
DUTIES, LIABILITIES, AND DAMAGES

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In this Article I explore two ways of understanding damage awards. The first way, which I call the duty view, supposes that damage awards confirm existing legal duties to pay damages. According to this view, damage awards are structurally similar to awards that require defendants to do things such as deliver contractually promised goods, cease nuisances, or pay contractual debts. Like these awards, damage awards are essentially rubber stamps: they require defendants to do what they should have done already. In contrast, the second way of understanding damage awards, which I call the liability view, supposes that insofar as it makes sense to speak at all of legal duties to pay damages, such duties are created — not confirmed — by damage awards. According to this view, damage awards are structurally similar to awards that require criminal wrongdoers to pay fines. In Montreal, there is a bylaw stipulating that citizens are liable to be fined a minimum of \$300 if they allow their dogs to run unleashed.¹ But there is no rule stipulating that if citizens allow their dogs to run unleashed, they should send the city a check for \$300. Errant dog owners have no legal or even moral duty to pay the city prior to being ordered to do so. The liability view regards damage awards as similar: they are at most duty creating, not duty affirming.

The Article defends three main propositions. First, the best-known contemporary theories of damages — “rights-based theories” and “utilitarian theories” — are committed to the duty view. Properly understood, the explanations these theories give for why damages should be paid — roughly, that there are moral duties to pay damages or that the practice of paying damages promotes utility — are in principle best satisfied if payment is made immediately after the wrong. If either of these theories is correct, the common law should contain a rule stipulating that wrongdoers have duties to pay damages to their victims. Second, the common law contains no such rule.² Rather than impos-

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¹ Montreal, Que., By-Law RCG 10-016 §§ 7, 14 (Aug. 26, 2010).

² The same proposition is defended in Nathan B. Oman, *Why There Is No Duty to Pay Damages: Powers, Duties, and Private Law* (William & Mary Law Sch., Research Paper No. 09-112, 2011), available at <http://ssrn.com/abstract=1906753>. Our reasoning differs, however, in four main respects. First, unlike my approach, Professor Nathan Oman places weight on the fact that American courts do not literally “order” that damages be paid and, more generally, on the fact that failing to comply with a damage award is not itself a ground for awarding further damages. *See id.* at 19–22. As I explain later, similar language is used with, and similar consequences are

ing ordinary or even inchoate duties to pay damages, the common law merely imposes liabilities to pay damages. Third and finally, it follows from the first two propositions that any theory of damage awards focusing on the value of the actions that such awards require — as do rights-based and utilitarian explanations — is bound to fail. The most important feature of damage awards is that they are *awards* — that is, that courts issue them. Like orders to pay fines, their importance lies fundamentally not in what they do, but in what they represent. And what damage awards represent is the law’s recognition that the plaintiff was wronged by the defendant. Damage awards are the law’s way of vindicating — not enforcing — the plaintiff’s rights.

A word on terminology: except where indicated otherwise, “legal duties” refers to duties that exist because there is a legal rule — legislative or judge-made — that makes certain behavior obligatory. This usage is familiar: lawyers say that citizens have legal duties to pay their contractual debts because there is a legal rule that contractual debts ought to be paid. It is not, however, the only usage; in particular, lawyers sometimes talk of legal duties that exist because a court issued a judicial award.³ Thus, it is sometimes said that a defendant who has been ordered to pay a sum has a legal duty, arising from the order, to pay the money.⁴ In Part II, I briefly consider whether “court-ordered duties” are different in kind from “rule-based duties” and, more generally, whether the idea of court-ordered duties makes sense at all. In general, however, this distinction is unimportant for my purposes. The alleged duties that are this Article’s focus are duties that arise upon the commission of a wrong and that require the wrongdoer to pay damages. Such duties are necessarily rule-based.

attached to, awards that clearly affirm existing duties, such as awards for the payment of a debt. *See infra* note 13. Second, unlike Oman I argue that an important objection to the idea of an ordinary duty to pay damages is that wrongdoers cannot reasonably be expected to know how much they should pay by way of damages or, in some cases, whether they ought to pay damages at all. *See infra* section II.A, pp. 1741–44. Third, I examine in detail the argument (not discussed by Oman) that the duty to pay damages is an inchoate duty (that is subsequently fixed by the damage award). This argument is the most plausible way to defend the idea of a duty to pay damages. *See infra* section II.B, pp. 1744–49. Finally, my argument applies beyond American courts to common law courts generally (and so does not depend, as does Oman’s argument, on the language in which American courts frame damage awards or on American rules of evidence, *see* Oman, *supra*, at 21–22). The lesson Oman draws from the absence of a duty to pay damages — namely that private law is better explained by civil recourse theories than by corrective justice theories, *id.* at 30 — is consistent with, but narrower than, the lesson drawn in Part III of this Article.

³ As understood here, a judicial “award” is the operational part of a legal decision. Common examples include orders or judgments that require the performance of a contract, the payment of money, or the cessation of an activity.

⁴ *See, e.g.*, Peter Birks, *Rights, Wrongs, and Remedies*, 20 O.J.L.S. 1, 28 (2000).

I. RIGHTS-BASED AND UTILITARIAN THEORIES: THE DUTY VIEW

A. *Rights-Based Theories*

Rights-based theories explain private law in terms of rights that individuals hold against other individuals.⁵ It is of course common to describe private law using the language of individual rights: lawyers say that contracting parties have rights to the performance of contractual promises, that landowners have rights to quiet enjoyment of their land, and so on. The distinctive feature of rights-based theories, however, is that they regard these legal rights as founded on a deeper, roughly Kantian (or “individualist”) conception of rights. In this view, legal rights are grounded in a conception of individual agency or freedom. For rights-based theorists, the law is concerned with duties that, at their foundation, are owed to other individuals qua individuals rather than duties that are imposed to further a collective or social goal. Thus, while rights-based theorists might accept that contract law benefits society, their basic justification for contract law is that contracting parties have obligations, owed to their co-contractors, to perform their contracts. Such theorists give similar explanations for other primary legal duties,⁶ such as duties not to trespass, not to cause nuisances, and not to carelessly injure another’s person or property.

⁵ See generally, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 197–439 (1992); CHARLES FRIED, *CONTRACT AS PROMISE* (1981); ARTHUR RIPSTEIN, *FORCE AND FREEDOM* (2009); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW* 118 (Peter Benson ed., 2001); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992). Rights-based theories are sometimes described as corrective justice theories; for an overview, see Benjamin C. Zipursky, *Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623, 627–31 (Jules Coleman & Scott Shapiro eds., 2002). The label is problematic because the concept of corrective justice is understood in radically different ways. For Professors Jules Coleman and Stephen Perry, corrective justice describes the basic form of the “duty to repair,” by which they mean the duty to pay damages. See COLEMAN, *supra*, at 361; Perry, *supra*, at 480. By contrast, Professor Ernest Weinrib appears to understand corrective justice as the basic form of all private law duties. See WEINRIB, *supra*, at 75–76. In this view, the duty to perform a contract is as much a matter of corrective justice as is the duty to pay damages for a breach of contract. Indeed, as I explain below, Weinrib believes that duties to pay damages are just transformed versions of the duties whose breach gave rise to them. See Ernest J. Weinrib, *Correctively Unjust Enrichment*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT* 31, 52 (Robert Chambers et al. eds., 2009); Ernest J. Weinrib, *Two Conceptions of Remedies*, in *JUSTIFYING PRIVATE LAW REMEDIES* 3, 31–32 (Charles E.F. Rickett ed., 2008) [hereinafter Weinrib, *Two Conceptions*]. The just-mentioned theories are, however, alike in that they all explain damage awards on the basis that victims have rights to the payment of damages.

⁶ Primary legal duties arise from “not-wrongs,” such as entering an agreement, being born, or attaining the age of majority. Secondary duties, by contrast, arise from legal wrongs, such as a breach of contract or a tort. Writers who use this terminology typically suppose that the main

As in most writing on damages, the rights-based literature is rarely explicit about whether the law it purports to explain is a law that creates legal duties to pay damages or merely a law that provides for court-imposed liabilities — or whether the distinction even makes a difference. Rights-based theorists frequently describe damages law using the language of liabilities.⁷ But these theorists' explanations for that law assume and justify legal duties to pay damages. The explanations fall into two main groups. In the first group are explanations that suppose wrongdoers should pay damages for the same reason that they should comply with their primary legal duties.⁸ The reason is the same, according to this view, because the original duty transforms itself, at the moment of injury, into a duty to pay damages. For rights-based theorists who adopt this explanation, the original right that was breached lives on, albeit in a different form.⁹ The second group of rights-based explanations of damages supposes that committing a wrongful injury gives rise, on the basis of a complex notion of responsibility, to a new and different "duty to repair."¹⁰ Both of these approaches thus explain damages law using the same kinds of individualist arguments that their defenders use to explain primary duties to perform contracts, not to injure others, and so forth. Indeed, rights-based theorists must explain damages in terms of individualist duties if they wish to provide a general theory of private law rather than mere-

example of a secondary duty is a duty to pay damages. *See, e.g.*, RAFAL ZAKRZEWSKI, REMEDIES RECLASSIFIED 165–77 (2005).

