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Why Is Corrective Justice Just?

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Ten years ago, Professor Jules Coleman wrote an article entitled *Corrective Justice and Wrongful Gain*,[1] in which he neatly dismantled and reassembled the notion of corrective justice. Corrective justice, he argued, dictates "grounds of recovery and liability," but not "modes of rectification."[2] Corrective justice requires that wrongful losses be annulled, but it does not require that one who causes a wrongful loss must annul it. It requires also that wrongful gains be annulled, but not that one who obtains a wrongful gain must pay it over to one who was injured in the process. Tort remedies are one way, but not the only way, to achieve corrective justice.[3]

In the final chapters of his book *Risks and Wrongs*,[4] Coleman sets out a refined theory of corrective justice and describes the role corrective justice plays in tort law. In his present "mixed" conception of corrective justice, Coleman combines his initial principle, that wrongful losses must be annulled, with a "relational" principle that places the duty to annul on the person responsible for the loss.[5] He defines wrongful loss as unjusti-

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1. Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982).

2. *Id.* at 423-27.

3. *See id.* at 423-28.

4. JULES COLEMAN, RISKS AND WRONGS (forthcoming 1992) (manuscript dated July 1991, on file with author; pages cited to manuscript).

5. Coleman notes that the relational aspect of his current theory is influenced by the writings of Professor Ernest Weinrib (among others). *See id.* at 513. Weinrib argues that tort law expresses an intrinsic and symmetrical relationship between a plaintiff, who is singled out for compensation by the element of causation (injury), and a defendant, who is singled out for liability by the element of wrongdoing. The standard of negligence supplies an appropriate moral foundation for this relationship, because it requires the defendant to treat the plaintiff's ends as he would his own. Just as the defendant would weigh costs and benefits before acting on his own property, so he must weigh costs and benefits before acting on the plaintiff's property. The standard of liability is an objective one, because a standard that defined wrongs according to the defendant's subjective capacities would violate the principle of equality. *See* Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 406, 425-31 (1987); *see also* Ernest Weinrib, *Legal Formalism: On The Immanent Rationality of Law*, 97 YALE L.J. 949, 995-99 (1988); Ernest Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37, 49-60 (1983).

Coleman's original theory challenged Weinrib's theory by suggesting that causation and wrongdoing are not symmetrical. Specifically, Coleman suggested that the moral basis of the defendant's liability is wrongful gain, while the moral basis of the plaintiff's

fied harm to legitimate interests or justified invasion of right, but acknowledges that some elaboration of responsibility will be necessary to complete the theory. If the conditions of wrongful loss and responsibility are met, corrective justice imposes a duty on the wrongdoer to remedy the victim's loss (at least when existing social institutions offer no alternative source of repair).[6]

Coleman then steps back to consider existing tort law. He concludes that corrective justice, as he has described it, explains (and justifies?) much but not all of tort law.[7] Remedies for intentional torts, negligence, and justified takings of property fit the pattern of corrective justice.[8] Other tort claims, such as strict products liability, are better explained as responses to market failure.[9]

This paper is concerned only with Coleman's discussion of corrective justice. I am writing as a skeptic. I find corrective justice intuitively attractive, particularly as Coleman presents it. But I am not persuaded that it is a form of justice. And if it is a form of justice, I do not fully understand how it progresses from a remedial principle—that the effects of a wrong should be corrected between parties—to a substantive definition of wrongdoing.

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claim is wrongful loss; and that gain and loss rarely match. *See* Coleman, *supra* note 1, at 423-28; Weinrib, *Causation and Wrongdoing*, *supra*, at 432-33.

Weinrib rejected Coleman's view, arguing that "[t]he notion of wrongful loss is inherently relational because to describe the plaintiff's loss as wrongful is to implicate the action of the person who wrongfully inflicted the injury." Weinrib, *Causation and Wrongdoing*, *supra*, at 434. Tort law "captures the relational aspect of wrongfulness by requiring the victim to be compensated by the tortfeasor." *Id.* Weinrib went on to say that the necessary symmetry between gain and loss can be achieved by measuring both loss and gain at the point in time when the risk of harm materializes in injury. The defendant creates a wrongful risk at the time of the negligent action, and his gain is the cost of eliminating that risk. The same risk later matures into a wrongful loss for the plaintiff. According to Weinrib, at this later time, it follows that "[g]iven the actuality of the injury, the defendant's gain . . . must now be the amount that would undo the injury itself." *Id.* at 437; *see also* Weinrib, *Toward a Moral Theory of Negligence Law*, *supra*, at 54.

