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Corrective Justice, Well-being, and Responsibility

ABSTRACT:
In this paper I argue that Coleman's mixed conception of corrective justice is subject to three important objections. First, it does not offer an explanation of the normative structure of tort law. The values of responsibility and concern for human well-being, on which Coleman grounds the practice of tort law, are not enough to justify its bilateral structure. Moreover, I suggest that the mixed conception does not offer a sufficiently deep *analysis* of the practice that might have explanatory power. Second, the mixed conception cannot account for all cases of strict liability. Coleman's argument reconstructs strict liability for risky activities as part of the fault principle. This goes against conventional wisdom, according to which strict liability regulates lawful activities, and fault liability is always imposed for wrongful actions. Finally, Coleman neglects the distributive aspect of tort law. As a result, he misses the importance of liability rules in creating the scheme of primary rights and duties that regulates private interactions. On the other hand, I offer a new account of tort law that is immune to these objections and at the same time is able to accommodate the significance of human well-being and individual responsibility.

KEYWORDS:
tort law, mixed conception of corrective justice, distributive justice, human well-being, individual responsibility, strict and fault liability.

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1. *Introduction*

For more than 35 years, Jules L. Coleman has enriched theoretical and philosophical thinking on private law. It is no exaggeration to say that his contributions have refunded the philosophy of this body of law. From the beginning his efforts were aimed at finding an explanation for tort law. This

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task consists in identifying the fundamental principles that articulate and make sense of the practice of repairing the harms we cause to each other. Most of his work applied a constructive interpretation methodology, so the principles in question make sense of tort law only if they fit the central features of the practice and also justify it[1]. In *The Practice of Principle*[2], on the other hand, Coleman adopts a different methodology. He intends to offer a conceptual explanation, which allows distinguishing between understanding tort law, and justifying it[3]. However, this methodological change with regard to *Risks and Wrongs*[4] was not reflected on his substantive account of tort law. In both books he claimed that tort law is the institutional implementation of a particular conception of corrective justice that he called the mixed conception.

The mixed conception got this name because it resulted from the combination of two other theories: the annulment thesis[5] – previously defended by Coleman – and the relational view – defended by authors that follow the Aristotelian tradition, such as Ernest Weinrib[6]. The annulment thesis only required that wrongful (or unjust) losses were eliminated or rectified, but it did not impose any specific

[1] See DWORKIN 1986, 52 and 90.

[2] COLEMAN 2001.

[3] It allows so, but it doesn't make it necessary. In the end, all depends on the theoretical attitude taken towards the so called "evaluative concepts". If we believe it is impossible to neutrally theorize on some notions such as negligence, recklessness, responsibility, accountability, duty, right, and so on, then, the outcome of conceptual analysis will have the same degree of normativity than a constructive interpretation.

[4] COLEMAN 1992a.

[5] The best presentation of the annulment conception is in COLEMAN 1992b.

[6] In my opinion, the best contemporary defense of the relational view is in WEINRIB 1995.

obligation on any particular person. Obviously, this principle treats the problem of wrongful losses as a *social problem*, so it is incapable of providing individual agent-relative reasons for action. Thus, the annulment thesis is an inadequate conception of corrective justice, insofar as it is not distinguishable from distributive justice, at least in its most important aspect[7]. The relational view does not place wrongful losses at the core of corrective justice. In fact, wrongful losses are not part of corrective justice at all. Instead, the point of corrective justice is to rectify the wrong itself. According to this alternative view, corrective justice provides agent-relative reasons for action, since whoever harms another has the duty to compensate the victim in order to eliminate the effects that his incorrect actions produced in the world. This conception, in Coleman's opinion, has an important flaw, given that it relies on an implausible notion of what is required to rectify the wrong. Think in the case of the cab driver that in the way to the airport negligently injures me. As a consequence of the accident, I have to be hospitalized and I lose my flight. My bad luck, however, becomes an extraordinary fortune when I read on the papers that the plane I was supposed to catch crashes and no survivors are found. In a relevant sense, the cab driver's negligence saved my life. In this case, how are we to understand the cab driver's duty to secure that the world is just as it would be had his incorrect action never taken place? It is obvious that the duty does not consist in eliminating *all* the consequences of his incorrect action, but only the *unjust* ones. In leaving aside wrongful losses, the relational view is inacceptable[8].

