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Brian Leiter

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TORT THEORY AND THE OBJECTIVITY OF CORRECTIVE JUSTICE

Brian Leiter*

I. INTRODUCTION

Three interrelated obstacles confront the theorist arguing that tort law is organized around principles of corrective justice:

First, tort law must in fact be a coherent practice, such that there really are coherent principles underlying it;

Second, principles of corrective justice must themselves have some objective or determinate content; and

Third, these objective principles of corrective justice must, in fact, be the principles that underlie tort law.

Writers in Critical Legal Studies [hereinafter CLS] who argue that the private law embodies essentially contradictory principles of political morality can be understood to deny that the first claim is true: tort law, like the private law generally, embodies inconsistent and conflicting moral principles.¹ Defenders of the economic analysis of law can be understood as denying that the third claim is true: tort law, like the private law generally, promotes economic efficiency, not corrective justice.² No writers, however, have yet to tackle the second obstacle to an objective account of tort law as implementing principles of corrective justice: namely, whether our conception of corrective justice itself is sufficiently objective that it can undergird an account of any practice. It is the great virtue of Jules Coleman's paper that he poses this question squarely, and sketches the beginnings of an adequate answer.

Notice that Coleman's concern here is strictly with the objectivity, not the

* Assistant Professor of Law, University of San Diego; Visiting Assistant Professor of Philosophy, University of California, San Diego (Spring 1995); as of July 1, 1995: Assistant Professor of Law and Philosophy, Rutgers University, Camden and New Brunswick. A.B. 1984, Princeton; J.D. 1987, Ph.D. candidate (Philosophy), University of Michigan. Thanks to Larry Alexander for helpful comments on short notice. To Joel Feinberg, I want to express both my appreciation for his invitation to participate in this conference and my deep admiration. For many years, I knew Joel Feinberg was an extraordinary philosopher; only when I had the great good fortune to be recruited for a position at Arizona Philosophy last year did I also learn that he is an extraordinary human being, to whom I am deeply grateful for all the generosity and kindness he has shown me.

1. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

2. See, e.g., RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* 163-214 (4th ed. 1992).

descriptive adequacy, of corrective justice. Coleman's question is only this: does our concept of "corrective justice" hang together in such a way that it can be a fruitful theoretical resource in understanding the structure of tort law. Such a determinate concept may be necessary to surmount the other two obstacles to an objective account of tort law, but it is plainly not sufficient: when we talk the language of "corrective justice" we may all be talking about the same thing, at bottom, but the language of corrective justice might simply not do justice to the conceptual language at the core of tort law.³

Does our account of "corrective justice," then, hang together in the requisite way—does it, as Coleman asks, have objective semantic content? I want to make three general observations about Coleman's question: first, why it matters; second, its connection to the philosophical debate about realism; and third, how to deal with the problem of divergent opinion about the meaning of corrective justice.

II. WHY DOES OBJECTIVITY MATTER?

Why should it matter whether "corrective justice" hangs together as a concept? Suppose Coleman's account of corrective justice—as the duty agents have to repair wrongful losses for which they are responsible—simply bore no relation to any recognizable notion of corrective justice; suppose, as it were, that it is purely stipulative. Let us call it then, instead, "Colemanesque justice." Suppose further, however, that Colemanesque justice is descriptively adequate to tort law, and that it is, as articulated by Coleman, a coherent, determinate body of principles. Wouldn't Colemanesque justice suffice to ward off the challenge of both CLS and the economic analysis of law? Clearly it would. Against CLS, one could argue that tort law embodies a coherent principle: Colemanesque justice. And against the economic analysis, one could argue that tort law promotes not efficiency, but Colemanesque justice. Why then care whether Colemanesque justice tracks the objective semantic content of what we call "corrective justice?" Why expect that Coleman's use of "corrective justice" to describe his preferred principles of justice be anything other than stipulative?

The answer must have something to do with the underlying aims of theory construction. An attraction of "theory" in any domain—tort law, morality, or empirical phenomena—is that it both *systematizes* inchoate phenomena and *unifies* disparate ones, by displaying their connections (causal, justificatory or conceptual) to each other. Colemanesque justice, like the economic analysis of law, can *systematize* the inchoate phenomena comprising tort law, but it cannot *unify*, that is, it cannot show the connections between one practice—tort law—and any other concept or practice of general cultural significance. For Colemanesque justice, unlike say the economist's notion of efficiency (whatever exactly that is),⁴ is explanatorily narrow: if successful, it lays bare the underlying logic of tort doctrine, but that is all it does or aspires

3. Note that on Coleman's view there is a "penumbra" of tort law that is best explained in terms of efficiency. See JULES L. COLEMAN, RISKS AND WRONGS 303, 428 (1992). Thus, Coleman's real project is to resist the imperialist ambitions of the economic analysis, which would hold that *all* of tort law aims to mimic the perfect market. Coleman, by contrast, holds that some of tort law *does* do this, but the "core" of tort law implements principles of corrective justice.