This bit of alchemy does not make the moral case for a symmetrical relation between causation and wrongdoing; at most, it proves that "wrongful loss" is an artificial notion. Weinrib's effort to update wrongful gain to the point of injury loses sight of the underlying moral inquiry, namely, why the defendant should be held responsible. In moral terms, it seems to me that the defendant's wrong occurs at the time he chooses to act. The plaintiff's loss can only be judged when the injury has occurred. Thus, the relation of which Weinrib speaks is not a natural one (to be "captured" by tort law), but one tort law creates by calling certain losses "wrongful."

6. *See* COLEMAN, *supra* note 4, at 354-94.

7. *See id.* at 438-73, 475-503.

8. *See id.*

9. *See id.*

What follows, then, is a series of questions I would like to put to Coleman as expositor, emender, and advocate of corrective justice.[10]

I. Where Does the Justice Lie?

To explain this question, I will refer to Coleman's early writing on corrective justice. Coleman proposed that we can distinguish between grounds of recovery and grounds of liability: why the plaintiff should be compensated and why the defendant should pay.[11] We also can distinguish between grounds of recovery (or liability) and modes of rectification: why the plaintiff should be compensated and from where the compensation should come.[12]

In his present version of corrective justice, Coleman has recombined recovery and liability by proposing that corrective justice places a duty of payment on the person responsible for a wrongful loss. But the analytical division of grounds for recovery, grounds for liability, and sources of payment is still useful, because it helps to locate the moral basis of corrective justice. At least, it frames a question: Does the moral force of corrective justice lie with the plaintiff's loss or the defendant's responsibility?

I do not think that responsibility is the primary element in Coleman's corrective justice. In Coleman's theory, as in tort law, responsibility for wrongful loss does not imply culpability or moral shortfall.[13] Coleman does not define responsibility, but presumably it entails some combination of voluntary action, causation, and societal attribution, with respect to a wrongful loss.[14] Wrongful loss, in Coleman's lexicon, means

10. Coleman duly warns his readers that he intends to address only penultimate questions about corrective justice and not the ultimate question of moral foundation. *See id.* at 503 n.1.

11. *See id.* at 323-52; Jules Coleman, Markets, Morals, and the Law 185-89 (1988); Coleman, *supra* note 1, at 423-28.

12. *See* Coleman, *supra* note 1, at 423-28.

13. *See* Coleman, *supra* note 4, at 527-28, 546-47.

14. *See* H.L.A. Hart & A.M. Honoré, Causation in the Law 62-83 (2d ed. 1985). Coleman specifically requires voluntary action. *See* Coleman, *supra* note 4, at 547-48. The element of wrongful loss in his equation indicates that responsibility includes causation. If the theory is to track existing tort law, it also will entail attribution, which is best illustrated by its opposite, the exclusion of very remote consequences.

Some corrective justice theorists, notably Professor Christopher Schroeder, have done without causation, positing that corrective justice encompasses liability even for creation of risks that do not materialize. *See* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. Rev. 439, 442, 451-69 (1990).

unjustified harm to legitimate interests or infringement of a right.[15] The first category, unjustified harm, may involve no moral fault at all, but only an inadvertent miscalculation or lapse from objective standards. The second, infringement of a right, is wrongful even if justified (as in the case of a theft of insulin or trespass to escape a storm). And in either case, liability is measured by the extent of the loss, not by the degree of wrong: One pays according to what one hits, not how recklessly one hits it.[16] Coleman himself says that when wrongful conduct is defined this way, "[i]t is hard to see why annulling [the defendant's wrong] would be a requirement of justice."[17]

There is further evidence that Coleman is not primarily concerned with responsibility in his proposition that a wrongdoer's duty to repair can be discharged by payment from another source. Coleman tells us that the moral duty to repair a wrongful loss is like a debt, which, if paid by a third party, is fully satisfied.[18] For example, if the state adopts a public compensation scheme to cover wrongful losses, corrective justice no longer imposes a moral duty on responsible individuals.[19] This must mean that the defendant's liability is dependent on and secondary to the plaintiff's claim to repair.[20]

It seems, then, that the moving principle in Coleman's theory of corrective justice is not that the defendant should pay, but that the plaintiff should be paid. The plaintiff has a just claim to compensation, and *given that claim*, the one who is responsible has a moral reason to pay. If I am right about this, a moral defense of corrective justice must begin with the plaintiff's claim to compensation. This leads to my next question.

