

## Symposium Participants

# THE PRACTICE OF CORRECTIVE JUSTICE

Jules L. Coleman\*

In a recent book,<sup>1</sup> I set out the contours of a conception of corrective justice, and tentatively explored aspects of its relationship to Anglo-American tort law. I argued that corrective justice is the principle that those who are responsible for the wrongful losses of others have a duty to repair them, and that the core of tort law embodies this conception of corrective justice. One could object to my argument on at least two grounds. One might accept my characterization of corrective justice, but deny that, so conceived, it is reflected in our tort practices,<sup>2</sup> or one might reject my conception of corrective justice.

In obvious ways, this second concern is more fundamental. Perhaps I see so much (or so little) corrective justice in tort law simply because I have such a confused idea about what corrective justice is. In any case, the extent to which I see corrective justice in tort law surely depends on my understanding of it; the same is true of any would-be corrective justice account of tort law—Weinrib's, Fletcher's and Epstein's, as well as mine. So it is only natural to ask whether any of us is right about the content of corrective justice. And that requires an account of what it means to say that a particular conception of a concept like corrective justice is correct, as well as an account of the adequacy conditions of such a judgment.

In this brief essay, I want to tackle some of these meta-ethical concerns. Before doing so, however, I want to outline the way in which corrective justice figures in my general approach to political philosophy.

## I. CORRECTIVE JUSTICE AND POLITICAL MORALITY

As I see it, the fundamental question of practical reason is: what ought I do? What I ought to do depends on what there are good reasons for me to do.<sup>3</sup>

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\* John A. Garver Professor of Jurisprudence and Philosophy, Yale University Law School. I am grateful to Stephen Perry and Brian Leiter for several discussions of previous drafts of this paper. I am especially indebted to Perry, who, I believe, is the best young person working on the moral foundations of tort law. His criticisms of my work have been the fundamental stimulus in its continued development. I am also grateful to Joseph Raz whose sympathetic prodding has brought out more in my thinking on these topics than was probably there to begin with. A slightly revised version of this paper also appears in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (David Owens ed., 1995).

1. JULES L. COLEMAN, *RISKS AND WRONGS* (1992) [hereinafter *RISKS AND WRONGS*].

2. Or that it is reflected in tort law to the extent I take it to be.

3. To say that what I ought to do depends on the reasons that apply to me is not to say that the justification of everything I do is settled by reason and reason alone. There are many

In the kind of liberal political morality I defend, the fact that events affect individual welfare or well-being is normatively important because effects on individual welfare are the kinds of things that provide agents with reasons for acting. That others have experienced a loss in welfare or well-being, or are in a situation in which they are likely do so, is the kind of fact about them that can provide me with reasons for acting: reasons for coming to their aid, for example.

This particular project of liberal political philosophy is to connect reasons for acting with the effects of events on welfare or well-being. There are at least four variables that figure in this project. If we focus on events that negatively or adversely affect welfare ("losses" or misfortunes), the four factors involved in the inquiry are: (1) the moral character of the loss; (2) the relationship between the loss and those thought to have a reason to act in virtue of it; (3) the nature of the principles that create reasons for acting, that connect losses with agents; and (4) the nature and content of the reason the principle, norm or practice supplies.

Here are some (hopefully, intuitive) examples of how the inquiry works. If individuals suffer loss as a result of a hurricane or a natural disaster of some other sort, this fact about them creates a reason for acting in each of us who stands in a certain relationship to them. Typically, it is enough that each of us be a member of the same political or geographic community in order that a hurricane or natural disaster affecting any one of us provide a reason for the rest of us to do something about it. The duty we have is to come to the aid of those who are victims of the hurricane, and it is a duty each of us has. So, to put this in terms of the four factors mentioned above:

In the case of a hurricane or other natural disaster, (1) with respect to the moral character of the loss, it is not necessary that we characterize or think of the loss as an injustice or a wrong. The fact that it is a simple but substantial misfortune appears to suffice. (2) With respect to the relationship of those said to have a reason for acting, for doing something about the plight of hurricane victims, there is no requirement that those who have reason to act must have caused or otherwise been responsible for bringing about the damage. Indeed, a hurricane is, if anything is, an act of god for which no human agent is responsible, causally or otherwise. (4) With respect to the nature and content of the duty (or reason) for acting, it is, first, a duty that falls on individuals quite generally, and, second, it is a duty to come to the aid of those in need, to help repair their loss or to alleviate its consequences. The exact nature of the duty depends on (3) the particular principle, norm or moral practice that grounds it.

Some might defend the duty to aid hurricane victims as being a matter of charity; others might see it as a matter of beneficence, and others as a matter of fairness or even distributive justice. If the duty to come to the aid of hurricane victims is a matter of distributive justice, for instance, it is plausible to suppose that it falls on all and only those members of the political community governed by the relevant conception of distributive justice. If, in contrast, the duty to aid is a matter of charity, it may extend beyond political boundaries and be otherwise independent of membership in a particular political community. Whether grounded in principles of charity or distributive justice (or something else

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choices I am justified in making for which I cannot offer conclusory reasons. Still, reasons figure prominently in determining what I ought to do.

altogether), the duty to come to the aid of hurricane victims is *agent-general* in that it applies to each person within the relevant political or moral community.