⁷ In *The Idea of Private Law*, Weinrib describes the law of damages as imposing liabilities. For example, at the conclusion of a discussion entitled "The Reparation of Tort Losses," Weinrib writes: "Consequently, the defendant's liability to the plaintiff rectifies both the normative gain and the normative loss in a single bipolar operation." WEINRIB, *supra* note 5, at 136. Coleman uses similar language in *Risks and Wrongs*. When discussing the duty to repair in tort law, Coleman distinguishes the rules that he is explaining by the kind of liability they impose. *See* COLEMAN, *supra* note 5, at 367 ("Corrective Justice and Fault Liability"); *id.* at 371 ("Strict Liability and Wrongful Losses"). Some writers seem to view liabilities and duties (or "obligations") as the same thing. Perry begins a discussion of tort theory by stating that "[t]he law of torts imposes legal liability on persons who in certain ways have caused certain kinds of harm to other persons." Stephen R. Perry, *Tort Law, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 57, 57 (Dennis Patterson ed., 1996). A few sentences later he writes: "The heart of tort law, then, is a legal obligation to pay compensation for harm caused." *Id.*

⁸ *See, e.g.*, Arthur Ripstein, *As if It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1979–82 (2007); Weinrib, *Two Conceptions*, *supra* note 5, at 12–15.

⁹ Suppose that the defendant has tortiously destroyed an object belonging to the plaintiff. Prior to the tortious act, the defendant was under a duty of care with respect to the object. The defendant's breach of this duty destroyed the object as a physical entity, but it did not destroy the plaintiff's right as a normative entitlement. Even after the object's destruction, the plaintiff is linked to the defendant through a right that pertains to the object as an undamaged thing, so that the right now takes the form of an entitlement to the cost of replacing it. Weinrib, *Two Conceptions*, *supra* note 5, at 12.

¹⁰ COLEMAN, *supra* note 5, at 361; *see also* Perry, *supra* note 5, at 497–500; Perry, *supra* note 7, at 72.

ly a theory of primary duties. And like the individualist duties that explain primary legal duties, the individualist duties that, in this view, explain duties to pay damages arise from prelitigation facts — in this case the fact of a wrongful injury. It follows that, at least in principle,¹¹ wrongdoers should pay damages immediately upon the commission of a wrong.

To avoid misunderstandings, it may be useful to mention that those who espouse the duty view are not committed to believing that damage awards should be framed literally as “orders” to defendants.¹² The conclusion that wrongdoers have legal duties to pay damages does not mean that the only way courts can give effect to such duties is by ordering their performance. It is consistent with the duty view to suppose that courts might enforce duties to pay damages directly — for example, by authorizing third-party execution via the seizure and sale of a wrongdoer’s property. The duty view is committed to only the proposition that the result contemplated by a damage award (namely the transfer of a sum of money from defendant to plaintiff) is the same result contemplated by the defendant’s existing duty to pay damages. How that result is brought about post-litigation is largely a matter of convenience.¹³

B. Utilitarian Theories

Utilitarian theories explain private law on the basis that private law promotes overall social welfare or “utility.”¹⁴ In the standard

¹¹ I say “in principle” to allow for the possibility that the duty to pay damages is inchoate until fixed by the court. I explore this possibility in Part II.

¹² For a different perspective on the importance of “orders” to the duty view, see Oman, *supra* note 2, at 19–20.

¹³ It is not an objection to the duty view, therefore, that in the United States damage awards are framed as abstract pronouncements that “the plaintiff shall have and recover” a certain sum from the defendant. DAN B. DOBBS, *LAW OF REMEDIES* 12 (2d ed. 1993). Similar language is used for awards that clearly confirm existing duties, such as awards to pay contractual debts. Courts in England formerly used the same terminology, but today damage awards and other monetary awards are framed as orders: “It is therefore ordered that [the defendant] must pay the Claimant [the sum of X].” CIV. P. R. para. C17-001, Form N30(1). This change in language, which attracted almost no attention, merely reflects the fact that it is preferable, for purely practical reasons, if defendants pay voluntarily — which many defendants are willing to do. Consistent with this explanation, defendants who fail to pay voluntarily are subject to roughly the same enforcement procedures in England as are similar defendants in the United States (for example, seizure and sale of assets). See ADRIAN ZUCKERMAN, *ZUCKERMAN ON CIVIL PROCEDURE* 822–30 (2d ed. 2006). It is only in exceptional circumstances that failing to comply with a monetary award can be enforced by committal or a fine under English law. See *id.* at 818–22.

¹⁴ *E.g.*, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 4–5 (1987); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29–34 (8th ed. 2011); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 9–32 (2004) [hereinafter SHAVELL, *FOUNDATIONS*]. Utilitarian theories are

presentation, utilitarian theories appear to adopt a radically different understanding of damage awards from that found in rights-based theories. The language of duties — legal or moral — is almost entirely absent from the utilitarian literature. Damage awards are typically described as setting “incentives” or “prices.”¹⁵ Arguably the most influential essay ever written about remedies from a broadly utilitarian perspective describes the law governing damages as setting “a liability rule.”¹⁶

Properly understood, however, utilitarian theories are committed to the duty view of damages. To see why, it is necessary first to say something about what utilitarians should think about legal duties generally. As a normative theory, utilitarianism holds that everyone, including the state, should act to promote overall welfare or “utility.” An obvious way for the state to promote utility is by encouraging citizens to act in utility-promoting ways. And an obvious way to encourage citizens to do anything is to provide material incentives that reward desirable behavior and penalize undesirable behavior. But it is not the only way.¹⁷ In particular, it is not the only way open to people and institutions that, like the state, are authorities. The first thing that most authorities do if they want to encourage those under their authority to act in certain ways is tell them how to act. Parents tell their children how they should behave. Coaches tell their players how they should play. Such communications may be in the form of individualized commands (that is, orders), or — my present concern — in the form of general directions (that is, rules). Enacting rules is an obvious and low-cost method that authorities can, and typically do, use to influence their subjects’ behavior.

often described as “economic” theories because contemporary writers who regard the law as a vehicle for promoting utility usually adopt economic tools and techniques in their arguments.

¹⁵ See, e.g., THOMAS J. MICELI, *THE ECONOMIC APPROACH TO LAW* 1 (2004) (“The economic approach to law assumes that rational individuals view legal sanctions (monetary damages, prison) as implicit prices for certain kinds of behavior, and that these prices can be set to guide these behaviors in a socially desirable direction.”); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 75 (1981) (“The basic function of law in an economic or wealth-maximization perspective is to alter incentives.”); Paul G. Mahoney, *Contract Remedies: General*, in 3 *ENCYCLOPEDIA OF LAW & ECONOMICS* 117, 118 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (“The economic function of contract remedies . . . is to alter the incentives facing the party who regrets entering into the contract . . .”).

¹⁶ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1092 (1972).

¹⁷ I explain the argument that follows in more detail in Stephen A. Smith, *The Normativity of Private Law*, 31 *O.J.L.S.* 215 (2011).

Of course, authority-issued rules normally influence behavior only insofar as the rules' subjects view the authority as legitimate.¹⁸ It goes without saying that many citizens do not regard the law (courts, legislatures, and the like) as a legitimate authority. Like Oliver Wendell Holmes's famous "bad man,"¹⁹ many citizens care about the law only to the extent that it is likely to penalize or reward them. For these citizens, the only rules that matter are rules that instruct legal officials to apply sanctions — and these rules matter only insofar as they predict how officials will behave. At the same time, it is also clear that many citizens regard the law as the authority that it claims to be. Many citizens believe they have a moral obligation to obey the law and further, many of them act on this belief. It hardly seems necessary to offer proof of this proposition — the idea that there is a moral obligation to obey the law is widespread, and it would be surprising if this idea had no effect on behavior — but there is empirical evidence that citizens are influenced by legal norms qua norms.²⁰ The theoretical literature on so-called "social norms" also supports this proposition. Although this literature says little about private law rules, it accepts that moral beliefs influence behavior²¹ and, further, that many people believe they have a moral obligation to obey the law.²²

The commonsense conclusion suggested by these observations is that a legal authority whose sole interest was in promoting utility-enhancing behavior would not just enact rules authorizing legal officials to impose sanctions or other penalties, but would also enact rules that tell citizens how they ought to behave. And since "enacting rules," in the context of citizen-directed rules, is just another way of saying "creating legal rights and duties," it follows that a legal system based on utilitarian principles would contain private law legal rights and du-

¹⁸ Authorities that are not viewed in this way may try to encourage compliance by attaching sanctions to their rules, but in this case the rules qua rules are superfluous: the same result could be achieved by making it clear that citizens who engage in a given behavior will be penalized.

¹⁹ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

²⁰ The leading study is described in TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990). Professor Tom Tyler summarizes previous studies, which his study corroborates, noting that "[a]lthough the studies examined differ in many ways, . . . they all reinforce the conclusion that normative support for the system leads to compliant behavior." *Id.* at 37–38. Later summaries of the empirical literature reach the same conclusion. See Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. L. & ECON. 715, 715–17 (2008); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468–71 (1997).

²¹ For an overview, see Richard H. McAdams & Eric B. Rasmusen, *Norms and the Law*, in 2 HANDBOOK OF LAW & ECONOMICS 1573, 1573–1610 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

²² See, e.g., Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1598–1600 (2000); Robert Cooter, *The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*, 75 FORDHAM L. REV. 1275, 1276–77 (2006).

ties. From a utilitarian perspective, the creation of legal rights and duties is a simple, low-cost method of influencing behavior.

