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COMMENTS ON STEPHEN SMITH'S  
*DUTIES, LIABILITIES, AND DAMAGES*

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In his article *Duties, Liabilities, and Damages*,<sup>1</sup> Professor Stephen Smith presents an important analysis of compensatory damages. Following a quick sketch of Smith's position, I will attempt to generalize from the suggestions he makes about damages to the law of remedies as a whole. The distinction Smith draws between legal rules that regulate conduct and legal rules that govern judicial responses to conduct<sup>2</sup> illuminates the special role that remedies play in private law.

Smith defends a "liability view" of damages, which he contrasts with the "duty view" he associates with corrective justice theories and utilitarian theories of tort liability. The duty view treats damages as analogous to injunctions: both require the defendant to perform a pre-existing duty established by the substantive law. The liability view, in contrast, treats damages as analogous to criminal punishment: both are imposed by the court as a response to wrongdoing. Damages "vindicate" rather than enforce rights and represent the state's recognition that the defendant has wronged the plaintiff.<sup>3</sup>

Smith characterizes substantive rules of law as imposing moral duties on those subject to rules by declaring what they ought to do in situations covered by the rule.<sup>4</sup> He maintains, however, that the common law does not treat damages as declarations imposing a second layer of duties on defendants.<sup>5</sup> Instead, damages are awards issued by

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<sup>1</sup> Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727 (2012).

<sup>2</sup> Professor Meir Dan-Cohen has noted a related fault line in criminal law, between "conduct rules" addressed to actors and "decision rules" addressed to courts. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626-27 (1984). See also GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 405-64 (1986) (describing Bentham's proposal for a dual system in which rules of conduct are established by legislation but judges are free to adjudicate on independent grounds, without precedential effect).

<sup>3</sup> Smith, *supra* note 1, at 1753.

<sup>4</sup> *Id.* at 1746. Smith adds that persons subject to a rule may not in fact be morally obligated to comply with rules, if the rules are mistaken about the content of moral duty. *Id.* Thus, I take him to be saying that rules *purport* to impose moral duties on rule-subjects. With this I agree.

<sup>5</sup> See *id.* at 1741. In support of this claim, Smith cites a rule, traceable to the days of *praecipe* and trespass writs, that payment of damages prior to trial is not a defense to damage liability. *Id.* at 1741-42. He also refers to the practical difficulty that damages typically are not ascertainable before trial. *Id.* at 1743-44. On a more theoretical level, he argues that treating damages as awards rather than as declarations — that is, as responses to wrongdoing rather than secondary duties of wrongdoers — preserves the independent significance of the wrongful act as

courts for reasons independent of any duty to pay.<sup>6</sup> On this understanding of the nature of damages, the rules governing damages are addressed to courts rather than actors, and whatever rights they create are not rights against wrongdoers but rights to demand an appropriate response to wrongdoing from the courts.<sup>7</sup> It follows that the amount of damages is a matter of judicial choice (guided by a principle of proportionality) rather than deduction from harm done.<sup>8</sup>

Although I am not entirely persuaded by Smith's duty/liability distinction,<sup>9</sup> his insight that damage remedies are not simply extensions of rights but responses to violations of rights is important and true. There are significant discontinuities between legal rules governing substantive rights and duties and legal rules governing damages. Damage rules that ostensibly require defendants to compensate plaintiffs for the loss of substantive entitlements often fall short of, and sometimes exceed, their compensatory goals.<sup>10</sup> In some cases the reasons for the discrepancies are practical difficulties of measurement and administration, but this is not always the case.<sup>11</sup> Monetary remedies for wrongdoing also include restitutionary awards that aim to capture defendants' unjust gains, even when these exceed the losses caused to plaintiffs.<sup>12</sup> Thus, in various settings courts issue monetary awards that appear to react to and reprove wrongdoing rather than to repli-

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a breach of legal duty and recognizes the fact that the effects of the wrong cannot be undone. *Id.* at 1753–54.

<sup>6</sup> See *id.* at 1741–42.

<sup>7</sup> See *id.* at 1749–50.

<sup>8</sup> See *id.* at 1754.

<sup>9</sup> Doctrinal evidence on the question of whether the law imposes a duty on defendants to pay damages is mixed at best. For example, the practice of awarding prejudgment interest, at least on “liquidated” damage claims, suggests that defendants have a duty to pay, retroactive to the time of the wrong. See, e.g., *City of Milwaukee v. Cement Division, Nat'l Gypsum Co.*, 515 U.S. 189, 195–97 (1995) (reviewing traditional rules and establishing a presumption in favor of prejudgment interest in admiralty cases). The widely cited principle that damages should place the plaintiff as close as possible to the position the plaintiff would have occupied but for the wrong also suggests that compensation is obligatory once a wrong has irrevocably been done. E.g., *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958) (citing the rule); see DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 14 (4th ed. 2010) (commenting on the rule).