Sometimes our actions affect the welfare of others in ways that create *agent-specific* reasons for acting, reasons that apply to us and not to everyone. If I promise to meet you for lunch tomorrow, then I have a reason for acting in a particular way that others do not have. I have a reason to show up. If others have a reason to show up, it might be because they too have promised you to do so: it cannot be that they have a reason to show up for lunch because I promised you that I would. The norms that give rise to the reason I have for showing up are constitutive of the practice of promising. If I fail to show up, then I have a reason to apologize that no one else has. If you have lost something by relying on my showing up, then I may have to make good your losses as well.

Ordinary norms of decency and civility can also give rise to agent-specific reasons for acting. Suppose that I unintentionally knock you down on a crowded city street and accidentally bloody your nose. Though my conduct is not intentional, perhaps not even negligent or otherwise careless, I may have a host of responsibilities with respect to your care, comfort and welfare. I may have a duty to lift you to your feet (if you cannot get up on your own), call for help if you cannot get up at all, wait with and attend to you until help arrives, and so on. Coming to your aid, in such circumstances is a matter of common decency. My having a reason to come to your aid does not depend on your loss being wrongful or unjust; it is simply undeserved and unfortunate. Nor does my reason for coming to your aid depend on my having done something wrong or blameworthy, though it appears to depend on my being very weakly (causally) responsible for what happened to you. Causal *responsibility*, however, is not a necessary condition of my having a reason to come to your aid. Had I been hurled into you by a gust of wind, I might have similar responsibilities towards you. In that case, my responsibilities to you would have nothing to do with my being an agent with respect to your injury.

Sometimes duties to come to the aid of another that derive from conventions of common decency are based on agency (as in the case in which I unintentionally knock you down); other times they derive from causation without responsibility (as in the case when the wind hurls me into you); but on other occasions, duties to come to another's aid will require neither agency, fault nor causation. Thus, individuals in the vicinity of the accident may have a duty to help you up or to seek aid for you, and so on. It may be enough that those in the vicinity be capable of helping and of doing so at no great personal inconvenience. Neither fault, nor agency, nor even the weakest form of causal connection is *necessary* to ground a duty to aid. On the other hand, if I have a special, stronger or more stringent reason for helping—stronger in the sense, for example, that it being inconvenient for me to wait around with you for help to arrive would not excuse me from my responsibilities—that may be because I am causally connected to your injury in ways in which onlookers are not.

None of this is intended to be earth shaking or terribly novel. What we ought to do depends in part on what we owe others (and ourselves). What we owe others depends in part on what happens to them, how fortune shines on them, how our agency affects their welfare, what relationships we bear to one another and so on. The specific duties we have towards others depends on the principles that apply to us and the moral and other practices in which we are

engaged. The principle of corrective justice is simply one of the norms that brings us together with the misfortunes of others.

## II. THE META-ETHICS OF CORRECTIVE JUSTICE

The principle of corrective justice imposes agent-specific reasons for acting. To put this in terms of the four factors outlined above: According to (3), corrective justice, (4), the duty of corrective justice is to make repair, to make good the victim's loss; (1), only *wrongful* losses can give rise to a duty of repair in corrective justice; and (2), an individual has a duty to make good another's wrongful loss only if he is *responsible* for having brought the loss about.

Whereas common decency may require that I lift you to your feet if I knock you down unintentionally through no fault of my own, the requirement that I make good your losses (should any arise) invokes the principle of corrective justice. And because it does, while I may have a responsibility to lift you to your feet even if I have done nothing wrong or violated no right of yours, my having a duty to rectify your loss depends on my having acted wrongfully in some way. Moreover, whereas civility and decency may impose a duty to come to the aid of those whose mishaps you have witnessed and can do something about reasonably easily, corrective justice imposes an agent-specific reason for acting that falls only to those whose agency is responsible for the harm done, and whose responsibility the harm is.

Put this way, the analysis is incomplete in three ways. First, corrective justice requires an analysis of what is to count as a loss. There is an important difference between being harmed and not being benefitted by the actions of others. Second, it requires an account of what makes a loss wrongful, for the duty to repair under corrective justice is restricted to wrongful losses.<sup>4</sup> Third, it requires a theory of responsibility, for the duty to make repair under corrective justice falls only to those who are responsible for the losses for which repair is sought.<sup>5</sup>

Most legal theorists who have been interested in corrective justice have been interested in it insofar as it might figure in an account, explanation or interpretation of various legal practices, especially tort law, and to a lesser extent, contract law. For such theorists, corrective justice provides an alternative to the prevailing economic analysis of the common law. As it happens, corrective justice accounts of tort law have not been as successful in capturing the imagination of the legal audience as those based on economic efficiency.

One reason for this is that there are very few systematic accounts of tort law based on corrective justice, and it is fair to say that the field is in its

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4. Whereas I have only provided a conceptual account of wrongfulness in my previous work, I have begun the task of providing a normative account of how we are to understand "fault" or wrongfulness. Cf. Jules L. Coleman & Arthur Ripstein, *Mischief and Misfortune*, (1995) (unpublished manuscript on file with authors).

5. Of course, wrongfulness, responsibility and loss are elements in *my* conception of corrective justice. Whether they figure in the correct conception of corrective justice, and do so in the way I allege they do, is the issue before us. In fact, I do not here defend my conception of corrective justice. Rather, I take up the more basic question of how we ought to think about defending or exploring a particular conception of corrective justice.

relative infancy. Another reason, frankly, is that the legal community has found various economic approaches more persuasive or compelling than those based on corrective justice. Finally, whereas proponents of economic analysis appear to agree upon one conception of economic efficiency—so there is only one “economic theory” of tort law<sup>6</sup>—there appears to be substantial disagreement among moral theorists of torts about the content and demands of corrective justice.