Theorists who believe the law is based on utilitarian values should welcome this conclusion, since much of the law is framed explicitly in terms of rights and duties. This conclusion does not prove, however, that utilitarians should believe in legal duties to pay damages. For that to be true, paying damages must itself be a utility-enhancing act; paying damages following the commission of a legal wrong must be the kind of behavior that utilitarians want to promote. It might be thought unlikely that utilitarians would take this position. As already mentioned, utilitarian writers typically explain damage awards in terms of the incentives that they create. This seems to suggest that utilitarians should view damages the way they have traditionally viewed punishment — as something that the law does *to* citizens in order to give them reasons to do *other* things that are valuable (for example, not to commit crimes or not to commit torts).

Properly understood, however, the incentives that utilitarians are or should be interested in can also be created by citizens' acting in compliance with legal duties to pay damages. To understand why this is the case, it is important to distinguish between damage awards' effects on potential plaintiffs (victims) and their effects on potential defendants (wrongdoers). From the perspective of potential plaintiffs, damage awards are similar to insurance: they provide compensation for injuries. If you damage my crops or injure my person, I can ask a court to force you to compensate me for my loss. Absent this power, I might hesitate to do things like plant crops or walk about on the street — or I might devote considerable resources to preventing other citizens from damaging my crops and my person (for example, by building fences, wearing protective armor, and so forth) or to purchasing private insurance. Contract damages can be explained in the same way: they give promisees incentives to rely on contractual promises.²³ From a utilitarian perspective, then, the practice of issuing damage awards is in principle justifiable on the ground that (like insurance) it provides potential plaintiffs with incentives to use their resources (broadly defined) productively.

Much more would need to be said to prove that the damage awards that courts actually issue are granted on the right occasions and in the right magnitudes to induce potential plaintiffs to act in utility-enhancing ways. For present purposes, however, it is sufficient to observe that insofar as this effect can be shown, it will also show that utilitarians should support rule-based legal duties to pay damages.

²³ See Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1263–64, 1279–80 (1980).

From the perspective of potential plaintiffs, the prospect of receiving a compensatory payment provides the same incentive regardless of whether the payment is made because courts issue damage awards or because there is a legal duty to make the payment. It does not matter why the payment is made. What matters is that potential plaintiffs have a reasonable expectation that payments will be made. It follows that, from the perspective of creating appropriate incentives for potential plaintiffs, a utilitarian should support legal duties to pay damages upon injury. Enacting such duties is a low-cost way to encourage wrongdoers to make the payments necessary to provide incentives to potential plaintiffs.

The next question is whether consideration of the effects of damage awards on potential defendants supports the same conclusion. It might be thought that it does not. Utilitarians do not dispute that wrongdoers ought to pay damages, but the typical utilitarian explanation for why they should pay appears to justify only liabilities, not duties. I noted earlier that utilitarian writers typically describe granting damage awards as setting prices or incentives.²⁴ This description appears to assume that, from the perspective of potential defendants, damages are sanctions that the state imposes in order to discourage undesirable behavior. Thus, the practice of awarding damages is said to give potential defendants incentives to avoid causing injuries or at least to avoid causing injuries where the cost of avoidance is less than the cost of the injury.²⁵ Understood in this way, paying damages is something that the state forces defendants to do in order to give potential defendants incentives to do other things (for example, not to commit torts). This is an argument for a liability, not for a duty.

This argument should, however, be rejected. The first clue that there is a problem with what I will call the “liability-deterrence” view is that it commits utilitarians to contradictory views about the desirability of legal duties to pay damages. As we have seen, insofar as utilitarians focus on the position of prospective plaintiffs, they should support such duties. But if the liability-deterrence view is correct, then to the extent that utilitarians focus on prospective defendants, they

²⁴ See sources cited *supra* note 15 and accompanying text. There are important exceptions. In particular, some utilitarian writers describe damage awards in contract cases as giving effect to implied contractual terms. This approach supports duties to pay damages. See *infra* note 35 and accompanying text.

²⁵ See, e.g., CALABRESI, *supra* note 14, at 68–75; POSNER, *supra* note 14, at 29–114; SHAVELL, FOUNDATIONS, *supra* note 14, at 9–32. As I discuss in more detail below, see *infra* pp. 1738–40, some writers have explained contract damages on the basis that they give contracting parties incentives to breach whenever the cost of performance is greater than the value of performance — the so-called “efficient breach” theory. See POSNER, *supra* note 14, at 119–20; Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 292 (1970).

should support only liabilities to pay damages. This position is obviously unstable. More importantly, the liability-deterrence view is vulnerable to a substantive objection. To the extent that damage awards are viewed as liability deterrents, the awards are inconsistent with the legal rules that prohibit the very conduct that (in this view) triggers the defendant's supposed liability to pay damages. The inconsistency arises because the threat of having to pay damages often provides little or no incentive for potential defendants to do the things that legal rules say they should do. The amount of damages that even deliberate wrongdoers must pay is frequently less than the gains that wrongdoers will obtain from their breach. Yet what common law judges and legislators say is that there are legal duties not to commit breaches. That is, judges and legislators say there are duties not to do things like break contracts, cause nuisances, commit trespasses, and so on. For reasons explained earlier, utilitarians need to take legal duties seriously because legal duties influence how citizens behave. It should also be remembered that courts frequently enforce legal duties directly by issuing injunctions and specific performance orders. Any attempt to explain damage awards as liability deterrents for potential defendants is therefore vulnerable to the objection that the explanation cannot account for the existence of legal duties to do things like perform contracts, not trespass, and so on, and for the practice of making orders that directly enforce those duties. In short, the conventional utilitarian explanation for why defendants should pay damages assumes that the law leaves potential defendants at liberty to do things that are forbidden by the law's substantive rules.

It is fortunate for utilitarians, then, that they are not committed to the liability-deterrence view. In fact, there are two alternative explanations — the “continuity” thesis and the “disjunctive duty” thesis — that utilitarians can adopt to explain why defendants should pay damages. Though different in important respects (primarily whether they accept the idea of “efficient breaches”²⁶), each thesis is consistent with private law's substantive rules. Further, each thesis supports duties to pay damages.

The continuity thesis is a variant of the idea, discussed earlier, that duties to pay damages should be understood as transformed versions of primary duties. Although this idea figures prominently in rights-based theories of private law, it does not depend on accepting a rights-based view. In particular, scholars have defended the continuity thesis on the general ground that while it is not possible to undo a breach, the reasons that justify the original duty live on (or “continue”) after the breach, and so give rise, post-breach, to a new duty to do the next

²⁶ See *infra* pp. 1738–40.

best thing — namely to pay damages.²⁷ The continuity thesis is neutral regarding the kinds of reasons that explain primary duties. In principle, therefore, utilitarian theorists can adopt the thesis. And in practice, utilitarians should be open to adopting the principle because the kinds of justifications that utilitarians give for primary duties are similar to the utilitarian explanations for secondary duties to pay damages that I discussed a moment ago. The basic utilitarian explanation for primary duties is that the expectation that the actions they require will be performed provides potential plaintiffs with incentives to use the resources at their disposal productively. If I know that people are unlikely to trespass on my land, I am more likely to plant crops on the land. Similarly, if I know that contractual promises made to me will be kept, I am more likely to rely on those promises. As we have seen, this is the same explanation that utilitarians give for why plaintiffs who have had their crops damaged or contractual promises made to them broken should receive damages.

Understood in this way, damage awards are interpreted not as attempts to provide potential wrongdoers with incentives to do things like perform or not perform contracts, but simply as attempts to get actual wrongdoers to comply, in the best way now possible, with their primary duties. Damage awards, in this view, are similar to specific performance. Another way of making this point is by noting that, from the perspective of the continuity thesis, damage awards are similar to awards that require payment of a contractual debt. An award that requires a defendant to pay a contractual debt is clearly not a liability deterrent. The event that must be proven to obtain the award — the nonpayment of the debt — is the mirror image of the action required by the award. The only material incentive that the law provides to pay debts is the threat that the debtor's assets may be seized or wages garnished, and so on, to satisfy the debt. The court's award establishes the value of the assets vulnerable to seizure, but the award is not calibrated to provide potential defendants with incentives to comply with the prior duty. The award is simply the amount of the original debt. Assuming, then, that utilitarians can justify awards to pay debts, there is no reason in principle that utilitarians cannot similarly justify awards to pay damages. Of course, the payment of damages is not identical to the performance of the original duty. But late payment of a debt is not identical to payment on time. Rather, it is the "next-best thing."²⁸ This reasoning is exactly how the continuity

²⁷ See John Gardner, *What Is Tort Law For? Part 1: The Place of Corrective Justice*, 30 *LAW & PHIL.* 1, 33–35 (2011). Professor John Gardner's explanation draws on Joseph Raz, *Personal Practical Conflicts*, in *PRACTICAL CONFLICTS* 172, 189–93 (Peter Baumann & Monika Betzler eds., 2004).

²⁸ Gardner, *supra* note 27, at 33.

thesis interprets payment of damages: it is the next-best thing to performance.²⁹

More broadly, the idea that paying damages is a second-best way of complying with utility-enhancing primary duties is in principle unexceptional. Imagine that I decide to live my life entirely according to utilitarian principles. In working out what this requires, I come to the view (after reading utilitarian legal theory) that one thing I should try to do is to take reasonable care not to damage others' property. But what should I do if, despite my best efforts, I accidentally, but carelessly, damage my neighbor's car? The obvious answer is that I should try to do the next best thing to having not damaged the car in the first place, which in the circumstances is probably to pay for repairing the car. By paying for the repair, I will satisfy, in the best way now possible, the utilitarian reasons that explain why I should have taken reasonable care in the first place (roughly so that my neighbors can go about their lives without worrying about damage to their property). If this is right, then utilitarians should support duties to pay damages. On this view, rather than trying to provide potential wrongdoers with incentives, paying damages ensures that actual defendants comply, as best they can, with their original duties (or, more strictly, with the reasons underlying those duties).