[7] This was the objection raised by Stephen Perry, after which Coleman abandoned the annulment thesis. See PERRY 1992, 387 and 390.

[8] COLEMAN 1992a, 323-324.

Then, Coleman tries to preserve the most attractive aspects of each theory while discarding the problematic ones. From the annulment thesis he takes its concern for wrongful losses, that in turn reflects an interest for human well-being. From the relational view, he deems essential that corrective justice provides agent-relative reasons for action. In this way he reaches the mixed conception, according to which the point of corrective justice is to impose on injurers the obligation to repair the wrongful losses for which they are responsible[9].

Since *Risks and Wrongs*, Coleman has defended the mixed conception of corrective justice. Recently, he expressed serious doubts about it, and suggested a possible return to a version of the annulment thesis, probably a more developed one[10]. However, he has not published any detailed work yet that allows us to assess in depth his reasons for abandoning this conception or his new ideas on tort law. Therefore, in what follows I will focus on the mixed conception, which until today has a strong influence in tort law theory. In section 2, I will try to show that the mixed conception is subject to three important objections. My criticisms are mainly aimed at conceptual or explicative problems, but they also make reference to some normative/justificatory problems. Anyhow, it is clear that any conceptual problem the mixed conception might have, will have a bearing on its justificatory power. Then, in sections 3 and 4, I will present an alternative reconstruction based on a kind of relational view that, complemented by the distributive aspect of tort law that Coleman leaves aside, can overcome the problems of the mixed conception without losing the normative intuitions underlying this view.

9 COLEMAN 1992a, 324.
10 See COLEMAN 2010.

2. *Evaluating the mixed conception*

Any theorist familiarized with tort law would recognize that certain features are distinctive of the practice. First, tort law protects some kind of *primary* rights, whose violation triggers *secondary* obligations of repair. Second, these primary and secondary rights of the victims are correlative to primary and secondary duties of injurers. Thus, potential victims have a right not to suffer certain kinds of losses at the hands of injurers, and injurers have the duty not to cause them. Once the harm is done, however, victims have a right to recover from the injurer, and injurers have the obligation to provide compensation. For this reason it is claimed that there is a normative connection between victims and injurers, which is very special. The victim has the right to recover from the injurer (and from no one else) the amount of the harm suffered (no more, no less), and the injurer owes the victim (and to no one else) that same amount. Finally, the obligation to repair can be regulated by a fault liability rule or by a strict liability rule. Sometimes, we are liable for the losses we cause to others without fault on our side.

This list does not intend to exhaust the relevant features of the practice. Nevertheless, I think it fits a standard description of its central aspects, and that any plausible theory should be able to account for them. Let's see how the mixed conception accommodates these elements.

This conception of corrective justice interprets tort law in terms of two central concepts: wrongful losses and moral responsibility. Regarding wrongful losses, they result from the invasion of rights or the setback to mere legitimate interests by wrongful actions. Invasions of rights can be justified or not. This means that in order to consider that a loss is wrongful it is irrelevant whether the conduct that creates it is wrong or not. In contrast, the setback to legitimate interests only concerns corrective justice when it is the conse-

quence of a wrongful action[11]. Thus, the absence of fault prevents the victim from getting compensation for the losses related to her legitimate interests, but it does not prevent her to recover when her rights have been invaded. That is, the absence of fault does not always defeat liability. Things are different regarding agency-defeating excuses. The absence of agency works as a general exclusion of liability because without agency there cannot be *wrongful* losses, nor responsibility. Only moral agents can invade rights or perform wrongful actions. Natural phenomena like earthquakes, fires or floods, among others, produce severe losses, they bring about a significant detriment to the well-being of the victims, and nevertheless, they don't invade any one's rights. Part of the difference between *misfortune* and *injustice* lies in the role played by human agency in each of them[12].