<sup>10</sup> For a catalog of discrepancies between the rules governing damages and the goal of compensation for harm done, see Emily Sherwin, *Compensation and Revenge*, 40 *SAN DIEGO L. REV.* 1387, 1389–96 (2003).

<sup>11</sup> For example, limits on liability for purely economic consequences of negligence appear to be based in part on a judgment about how much risk a negligent defendant should be deemed to assume. See, e.g., *Pruit v. Allied Chem. Corp.*, 523 F. Supp. 975, 979–80 (E.D. Va. 1981) (modifying but not abandoning the traditional rule in the context of a chemical spill).

<sup>12</sup> See *RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT* § 51 & cmt. a (2011) (providing for disgorgement of profits). Although disgorgement is not a form of damage remedy, it lends some support to Smith's no-duty view, broadly conceived. Disgorgement of profits is a penalty imposed on defendants in response to wrongdoing, not a preexisting duty owed by the defendant to the plaintiff.

cate the state of affairs that would hold if the defendant had respected the plaintiff's substantive rights.<sup>13</sup>

Smith limits his discussion to damages and leaves the status of other remedies, particularly injunctions, unspecified.<sup>14</sup> Yet I believe that his arguments, broadly conceived, can be extended from damage awards to remedies in general. Injunctive remedies can be viewed as means of preventing rights violations — thus alleviating the need for further judicial response — but this is not their only role. Injunctions do not always perfectly track the requirements of substantive law,<sup>15</sup> and to the extent that they do track the substantive law they represent a remedial choice, not an automatic consequence of threatened wrongdoing. Courts may withhold injunctions and limit plaintiffs to damages for a variety of reasons, including the behavior and dispositions of the parties in connection with the wrong.<sup>16</sup> Accordingly, the remedial stage of adjudication as a whole can be viewed in much the way that Smith views damage awards: the objective of remedies law is not to impose a derivative layer of remedial obligations on the defendant but to authorize courts to respond in appropriate ways to the defendant's wrongdoing. In this way, remedies are theoretically distinct from legal rights.

Expanded in this way, Smith's analysis provides a possible solution to one of the more difficult puzzles of law: the relationship between

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<sup>13</sup> This view of damages is consistent with the early history of monetary awards in English law. Anglo-Saxon legal codes from the period preceding the Norman Conquest fixed schedules of payment for wrongs, which varied according to the type of wrong and the status of the victim and seemed to have little to do with making victims whole. See 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 3-21 (4th ed. 1936); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 25-56 (2d ed. 1898); 2 *id.* at 449-62 (2d ed. 1899). For example, the Laws of Alfred provided for payments of thirty shillings for cutting off a thumb, sixty six shillings and change for gouging out an eye, and thirty shillings for inflicting a head wound "if both bones . . . be pierced." BILL GRIFFITHS, AN INTRODUCTION TO EARLY ENGLISH LAW 75-76 (1995). These remedies are more easily explained as official responses to wrongdoing — perhaps to head off private revenge — and as amends for harm done.

<sup>14</sup> Smith characterizes injunctive remedies, like damage remedies, as "awards" rather than declarations of rights and duties. Yet he also suggests that injunctions are designed to bring about compliance with duty. See Smith, *supra* note 1, at 1751. Thus, the position of injunctions in relation to the duty/liability divide Smith defends is unclear.

<sup>15</sup> Courts sometimes grant "prophylactic" injunctions that prohibit otherwise lawful conduct in order to protect the plaintiff's right. See LAYCOCK, *supra* note 9, at 288. More tellingly, they sometimes view a rights violation as an occasion to correct perceived injustice in a manner that extends significantly beyond the plaintiff's substantive right. See, e.g., *Shellmar Prods. Co. v. Allen-Qualley Co.*, 87 F.2d 104, 109-10 (7th Cir. 1936) (upholding a perpetual injunction against use of trade secrets although the secrets had been disclosed); *Bailey v. Proctor*, 160 F.2d 78, 83 (1st Cir. 1947) (upholding an order for dissolution of an unfairly structured investment trust although the trust was technically exempt from statutory requirements).