4. For discussion, see generally JULES L. COLEMAN, MARKETS, MORALS AND THE LAW chs. 3–4 (1988).

to do. By contrast, the economist's notion of efficiency, if applicable to tort law, displays a continuity between tort law and all those other domains where the notion of efficiency does explanatory work (including, of course, other areas of the private law, and market transactions generally).

By contrast, if Coleman's notion of "corrective justice" is not simply stipulative—if it is, in other words, not simply Colemanesque justice—then the descriptive adequacy of corrective justice to tort law *unifies* torts with those other domains in which the same *objective* concept of corrective justice is in play—including perhaps other areas of the private law, as well as those informal social practices grounded in corrective justice that give this theory of justice its sense and importance.⁵ In short, we have a richer theoretical understanding of tort law when we can see it in relation to other corrective-justice based practices outside of torts.

III. CORRECTIVE JUSTICE AND REALISM

Coleman revisits the issues of realism, anti-realism and objectivity several times in his paper, and I am generally in agreement with his way of characterizing the issues.⁶ Sometimes, however, Coleman puts the issues in ways which might seem misleading. For example, Coleman writes, "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."⁷ But even the "stark raving moral realist"⁸—to borrow Peter Railton's self-description—can be committed to the view that the core of some moral concept "is drawn from the practices in which it figures."⁹ Thus, for example, Railton says that in order to give a reforming naturalistic definition of both non-moral goodness and (moral) rightness, we must draw on "our linguistic or moral intuitions" so as to "express recognizable notions of goodness and rightness."¹⁰ This sounds like Railton thinks moral realism is anchored in our practices, in the sense that what counts as the core of, say, "moral rightness" depends on what we would "recognize" (presumably from within the relevant practices) as "moral rightness."¹¹

It is important to see that this sort of dependence is trivial, and does not endanger realism. Realism about any discourse, as I understand it, involves three claims: first, that sentences in that discourse are cognitive, that is, apt for

5. Readers of Coleman in fact take him to be using "corrective justice" non-stipulatively, precisely because they see his theory of tort law as *unifying* torts with other social practices informed by the same moral principles. See, e.g., Gerald J. Postema, *Risks, Wrongs and Responsibility: Coleman's Liberal Theory of Commutative Justice*, 103 YALE L.J. 861, 871 (1993) ("Coleman's central thesis is that modern tort law gives legal expression to our informal social practice of corrective justice").

6. See, e.g., Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187 (1993) (distinguishing minimal, modest and strong objectivity); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993).

7. Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 23 (1995). All further references will be included in the body of the text.

8. Peter Railton, *Moral Realism*, 95 PHIL. REV. 163, 165 (1986).

9. Coleman, *supra* note 7, at 23.

10. Railton, *supra* note 8, at 205.

11. Is there an important difference here between an "intuition" and a "practice" in Coleman's sense. I am inclined to think not: we have intuitions about what "corrective justice" means, and these intuitions are both drawn from and manifest in those practices in which principles of corrective justice figure (e.g., tort law).

evaluation in terms of truth and falsity (even if the principle of bivalence does not hold); second, that whether such sentences are true or false is an objective matter; and third, that at least some sentences in the discourse are true. Take our discourse about "corrective justice." To be a realist about corrective justice is to hold, first, that sentences about "corrective justice"—sentences like Coleman's claim that corrective justice is concerned with agency, rectification, and correlativity—are apt for evaluation in terms of truth and falsity (they are not merely expressive, say, of attitudes or feelings); second, that Coleman's claims about corrective justice are *objectively* true or false; and third, that at least some claim about corrective justice (if not Coleman's) is objectively true.¹²