Of course, the continuity thesis cannot justify actual damage awards unless the law's primary duties can themselves be justified on utilitarian grounds. In principle there is no reason to suppose this justification is not possible; there are well-known utilitarian justifications for rules prohibiting stealing, trespassing, lying, and so on. And as I discussed earlier, insofar as utilitarians cannot justify the actions required by primary duties, they will have difficulty explaining why the law declares such actions obligatory. All that said, there is one private law duty that, in the view of at least some utilitarian writers, cannot be justified. According to what has become known as the "efficient breach" theory, it is often inefficient, in utilitarian terms, for contracting parties to perform their contractual duties.³⁰ According to this theory, at least part of the explanation for why courts award the damages that they award in contract cases is that the law wants to give potential defendants incentives to breach their contractual duties when (but only when) the cost of performance outweighs the benefits from performance. This theory is thus inconsistent, at least for the case of contract damages, with the continuity thesis.

This Article is not the place to debate the merits of the efficient breach thesis. For this Article's purposes, two observations are suffi-

²⁹ See *id.* at 33–34.

³⁰ See POSNER, *supra* note 14, at 119–20; Birmingham, *supra* note 25, at 292.

cient. First, many utilitarian scholars — probably the majority — reject the efficient breach thesis on straightforward utilitarian grounds.³¹ Second, even utilitarian scholars who accept the efficient breach thesis can — and should — accept the duty view of damages, albeit for slightly different reasons from those suggested by the continuity thesis. As was explained earlier, an objection to the efficient breach thesis is that it supposes the law of damages is designed to promote certain actions (“efficient breaches”) that are forbidden by contract law’s substantive rules. The rules of contract law inform citizens that they should do what they have contractually undertaken to do. This objection, however, can be avoided — without abandoning the substance of the efficient breach thesis — by casting the thesis not as a thesis about efficient *breaches* but as a thesis about efficient *duties*. According to the “disjunctive duty” thesis, in every case in which courts award contract damages,³² the defendant’s contractual duty was a disjunctive duty either to perform the “primary” duty or, as an alternative, to pay a sum of money (“damages”).³³ If this theory is right, then damage awards are again a kind of specific relief: they directly enforce a contractual duty either to perform a nonmonetary action or to pay a sum of money.

Utilitarians might defend the disjunctive duty thesis on either of two grounds. First, utilitarians might defend (and have defended) it on the ground that, as a matter of fact, contracting parties understand themselves to be committing to disjunctive duties.³⁴ In other words, it might be argued that even when contracts do not contain explicit clauses to this effect, it goes without saying that contracting parties implicitly agree to disjunctive duties. The second, and in principle more broadly applicable, way of defending the disjunctive duty thesis is on the basis that, as a matter of law (not fact), there are implied terms in the relevant contracts that provide for disjunctive duties. Clearly, courts and legislatures can, and regularly do, imply terms into

³¹ See, e.g., Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 834–39 (2003); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 278–96 (1979).

³² This qualification is necessary because contractual duties cannot plausibly be described as disjunctive in cases in which courts are willing to order specific performance of those duties.

³³ The idea that contractual duties are disjunctive duties to perform or pay is usually associated with Holmes. See Holmes, *supra* note 19, at 462 (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.”). As the above quotation suggests, however, Holmes did not understand legal duties in the sense that they are understood in this Article. For Holmes, to say there is a legal duty to pay a sum of money is not to say that legally the money should be paid; the duty may mean no more than that the law will force you to pay the money.

³⁴ See, e.g., Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 2006 (2011). The authors limit their argument to commercial parties.

contracts as a matter of law. And assuming that the substantive ideas underlying the efficient breach theory are compelling, utilitarian law-makers would have good reasons to imply just such terms. These reasons can be described in different ways, but perhaps the simplest way starts from the idea that in a world of costless contracting, parties themselves would agree to disjunctive duty terms.³⁵ They would agree because, if the theory is correct, a disjunctive duty minimizes the costs and maximizes the benefits of contracting. In practice, however (the argument goes), parties rarely provide for such terms explicitly because drafting them is costly and because they are only rarely needed. Thus, the law steps in by implying disjunctive duty terms into certain contracts. The end result is the same as that contemplated by the conventional description of the efficient breach idea, namely that contracting parties will have incentives to pay money rather than perform when performance is inefficient, but — crucially — the result is achieved while respecting the idea that there are legal duties to perform contracts.³⁶ According to the disjunctive duty thesis, when a court awards contract damages, it is directly enforcing the contract. Even more than in the case of the continuity thesis, the disjunctive duty thesis thus views damage awards as akin to awards to pay a debt.³⁷ Both awards (merely) confirm existing duties to pay money.

The preceding discussion of the utilitarian explanation of why defendants should pay damages can be summarized in three propositions. First, even scholars who are wedded to the efficient breach theory are not committed to viewing damages as liabilities. The disjunctive duty interpretation of the efficient breach theory (like the continuity thesis) supports duties to pay damages. Second, utilitarians must adopt either the continuity thesis or the disjunctive duty thesis (or a close relative) if they want to explain damages law in a way that is consistent with the existence of primary legal duties to do things like perform contracts, not trespass, and so forth. These two theses are consistent with primary duties because they suppose that damages are either substi-

³⁵ See *id.* For an argument describing the general utility of implying terms that the parties would have wanted, see Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983), which notes that “[i]deally, the preformulated rules supplied by the state should mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction,” *id.*

³⁶ This version of the disjunctive duty thesis is therefore similar to the idea, defended by some utilitarian writers, that the damages rules for breach of contract should be understood as default terms implied into all contracts. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88, 101–04, 121–22 (1989); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 615–18 (1990).

³⁷ I qualify this as “even more” because the disjunctive duty thesis regards paying damages as full compliance with the primary duty (rather than as a second-best way of complying with the reasons underlying the duty).

tutes for, or aspects of, those duties. Neither thesis entails the implausible position that the law of damages is designed to encourage behavior that is inconsistent with the behavior stipulated by primary rules. Third, and finally, utilitarians must also adopt one of these theses if they wish to explain why defendants should pay damages in a way that is consistent with their explanation for why plaintiffs should receive damages. The latter explanation, as discussed above, supports duties to pay damages. The conclusion, then, is that utilitarians have good reasons to support duties to pay damages.

II. THE POSITIVE LAW: THE LIABILITY VIEW

Notwithstanding their different normative foundations, rights-based and utilitarian theories are alike in assuming that there should be legal duties to pay damages. It is a major objection to these theories, therefore, that the common law does not recognize such a duty.³⁸ This objection applies whether one sees the duty as an ordinary legal duty or as an inchoate legal duty.³⁹

A. *An Ordinary Legal Duty to Pay Damages?*

The law does not recognize an ordinary legal duty to pay damages following the commission of a legal wrong. Two features of the positive law are inconsistent with such a duty.⁴⁰ The first is that payment of damages prior to litigation is no defense to a claim for damages. In common law jurisdictions, the positive law is clear that except in cases where payment is accepted as part of a settlement, payment of damages before litigation does not extinguish a plaintiff's right to an award

³⁸ I discuss the civil law position briefly *infra* note 78 and accompanying text.

³⁹ I earlier defended the first half of this proposition (though on slightly different grounds) in Stephen Smith, *Why Courts Make Orders (And What This Tells Us About Damages)*, 64 CURRENT LEGAL PROBS. 51 (2011). For a contrary view, see ZAKRZEWSKI, *supra* note 6, at 165–75; Peter Birks, *Definition and Division: A Meditation on Institutes 3.13*, in THE CLASSIFICATION OF OBLIGATIONS 1, 24 (Peter Birks ed., 1997).

⁴⁰ A third possible feature, raised by Oman, *supra* note 2, at 3, is that there is no liability for failing to pay damages (even after an award is made). As the example of duties to make restitution shows, however, it cannot be assumed that failing to comply with an ordinary duty is necessarily a liability-grounding wrong. Damages are not available for failing to make restitution, notwithstanding that it is generally assumed (at least in the Commonwealth) that mistaken payees are under a duty, immediately following receipt, to make such payments. PETER BIRKS, UNJUST ENRICHMENT 169 (2d ed. 2005). I discuss this issue in more detail in Stephen A. Smith, *Unjust Enrichment: Nearer to Tort than Contract*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT, *supra* note 5, at 181. Nor should weight be placed on the absence of liability for failing to pay damages following an award: the same rule is applied to monetary awards that clearly confirm existing duties, such as awards requiring payment of a contractual debt. See DOBBS, *supra* note 13, at 13–14.

of damages.⁴¹ If you sue me for \$100 for the cost of replacing a window that I carelessly broke, it is no defense that I already paid you \$100. If the court determines that your loss is \$100, the court will issue a judgment for \$100 in your favor. The payment might be legally relevant in other ways — for example, it might be the basis for a restitutionary claim or the grounds for offsetting a judgment — but it is no defense to the claim in damages.⁴² If there were a legal duty to pay damages, therefore, it would be a duty that could not be fulfilled.