Those who have offered corrective justice accounts of tort law differ with respect to: (1) the conditions of responsibility; (2) whether in order to invoke corrective justice, losses must be wrongful; (3) what makes conduct wrongful within the ambit of corrective justice—and more. It is hard for an approach to tort law to gain widespread acceptance when disagreement about what that approach is committed to is apparently so widespread.

Widespread disagreement about its content raises an even more fundamental worry about the principle of corrective justice, and that worry is that corrective justice lacks semantic content; or, if it has semantic content, its content is subjective, not objective. In either case—no semantic content, or subjective content—there is a problem for the legal theorist who invokes the concept of corrective justice as a substantive moral ideal and not just as a vehicle for expressing approval of certain arrangements and disapproval of others.

To understand the issues at stake, we first have to indicate ways in which tort theorists who invoke the concept of corrective justice are committed to its having objective semantic content; then we need to explain why substantial disagreement about what that content is invites either a skeptical or subjectivist interpretation of corrective justice.

In order to meet these demands, it may be helpful if we draw some preliminary distinctions: first, between cognitive and noncognitive interpretations of a concept, predicate (or an entire discourse); and second, between subjective and objective interpretations of semantic content. A discourse is cognitive if the majority of its syntactically specified declarative judgments are fact-stating or truth value worthy. Sentences in a cognitive discourse are typically either true or false. Cognitivists about moral discourse—ethical cognitivists—believe that moral judgments are typically either true or false. Noncognitivists deny that the sentences of a discourse are not truth value worthy; noncognitive discourses are not fact-stating. Ethical noncognitivists believe that moral judgments are normally neither true nor false; rather than describing moral facts, moral judgments express attitudes of approval or disapproval. An ethical noncognitivist, then, might believe that moral predicates like corrective justice are used to express approval of certain institutional arrangements and to disparage others.

The next distinction is between subjectivist and objectivist interpretations of a concept or an entire discourse. Suppose that ethical noncognitivists are mistaken about moral discourse, in which case most moral judgments will turn out to be either true or false. What makes them true or false? On a subjectivist

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6. I have argued that there are in fact several different conceptions of economic efficiency. Cf. Jules L. Coleman, *Efficiency, Auction and Exchange*, in *MARKETS, MORALS AND THE LAW* 67–94 (1988). Even economic analysts who agree on a single conception of efficiency differ with respect to its implications for tort law.

view, moral judgments are true provided they accurately report the speaker's (or theorist's) beliefs or views. A subjectivist view about corrective justice, then, would amount to the claim that the content of the concept is fixed by the speaker's or theorist's beliefs about what that content is. On an objectivist interpretation, the truth of moral judgments is independent of how particular speakers or theorists regard it. For a subjectivist, what is the case is fixed by the beliefs of particular persons; for an objectivist, what individuals take to be the case has no bearing on what is the case. Whatever the differences between subjectivists and objectivists are, it is important to keep in mind that both are cognitivists about moral predicates.

With these roughly characterized distinctions in hand, we can return to the principle of corrective justice. Judging by the role it plays in their scholarship, tort theorists who invoke the concept of corrective justice treat it as objective. Tort theorists are cognitivists and objectivists about corrective justice. For legal theorists who invoke the concept of corrective justice mean to treat it as a substantive moral ideal, and not just as a vehicle for expressing approval of certain arrangements and disapproval of others. This means that they believe the concept of corrective justice has cognitive content.<sup>7</sup> They believe, moreover, that some conceptions of corrective justice are more plausible than others; some might even believe that there is one (and only one) correct conception of it, and so on. This means they believe that the content of corrective justice is, in a suitable sense, objective. Not every conception of corrective justice is equally good.

It is commonplace that in order for a predicate or a discourse to admit of an objectivist interpretation, there must be some considerable agreement or convergence regarding the core use of the concept(s). The lack of convergence or coherence is normally seen as inviting some or other form of skeptical interpretation: either noncognitivist or subjectivist. To understand the importance of convergence to objectivity, we need to introduce one further set of distinctions: those between realist and various forms of anti-realist accounts of the metaphysics of (moral) properties.

Roughly, a realist believes that the existence and character of properties or predicates, including moral ones, are logically and constitutively independent of human minds (beliefs) and evidence. The moral "world" is logically and constitutively independent of how we humans regard it, the beliefs we have about it, and the evidence we can adduce in favor of those beliefs.

The anti-realist denies what the realist asserts. He claims that the (moral) world is fixed by human practices and beliefs. For the anti-realist, the way the world is not logically or constitutively independent of our beliefs about it or the evidence one can adduce in favor of those beliefs.

All moral realists are cognitivists and objectivists about moral discourse. The situation is more complex for the anti-realist. Realists are committed to

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7. No doubt, in defending or rejecting tort practice as satisfying or failing to measure up to the demands of corrective justice, tort theorists typically mean to be expressing their pleasure or disfavor with current legal arrangements. But they mean to be doing so because current practice either satisfies or fails to satisfy certain substantive constraints that specify the cognitive content of corrective justice. The expressive function of corrective justice is conceptually connected to its cognitive content—or at least it is for those tort theorists who invoke it as a standard for evaluating existing tort practice.

two claims: that there are moral facts, and that they are mind or evidence-transcendent. Some anti-realists are noncognitivists. They deny that there are moral facts at all. If there are no moral facts, then moral discourse cannot refer to such facts. Therefore, moral discourse is not fact-stating. Anti-realists need not deny the existence of moral facts, however. In order to qualify as anti-realist, a theory need deny only that such facts are objective in the way realism takes them to be. That is, an anti-realist need deny only that (moral) facts are mind or evidence-transcendent. So anti-realists can be either noncognitivists or cognitivists.