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15. *See* COLEMAN, *supra* note 4, at 395-437.

16. For a concise account of the various discrepancies between tort liability and retributive justice, see Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 L. & PHIL. 1, 4-5 (1987).

17. COLEMAN, *supra* note 4, at 528. *But see id.* at 530 (noting that a defendant who is not morally blameworthy nevertheless has a duty to repair because the plaintiff's wrongful losses are "the consequences of his agency: his causal powers").

18. *See id.* at 530-32. This is not always true in law. Depending on the circumstances of the payment, the third party may be subrogated to the rights of the creditor he paid. *See* RESTATEMENT (SECOND) OF RESTITUTION § 31 (Tentative Draft 1984); *see also* Owen v. Tate, [1976] 1 Q.B. 402 (1974).

19. *See* COLEMAN, *supra* note 4, at 666-67.

20. Furthermore, the reasons Coleman offers to explain why a third party payment discharges the duty to repair have nothing to do with the wrongdoer; they turn on the victim's consent or waiver. *See id.* at 666. This reasoning tends to confirm that the victim's claim, not the wrongdoer's responsibility, is the primary element in Coleman's theory of corrective justice.

II. Why Is the Claim to Correction Just?

Suppose the owner of an office building fails to take proper care of an elevator. It crashes, leaving several people seriously injured. Why should they be compensated?

Remember that for the moment, with the aid of Coleman's distinctions, I have disconnected plaintiffs' claims from defendants' payments. If we are concerned with punishment or deterrence or forcing actors to internalize costs, we can meet our objectives by imposing fines on defendants. I want to know what independent, affirmative reason there is to compensate plaintiffs.

We tend to assume that if an innocent person has been wronged, there must be a reason to restore him to his former position. But the justice of compensation is not as obvious as it may seem. The plaintiff has suffered a loss; but loss alone cannot be the reason for compensation, because many undeserved losses go uncompensated in our society. The plaintiff's loss resulted from something we have chosen to call a wrong; but, the wrong may not be morally blameworthy, so it adds little to the fact of loss. At least in tort law, the plaintiff's loss is a violation of a legal right; but, the law need not provide for compensatory remedies, and in any event we are looking for justice, not law.

The strongest argument for compensation is that the plaintiff was deprived of just holdings. But to say this, we must also say that his holdings at the time of the wrong were perfectly tuned to the requirements of distributive justice. Because few would argue that the existing distribution of goods is ideal (acceptable, maybe, but not ideal), it is hard to explain why the plaintiff's holdings ought to be restored.[21]

There are economic explanations for compensating plaintiffs. For example, if we want actors to consider the external costs of their activities (to check their elevators), we need some method for imposing those costs upon them. The cheapest and most effective way to force actors to internalize costs is to allow victims, who have the best information on losses, to sue for what they have lost.[22] But this is not a reason of justice, or at

21. For a discussion of the relationship between corrective justice and distributive justice, see Alexander, *supra* note 16, at 6-11.

22. *See* Richard A. Posner, Economic Analysis of Law 176 (3d ed. 1986). Another possibility is that because of the diminishing marginal utility of wealth, losses are greater if borne by the victim than if spread to a larger group through insurance or

least it is not justice of the sort most corrective justice theorists would like to achieve.[23]

My own conclusion is that compensatory remedies can be justified on consequential grounds, but not on intrinsic moral grounds. A variety of consequential arguments are available, varying from efficiency to extensions of particular theories of rights to the stability of the legal system. But none of these arguments establishes that compensation for its own sake is just.

The strongest reason to provide private compensatory remedies for wrongs is that compensatory remedies promote public acceptance of law. In saying this, I assume (and believe) that public acceptance is important to a legal system, and that individual citizens' perceptions that law promotes their personal security is an important element of public acceptance. It would be possible to maintain social order through a legal system that protected rights only prospectively, by means of deterrent sanctions. But deterrence is an abstraction, and the advantages of law will be clearer to citizens if they are played out in individual cases in the form of corrective remedies. A right against negligent harm, for example, seems more real if we see the victims of an elevator crash recover damages, than if we are told that deterrent sanctions have greatly improved the condition of elevators. Thus, a legal system that hopes to obtain the willing obedience of its subjects probably should include corrective justice among its founding principles.[24]

This argument suffers from the weakness of any utilitarian argument, namely that it must yield if something else proves more expedient. As a result it may disappoint those who would like to maintain that corrective justice is just. For the moment, though, I will assume that this argument (or some other argu-

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adjustments in the price of products. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 39-45, 64-67 (1970). This in turn raises a number of subsidiary questions concerning the relative advantages and disadvantages of first and third party insurance and other methods of loss-spreading. *See id.* at 46-64.