For obvious reasons, the prepayment rule rarely arises in litigation. It should be stressed, therefore, that the rule is not a mere technicality. To the contrary, the prepayment rule is a direct implication of what was, until the abolition of the writs in the nineteenth century, the most important distinction within the English law of obligations: the distinction between actions to enforce existing rights (for example, an action to enforce a contractual debt) and actions to obtain redress for wrongs, that is, actions for damages (for example, an action for damages for physical injury) — in short, the distinction between rights and wrongs.⁴³ The *praecipe* writs that initiated proceedings in claims to enforce rights ordered the defendant to fulfill the right or come to court to explain himself.⁴⁴ By contrast, the trespass writs that initiated proceedings in claims for damages left the defendant no option: he had to come to court. The defendant could not avoid appearing by paying damages because the plaintiff had no right to damages.⁴⁵ There was no demand that the defendant could satisfy because the plaintiff was not seeking to enforce a right but rather to obtain redress for a wrong:

Whereas a *praecipe* writ ordered the defendant to accede to a demand or justify himself, a trespass writ brought the defendant directly to court to explain why he had done wrong. Trespass writs were therefore not concerned with the vindication of rights, but with punishment and amends for past transgression. A writ of trespass offered no option, even fictitious, of doing right: as Blackstone put it, while a *praecipe* writ was ‘optional’, trespass was ‘peremptory’. It embodied a complaint rather than a demand. As with the assize and the appeal, trial was by jury. And the out-

⁴¹ See, e.g., *Edmunds v. Lloyds Italico & l’Ancora Compagnia di Assicurazione & Riassicurazione S.p.A.*, [1986] 1 W.L.R. 492 (P.C.) at 495–96 (Eng.); *THE LAW OF DAMAGES* 211 (Andrew Tettenborn et al. eds., 2003). American law is the same. Oman, *supra* note 2, at 15–22. Settlement (of an actual or potential legal action) is different from performance (of an unperformed legal duty). I can settle an action to enforce a contractual obligation to deliver goods valued at \$1000 in exchange for a payment of \$100. See *British Russian Gazette & Trade Outlook Ltd. v. Associated Newspapers Ltd.*, [1933] 2 K.B. 616 at 643 (Eng.).

⁴² See Oman, *supra* note 2, at 16–18.

⁴³ See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 67 (3d ed. 1990); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 243–44 (2d ed. 1981).

⁴⁴ See BAKER, *supra* note 43, at 68.

⁴⁵ See *id.* at 71.

come of a successful suit was damages, with a fine to the king in serious cases.⁴⁶

The second reason for doubting the existence of an ordinary duty to pay damages is that it would normally be impossible for wrongdoers to satisfy such a duty (or at least impossible for them to know that they had satisfied it) because the duty's content could not be determined prior to a judicial decision. Defendants normally cannot determine how much they should pay in damages (and sometimes cannot determine whether they should pay damages at all) until a court makes an award. In many cases, courts (or juries) are given wide and explicit discretion in assessing damages,⁴⁷ as for example when they assess claims for punitive damages, nominal damages, or damages for mental distress or pain and suffering.⁴⁸ More importantly, certain of the facts upon which damage awards — all damage awards — are based may be known to only the victim. Every damage claim potentially includes a claim for damages for consequential losses. By definition, the facts on which such claims depend — for example, whether the plaintiff lost profits — are in the victim's hands. Whether the plaintiff has lost profits depends on the plaintiff's particular circumstances. And even where the claim is limited to damages for direct losses — for example, the cost of replacing damaged property — the assessment may turn on information that only the plaintiff knows. Indeed, in many cases, the

⁴⁶ *Id.* Professor S.F.C. Milsom's description is similar:

The modern law of obligations, roughly that concerning contract, tort and personal chattels, is the result of a continuing interplay between two simple ideas from which the common law started[] . . . the demand for a right and the complaint of a wrong. . . . [T]here is an underlying juridical difference: in *praecipe* situations the defendant can put matters right by a definite render, whereas in most *ostensusus quare* [trespass] situations he has done an irreparable wrong for which compensation must be assessed.

MILSOM, *supra* note 43, at 243–44. Note that by “vindication of rights,” Professor John Baker means steps taken to ensure compliance with a right — for example, to ensure a debt was paid. I use the term in a different sense in Part III.

⁴⁷ This discretion is qualitatively different from the weak discretion that courts necessarily exercise whenever they apply general rules to specific facts. Courts openly acknowledge that the quantification of, for example, damages for pain and suffering involves a large subjective element. *See, e.g.,* *Wise v. Kaye*, [1962] 1 Q.B. 638 at 669 (Eng.); THE LAW OF DAMAGES, *supra* note 41, at 81. In the United States, where juries still assess such damages, awards vary enormously. DOBBS, *supra* note 13, at 659.

⁴⁸ Although I cannot defend the claim here, arguably courts also have a degree of open discretion when determining whether a particular loss is too remote, that is, when assessing damages for consequential losses (for example, loss of profit, out-of-pocket expenses, and so on). There is no formula or anything remotely similar for determining which losses are “reasonably foreseeable.” *See* THE LAW OF DAMAGES, *supra* note 41, at 127–50. In contract cases, English courts are simply told to consider whether a loss was “‘not unlikely,’ . . . a ‘real danger,’ a ‘serious possibility,’” or something similar. *Id.* at 133 (footnotes omitted). Because consequential damages are in principle available in any case in which damages are sought, in theory damages are always, to an extent, discretionary.

facts that establish whether a wrong has occurred at all, and so whether damages in any amount should be paid, will be known to only the plaintiff: a vendor who delivers defective goods may not know that the goods are defective. Finally, it should be noted that these difficulties cannot be avoided by assuming that the putative duty to pay damages arises only if and when the victim provides the wrongdoer with the relevant information. Victims often want nothing to do with those who have injured them. And even if a victim agrees to hand over information to the wrongdoer, there is the problem of proof. Does the victim have to provide receipts? Witnesses? Expert reports? Must the parties engage arbitrators to assess the evidence?

It is of course possible that, notwithstanding the practical difficulties just described, the law could enact a duty to pay damages. The existence of an impossible-to-perform legal duty is not a logical impossibility. It is, however, highly unlikely. Legal duties are meant to express moral duties — that is why they are called “duties”⁴⁹ — and in morality “ought” generally implies “can.”⁵⁰ The suggestion that the law recognizes a legal duty to do something that individuals cannot reasonably be expected to do should be accepted on only the clearest evidence. The prepayment rule shows that in the case of an alleged duty to pay damages, the evidence points in the opposite direction.

B. An Inchoate Legal Duty to Pay Damages?

Although the practical difficulties associated with operationalizing an ordinary duty to pay damages argue against the existence of such a duty, they might be thought to suggest another way that defenders of the duty view could account for the positive law. Duty-view defenders might argue that the duty to pay damages is an unliquidated or inchoate duty — a duty “in principle” — which courts then fix or crystallize following litigation.⁵¹ Adopting this perspective, it might be argued that the prepayment rule is explained by purely practical considerations — namely the practical difficulty of framing a rule prescribing how and when citizens should pay damages. In an ideal world, the inchoate duty argument goes, wrongdoers would have duties to pay damages immediately following commission of the wrong. In the real

⁴⁹ See *infra* note 57 and accompanying text.

⁵⁰ IMMANUEL KANT, *CRITIQUE OF PURE REASON* 473 (Norman Kemp Smith trans., 1965) (1787).

⁵¹ Though not presented specifically for this purpose, Professor Arthur Ripstein’s Kantian explanation of the role of adjudication in solving problems of indeterminacy might be invoked in support of the idea of an inchoate ordinary duty to pay damages. See RIPSTEIN, *supra* note 5, at 168–76. In *Torts and Other Wrongs*, Gardner remarks (without comment) that the duty to pay damages is an unliquidated duty. John Gardner, *Torts and Other Wrongs* 25 (Univ. of Oxford Legal Research Paper Series, Paper No. 46/2011, 2011).

world, however, it is necessary, for practical reasons, for courts to quantify such duties. If this observation is correct, then defenders of the duty view can argue that the substantive reasons they give for why, in principle, an ordinary duty to pay damages is appropriate also explain why courts make the awards they make. The basic justification for paying damages (whether rights based or utilitarian), they can argue, remains the same regardless of when the duty comes into existence.

In considering this argument, an initial observation is that it may be queried whether it even makes sense to speak of inchoate legal duties or — what amounts to the same thing — legal duties that owe their existence to a specific judgment or court order. Citizens no doubt have legal duties to comply with commands issued by officials vested with the authority to issue commands (for example, police officers directing traffic). But it does not follow that such commands state legal duties themselves. The fact that American courts are sometimes required, by virtue of the conflict of laws rules, to apply foreign laws to American citizens does not mean those laws are American laws or, more to the point, that they should be included in a list of legal duties recognized by American courts. Of course, domestic court awards are different from foreign laws (and foreign court awards) in that they are issued by domestic legal authorities. But they also lack another standard hallmark of law, namely generality. As Professor Lon Fuller demonstrated with his parable of the ruler who, by failing to consistently apply generally applicable laws, failed to make law at all,⁵² a “legal” system that consisted entirely of rules stipulating that citizens must do what legal officials tell them to do on a case-by-case basis would not qualify as a legal system at all. Given that court awards systematically lack generality, it may therefore be queried whether they qualify as legal propositions at all.

Even assuming, however, that the idea of inchoate legal duties makes sense in principle, there are particular difficulties with the idea of inchoate duties to pay damages. One difficulty is that such duties remain inconsistent with the prepayment rule. If it were the case that, in principle, damages ought to be paid prior to an award, then in cases where a payment equal to or greater than an award is made, this should be a good defense.⁵³ The utilitarian and rights-based reasons

⁵² LON L. FULLER, *THE MORALITY OF LAW* 33–39 (rev. ed. 1969); *see also* H.L.A. HART, *THE CONCEPT OF LAW* 20–21 (1961).