Must a cognitivist, anti-realist be a subjectivist? The answer is no. Even though this kind of anti-realist denies that (moral) facts are objective in the realist sense, he need not deny that facts can be objective in some other sense. Of course, the burden then falls to the anti-realist to specify the relevant sense of objectivity. Let's distinguish among three senses of objectivity. At one extreme is the strong objectivity of the realist. Facts or properties that are objective in this sense are mind (belief) or evidence transcendent. They do not depend on human practices or the ways in which humans regard them. At the other extreme is minimal objectivity. Facts or properties that are objective in this sense do depend on human practices, beliefs and evidence. Something is the case in this sense provided that is how most competent language users and observers regard it. Facts are objective in this sense because they take the judgment of what is the case out of the "hands" of particular speakers or observers and place it in the hands of the community as a whole. Minimal objectivity is therefore normally associated with forms of conventionalism. From both minimal and strong objectivity we can distinguish modest objectivity. Facts or properties are modestly objective provided their content is fixed by how they would be regarded by individuals under idealized or appropriate epistemic conditions.

These various notions of objectivity play useful explanatory roles, in particular, they provide (different) accounts of the possibility of mistake, growth, disagreement and the like. Someone can be wrong in his judgment according to minimal objectivity if his judgment departs from what most people take to be the case. On the other hand, one consequence of minimal objectivity is that most people cannot (logically) be wrong. (What is the case just is what most people take it to be.) Someone can be wrong in his judgment according to modest objectivity provided his judgment departs from what it would have been under ideal conditions of judgment. Moreover, modest objectivity allows that everyone could be wrong in their judgment provided the judgments they reach diverge from those they would have reached under ideal conditions of observation and judgment. It is straightforward how a realist would explain both local and general mistake.

There are at least three (and probably more) conceptions of objectivity: minimal, modest and strong. Different concepts of objectivity may be suitable to different domains. Someone may hold the view that mid-sized physical objects, e.g., tables and chairs, are strongly objective, whereas moral properties are either minimally or modestly objective. The kind of objectivity involved in some discourses, e.g., science, may be the strong objectivity of realism, whereas that involved in legal discourse may be something considerably weaker.

Whichever concept of objectivity is at work in a domain of discourse, the important point for our present purposes is that convergence is a precondition of objectivity of any sort. First, for the anti-realist, noncognitivist moral predicates lack cognitive content, so the question of whether that content is objective simply does not arise. Second, for the anti-realist, subjectivist moral predicates are not objective simply because they are reports of the beliefs or judgments of minimally competent language users and observers. Third, for the anti-realist, conventionalist (or minimal objectivist) the objectivity of moral predicates depends on actual convergence of usage among the majority of competent language users and judges. Fourth, for the anti-realist, ideal observer theorist (or modest objectivist) the objectivity of moral predicates depends on individual judgment converging under ideal epistemic or observation conditions.

Though realism holds that the existence and character of moral predicates is logically and constitutively independent of human beliefs and practices, the realist is also committed to convergence over time, as a pragmatic if not as a conceptual matter. Moral predicates are to figure in the explanations of our beliefs and judgments. If those beliefs and judgments do not converge over time, then it is implausible to suppose that strongly objective properties can explain our beliefs. For if such properties did exist, then they appear to play no explanatory role in understanding the divergence of our beliefs and judgments. This is not to say that convergence would be enough to establish that strongly objective properties lie behind our judgments, but it does suggest that the absence of convergence gives us cause to worry that such properties do exist.

Of course, divergence in judgment and belief can have a variety of different sources: disagreement about relevant facts, cognitive shortcomings, prejudice and the like. So disagreement as such does not undermine realism. But this simply implies that realism is committed to a form of conditional convergence: for moral properties to be strongly objective, it is likely necessary that judgments and beliefs about their instantiation made under certain conditions, e.g., full information, rationality, etc., would converge.

Convergence or coherence regarding the core of a concept (and its instantiations) is a precondition of objectivity; and thus it is a precondition of the objectivity of corrective justice. That is why the apparent widespread disagreement among tort theorists about the content of corrective justice invites the worry that corrective justice lacks objective semantic content. Either corrective justice is just a name we give to certain institutional arrangements we wish to praise, or else it is a gloss we put on our own theories about it: a gloss we mean for others to treat as objective, but for which we in the end cannot fully defend by appeal to general reason, principle or practice. This is the fear that disagreement invites, and the one I mean to allay.

Like others, I am committed to the objectivity of corrective justice. Unlike others, however, I take this meta-ethical worry about the objectivity of corrective justice very seriously. I do not believe that it can go unanswered, and I mean to answer it. Moreover, because I am an anti-realist about moral properties and moral discourse generally, the kind of answer I want to pursue must reflect my view that the content of corrective justice depends on human practices, beliefs and evidence. So, I am both an anti-realist and an objectivist about corrective justice. For me, then, the content of corrective justice depends

on the practices in which it figures, but it is not fully fixed by how I or anyone else happens to regard it.

