplish the same result with a judicial declaration that a certain sum of money was mistakenly transferred. The declaration would thus trigger a substantive duty to return the funds—but only if we recognize a substantive duty to correct injustices. So the real nub of the issue is: why we don't recognize an underlying duty to correct an injustice?

Smith's answer, which I find the most interesting part of his paper, is as follows:

> To say that someone has a duty to do X is to say, roughly, that regardless of how costly or inconvenient X is, X must be done. Duties are correlative to rights, and rights, to borrow Ronald Dworkin's terminology, are trumps. Thus we say (and the law confirms) that we have rights to physical integrity—and correlative duties to respect physical integrity—because we believe that, with rare exceptions, non-consensual interferences with another's physical integrity are never permissible.
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> "Correcting injustices" is different than "not injuring": it is a valuable thing to do, but it is not, or at least should not be, a duty. Private law duties are basically duties not to interfere with others' persons, property, or liberty, and duties to keep contractual promises. The actions that are required to correct injustices have a different orientation. A failure to compensate a loss or to reverse an enrichment is not an interference with the beneficiary's personal property or liberty; nor is it breaking a promise. It is simply a failure to correct an injustice. Correcting an injustice is valuable but failing to do so is not a wrong in the sense that stealing or lying or breaking promises is wrong. As a society, we regularly trade off the value of correcting injustices against other values. The courts clearly play a crucial role in correcting injustices….Yet it is clear that criminals are often not brought to court (or not pursued at all) because courts and prosecutors are in short supply….[I]f our goal was to ensure that every injustice was corrected, there would be almost no limit to the number of courts, judges, lawyers, police officers and so on that the State ought to provide." (P. 29.)

Summing up his point, Smith puts it thus: "Private law duties correlate to individual rights, but no one has a right that justice be done, and certainly not a right that another private individual ensure that justice be done." (P. 30) This is not to say that the state may not concern itself with injustices, or that it may not refer them to the courts for resolution when it finds them. The fact that restitution cases are resolved by courts is enough to prove this point. But such adjudication is not, in a fundamental sense, the adjudication of rights. Instead, it is something that Smith calls the provision of "justice services"—the correction of an unjust circumstance that has arisen without any wrong being committed.

Smith's article is both enlightening and thought-provoking. In explaining the phenomenon of rightless remedies—i.e., court orders untethered to underlying substantive rights—Smith shows us something important about both rights and remedies. In particular, he shows us how substantive rights are correlated with wrongs but always correlated with remedies. In doing so, Smith deepens our understanding of the complex relationship between the common law itself and institutions that both create and maintain it (i.e., the courts).

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