As to moral responsibility, Coleman does not offer a complete account of it, as he acknowledges. He appeals to this intuitive notion to explain that the duty to repair wrongful losses is not grounded on the fact that they are the consequence of a wrongful action, but on the connection the injurer has with them. Wrongful losses that result from the exercise of his agency, his autonomy, are his responsibility; in an appropriate sense they belong to him, and that is why he has to repair them. According to Coleman, by exercising their autonomous agency individuals change the world, they make their mark on it. In a way, we come to understand individuals, and ourselves, through actions and the consequences they have on the world[13]. Tony Honoré advanced a similar idea when he claimed that what we do in the world determines our history, our identity and character; and the price of being

[11] COLEMAN 1992a, 331-332.
[12] COLEMAN 1992a, 334, and specially n. 4.
[13] COLEMAN 1992a, 326, also n. 10.

persons is responsibility[14]. Now it seems clear that to suppress responsibility is to eliminate authorship and, with that, personal identity; and the latter concept is basic to our self-understanding.

It is important to stress that the two elements of corrective justice are conceptually inseparable[15]. The very definition of "wrongful loss" presupposes the intervention of human agency. Therefore, wrongful losses are impossible without a particular individual being responsible for them. The mixed conception articulates the values of human well-being and individual responsibility establishing a particular way of addressing the problem of wrongful losses: the agent that is morally responsible for them has the obligation to repair. For this reason, corrective justice, just as it is defined by Coleman, explains the correlativity of the parties' rights and duties. The victim has a right to recover from the injurer because the loss that calls for redress belongs to the latter. The loss belongs to no one else, and the victim has no power to seek compensation from anyone else besides the injurer. In the same line of reasoning, the injurer ought to make good on the victims loss because this is the only way he can get back the loss that belongs to him.

In a nutshell, this is the normative core of the mixed conception. Let's see some possible objections to it.

2.1. *The normative basis of the mixed conception and the bilaterality criticism*

First of all, I want to argue that the mixed conception of corrective justice leaves tort law normatively unsupported, since one

[14] Honoré 1999, 29.

[15] For a different opinion, see WRIGHT 1992, 679-680; WEINRIB 1992, 446.

of the two conceivable versions of the argument is uninformative, and the other is vulnerable to the bilaterality objection.

How could the mixed conception deprive the practice of a solid normative foundation? In other conceptions of corrective justice, like the one defended by Weinrib, for example, corrective justice is a principle that honors the equality of individuals as self-determined moral agents[16]. For liberalism, self-determining agency seems to be the kind of value that can justify tort law. Likewise, in the case of the annulment thesis the morality of eliminating wrongful losses is rather obvious. After all, what else are we supposed to do with unjust losses but to eliminate them? In contrast, within the framework of the mixed conception, the moral value of imposing the obligation to repair wrongful losses on those who are morally responsible for them is not easy to grasp. One might think it is quite annoying to ask about the *moral* value of imposing the duty to repair on the person who is *morally* responsible for the loss. The answer seems so obvious that the question does not deserve to be asked. However, I think it is not obvious at all. Coleman's account of moral responsibility is not much more than mere authorship, understood in terms of what we cause in the world. Therefore, the question can be reformulated in a way that results interesting again: why morality (or justice) requires that losses are repaired by those who cause them (and not by other person or the State)?

Even from a conceptual point of view one might have reasons not to rely on the explanatory power of the mixed conception. Notice that the mixed conception can be seen as an excellent *description* of the practice, more than as an illuminating *analysis* of it. Once *wrongful losses* are defined as resulting from fault or the invasions of rights, and *re-*

[16] WEINRIB 1995, 81-83.

sponsibility is reduced to causation, no one would deny that tort law «imposes a duty to repair wrongful losses on those agents responsible for them»[17]. Basically, this is what tort law *does*, at least in its remedial aspect. So, the mixed conception cannot be an explicative analysis of the practice, because it merely offers a partial description of it. In a relevant sense – the objection goes – the mixed conception would be uninformative. That is, after studying the mixed conception, tort law theorists might still be interested in knowing something about the point of implementing an institutional scheme that imposes wrongful losses on the agents that caused them.