Some of my critics have wanted me to defend my conception of corrective justice by deriving it in some way from a set of first principles, from more basic principles of justice; while others have objected to my emphasis on what I have called, "middle level theory": that is, my emphasis on extracting principles and norms from existing practices, including legal ones. In fact, I have not tried to defend my conception of corrective justice as following from a more general theory of distributive justice, nor have I argued for it in some contractarian manner, by trying (futilely no doubt) to establish that my conception would be chosen by rational agents under certain specified conditions, and so on.

Perhaps I am mistaken in taking the meta-ethical approach to corrective justice (and to other moral concepts as well) that I have taken. But I am wrong only if some other meta-ethical view about moral predicates is correct. So someone objecting to my approach, and not merely to my execution of it, has to defend, or, at least, must have in mind a different kind of meta-ethics. Perhaps a subjectivist or noncognitivist can fault me for looking to our practices for the content of corrective justice. In their minds, the problem is that corrective justice has no content (noncognitivism), or its content is subjective and fixed by how particular persons regard it. My mistake is in looking to communal practices. Or a realist might fault me for looking to practices at all, for, in her view, the content of corrective justice is fixed by some set of natural facts, not by the behavior of individuals. I am unmoved, however, by the objection to middle level theory, of extracting the content of our norms and principles from the practices in which they figure when it is advanced by those who are unprepared to defend some other meta-ethics. Many who advance this objection are apparently committed to the fashionable view that one can engage in substantive normative ethics while remaining agnostic on meta-ethical issues. This view of the relationship between meta and normative ethics strikes me as mistaken.

I have looked to see how the concept of corrective justice figures in various practices, including tort law, as a way of getting a handle on its content. Because I am an anti-realist about moral predicates, I am committed to the view that the core of corrective justice is drawn from the practices in which it figures. And that is part of the meaning of the phrase I have employed in speaking of corrective justice as a practice—"the practice of corrective justice"—a phrase that George Fletcher claims to find wholly mysterious.<sup>8</sup>

There are, of course, legitimate, general concerns one might have about my kind of approach to fleshing out the content of corrective justice. Consider two: First, by focusing on the practices in which the concept figures as the source of its content, aren't I just committing myself to a kind of conventionalism in which all we can say, for example, about corrective justice is that the community regards it in a certain way? Corrective justice is fixed by our practices, and, if that is the case, how can corrective justice serve as a criterion or standard for assessing our practices?

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8. For a review of RISKS AND WRONGS, *supra* note 1, written by someone who appears not to have read it, see George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658 (1993).

Second, if I focus on practices as the source of the content of corrective justice, then I will treat tort law as one such practice. If tort law helps to give content to the concept of corrective justice, in what sense can corrective justice serve as a criterion for assessing existing tort practice? In what sense can we even ask whether and to what extent existing tort practice implements the principle of corrective justice? Mustn't there be some distance between corrective justice and tort law in order for us to be able to answer either of these questions?

Let's consider the first question, the second being largely an extension of the general worry it raises. Unfortunately, I cannot answer this serious and legitimate concern in any detail here. I hope the following remarks are not so cryptic as to be unhelpful. Generally, my view is that our practices contain adequate resources for critically assessing what those practices at any given time happen to be. That is, certain practices (I believe law is one of these) are both conventional—that is, their content depends on what people do—but their content is not fixed by what people at a particular time happen to be doing. I like to think that in such practices “truth outruns the practice.”

How can a practice be conventional and have resources sufficient for self assessment? Let me try to illustrate what I have in mind by exploring the well-known positivist view that law is a matter of convention or social fact. With respect to law, Hart famously held that law consists in social rules and that the content of social rules is fixed by convergent practice. Dworkin takes this to be a statement of conventionalism, attributes it to all positivists, and powerfully exploits its shortcomings. The problem is that such an account does not provide a plausible understanding of key features of legal practice, including the nature of theoretical disagreement, the existence of right answers in hard cases, and the possibility of large scale, pervasive mistake. In the Hartian view of social rules, law runs out—and discretion begins—when behavior no longer converges. Isn't law possible even in the face of disagreement about its content or requirements? Dworkin thinks the answer to this question is in the affirmative. If law extends beyond convergent behavior, and if the content and requirements of social rules is fixed by convergent practice, law cannot consist in social rules. Roughly, law cannot be a matter of sociology or social fact as the positivists contend; instead, it must be a matter of substantive moral argument, as Dworkin contends.

The problem is not with the view that law is a matter of social fact or convention; the problem is with the Hartian conception of what a social rule or convention is, and what its requirements are. For Hart the *content* of a social or conventional rule is fixed by the scope of convergent behavior. What a rule requires is restricted to the scope of that convergent behavior. Where convergence, ends so too do the duties to which the rule gives rise. This is not the way I think about social or conventional rules. In my view, conventional or social rules require both convergent behavior and shared understanding. There must be sufficient convergent behavior to establish the existence and core of a social rule. The shared understanding (which is also typically reflected in behavior) determines the kind of practice or rule the behavior instantiates.