<sup>16</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 364 (1981) (effects of unfairness on specific performance); RESTATEMENT (SECOND) OF TORTS § 941 & cmt. b (1979) (balancing equities).

rights and remedies. By definition, legal remedies enforce legal rights. As a result, it may appear that remedies are simply extensions of rights, specifying the impact of rights in particular contexts. On this view, the difference between a legal rule defining a right and a legal rule defining a remedy is only a difference in the particularity of the rule. Rights are defined in general terms, stating what one person can demand of another; remedies are defined more contextually, stating what one person can demand of another on facts made salient by a dispute.

Legal practice and terminology, however, suggest a more radical break between rights and remedies. Courts speak of remedial rules as a separate category of law,<sup>17</sup> and distinctions they draw can have practical consequences. Most notably, courts pay more attention to specific facts, and exercise greater discretion, in granting remedies than they do in formulating substantive rules for conduct.<sup>18</sup> There is a corresponding psychological divide between prospective general rules defining rights and application of those rules to particular disputes. The factual details of a legal dispute — what the defendant did to the plaintiff — are vivid and engaging in a way that the background objectives that shape general rules of conduct often are not.<sup>19</sup> Consequently, the equities and exigencies of particular cases may overshadow the goals of clarity and consistency in regulation of conduct, tempting judges to reach remedial decisions that are not just distinct from, but contrary to, the rights defined by substantive law. The best general rule of contract law may be that contracts should be enforced in cases of unilateral mistake, and yet particular facts may make enforcement seem too harsh.<sup>20</sup>

It may be that judicial language that treats remedies as a separate legal category and remedial decisions that deviate from substantive rights are simply mistaken. Smith's analysis, however, suggests a principled way to defend the right/remedy distinction: rights and remedies (or at least damage remedies) serve different functions in the legal system. Substantive rules of law impose limitations on individual con-

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<sup>17</sup> An example of this disparate treatment is the special set of rules governing modification of injunctions, which rests on the assumption that injunctions are remedies rather than rights. See, e.g., *Ladner v. Siegel*, 148 A. 699, 701 (Pa. 1930) (explaining that injunctions are “executory and continuing as to the purpose or object to be attained” and thus subject to change).

<sup>18</sup> A classic example is *Panco v. Rogers*, 87 A.2d 770, 773–74 (N.J. Super. Ct. Ch. Div. 1952), in which the court held a land sale contract to be valid despite the buyer's unilateral mistake, but nevertheless denied specific performance.

<sup>19</sup> See Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 163 (Daniel Kahneman et al. eds., 1982); Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Source of Information*, in *HEURISTICS & BIASES* 103 (Thomas Gilovich et al. eds., 2002).

<sup>20</sup> See *Panco*, A.2d at 773–74.

duct. In contrast, remedial rules apply to courts, instructing them to craft an “appropriate” official response when individuals depart from legal norms. What counts as appropriate for this purpose is an award that will satisfy the victim of wrongdoing, and the public at large, that justice has been done.

Smith is correct that both corrective justice theories and utilitarian (or welfare economic) theories of legal liability rest on the assumption that remedies are continuous with rights, and are in jeopardy if this assumption proves false. Most corrective justice theories posit a moral duty of defendants to rectify wrongdoing by compensating for harm done.<sup>21</sup> Prominent corrective justice theories also purport to “interpret” the practice of tort law.<sup>22</sup> Yet, tort remedies often depart from compensatory goals, and thus cast doubt on the interpretive soundness of corrective justice.<sup>23</sup>

The problem for economic theories is more subtle, and here my analysis is somewhat different from Smith’s.<sup>24</sup> Economic theories are concerned with incentives. Because remedies represent the final legal outcome of conduct, the law of remedies, rather than the substantive law, is the ultimate source of incentives for actors.<sup>25</sup> This fact, in itself, does not mean that discontinuities between rights and remedies undermine economic analysis of law: economists can simply shift their focus from substantive legal rules to remedial rules. The difficulty is that, as suggested above, courts tend to be particularistic and backward-looking in their treatment of remedies. If so, remedial rules may

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<sup>21</sup> See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 374–75 (1992) (adopting a “mixed conception” of corrective justice); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 48–58 (1999) (explaining negligence law in terms of correction of unfair divisions of risk); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *OXFORD ESSAYS IN JURISPRUDENCE* 237, 237 (Jeremy Horder ed., 2000) (defending a loss-based corrective justice theory); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449, 496–514 (1992) (defending a “volitionist/distributive” theory of fault-based liability for loss).

<sup>22</sup> See, e.g., COLEMAN, *supra* note 21, at 433 (“My conception of corrective [justice] is an interpretation, or a way of understanding, a prevalent social practice”).

<sup>23</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917, 978–80 (2010). I believe there are deeper problems with corrective justice as an “interpretation” of tort law, so to me this is a secondary flaw. See Emily Sherwin, *Interpreting Tort Law*, 39 *FLA. ST. U. L. REV.* 227 (2012).