⁵³ A related point is that it has never been suggested that the historical distinction between claims to enforce rights and claims to obtain redress for wrongs (on which the prepayment rule is based) merely reflects the fact that the latter were claims to enforce unliquidated rights. Neither Baker nor Milsom suggests that the distinction was regarded as a response to practical difficulties associated with rights to damages. *See* BAKER, *supra* note 43; MILSOM, *supra* note 43. Nor, for

for paying damages are fully satisfied if payment is made prior to an award regardless of when the duty is liquidated.

The most important objection to the inchoate duties argument, however, is that the normal and appropriate way for courts to specify uncertain duties is for them to make declarations, not awards. Declarations are the individualized counterparts to legal rules: in the same way that legal rules tell citizens generally how they ought to behave, declarations tell specific individuals how they ought to behave.⁵⁴ Indeed, the connection is even closer, because a legal rule does not strictly “tell” citizens how to behave but rather “declares” what they are obliged to do. Legal rules are typically described not in the language of generalized directives — “perform contracts,” “do not trespass,” and so on — but in the language of general declarations — “everyone has a duty to perform their contracts,” “everyone has a duty not to trespass,” and so on.⁵⁵ As Professor H.L.A. Hart made clear in his critique of Professor J.L. Austin’s command theory of law, it is part of the essence of a legal rule that, unlike a mere command, it states — that is, declares — what citizens *ought* to do.⁵⁶ Legal rules are normative propositions. More generally, it is part of the very meaning of a legal rule that it is meant to reflect reasons — moral reasons — that already apply to those subject to it.⁵⁷ When a court or legislature says that “there is a duty to do *X*,” it is saying that citizens are morally obliged to do *X*. This understanding does not mean that citizens are in fact morally obliged to do *X* (the law may be mistaken). It is, however, part of the meaning of legal rules that the actions they stipulate are morally obligatory. Declarations carry the same meaning, albeit rather than declar-

that matter, do courts today characterize the rules on damages as one might expect if the inchoate duty explanation were correct. Courts do not portray the task of assessing damages as a matter of determining how, ideally, the defendant should have acted from the moment of injury. They portray the task as a matter of determining what judges (or juries) should do.

⁵⁴ DOBBS, *supra* note 13, at 7 (“Declaratory remedies furnish an authoritative and reliable statement of the parties’ rights.”); LORD WOOLF & JEREMY WOOLF, *THE DECLARATORY JUDGMENT* 1 (3d ed. 2002) (“A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs.”). A legal state of affairs may be a legal duty (for example, a contractual duty, *see* DOBBS, *supra* note 13, at 7), but it may also be a status or proprietary relationship.

⁵⁵ This language is often explicit in civilian codes. *See, e.g.*, Civil Code of Québec, S.Q. 1991, c. 64, art. 1458 (Can.) (“Every person has a duty to honour his contractual undertakings.”).

⁵⁶ HART, *supra* note 52, at 82–91. The arguments that follow draw on Professor Joseph Raz’s development of Hart’s insight: *see* in particular JOSEPH RAZ, *THE AUTHORITY OF LAW* 3–232 (1979) and JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 210–37 (1994) [hereinafter RAZ, *ETHICS*].

⁵⁷ This proposition is true even where, absent the legal duty, there would be no moral duty to do what the legal duty requires. Thus, a rule that solves a coordination problem — for example, which side of the road to drive on — fits this explanation because everyone has moral reasons to do whatever is reasonably necessary to ensure the safe and efficient flow of traffic. *See generally* RAZ, *ETHICS*, *supra* note 56.

ing what everyone ought to do, they declare what particular individuals ought to do.

By contrast, damage awards, whether framed as orders or as abstract “shall have and recover” pronouncements, are ill-suited to specifying inchoate duties. Orders (I discuss “shall have and recover” awards below) are basically commands; they tell defendants what the authority wants them to do, not what they morally ought to do. This meaning is evident from both the imperative language in which orders are framed (“It is ordered that . . .”) and the characteristic situations in which they are issued. Aside from damage awards, courts grant orders in two broad categories of cases. The first category includes cases where courts want to motivate defendants to perform legal duties that the defendants have been unwilling to perform. Such “replicative” awards confirm existing legal duties and so might be thought to have a function similar to that of declarations. The fundamental difference, however, is that orders (replicative or not) do not call upon the defendants’ sense of moral obligation. Orders do not inform defendants what they have “duties” to do: they simply command defendants to do things. Orders are intended to be practically, rather than morally, authoritative. This feature is of course exactly what one would expect in the case of a replicative order, since the reason for the order is the defendant’s failure to fulfill his or her legal duty.⁵⁸ This first situation does not fit orders that are intended to fix inchoate duties to pay damages. If the duty is inchoate, then by definition the defendant has not shown that he or she is unwilling to perform it.

The other situation in which courts issue orders (again leaving aside damage awards) is when they want defendants to do something that is not appropriately the subject of a legal duty because the law does not regard it as morally obligatory. The obvious example is when a court wants a defendant to perform an action by way of a punishment. For example, a court might order a defendant found guilty of littering to pay a \$1000 fine. In this case, the order is not intended to motivate the defendant to perform an existing legal duty. To the contrary, such orders are used — and used to the exclusion of rule-based duties — precisely because the stipulated action is not an appropriate subject matter for a rule. Legal duties are meant to reflect moral obli-

⁵⁸ It might be asked how issuing an order to do *X* could motivate a defendant to do *X* when the defendant already refused to comply with a legal duty to do *X*. Briefly, the answer is that legal orders rely on a different kind of authority than do legal rules. Legal rules are indirectly authoritative: rather than telling citizens directly what to do, they provide authoritative statements of citizens’ moral obligations. Thus, legal rules’ motivational force, such as it is, derives from the subjects’ motivation to comply with their moral obligations. By contrast, orders are meant to be directly authoritative: they directly tell citizens how to act. The only reason the authority provides to comply with an order is that the authority has issued it. I discuss this question in more detail in Smith, *supra* note 39, at 60–63.

gations, and citizens are not usually thought to have moral obligations to punish themselves.⁵⁹ This second situation also does not fit orders that are intended to fix inchoate duties to pay damages. In contrast to an order to pay a fine, an order that fixes an inchoate duty to pay damages would stipulate the performance of something that, if the duty were inchoate, the law would regard as a moral obligation.

It is theoretically possible that orders designed to fix inchoate duties to pay damages fall into a third category, one that is justified differently than the two categories just described. But this explanation seems highly unlikely. *Ordering* defendants to comply with duties without first giving them the opportunity to comply voluntarily makes nonsense of the very idea of a duty. It implies — without any proof to the contrary — that defendants are unwilling to comply with their legal duties. As the law governing requests for injunctions to prevent future wrongs shows, common law courts hesitate to order defendants to comply with legal duties in advance of clear proof that the defendants are unwilling to do so voluntarily. Preventative injunctions are normally awarded only where the breach is imminent and the expected injury significant.⁶⁰ Yet the inchoate duty argument must suppose that courts make such orders routinely in the case of duties to pay damages.⁶¹ Finally, the present objection cannot be avoided on the ground that, whatever the theoretical appropriateness of using declarations to specify inchoate duties, courts do not use them for the practical reason that their use would lead to costly additional litigation (because many defendants would not heed declarations). A declaration states as clearly as a damage award the sum of money that the defendant must pay. In practice, then, declarations of duties to pay damages could function — so far as enforcement is concerned — exactly as or-

⁵⁹ Thus, a statute that attempted to impose a duty to pay a fine (for example, “anyone who litters has a legal duty to pay the state \$1000”) would be interpreted as imposing a tax. Only the latter interpretation makes sense of the fact that, because it is directed at citizens generally, the statute purports to declare a moral duty.

⁶⁰ ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 544–45 (3d ed. 2004); DOBBS, *supra* note 13, at 164.

⁶¹ There are also practical reasons for announcing legal duties in advance of ordering them or authorizing their execution. To the extent that paying damages is presented as a legal duty, citizens who are disposed to view their legal duties in the way the law wants them viewed — namely as moral duties — will approach such actions differently than they would if they were merely ordered to perform them. For law-respecting citizens, settlements made in advance of litigation will not be regarded as akin to plea-bargaining deals, but rather as attempts to determine, so far as practical, their moral duties. Similarly, post-litigation payments will be regarded as fulfilling a moral obligation, not merely as something that one has been forced to do. For these citizens, there will be a stigma attached to attempts to avoid payment (for instance, by hiding assets) that would not exist if the only reason for making the payment were that the law commanded such payment. Thus, if the law did indeed regard paying damages as a moral obligation, it would be in the law’s interest to make this fact clear by clarifying that payment is a legal duty.

ders to pay damages currently function in English law. The defendant would need to be given a period of time — though it could be quite short — to do what the declaration required. Once the period expired, the plaintiff could immediately seek permission to engage bailiffs and others. The plaintiff would need to establish that payment had not yet happened, but this step is also required under the current procedure.