Where do our "practices" or "intuitions" enter here, on the realist picture? They come in when we try to get an idea what would count as truth-conditions for particular propositions in the discourse. Consider, for a moment, the doctrine of "moon realism," that is realism regarding talk about the moon. The moon realist holds that propositions like, "The moon has a circumference of 14,000 miles" are *objectively* true or false. But to have any idea what would count as a truth-condition for this sentence we have to have some notion what we're talking about when we talk about the "moon." We have to know, in other words, that when we make claims about the "moon" we're talking about that celestial body that stands in a certain spatial relation to the earth, and not, say, the Catalina Mountains in Tucson: it is facts about this celestial body, and not facts about the Catalina Mountains, that determine the truth or falsity of sentences about the circumference of the moon. To give a definition (reforming or otherwise) of some putatively cognitive predicate—whether it be "the moon" or "morally right"—is just to specify the domain of facts which constitute the locus for the truth-conditions for sentences in that domain: for example, facts about that celestial body that stands in the requisite spatial relation to the earth (as in "moon realism"); or facts about aggregate human well-being (as in Railton's "moral realism").

What distinguishes the realist from the anti-realist—what distinguishes, say, Railton from Coleman—is that the former makes a special sort of demand about the requisite objectivity of the truth-conditions. What this demand consists in is a controversial topic, with some, like John McDowell, claiming the realist mantle for underlying conceptions of objectivity that may look decidedly too dependent—epistemologically—on human response and judgment.¹³ But "stark raving realists" like Railton assert that the fact (the "moral reality" as it were) that constitutes the truth-condition is objective in a more familiar sense: "it exists and has certain determinate features independent of whether we think it exists or has those features, independent, even, of whether we have good reason to think this."¹⁴ This is what Coleman the anti-realist must deny: he must deny that the domain of facts (perhaps about agency, rectification and correlativity) that constitute the truth-conditions for claims about corrective justice are, in fact, independent of what we think about them

12. Notice, then, that "objectivity" is the key notion in making out the realist picture, and Coleman rightly places it at the center of his discussion. Cf. Leiter, *supra* note 6, at 192–196; Coleman & Leiter, *supra* note 6, at 607–12.

13. See, e.g., John McDowell, *The Lindley Lecture: Projection and Truth in Ethics* (Department of Philosophy, University of Kansas 1987).

14. Railton, *supra* note 8, at 172.

or what we would have reason to think or believe about them. What facts constitute the truth-conditions for claims about corrective justice, according to the anti-realist, very much depend on our epistemic resources, and thus may vary with them.

IV. THE DIVERSITY OF OPINION ABOUT CORRECTIVE JUSTICE

It is hard to see, however, how we can even get this project of specifying the truth-conditions off the ground if we can't agree on the domain of facts that constitute the truth-conditions for claims about corrective justice. This is precisely the problem we face when opinions about corrective justice diverge in significant ways. Thus, as Coleman himself notes, theorists like Stephen Perry¹⁵ and Coleman in an earlier incarnation¹⁶ regard themselves as proponents of corrective justice even though they do not adhere to the conception of corrective justice Coleman articulates here: Perry, for example, does not view the loss as necessarily giving rise to a claim that one party has against the other; while the earlier incarnation of Coleman required only that wrongful losses be annulled, regardless of whether there is a normatively significant relationship between the parties. But surely Perry and the earlier Coleman weren't talking nonsense in calling their accounts ones in terms of corrective justice. So how do we know where to look for the (modestly objective) facts that will constitute the truth-conditions for claims about corrective justice?

Convergence in judgment is not a prerequisite for the objectivity of any concept, for the reasons Coleman identifies: "disagreement about relevant facts, cognitive shortcomings, prejudice and the like"¹⁷ can all account for diversity of opinion, without impugning the objectivity of the concept. To preserve objectivity, the best explanation for the diversity of opinion must simply not include the assumption that the concept has no objective content.

But the burden for the "objectivist" is somewhat lighter than this: for we should only expect the objectivist to have an account of the objective semantic content of a concept that does justice to the major or serious uses of the concept. Railton, for example, faces the same, if not a worse problem with respect to the diversity of opinion about the concept of "moral goodness." Thus, he observes:

If, in any area of inquiry, including empirical science, we were to survey not only all serious competitors, but also all views which cannot be refuted, or whose proponents could not be convinced on non-question-begging grounds to share our view, we would find that area riven with deep and irremediable disagreement.¹⁸

But here, of course, this constraint may not help since we seem to have

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

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

17. Coleman, *supra* note 7, at 22.

18. Peter Railton, *What the Noncognitivist Helps Us to See the Naturalist Must Help Us to Explain*, in REALITY, REPRESENTATION AND PROJECTION 279, 281-82 (John Haldane & Crispin Wright eds., 1993). For a similar constraint on the demands the defender of the objectivity of morality must satisfy, see Philippa Foot, *Moral Arguments*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 96, 106-08 (1978).