<sup>24</sup> Smith focuses on the role of duty-creating legal rules in influencing behavior. If I understand Smith correctly, he argues that substantive rules guide conduct, at least for those who accept a duty to obey prescriptive rules of law. Damage awards impose no duties, and so lack this effect. Moreover, rules of damages that do not deprive defendants of all potential profits from wrongdoing may undercut the incentive effect of substantive rules. See Smith, *supra* note 1, at 1731–36.

<sup>25</sup> See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972) (providing an economic analysis of protection of entitlements).

be incapable of providing effective incentives for actors.<sup>26</sup> Thus, Smith's analysis offers both a cogent distinction between right and remedy and an important challenge to prevailing theories of private law liability.

At the same time, the distinction between right and remedy raises several significant concerns about our legal system. One of these is the motivation for remedies, and especially damage remedies, that do not simply replicate substantive rights. The primary reason why plaintiffs seek, and courts award, compensation for wrongful harm is to improve the plaintiff's position and to restore the plaintiff, to the extent possible, to the state of affairs that would have evolved if the defendant had not wrongfully intervened. This is a reasonable objective for plaintiffs: compensation for the effects of a rights violation serves both to reestablish lost welfare and to establish self-worth. The only question is whether the party who caused the harm (perhaps inadvertently) is the proper source of compensation.<sup>27</sup>

A private remedy whose primary purpose is to express official disapprobation of the defendant's wrong is harder to explain in benign terms. If the objective is not to shift the plaintiff's loss to the defendant, it must be to impose a new loss on the defendant in response to the defendant's wrong. The sentiments implicated are not sentiments connected to the welfare of the plaintiff, but sentiments in the vicinity of revenge.<sup>28</sup> Vengeance is not necessarily a vicious pursuit: when one person commits a moral wrong toward another, the wrong can be viewed as a denigration of the victim's moral worth. If so, providing the victim with a retaliatory remedy is a way to recognize, and allow the victim to reassert, moral equality.<sup>29</sup> Not all legal wrongs, however, are morally blameworthy. Legal remedies extend to inadvertent wrongs and to wrongdoers who are unable to meet objective standards of care, and the extent of liability is typically tied to the outcome of actions rather than to blameworthiness of actors.<sup>30</sup> At least in the ab-

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<sup>26</sup> For an extended version of this argument, see Emily Sherwin, *The Truth About Property Rules: Some Obstacles to the Economic Analysis of Remedies*, 2 WASH. U. JURISPRUDENCE REV. 39 (2010).

<sup>27</sup> Corrective justice theories and economic theories provide alternative grounds for assigning responsibility to legal wrongdoers. See, e.g., COLEMAN, *supra* note 21, at 374–75 (describing compensation as a duty of wrongdoers); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.10 (8th ed. 2011) (pointing to the need for incentives and the efficiency of private actions by victims against wrongdoers).

<sup>28</sup> For analysis of the properties of revenge, see ROBERT NOZICK, *PHILOSOPHICAL EXAMINATIONS* 366–68 (1981).

<sup>29</sup> For extended discussion of and debate over the virtues and vices of retaliation, see JEFFREY G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988).

<sup>30</sup> See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1132–49 (2007) (describing “causal luck” and “compliance luck” in tort law).

sense of moral wrongdoing, remedies that focus on reproof of wrongdoers rather than restoration of victim welfare are difficult to defend. It may be that a legal system that hopes to maintain the voluntary allegiance of its subjects must offer remedies that appeal to the vengeful side of human character, but remedies of this kind rest on weak moral grounds.

A final question is whether a legal system in which remedies are not continuous with rights is viable in a practical, as opposed to theoretical, sense. Smith indicates that quantification of damage awards will not always conform to the substantive rights the award is designed to vindicate.<sup>31</sup> Presumably, on his wrong-based view of damages, the award should reflect the circumstances that led to the wrongful act and the defendant's attitude in committing it — features of the case that may be independent of the plaintiff's right and the extent of the plaintiff's loss.<sup>32</sup> In any event, damages under any theory, and other remedies as well, are likely to respond to the factual details of particular disputes in ways that the general rules of substantive law do not.