23. Not surprisingly, Judge Richard Posner has argued that corrective justice can be harnessed to economic theory. For Posner, corrective justice is a purely remedial principle—holding that the effects of wrongful conduct should be rectified—which can be filled in with an economic definition of wrongdoing. *See* Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 189-91, 201-06 (1981). Posner's recent views on corrective justice are set out in RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 313-32 (1990).

24. *See* JOHN S. MILL, UTILITARIANISM 57-83 (Prometheus Books 1987) (1861). My arguments are set out in more detail in Emily Sherwin, An Essay on Private Remedies (1992) (unpublished manuscript, on file with author).

ment I have missed) can justify corrective remedies, and move on to my last question.

III. What Is the Relation of Remedy to Wrong?

Corrective justice is, at least, a remedial principle, which holds, at least, that wrongful losses should be corrected. But Coleman does not stop at this; like other corrective justice theorists, he attempts to fill in the remedial structure with a substantive definition of "wrongful" loss. Here he runs into some difficult issues, such as the problem of justified infringement. How can we treat a stranded backpacker's trespass as a wrong, when we admit that if the same event occurred again we would want the backpacker to act in the same way?

This problem of fitting substance (wrongfulness) to remedy is endemic to corrective justice theories and to tort law. Aristotle first described corrective justice as a restoration of proportion between parties after a wrong has occurred.[25] The return to just proportion entails a correlative right and duty; by imposing the plaintiff's loss on the defendant, we bring the parties back to their initial positions. But as Coleman has often acknowledged, Aristotelian corrective justice does not work because plaintiffs' losses seldom equal defendants' gains.[26] When they do not, we are left with a principle that superimposes a Hohfeldian relation of remedial right and duty on facts that do not stand in the same relation.[27] There is no natural correlation between the plaintiff's loss and either the defendant's gain or the defendant's culpability. No matter how intricate one's taxonomy of wrongdoing and wrongful loss, this fact will not disappear.

I do not think the problem can be solved analytically, by deducing substance from remedy. Professor Ernest Weinrib's theory comes closest to this approach. According to Weinrib, law is governed by two supreme forms, corrective justice and distributive justice.[28] The form of corrective justice is expressed in a bipolar relation between two parties as "doer" and "sufferer."[29] The structure of this form dictates that parties should

25. *See* Aristotle, Nicomachean Ethics 144-45 (Terence Irwin trans., Hackett 1985).
26. *See, e.g.*, Coleman, *supra* note 11, at 186-87.
27. *See* Wesley N. Hohfeld, Fundamental Legal Conceptions 36-65 (1919).
28. *See* Weinrib, *Legal Formalism*, *supra* note 5, at 977-85.
29. *Id.*

be judged according to a Kantian prohibition against self-preference in transactions with others, without regard to external goals or consequences.[30]

In this way, Weinrib manages to reason from the structure of corrective remedies to the substantive content of tort law. But Weinrib's theory proceeds from an odd vision of law, in which the object of law is internal logical coherence.[31] Law (which is after all the medium of social organization) is severed from social ends or ideals, and set apart as pure concept. Weinrib argues well for the coherence of his theory, but he does not explain why it should govern our transactions. By contrast, I think Coleman intends his theory to have general normative appeal, not just coherence within a particular formal structure.

Coleman nearly escaped the substantive dilemma of corrective justice in his first version, which distinguished among grounds of recovery, grounds of liability, and modes of rectification.[32] A plaintiff who suffers a wrongful loss has a just claim to compensation, but nothing in justice requires that the defendant should pay. This opened the way to alternative methods of compensating plaintiffs, which other writers pursued further. For example, Professor Christopher Schroeder proposed (roughly) that we might impose liability on all those who create risks (measured by the probability of harm), then pool the proceeds for compensation of those who actually suffer losses.[33]

This does not quite solve the problem of correlation; liability still does not correspond to culpability,[34] though it may come somewhat closer to gain.[35] And there is the further difficulty that a scheme such as Schroeder's will never work. There are daunting problems of prediction, of detection, and of catego-

30. *See id.* at 977-85; *see also* Weinrib, *Causation and Wrongdoing*, *supra* note 5, at 425-29; Weinrib, *Toward a Moral Theory of Negligence Law*, *supra* note 5, at 38-43, 49-54.