disagreement among “serious competitors” for proper understandings of corrective justice, including new Coleman, old Coleman and Perry. Here I think it is fruitful to think of Coleman’s program as being like the realist Railton’s, in the sense that Coleman, like Railton, aims for a “reforming definition” of the concept at issue (corrective justice). In a reforming definition, one can, as Railton says, sacrifice certain opinions about the meaning of the concept on the grounds that the resulting definition “earn[s] its place by facilitating the construction of worthwhile theories.”¹⁹ (Unlike Railton, of course, Coleman is not looking for a definition of the concept at issue—“corrective justice”—in terms of naturalistic predicates.) In short, the only reason to prefer new Coleman over Perry or old Coleman (or Weinrib or any other theorist of corrective justice for that matter) is that by sacrificing some set of intuitions about the concept we get some theoretical payoff.²⁰ What might that be and which concept would it favor?

Here I want to sketch ever so briefly the possibility that we will get a theoretical payoff by in fact discarding an element of Coleman’s current account of the core of corrective justice: correlativity.²¹ As Coleman notes, his earlier “annulment thesis” omitted correlativity.²² But how strongly is Coleman’s current view committed to it? Coleman reiterates his view that there are no duties of corrective justice in New Zealand where a global no-fault system compensates victims of accidents.²³ But this, as Gerald Postema notes, suggests that Coleman’s “theory is built around a view or intuition about the fundamental concern of corrective justice.”²⁴ Postema explains:

What [Coleman] finds fundamentally important to corrective justice is that human losses suffered at the hands of others, especially those caused by the wrongful acts of others, must be redressed, and the victim made whole. Other aims—such as holding persons responsible for their actions...—to the extent that they play any role in Coleman’s account of corrective justice, are secondary and derivative. They do not survive satisfaction of the fundamental aim, the victim’s being made whole. Once the loss is redressed [as it is under the New Zealand system], nothing remains for corrective justice to do. In this respect, Coleman’s new...conception has not moved far from his earlier annulment conception.²⁵

Assuming Postema’s assessment is correct—and I think it is—it still doesn’t tell us what theoretical payoff we get by excluding from the “core” of the objective content of corrective justice the requirement of correlativity. Coleman allows that the character of this “normatively important relationship” between the parties might be characterized solely in terms of causation—i.e., “the fact that I caused your wrongful loss”—but he also suggests more might be

19. Peter Railton, *Naturalism and Prescriptivity*, in FOUNDATIONS OF MORAL AND POLITICAL PHILOSOPHY 151, 157 (Ellen Frankel Paul et al. eds., 1990).

20. The reform must also, as Railton aptly puts it, be “tolerably” revisionary: it must “in some direct or indirect way, capture most of the central intuitions in this area and must do something to lessen the force of those which [it] cannot capture.” *Id.* at 169. For a more detailed discussion, see *id.* at 164–67.

21. I confess uncertainty as to whether “correlativity” is the precise element we should forego; the question is where “fault” comes into the picture, for it is because of the invocation of “fault” that the explanatory scope of the theory is circumscribed.

22. Coleman, *supra* note 7, at 27.

23. *Id.* at 30. Cf. COLEMAN, *supra* note 3, at 402–03.

24. Postema, *supra* note 5, at 885.

25. *Id.* at 885–86.

required, like responsibility owing to fault.²⁶ Perhaps then we can allow correlativity-as-causation, but just purge correlativity-as-at-fault-causation. Why would we want to do that? Doing that would, in fact, deliver a substantial theoretical payoff: namely, all those tort cases hard to subsume under corrective justice—where corrective justice requires correlativity in virtue of fault—would now fall within the ambit of the theory. These, of course, are strict liability cases involving injury due to ultrahazardous activities as well as the “necessity” cases in which damage to property is required in order to avert a much greater harm. In these cases, there is no fault in the action, yet there is still a claim for repair of the loss. Coleman’s fault-based notion of correlativity deals only uneasily with these cases; but if Coleman is wrong that this type of correlativity is at the core of corrective justice, then corrective justice will fare much better—descriptively—as a theory about the foundations of tort law. It will, in short, capture more of the phenomena constituting the practice of torts.²⁷

26. Coleman, *supra* note 7, at 26.

27. For an argument to this general effect, see Postema, *supra* note 5, at 886–96.