Assuming that, for one reason or another, the remedies granted by courts will sometimes contradict the prescriptions of substantive legal rules, the capacity of rules to govern conduct may be undermined. I assume here that the primary role of law is to settle uncertainty about what members of the governed community should do in certain spheres of action (those that are deemed appropriate for authoritative regulation). Settlement minimizes controversy and permits individuals to coordinate their decisions with those of others in beneficial ways. The mechanism by which law produces settlement is promulgation of general rules. Wisdom and fairness in the choice of conduct-regulating rules are certainly important, but settlement itself is the fundamental goal. Accordingly, rules of conduct must be general enough to cover substantial numbers of potential disputes, determinate enough to resolve most of those disputes without further evaluation, and authoritative in the sense that most rule-subjects accept them as normative.<sup>33</sup> Although Smith might object to some aspects of this account, his de-

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<sup>31</sup> Smith says that “quantification is ultimately a matter of choice, not logic.” Smith, *supra* note 1, at 1754. He adds that “there is no uniquely correct method for quantifying vindicatory damages” and that the measure should “reflect the seriousness of the particular rights infringement.” *Id.* at 1755.

<sup>32</sup> Smith suggests that compensation for losses provides a minimum measure, but he also notes the difficulties of compensating noneconomic loss and the tendency of courts to apply objective rather than subjective standards in measuring loss. *See id.* at 1755–56.

<sup>33</sup> Larry Alexander and I have defended this view of law and legal rules at some length. *See* LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* 11–36 (2001).

scription of duty-creating rules appears to contemplate a body of substantive rules that meets these criteria.<sup>34</sup>

When the remedy for violation of a substantive legal rule departs from the right established by the rule, the settlement value of the rule may be undermined. For example, assume the substantive rules of contract law provide that when two parties have manifested assent to a bargain, the bargain will be enforced.<sup>35</sup> The object of these rules is to allow parties to extend credit and plan accordingly. But suppose also that remedial rules permit courts to choose damages over specific performance when the defendant has made a subjective, unilateral mistake; or to measure damages in ways that, in the hands of a jury, may vary according to the circumstances of the breach. Remedial rules of this type may allow for a just outcome — one that accurately responds to the particular wrong done. But their effect is to diminish the determinacy of the substantive rule and the extent to which it settles the rights of contracting parties.

At this point, Smith might interject that there is no real conflict between right and remedy in this situation. The rights and duties of the parties are fixed by the substantive rules of contracts; remedial rules, in contrast, are addressed to courts and regulate only the official response to a breach. Therefore actors who take seriously the normativity of legal rules will view their duties as unchanged by whatever remedies courts may grant in particular cases.

This answer, however, seems to rest on an unrealistic view of the effect of legal rules on rule-subjects. Not all individuals accept the normativity of legal rules, and even those who do may understandably wonder where their legal duties lie. Rules of law do not come marked as “duties” or “official responses.”<sup>36</sup> More likely, rule-subjects will look at the bottom line of liability as well as substantive rules of conduct to map a course of action. When rights and remedies diverge, the message is mixed and conduct rules no longer provide a definitive answer to the question what to do.

In practice, the impact of remedial decisions on substantive rules may be mitigated by their limited public visibility. I have argued elsewhere that there is a natural form of “acoustic separation”<sup>37</sup> between conduct-regulating legal rules and remedial rules.<sup>38</sup> Ordinary

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<sup>34</sup> See Smith, *supra* note 1, at 1746–47 (describing legal rules as general declarations of how rule-subjects should behave).

<sup>35</sup> Smith might put this differently, saying that the rules of contract law declare that when two parties have manifested assent to a bargain, they have a duty to perform.

<sup>36</sup> The system Bentham envisioned might have operated in this way, but no actual legal system of which I am aware has followed his model. See POSTEMA, *supra* note 2, at 405–64.

<sup>37</sup> See generally Dan-Cohen, *supra* note 2.

<sup>38</sup> See ALEXANDER & SHERWIN, *supra* note 33, at 88–89.



citizens, and many lawyers as well, are more likely to be familiar with substantive rules of law than with the relatively arcane, particularistic, and discretionary doctrinal rules that govern remedial decisions. As a result, the obligations set forth in substantive legal rules, such as the obligation to perform contracts, may control despite the contradictory implications of remedies that are not continuous with substantive rights. A system of governance that relies on acoustic separation, however, is inherently unstable, because remedial outcomes will sometimes come to light.<sup>39</sup> It is also morally suspect because it makes the effectiveness of legal rules depend on a form of deception about the full content of law.<sup>40</sup>

The questions I have raised are not intended to undercut Smith's accomplishment. His article is carefully reasoned and broadly knowledgeable, and it poses an important challenge to dominant theories of legal liability.

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<sup>39</sup> See Larry Alexander & Emily Sherwin, *The Deceptive Nature of Legal Rules*, 142 U. PA. L. REV. 1191, 1212 (1994).

<sup>40</sup> See *id.* at 1202–05 (describing the deception sometimes entailed in application of remedial rules).