It is important to note that any analysis of a concept *C*, or a practice articulated around a set of concepts, like *C* and *K*, is carried out in terms of other concepts, like *P*, *J*, and *R*, that should be "more fundamental" than the former[18]. If *P*, *J*, and *R* were at the same level than *C* and *K*, we could not claim to have analyzed these concepts. At most, we would have offered a translation of them which does not lead us to a different description of the practice. But this would not be informative or, at least, it would be as informative as statements of synonymy. My argument against the mixed conception is that it stays on the same level than traditional theory or, at least, that its terms are too close to those used in the practice. It simply introduces the labels "wrongful loss", to refer to those that the agent causes with an incorrect action or by invading the victim's right, and "moral responsibility" to refer to causation. Beyond this, I don't see a deep conceptual analysis here, and precisely for this reason the question regarding the point of imposing on the injurer the obligation to repair the losses she causes remains

[17] COLEMAN 1992a, 329.

[18] JACKSON 1998, 28 and 44; see also SMITH 1995, 36 and 37.

open. Ultimately, it seems, the mixed conception itself is in need of an explanation.

Coleman can escape this problem by finding a *moral ground* for his conception of corrective justice. To that effect he can appeal to the values underlying the mixed conception. As we saw, corrective justice «reflects liberal values of equality, respect for persons and their well-being, as well as responsibility for the consequences of one's actions»[19]. All this is present in tort law, although does not determine its structure. Perhaps the way to show the practice in its best light is by drawing upon two ideas that have strong moral implications: responsible agency and human well-being. Corrective justice expresses these values. It imposes on injurers the obligation to repair the wrongful losses they cause in order to make them responsible for their actions, and to protect human well-being at the same time. Unfortunately, this is not enough, because the following question immediately comes to our minds: could these two ideals not be honored by mechanisms other than corrective justice, among other possibilities, with compensatory funds for victims and sanctions for injurers?

We should note that this line of answer makes the mixed conception vulnerable to the bilaterality objection that Coleman himself successfully advanced against economic analysis of law[20]. These two values can always be satisfied by the State implementing institutions other than tort law. But then, what explains tort law? Taking this into account, it should not be a surprise that, according to Coleman, corrective justice is *conditional*, in the sense that the social context defines whether this principle provides reasons for action or not. In a community in which all losses were compensated

[19] COLEMAN 1992a, 433.

[20] See COLEMAN 1988, 1250-1253. See also WEINRIB 1989, 506-509.

with public funds, corrective justice would lack of normative force. This means that the State can decide to implement institutions of corrective justice or of a different kind to deal with losses produced by human agency[21]. But this brings up two problems: (1) the bilateral structure of tort law is left unexplained. Why implement *this* institution and not another? (2) Doubts about the normative force of corrective justice persist, since it is hard to understand how corrective justice can be a *principle of justice* and, at the same time, an *optional* possibility for the State[22].

In short, according to one version of the argument, the mixed conception cannot constitute the moral basis of the practice because it provides little more than a description of it, which means that its justificatory power is null. On the other hand, according to another reading, if the moral bases are traced back to the values of human well-being and autonomy, we have just seen that they underdetermine the normative structure of tort law. Consequently, they cannot explain the bilateral (or private) character of the practice and, ultimately, that prevents considering that corrective justice can be a true *principle of justice*. It would be only one of the many available mechanisms (probably the most efficient) to implement the values underpinning the normative work that justifies the institution of tort law.

2.2. *Fault and strict liability*

Another question I would like to raise is whether the mixed conception of corrective justice can account for all strict liability cases that emerge in contemporary legal

[21] COLEMAN 1992a, 404.
[22] See ARNESON 1995, 34.

systems[23]. I would like to suggest that it is incapable of doing so[24]. The reason is simple: wrongful losses result from the invasion of rights or a setback to a legitimate interest produced by wrongful actions. Can there be a wrongful loss when a lawful but risky action or, if you like, a hazardous action, undermines the legitimate interests (not the rights) of the victim? At glance, it seems that corrective justice precludes this possibility. But strict liability is not conceptually tied to the invasion of rights[25], and that drives Coleman to interpret these cases as covered by the fault principle. According to Coleman, the key is to note that an agent can be at fault merely in virtue of engaging in an activity or for the manner in which she engages in it. Unusually dangerous activities are inherently faulty. This implies that someone is at fault by the mere fact of carrying out the activity, though no available precaution is