The conclusion to draw from these observations is that the fact that damage awards are awards — not declarations — is a major objection to the suggestion that wrongdoers have inchoate duties to pay damages. We would not expect courts to issue damage awards if their role were to fix inchoate duties to pay damages. It remains only to add that the idea that damage awards fix inchoate duties is no more plausible in jurisdictions like the United States (and, until recently, England) that frame damage awards as “shall have and recover” pronouncements rather than as “orders.”⁶² The former formulation is even more inconsistent with the idea that a damage award fixes an inchoate duty because it allows for the possibility of coercive execution immediately following the putative fixing of the defendant’s duty.

III. THE WAY FORWARD

How, then, should we understand damage awards? Although the preceding discussion does not provide the answer, it points us in the right direction. Rather than focusing on why citizens should pay damages, theorists attempting to explain damage awards need to focus, at least in the first instance, on why courts issue such awards.⁶³ These theorists need to focus on the feature that distinguishes damages law from most, if not all, other private law fields: namely, that it is fundamentally directed at judges. The damages rules instruct courts what to do when citizens come to them complaining of a wrong.⁶⁴ Insofar

⁶² See *supra* note 13.

⁶³ Within the contemporary literature (and as Oman, *supra* note 2, argues), the most sophisticated attempt to understand damages from (roughly) this perspective is set out in the “civil recourse” theory of tort law. See John Goldberg & Benjamin Zipursky, *Rights and Responsibility in the Law of Torts*, in *THE RIGHTS OF PRIVATE LAW* 251 (Donal Nolan & Andrew Roberston eds., 2011); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L.J.* 695 (2003); Zipursky, *supra* note 5, at 627–31. The main difference between Professor John Goldberg and Professor Benjamin Zipursky’s theory and the theory defended below is the former’s reliance on Lockean social contract arguments (in contrast to my focus on the nature and role of judicial awards) and its exclusive focus on tort damages.

⁶⁴ I explore this idea in more detail in Stephen A. Smith, *The Law of Damages: Rules for Citizens or Rules for Courts?*, in *CONTRACT DAMAGES* 33 (Djakhongir Saidov & Ralph Cunnington eds., 2008). A similar idea was developed in the context of criminal law in Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625 (1984). The rules governing the availability (though not the content) of injunctions, specific per-

as these rules provide citizens with rights, they are rights against courts, not other citizens.

From this perspective, the first question to consider when thinking about damages is why courts make awards — any kind of awards — at all. Damage awards are just one possible outcome to a successful private law action, and in many cases they are a substitute for, alternative to, or supplement to other kinds of awards. It is unlikely, then, that we can understand the practice of making damage awards without also understanding why courts make other kinds of awards.

If we focus on awards associated with the final disposition of a private law claim (and put aside damage awards for the moment), we can see that the most obvious thing that courts appear to be doing when they make awards is trying to ensure that defendants fulfill their legal duties where it is still possible to do so.⁶⁵ Three familiar kinds of awards can be straightforwardly interpreted in this way. The first are awards that direct citizens who are unwilling to comply with their legal duties to do the very things that those duties require (“directive awards”). Although I have argued that this description does not apply to damage awards, it is the natural way to understand orders that direct defendants to do things like perform contractual obligations and refrain from trespassing, causing a nuisance, and so on.⁶⁶ The second type of award is one that directs or authorizes legal officials or other third parties to attempt to execute an unperformed duty (“executive awards”). Such awards are possible only where the legal duty in question is to bring about a specific result such as payment of money, delivery of goods, or conveyance of title to land. In practice, however, executive awards are common, either as an alternative to, or following noncompliance with, directive awards. Examples include awards that

formance orders, and awards requiring payment of a contractual debt are also directed at courts. This fact helps to explain, *inter alia*, why specific relief is not available as of right and why, in determining whether to grant specific relief, courts explicitly take into account a range of “good faith” considerations (“clean hands,” “hardship,” “delay,” and so on) and administrative concerns (“supervision”) that are largely ignored in the substantive law. *See, e.g.*, BURROWS, *supra* note 60, at 475–78, 498–500. The factors that courts may legitimately take into account when determining how *they* should respond to requests for their assistance are different from those they should take into account when determining how citizens should treat each other. *See* Stephen A. Smith, *Substitutionary Damages*, in JUSTIFYING PRIVATE LAW REMEDIES 93, 105–09 (Charles E.F. Rickett ed., 2008).

⁶⁵ This aim is perfectly reasonable. Whether for reasons of fairness, social contract, natural obligations, the need to coordinate behavior, or others, it is widely and rightly assumed that a necessary adjunct to, if not a *quid pro quo* for, the duties that the state imposes on each of us is the state’s duty to try to ensure that other citizens comply with their duties. Indeed, it is part of the general understanding of what counts as a legal system that the system’s officials will attempt to uphold — the term is deliberately vague — the system’s duty-imposing rules. HART, *supra* note 52, at 103–04, 194–95.

⁶⁶ *See supra* note 58 for an explanation of the motivational force of replicative directive orders.

authorize legal officials to seize and sell a recalcitrant debtor's assets and then give the proceeds to the plaintiff, transfer physically a chattel from the defendant to the plaintiff, or execute a conveyance to the plaintiff in the defendant's name. Finally, the third familiar type of award that seems intended, at least in part, as a tool for ensuring that defendants fulfill their legal duties is an order that commits a defendant to prison for failing to comply with a directive award ("punitive awards"). The traditional and still conventional view (at least in the United Kingdom) is that the primary justification for imprisoning a defendant who has refused to comply with an injunction or specific performance order is to induce that defendant to comply with the order.⁶⁷ Hence the traditional practice of sentencing recalcitrant defendants to remain in jail until they agree to comply with the order.⁶⁸

Much more could be said about the merits and modalities of directive, executive, and punitive awards. From the perspective of understanding the possible role of damage awards, however, the most important fact about these awards is that they provide no guarantee that defendants will comply with their legal duties. Directives may be ignored, third-party execution is possible for only certain kinds of duties (and then only if the defendant has sufficient assets, and so on), and punishment is not performance. Courts have other means of trying to ensure that citizens generally (not just defendants) comply with legal duties; in particular, courts can threaten to punish civil wrongs. But even if the law adopts this technique (and it is by no means clear that it has⁶⁹), rights infringements will still happen. There is no way to guarantee that citizens will comply with their legal duties.

The question, then, is how the law should respond to rights infringements. In particular, how should the law react to citizens' complaints that their rights have been infringed? One option is again to punish rights infringers, albeit in this case as a response directly to the wrong that happened (rather than as a deterrent to future wrongs). But unless the distinction between criminal law and civil law is to be erased, punishment can be a response to only a small number of civil

⁶⁷ ZUCKERMAN, *supra* note 13, at 820.

⁶⁸ In the United Kingdom, the power to commit contemnors for an uncertain term was removed by the Contempt of Court Act, 1981, c. 49, § 14 (U.K.). See ZUCKERMAN, *supra* note 13, at 821.

⁶⁹ Deterrence is one — but only one — possible explanation for the practice of punishing criminals. For an overview of theories of punishment, see A READER ON PUNISHMENT (R.A. Duff & David Garland eds., 1994). As we saw earlier, with the exception of punitive damages, damage awards cannot be explained, even in principle, by deterrence (because the defendant's gain can exceed the award). This conclusion does not preclude the possibility that having to pay damages may influence citizens' behavior. It merely reflects the fact that if damage awards were designed to deter rights infringements, then we would expect them to be set much higher than they are.

wrongs. And even if punishment were available for all civil wrongs, it would be no response to victims' complaints that *their* rights were not respected.

Two other options exist (aside from doing nothing). The first is for the law to continue to do what it does generally, which is to enact and enforce (in the three ways just described) legal duties that reflect the law's view of citizens' moral duties.⁷⁰ In the case of rights infringements, a legal system that adopts this approach would announce and enforce legal duties that require rights infringers to comply with their post-infringement moral duties. Thus, if the system's lawmakers believed that rights infringers have moral duties to compensate those they have injured, for example, lawmakers would announce a legal duty to compensate and enforce that duty in the same way that they enforce other monetary duties.

This first option is basically what rights-based and utilitarian theorists think, or at least should think, the law ought to do.⁷¹ And if we assume that the duty will be understood to be inchoate until fixed by a declaration, we can see why these theorists might find this option appealing on its face. But the duty option has one feature that some lawmakers, in particular some judges, might find unattractive. Under the duty option, the wrongfulness of the defendant's act ceases to have significance, so far as litigation is concerned. If the only available judicial response to a civil wrong is to try to induce rights infringers to comply with their post-infringement moral duties, then so far as litigation is concerned, civil wrongs are just another category of duty-creating events. The fact that a wrong has occurred is no different from the fact that the defendant promised to pay a sum of money or received money by mistake. If the law adopts the duty option, then in every case where a court makes an award, damages or not damages, it would be doing the same thing: in every case, the court would be attempting to ensure that something that ought to have happened in the past happens in the future. The fact that in one case the duty arises from a wrong and in the other from a non-wrong would be legally irrelevant. A claim to enforce a contractual debt and a claim for damages become indistinguishable: they are both just claims to enforce existing duties to pay money.⁷² Indeed, it is precisely because paying

⁷⁰ I am not suggesting that all moral duties have or should have legal counterparts. I am merely reiterating the point made earlier that, from the law's perspective, legal duties are meant to reflect or give effect to moral reasons that already apply to the duties' subjects. See *supra* notes 56–57 and accompanying text.

⁷¹ See *supra* Part I, pp. 1729–41.