For some practices, the understanding may be that the full content of the rules and the duties to which they give rise is fixed by the scope of convergent behavior. Participants in such practices understand that they have no duties

under the rules beyond the range of convergent behavior. Let's imagine that stopping at red lights is such a practice. If most people stop at red lights, then (provided other conditions are satisfied) individuals would have a duty to stop at red lights under normal circumstances. But now suppose that some people don't stop at red lights after midnight (in the absence of other traffic), while others continue to stop even when there is no danger in merely slowing down then moving on. Were stopping at red lights the sort of practice in which the duties imposed were fixed by the scope of convergent behavior, then individuals would have no duty to stop at red lights after midnight. Or if they had such a duty it would not be imposed by the social practice of stopping at red lights. On the other hand, if the shared understanding were that the scope of the duties imposed by the rule extended beyond convergent practice, then whether individuals uniformly stop at red lights after midnight will not settle whether they have a duty under the rule to do so. The behavior that reflects this understanding consists in the offering of arguments among participants regarding how the rule is to be understood and thereby extended. Such rules are social or conventional in spite of disagreements about their content precisely because their existence and character depends on substantial convergent behavior and a shared understanding of its character.

If I am right, the content of moral predicates derives from the ways they figure in various practices. That may make these concepts conventional in a familiar sense of that term. But their conventionality does not mean that the content of the predicate or rule is fixed by the scope of convergent behavior. Even conventional rules can have content that extends beyond the scope of convergent practice. Whether they do depends on the kind of practice involved. And that depends on the nature of the shared understanding about the kind of practice the participants are engaged in. If the understanding is that the scope of the practice extends beyond convergent behavior—an understanding that is itself expressed in the behavior of participants offering arguments for extending the practice one way rather than another—then the practice may be one that has internal resources sufficient for self-assessment.

If this is right about certain concepts and practices, I have the beginnings of an answer to the second worry someone might have about my approach to corrective justice. Recall, that worry is that if tort law is among the practices to which we appeal in fixing the content of corrective justice, how can corrective justice be a criterion for assessing existing tort law? If the content of corrective justice depends on but is not fully fixed by existing practices, then the concept may yet provide a criterion for critically assessing even those practices whose existence is essential to the concept's existence. Were tort law the only practice in which claims to repair for harms suffered at the hands of others were made, then much of the content of corrective justice would be fixed by tort practice. But claims to repair are part of our ordinary moral practices as well, and substantially so. For that reason (among others) we can assess tort law in the light of corrective justice even if we recognize that the content of corrective justice is itself partially fixed by tort practice.

### III. THE CORE OF CORRECTIVE JUSTICE

With this digression into meta-ethics (and into the meta-ethics of corrective justice) complete, I return to the concept of corrective justice. My

thought is that while there is substantial disagreement about the particulars of corrective justice, the scope of the disagreement can be easily overstated. I want to suggest that the concept has a coherent core drawn from the practices in which it figures. All viable accounts of corrective justice, whatever their substantive disagreements, are committed to the centrality of *human agency, rectification, and correlativity*. That is, the claims of corrective justice arise only with respect to losses occasioned by human agency. Other forms of misfortune do not fall within its domain. Different conceptions of corrective justice might differ with respect to the bounds and conditions of human agency, and why agency matters, but all share the view that only losses resulting from human agency can give rise to claims in corrective justice.

Second, claims in corrective justice are claims to repair or rectification. Again, different accounts are likely to pick out different objects of rectification. One way in which Ernie Weinrib's theory differs from mine is that in his account the object of rectification is the "wrong," whereas in my account it is the "wrongful loss." The difference between us reflects differences in our overall political and metaphysical commitments. For me, corrective justice is to be understood as a practice within a liberal political morality that emphasizes autonomy and well-being: thus, the emphasis on loss, which I think of in terms of diminished welfare. For Weinrib, the Hegelian, the important normative objects are abstract and only indirectly connected to human welfare or interests: thus, the emphasis on wrongs—understood as strongly objective metaphysical objects. Whatever our differences, both of us are committed to the importance of rectification as an element of corrective justice.

Finally, corrective justice involves correlativity of some sort. "Correlativity" may be an unhappy phrase, but perhaps I can clarify it. The claims of corrective justice are limited or restricted to parties who bear some normatively important relationship to one another. A person does not, contrary to the view I once defended, have a claim in corrective justice to repair *in the air*, against no one in particular.<sup>9</sup> It is a claim against someone in particular. Different conceptions of corrective justice might flesh out the conditions under which individuals could come to stand to one another in the appropriate way, but all are committed to providing an account of those conditions as a way of explaining in part what corrective justice is. Some might emphasize causation: the fact that I caused your wrongful loss is enough for us to stand in a relationship such that if you have a claim in corrective justice it is against me, and if I have a duty of repair, it is to you. Some might argue that responsibility is the key concept: responsibility is connected to causation, of course, but not coextensive or cointensional with it. Someone can be responsible for the acts of others (acts and consequences he did not cause), and someone may perform acts that have untoward consequences for which one is not responsible (acts and consequences he caused, but for which he is not responsible). Some might emphasize being in the position of having been able to prevent the accident at the lowest cost (the cheapest cost-avoider). If I could have prevented your injury at a cost lower than anyone else (and I do not and you are injured), then I stand in the appropriate relationship to you that gives me a reason to repair

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9. Cf. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1992).

your loss.<sup>10</sup> Whatever view one has about this matter, the important point is that in every account of corrective justice, there is presumed to be a relationship between the parties that makes the claims of corrective justice appropriate to them—and not to others.<sup>11</sup>

#### IV. WHAT CORRECTIVE JUSTICE IS NOT

Any account of the content of corrective justice will be both controversial and prescriptive. But we should not overemphasize the differences at the expense of the coherence of the core of the concept. If I am right in claiming that corrective justice requires agency, rectification and correlativity, a variety of theories of tort law, whatever their substantive merits may be, do not involve corrective justice. Let me mention three.