31. *See* Weinrib, *Legal Formalism*, *supra* note 5, at 949-57.

32. *See* Coleman, *supra* note 1, at 422-28.

33. *See* Schroeder, *supra* note 14, at 460-69.

34. Presumably, objective standards still govern the creation of unreasonable risk. And to the extent actors do not have full information on probable consequences, or do not reflect before acting, equating the extent of risk created with the degree of lapse from moral standards seems inaccurate. On this question, see Kenneth W. Simons, *Corrective Justice and Liability for Risk Creation: A Comment*, 38 UCLA L. REV. 113, 120-22 (1990).

35. Assuming that people act rationally when they engage in risky activity, no one will act unless he anticipates a gain in excess of the risk of liability. This suggests that risk creators realize gains at least equal to the amount they would be charged under Schroeder's system. Much negligence is inadvertent, however, rather than rational.

rizing activities.[36] In any event, Coleman has moved now to a theory of correlative right and duty, which puts him to the difficult task of defining wrongdoing in a way that brings together plaintiffs' just claims and defendants' just liability.

The most promising justification of tort liability is that individuals should be held responsible for the consequences of their actions or at least that it is more just to impose a loss on the actor who caused it than on a passive victim.[37] But it seems to me that if the duty to repair a wrongful loss is conceived as a moral duty, grounded in notions of autonomous agency, it should address the choices defendants have made rather than the fortuitous consequences of their choices.[38] I admit that it is difficult to draw a clear line between individual will and its external antecedents and consequences.[39] And I admit that intuitively, many people would judge it more heinous to aim a gun and hit than to aim and miss. But I cannot accept that a driver who takes a curve too quickly owes more, as a matter of moral duty, if he skids left into a pedestrian than if he skids right into a billboard. He may feel his wrong more deeply in the first case because the severity of its consequences gives him more cause to dwell on it. But is he more wrong?[40]

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36. Schroeder recognizes the practical difficulties his system faces and acknowledges that some areas of tort law are more amenable to risk liability than others. *See* Schroeder, *supra* note 14, at 468-69, 473-78 (1990); *see also* Simons, *supra* note 34, at 129-33 (1990).

37. *See, e.g.*, Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 399 (1992); Stephen R. Perry, The Mixed Conception of Corrective Justice 28-31 (unpublished manuscript, on file with author); JUDITH J. THOMSON, *Remarks on Causation and Liability*, *in* RIGHTS, RESTITUTION, AND RISK 192, 199-207 (William Parent ed., 1986); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 158 (1973).

38. *See* JOEL FEINBERG, *Problematic Responsibility in Law and Morals*, *in* DOING AND DESERVING 25, 30-32 (1970) (suggesting, however, that a pure notion of moral responsibility cannot be applied in practice to human actions). For a full selection of philosophical sources in support of an *ex ante* view of responsibility, see Schroeder, *supra* note 14, at 451-60.

39. *See* THOMAS NAGEL, *Moral Luck*, *in* MORTAL QUESTIONS 24-38 (1979). Nagel begins with Kantian ideals, which hold that moral responsibility should turn on conscious will and not on matters we cannot control. But many of our ordinary judgments are based on consequences that depend on the influence of external facts. This inconsistency results from a paradox in the notion of responsibility: We want to think of ourselves as independent wills, but if we exclude all external influences (constitutive luck, luck in situations presented to us, and luck in the causes and effects of action), there is nothing left that we can call pure will. To avoid facing this, we must take account of some external influences in moral judgment; but, this in turn conflicts with the ideal of free will. *See also* FEINBERG, *supra* note 38, at 25-37; BERNARD A. O. WILLIAMS, *Moral Luck*, *in* MORAL LUCK 20-39 (1981).

40. Another difficulty is that if we base liability on a principle of responsibility for causal agency, we might (to be consistent) have to reward actors for the unforeseen benefits of their conduct. Surely Coleman is right in saying that a taxi driver who loses

In any event, this is the substantive problem a theory of corrective justice must confront: how to fit the plaintiff's claim to the defendant's liability. It is worth restating that the problem arises only if we conclude that private compensatory remedies are a necessary (or just) part of our legal system. If so, the problem of correlation is inescapable. I suspect that in the end, it cannot be resolved within a theory of justice, and that the grounds of defendants' liability can only be explained on consequential grounds.

his way and causes his fare to miss a plane ought not be rewarded when the plane turns out to have crashed. *See* COLEMAN, *supra* note 4, at 526-27.