[23] Even though Coleman writes in the context of Common Law, I never took his theory to be parochial. Moreover, a parochial theory on the moral foundations of tort law would be to some extent disappointing. After all, there is no sign that the foundations of tort law in Common Law and Civil Law systems are different, since both impose the duty to repair certain losses qualified as wrongful or unjust to the person that caused them.

[24] For different reasons, other authors have also criticized the incapacity of the mixed conception to account for strict liability cases. See POSTEMA 1993, 880-881.

[25] In fact, many legal systems have general rules of strict liability for the risks or defects in the things one owns or the risky behavior one performs, like driving, for example. In these cases, claiming to have suffered a loss caused by the activity which is deemed to be risky, once the general requirements for recovery are met, is sufficient to receive compensation. The important point here is that it is not required that the loss results from the invasion of a right.

sufficient to reduce the risks involved to a diligent level[26].

The problem with this reconstruction is that it turns all lawful but risky actions into inherently faulty ones. This line of thought prevents us from accommodating two ideas that make perfect sense in our tort law systems: first, we recognize that there are dangerous activities that should not be prohibited or discouraged (or, at least, that there are no reasons to forbid). Research, development, and application of nuclear energy might be a case of this sort. The activity is lawful, not inherently faulty. However, and this is the second idea that seems *prima facie* reasonable, many times the State allows the undertaking of some ultra-hazardous activities considering that victims of accidents related with them will receive an adequate compensation for the losses they suffered. These activities are in general permitted or sometimes even encouraged, and in no sense it is deemed that those who engage in them carry out an inherently faulty action.

Also, the distinction between being at fault in virtue of engaging in an activity and being at fault in virtue of the way one engages in it should be called into question. According to this distinction, there are actions that are faulty because of the way they are performed; while others are faulty *whichever the way they are performed*. For example, driving in the downtown area might be a faulty action if the driver does not meet the standard of care required in the situation; in contrast, transportation of explosives is an inherently faulty action, and the agent is at fault merely for performing the action. In these cases, to engage in *that class* of actions constitutes negligence, surely because they are deemed extremely dangerous.

I think the argument is flawed because it assumes that there can be such things as *natural* descriptions of actions.

[26] See COLEMAN 1992a, 368-369.

In order to hold the distinction between fault in engaging in the activity and fault in the way in which ones engages the activity, the description of the conduct must never include the way in which the action is performed as a defining feature, and this is counterintuitive. The action of driving around the downtown area can be performed in a way that makes it negligent. Suppose a person drives in the downtown area at 110 mph, after drinking two glasses of wine. Probably, when describing her action, that is, when defining *what she is doing*, we would include the way in which she drives as an essential element of this conduct. We would say that the person is driving *negligently* in the downtown area. Driving in the downtown area is permitted; driving negligently in the downtown area is prohibited. The second action, the one that is legally relevant to impose sanctions to the agent, is not faulty *in virtue of the way it is performed*. In any case, it is as faulty as transporting explosives. In both cases, the agent is at fault in virtue of engaging the activity. Moreover, when claiming that a conduct like transporting explosives is inherently faulty we are implicitly assuming a specific way of performance. We would hardly deem that transporting explosives is a faulty conduct *per se*, without considering the quantity it is being transported. The true inherently faulty action is transporting explosives *in a quantity sufficient to cause serious losses to others*, and this description of the action obviously includes in its "nature" the way in which is performed.