First, there is my former account of corrective justice, which I called “the annulment thesis.” According to the annulment thesis, corrective justice requires annulling wrongful gains and losses. Understood in this way, the annulment thesis lacks the dimension of correlativity that I have suggested is part of the core of corrective justice.

A second account of tort law that has only recently begun to receive the attention it deserves is Stephen Perry’s. In Perry’s account, there is a two step analysis.<sup>12</sup> First, we have to identify the class of individuals who are candidates for having the loss imposed on them. Here he relies on the important notion of “outcome responsibility” originally developed by Tony Honore.<sup>13</sup> It turns out in Perry’s view that in the typical tort both the victim and the injurer are outcome responsible for the harm: typically, moreover, no one else is. Then the question becomes, how should the loss be allocated between these two parties. In Perry’s account, only losses resulting from human agency fall within its ambit: that is entailed by the principle of outcome responsibility. Moreover, his analysis relies on some notion of correlativity since the victim and injurer are presumed to be connected to one another through the important relationship of outcome responsibility. But his is not an account of corrective justice because it does not invoke the concept of rectification or repair. Rather, his is best seen as an approach to tort law that emphasizes a concept of “local distributive justice,” in which the principle of outcome responsibility fixes the range within which the allocation or distribution question is raised and answered. His is an account of

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10. For a discussion of the way in which the concept of the cheapest cost-avoider can figure in an account of corrective justice, see *infra* Section V.

11. I want to be perfectly honest not only about what I hope to accomplish, but also about what I have accomplished—which is considerably less. I am committed to the claim that the content of corrective justice is drawn from the practices in which it figures. I have suggested that so conceived the principle of corrective justice is not fully fixed by the convergent behavior of the population at any given time. Such a view allows me to treat the concept of corrective justice as both anti-realist, objective and, therefore, critically useful. I have not fully developed the argument that practices can be conventional in the way I suppose they can be, nor have I demonstrated conclusively that the practice of corrective justice is of this sort. The plausibility of my overall argument depends ultimately on my providing those arguments.

Next, I claim that if we focus on the practices in which it figures, we will note three core elements: agency, rectification and correlativity. In fact, I have not shown that these are features of our practices. That too remains to be done, but not here.

12. Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

13. Tony Honore, *Responsibility and Luck, The Moral Basis of Strict Liability*, 104 LAW Q. REV. 530 (1988).

the distribution of loss, not the rectification of loss.

Finally, as an alternative to my conception of corrective justice, Ronald Dworkin has suggested another two-step analysis.<sup>14</sup> First, distinguish losses that result from human agency from other sources of misfortune or loss. Then ask the following question: What does fairness require with respect to the allocation of losses resulting from human agency? The principles for allocating loss that are required by fairness within that domain constitute the principles of corrective justice.

Whatever else can be said either in favor of or against this account, it is not an account of corrective justice. Whereas it emphasizes human agency, it ignores both correlativity and rectification. Instead of asking whether a victim has a right to recover against a particular person who stands in a certain kind of relationship to her (a relationship that makes that question meaningful and appropriate), it asks how shall a loss be allocated. In short, my previous theory of corrective justice lacks the correlativity dimension; Perry's lacks the rectification element; and Dworkin's suggestion lacks both. This does not mean that none of these "moral ideals" is attractive or the best interpretation of important aspects of our legal practices. It means only that they are not genuine accounts of corrective justice.

## V. THE PRACTICE OF CORRECTIVE JUSTICE

If I am right, any plausible account of corrective justice will emphasize agency, correlativity and rectification. In this section, I want to fill out my own conception of corrective justice by exploring other features of the duty to repair the wrongful losses for which one is responsible. These are not features that have been emphasized by other writers, and at least some of them are likely to be quite controversial.

The duty to repair in corrective justice is pre-political and non-instrumental. As I have said on several occasions now, the content of corrective justice is neither epistemically, constitutively, nor logically independent of the moral, legal and political practices in which it figures. Even more interestingly, whether or not the principle of corrective justice gives rise to a duty of repair in a particular community is conditional on the practices, legal and otherwise, that already exist within the community. Let me briefly explain each of these characteristics of corrective justice.

To say that corrective justice is pre-political is to say that there may be duties of corrective justice even in the absence of political institutions designed to enforce or implement them. Corrective justice cannot exist independent of all practices whatsoever, but it does not require political or legal institutions to enforce the duties to which it gives rise. So, in the absence of a state, there may be a duty of corrective justice: that is, a responsibility in morality to repair the

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14. This account was suggested to me by Ronald Dworkin at a seminar at NYU Law School in the fall of 1993 as an alternative to the account I developed in *RISKS AND WRONGS* which was the topic of discussion in the seminar. I do not mean to attribute the view to him as his ultimate position. I bring it up, not to criticize Dworkin, but to elucidate my own views by contrasting them with several plausible alternatives. Indeed, this paper developed primarily as a result of the discussion during that seminar, and, in particular, in response to a question of Thomas Nagel's about whether the duties of corrective justice are *natural*, and if they are whether legal or other institutions could cancel them.

wrongful losses for which one is responsible.