⁷² This understanding is explicit in the traditional civil law view that there are two basic sources of legal rights: non-wrongs (contracts, unjust enrichments) and wrongs (torts, including breach of contract). Contracts and breaches of contracts are on the same plane in this taxonomy. See Birks, *supra* note 39, at 17–22.

damages becomes, in this model, just another duty that its defenders are concerned to stress that their position does not entail that citizens can choose to pay damages rather than perform their primary duties.⁷³ They are concerned because the contrary conclusion might be thought to flow naturally from a model in which wrongs qua wrongs have no significance.

If it were the case that by announcing and making awards available for the breach of post-infringement moral duties, the law could make the world as if the wrongs that triggered these duties had never happened,⁷⁴ this objection to the duty option might be thought unimportant. If the wrong can be retroactively undone, then it is no longer significant. But wrongs cannot be retroactively undone. Even assuming that the wrongdoer's duty is merely to pay a sum of money, and so a duty in principle capable of execution by a third party, wrongdoers may lack sufficient assets to satisfy a judgment. More importantly, even the sums of money that courts currently require wrongdoers to pay — sums that often appear far greater than what even the most upstanding individuals would think themselves morally obliged to pay — cannot make the world as if the wrong never happened. No sum of money can make it as if a rape or assault or the loss of a loved one never happened. Indeed, there is no sum of money that can undo even a trivial infringement of rights. Individuals are often willing to waive their rights for little or no compensation, but it is part of the very concept of a right that such waivers must be done willingly and prior to the infringement. If paying damages could make it as if a legal wrong had never happened, then the idea — central to the common law — of rights that are actionable per se, that is, without proof of loss or harm (such as rights against trespass and rights to contractual performances), would be incoherent. More generally, a right whose infringement can be undone by a payment is not a right.

In contrast, the second way that the law might respond to rights infringements focuses specifically on the wrongness of the infringing action. In this second option, the law's main concern is to provide a means whereby victims may have their infringed rights publicly acknowledged or "vindicated."⁷⁵ The intent in this case is not to attempt to make the world as if the wrong never happened, but instead to make it clear to the world, or more precisely to the two parties, that the wrong was a wrong and should never have happened. In theory,

⁷³ See Gardner, *supra* note 27, at 41–42; Ripstein, *supra* note 8, at 1961, 1982.

⁷⁴ The proposition that post-infringement awards can restore the world that existed before the wrong is defended by Ripstein. See generally Ripstein, *supra* note 8.

⁷⁵ The term "vindication" is preferable because, while related to acknowledgment (and recognition), it is stronger and appropriately conveys the fact (as explained above) that the law actually requires an action as opposed to merely making a pronouncement.

one could imagine the law's attempting to vindicate rights in different ways. For example, we might imagine courts issuing pronouncements that condemn wrongdoers' actions and affirm victims' rights. In practice, however — and as criminal punishment illustrates — it is important, in order for the law's message to be brought home to specific victims and wrongdoers, that the message be conveyed at least in part in a tangible form. And it is important that that form reflect, however abstractly, the nature of the wrong. In practical terms, a mere announcement is just words; unless the parties are forced to attend the announcement (in which case the law *is* involving the parties), they can choose not to listen. More fundamentally, by requiring that wrongdoers do or provide something for their victims, the law can represent in tangible form the facts that the behavior that it is condemning is a wrong that the defendant did to the plaintiff and, at the same time, the right that it is affirming is a right held by the plaintiff against the defendant. In criminal law, where the wrong is understood as a wrong against the public, this message is often conveyed by requiring the wrongdoer to pay a fine to the state.

In private law, damages can serve a similar role, or at least they can serve this role if they are imposed as liabilities, not duties. If a damage award is seen as giving effect to a duty, inchoate or otherwise, then the message that it carries is that the defendant has a moral obligation to pay the sum to the plaintiff. Any attempt to vindicate the plaintiff's previously infringed rights by imposing rule-based duties would therefore fail for the same reason that (as explained earlier) attempts to impose fines by imposing rule-based duties fail: rule-based duties carry the wrong message. In contrast, where a damage award is imposed as, and only as, a liability, then as in the parallel case of criminal punishment, it necessarily carries the message that the stipulated actions are not mandated in order to fulfill a moral duty. And given that damages are, by definition, always and only given in cases where a wrong has been proven, the message that damages will necessarily carry is that the defendant wronged the plaintiff.

It would be convenient if the two options just described could be combined. But aside from the fact that the first supports duties to pay damages while the second calls only for liabilities, there is the problem of proportionality. Imposing both duties and liabilities to pay money for the same wrong may subject wrongdoers to disproportionate hardships and award victims disproportionate gains. A choice must be made. And it is not an easy choice. As noted, the main drawback to the first option is that it fails to mark wrongs as wrongs. The second option avoids this objection, but at the price of leaving open the possibility of courts' imposing damage awards that might amount to criminal punishment in practice. Although vindictory awards need not be arbitrary, their quantification is ultimately a matter of choice, not logic.

Against this background, there is no reason to expect that all legal traditions would make the same choice. The civil law, which was developed primarily by scholars and theologians (not judges)⁷⁶ and which has long given special attention to identifying the rights and duties of citizens (not judges),⁷⁷ appears, perhaps unsurprisingly, to have adopted the duty option. The core of the law of obligations in civil law systems is a duty, recognized in all civilian codes, to repair injuries that one has caused through one's fault.⁷⁸ The common law, which was developed by judges in the context of developing rules for dealing with disputes, made a different choice. The fact that the common law recognizes only liabilities, not duties, to pay damages, shows that it has chosen to respond to civil wrongs as wrongs. In the common law, damages are awarded not in order to uphold defendants' post-infringement moral duties, but instead in order to vindicate plaintiffs' rights.

In closing, let me add a few observations about the assessment of damages under a vindicatory model. As is true of punishment, there is no uniquely correct method for quantifying vindicatory damages or for vindicating rights generally. In theory, a court might vindicate a victim's rights by forcing the wrongdoer to apologize. However, forcing payment of damages can carry the same message. And forcing payment of money, aside from being easily administered and respectful of the wrongdoer's dignity, has the important virtue that it can be imposed in varying amounts in order to reflect the seriousness of the particular rights infringement. If damages are to vindicate private law rights, then like criminal punishment, damages must be seen as proportionate to the wrong.

In broad outline, the damages available in common law regimes fit this picture. In every case where a civil wrong has been proven, plaintiffs have at a minimum a right to an award of damages equal to such pecuniary losses as can reasonably be attributed to the wrongful act. Thus, wrongdoers are required to compensate victims for actual and anticipated out-of-pocket expenses, lost profits, and so on. Such sums might plausibly be regarded as an attempt, so far as the pecuniary consequences of breach are concerned, to make the world as if the wrong had never happened. But insofar as these sums are given legal

⁷⁶ See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 118–19, 123 (2000); BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 4 (2d ed. 1992).

⁷⁷ See GLENN, *supra* note 76, at 122–23, 131, 134–35; NICHOLAS, *supra* note 76, at 4.

⁷⁸ See, e.g., CODE CIVIL [C. CIV.] art. 1382 (Fr.) (“Every action of man whatsoever which occasions injury to another, binds him through whose fault it happened to reparation thereof.”). For an overview of the civil law position, see Helge Dedek, *The Relationship Between Rights and Remedies in Private Law: A Comparison Between the Common and the Civil Law Tradition*, in *TAKING REMEDIES SERIOUSLY* 63 (Robert J. Sharpe & Kent Roach eds., 2010).

recognition in the form of court-imposed liabilities, they can also be interpreted as an obvious and straightforward way to vindicate the plaintiff's rights. By holding the defendant liable for the tangible consequences of his wrongdoing, the law makes clear that these consequences should not have happened. By shifting the cost of the rights infringement from the victim to the wrongdoer, the law holds the wrongdoer responsible for his wrongdoing as wrongdoing.

In addition to awarding damages for pecuniary harm, courts also frequently award what are sometimes described as "noncompensatory" damages or damages for "nonpecuniary" injuries.⁷⁹ In the United Kingdom, plaintiffs who have been falsely imprisoned will be awarded significant damages even if they cannot prove any loss or harm and even if the defendant acted in the best of faith.⁸⁰ More familiar examples include nominal damages, damages for pain and suffering, aggravated damages, punitive damages, and many instances of damage awards made under human rights legislation.⁸¹ Less obvious examples include damages for things like the nondelivery, loss, or destruction of goods where the sum awarded is quantified not by the actual loss suffered but by an objective measure, such as market value.⁸² In all these cases, the damage award is most naturally understood as attempting to place a value directly on the right *qua* right. It is a vindication of a right in a rather pure form, which explains why courts normally enjoy considerable discretion in the assessment of damages awarded on this second basis. This discretion would be an embarrassment if it were the case that such awards were intended to give effect to a moral duty. But it is exactly what we should expect if, as I have argued, damage awards are intended to vindicate rights.

⁷⁹ The distinctiveness, importance, and ubiquity of such awards is a theme discussed in ROBERT STEVENS, *TORTS AND RIGHTS* 59–91 (2007).

⁸⁰ See, e.g., *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.).

⁸¹ See STEVENS, *supra* note 79, at 74–91.

⁸² In the United Kingdom, a purchaser of defective goods is entitled to the difference in market value between the promised goods and the goods he received — even where he suffers no loss because the goods are satisfactory for his purpose. See, e.g., *Rodocanachi, Sons & Co. v. Milburn Bros.*, [1886] Q.B.D. 67 at 76–77. For further discussion of this and other examples in support of the above proposition, see STEVENS, *supra* note 79, at 63–66, 70–72.