My point is that there are not *actions*, on one side, and *ways of performing actions,* on the other. Even if it were possible to draw, this distinction would be irrelevant. Only descriptions that turn out to be appropriate in certain normative contexts and that allow us to characterize actions as *lawful* or *wrongful* are relevant. For example, an action is negligent if, and only if, it violates the relevant standard of care. So, given the rules of diligent driving, it might be correct in analytical terms to claim

that driving in the downtown area at a speed of 110 mph, after drinking two glasses of wine is inherently faulty, although it is uninformative: negligent conducts are always at fault. The same goes for the transportation of explosives. For this conduct to be faulty *per se*, it is necessary that the conduct is prohibited or that it can be subsumed in some general rule that defines negligence. If a norm establishes that conducts that create unusual or extraordinary levels of risks to the interests of others are negligent, then, transporting explosives in a sufficient amount would be a faulty conduct, and *necessarily wrongful*. For this reason, and here the modern private law theorists tend to coincide, it seems inadequate to analyze strict liability cases from the perspective of fault liability. Conducts regulated by strict liability are *inherently lawful*, but *risky*. Given the normative context, it would be a mistake to describe them as wrongful. Obviously, risky conducts can also be performed negligently. Thus, risks of transporting explosives, assuming this were a lawful conduct, increase substantially if the driver does not respect traffic signs. What is distinctive of strict liability is that the driver is under an obligation to compensate any loss that results from the inherent risks of the activity she performs, being irrelevant that she was not at fault. In general, public authorities take action against those who transport explosives in a wrongful manner to prevent their deeds; but this is not the case with those who perform the action complying with all the relevant standards of care, even if their activity increases the probability of harm to others.

In sum, if my argument is sound, Coleman cannot turn all cases of strict liability based on risk creation into cases of fault liability. This strategy would not account for the distinction between strict and fault liability, in the sense that strict liability regulates lawful activities, and fault liability is always imposed for wrongful actions. On the other hand, if he intends to preserve this distinction, his conception of wrongful losses prevents him from explaining cases of strict liability

based on risk creation in which the victim suffers a setback to his legitimate interests (not an invasion of her rights)[27].

2.3. *Primary rights and duties: the role of distributive justice*

Theories of corrective justice have been accused of misrepresenting the purpose of tort law, since they focus exclusively on its remedial aspect. Corrective justice, the criticism recalls, just enters into the picture when primary rights and duties of the parties are violated. Only when the victim suffers a wrongful loss, corrective justice demands rectification. But the intervention of corrective justice in tort law shows that the aspirations of the practice have not been fulfilled. The normatively ideal world, from the point of view of tort law, is the one in which no person is wrongfully harmed. This shows that, in normative terms, reparation is a secondary, or less important, goal of tort law. The most important aspect of the practice is preventive, not remedial. In particular, tort law establishes a set of primary rights and duties associated with harm prevention that, for conceptual reasons, cannot derive from the principle of corrective justice. If this is so, theories of corrective justice do not merely offer an *incomplete* explanation of the phenomena, but a deeply mistaken one: the most fundamental point of the practice is not to compensate victims for the loss they suffer; it is, instead, to regulate harm prevention[28].

[27] Among the defenders of corrective justice, Coleman is not the only one that has problems with strict liability. An even more serious case is Weinrib's, for whom strict liability is incompatible altogether with corrective justice.

[28] For a good presentation of this objection, see SHEINMAN 2003, 34-35, 41, 43-44, 47-48.

In *Risks and Wrongs*, Coleman might have led to this kind of objection. He expressly claims: «[t]ake away the damage remedy of liability for wrongful loss and tort law loses both its content and its point»[29]. By itself, this sentence seems to support the objection. But also in *Risks and Wrongs*, Coleman takes into account the regulatory aspect of tort law when he says that «corrective justice sustains norms that coordinate the expectations, understandings and behavior of members of the community. These conventions arise to give expression to a local understanding of reasonable risks taking behavior»[30]. Coleman's point, that has been emphasized in later works, is that informal conventions that grow around corrective justice give expression and content to the prohibition of imposing others unreasonable risks in a certain context. The fact that primary rights and duties have a conventional source leads him to claim that it is not possible to derive them from a general normative theory; therefore, failing to provide a theory of this kind cannot count as an objection against the explanation based on corrective justice[31].