This is not to say, however, that the duty in corrective justice is a natural duty in the moral realist sense: that is, a duty whose existence is logically and constitutively independent of human practices and motivations. If a duty is natural then it imposes responsibilities on individuals regardless of how they regard themselves and independent of whatever practices they may have. The source of the duty is not human practice, but moral fact (or natural facts on which the moral fact is said to supervene or to be reducible to). One can accept the prepolitical character of corrective justice without accepting the metaphysics of natural duties. And that is precisely the kind of approach I have in mind.

The duty of corrective justice is also non-instrumental in an important sense. To see this, compare the duty one has to repair the wrongful losses for which one is responsible (under corrective justice) with the alleged duty one might have to repair all losses which one could avoid (in the future) at the lowest cost. The phrase "one could avoid at the lowest cost" or "cheapest cost-avoider" might be understood as a definition or an analysis of responsibility: the cheapest cost-avoider is all we mean by the responsible party. This is hardly a compelling characterization of the very complicated notion of responsibility, but if it is the right one, then there would be no difference between the economic and corrective justice principles stated above. In contrast, if the cheapest cost-avoider can sometimes be different from the responsible party, then it is hard to make sense of the claim that individuals who are the cheapest cost avoiders have a duty to repair simply in virtue of their being the cheapest cost avoider apart from such a duty figuring instrumentally in serving a desirable collective or social policy goal of reducing accident costs. Imagine no such collective goal. Can it make sense to say that those people who are in fact the cheapest cost-avoiders have a duty to repair wrongful losses? Not really. But once we introduce the "collective" goal of reducing accident costs, such a duty makes perfectly good sense, but only instrumentally in the pursuit of the collective goal. We need no notion of a joint goal or aspiration to make sense of the claim that those responsible for the misfortunes of others have a duty to repair them. It is part of our common sense morality or moral practice that individuals have such a duty. That is what I mean by saying that the duty of corrective justice is non-instrumental. It does not mean that such a duty can serve no instrumental role, and in my book I indicate the way in which such a duty might figure in a liberal political theory more generally.<sup>15</sup>

Whereas corrective justice is both pre-political and non-instrumental, legal and political practices can affect the content of the duty corrective justice gives rise to in many ways. Let me mention two. First, such duties can affect what behavior will count as satisfying or meeting the duty. Second, such practices may even cancel the duty altogether. To see how the former claim can be made out consider the duty to be *charitable*. Imagine that there is a hurricane that leaves 100 people homeless. The cost of providing shelter turns out to be \$300,000; imagine, moreover, that there are 1,000 people in the community who have a duty to be charitable, to come to the aid of the 100 homeless people. Suppose the local municipality puts a project in place to provide shelter that

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15. See especially the discussion of the relationship of corrective justice both to distributive justice and to stability in RISKS AND WRONGS, *supra* note 1, at 67–70, 350–54.

requires each member of the community to contribute \$300. Discharging the duty to be charitable can be accomplished by making a payment of \$300 to the fund. Now there may be other ways of discharging the duty to be charitable in this instance. Given the state sanctioned project, giving one homeless person \$300 would not count as discharging one's duty, even though providing the same amount to the general fund would. So the legal practice can sometimes determine whether an act constitutes discharging a duty whose existence does not depend itself on legal practices. I want to suggest, in effect, that the same is true of corrective justice.

Finally, and perhaps most controversially, whether one has a duty in corrective justice within a particular community can depend on the other practices in place for allocating losses. So, to use a familiar example, in New Zealand, where all accident costs (we may presume) are handled through the general tax coffers, whether they result from human agency or not, there is no practice of corrective justice. There are no duties to repair the wrongful losses for which one is responsible. This does not mean that there are no duties that fall to those responsible for harming others—duties that do not fall to others. Those responsible for loss may well have duties to make amends in other morally relevant ways: e.g., to apologize. It is just that there is no moral duty to make repair. This suggests that the duty to repair is conditional on other practices.

Again, this does not mean that there is nothing we might be able to say regarding the morality of New Zealand's practices for allocating accident costs. We might point out that a practice of corrective justice tightens the bonds of community and of personal responsibility (if, in fact, it does), and that, to the extent a community lacks a practice of corrective justice, it may risk eroding these bonds as well as the liberal ideal of community. What we could not say, however, was that New Zealand had failed in some way simply by not having a practice of corrective justice. So even though the duties of corrective justice are non-instrumental, whether a community's not having a practice of corrective justice marks a moral shortcoming, depends on what's lost morally, from the point of view of other principles, e.g., autonomy and responsibility, to which a practice of corrective justice contributes.

## VI. SUMMARY

Let me see if I can sum up what I have tried to say about corrective justice. Corrective justice is, in my view, the principle that one has a duty to repair the wrongful losses for which one is responsible. The principle of corrective justice, like other similar norms in a community serves to link agents with the misfortunes of others. The content of the principle is not independent of human practices with respect to it (as it would be for a moral realist). Yet the content of the principle is not fully fixed by the practice at any given time: what corrective justice requires is not fixed by what people regard it as requiring at any given time.

Any particular conception of corrective justice will be a contestable interpretation drawn from practices, including legal ones, in which the concept figures. In the conception I want to offer, corrective justice requires agency, rectification and correlativity (at a minimum). The practice of corrective justice is such that the duties imposed by it are pre-political—that is, they do

not rely on legal or other political institutions for their implementation or enforcement; they are also non-instrumental, that is, they make sense independent of our having some set of collective goals (like cost avoidance) that they might serve; and while the duties of corrective justice do not depend on legal practices for their enforcement, legal and other practices may have an effect both on the content of the principle of corrective justice and whether such a duty exists at all in a particular community.