As I see it, this line of criticism against corrective justice theories is not entirely convincing. It is true that, in general, corrective justice theories have neglected the place of primary rights and duties, focusing instead on the remedial aspect of tort law. But this does not mean that they have misrepresented the practice. Certainly, the regulation of the risks we can reasonably impose on others with our conduct is not a *distinctive* feature of tort law. Criminal law, administrative law, and even public policy regulations also set up standards

[29] COLEMAN 1992a, 431.

[30] COLEMAN 1992a, 437.

[31] See COLEMAN 1992a, 358; COLEMAN 2001, 34-35; COLEMAN 2010, 466.

that define the boundaries of reasonable conduct and protect the interests of persons against the interferences of others. The distinctive aspect of tort law, arguably, is *reparation* of losses, not its *prevention*. Any private law professor knows that the object of a course on torts is to study how the legal system deals with the losses produced by human agency in the community. The remedial aspect, from this point of view, is the central point of tort law. This thesis is also supported by the fact that judges almost never, and always after exercising their discretion, issue an injunction before the harm is caused in order to prevent it, but they invariably recognize the secondary right of the victim to receive compensation when the other legal requirements are met. This is sufficient to contest the idea that the central aspect of the practice is preventive instead of remedial. A different question is whether the reparation of a loss has the same moral value than its prevention, or whether the world in which the loss is repaired is normatively equivalent to that in which the loss never occurs. Of course, everyone would agree that a world free of harm is morally better than a world in which damages are paid. But this is hardly illuminating.

Despite of all, this criticism invites reflection on the role of primary rights and duties in the practice of tort law. Grasping their importance in the practice might contribute a great deal in understanding it. Like Coleman, I think it is not possible to provide a general theory of the content or the substance of primary rights and duties involved in tort law. I agree that in many cases the content of these rights and duties is determined by informal practices, but in many other cases, certainly, they are determined by formal practices, such as legislative action or judicial decisions. In any case, the content of these rights and duties depends on social facts, thus nothing can be claimed of their substance *a priori*. Of course, this does not imply that it is impossible to offer an analysis on the *kind* of rights and duties that our

conventions create. My thesis is that part of these primary rights and duties can be conceived as pertaining to the sphere of distributive justice, rather than to corrective justice. As it will be clear soon, noting the extent to which tort law is also a matter of distributive justice will allow us to solve the problems I pointed out in the mixed conception. The rest of the essay is devoted to this task.

3. *Distributive justice in tort law*

3.1 *Conventions and indemnity rights and duties*

What goes on in our formal and informal conventions? What kind of primary rights and duties are established by them? Let's begin with a hypothetical situation. Suppose Xenophon and Achilles are neighbors and their activities are partially incompatible. Xenophon breeds chickens and Achilles has ferocious guard dogs watching his property. From time to time it happens that Achilles' dogs kill some of Xenophon's chickens. In every occasion, Xenophon presents a claim against Achilles. Achilles sometimes accepts the claim, but other times he rejects it. Their disagreements are mainly related to the fact that it is not clear at all whether, in the circumstances, Achilles had the duty to tie his dogs or Xenophon should have kept his chickens locked in the henhouse. After some time and a lot of debate, a convention arises between the neighbors. Achilles is able to predict when Xenophon will present a claim, and Xenophon is able to predict when Achilles will be willing to make good on his losses. They both guide their conducts following the pattern established by this conventional rule. The convention they reached specifies a standard of reasonable care, the violation of which justifies the duty to repair (or the duty to bear the loss). The result is not odd at all, since

individuals usually coordinate themselves, spontaneously or by law, in order to solve the problems that emerge in the course of their interactions. In any case, in a stable society the final result will always be the creation of some rule that defines the rights and duties of the parties involved.

It is important to stress that before this rule is created, we cannot answer the question regarding what demands corrective justice in a particular case. Only once we know that Xenophon has a right that protects his chickens from being killed by Achilles' dogs, we can say that corrective justice imposes on Achilles the duty to compensate Xenophon's losses. This means that the rights and duties defined by the convention cannot be evaluated by corrective justice itself. But, what about distributive justice? In the case of Achilles and Xenophon, there are at least tree clear rules that might give content to their convention: (1) fault liability; (2) strict liability; (3) no liability. These three rules, as economic analysis of law showed more than half a century ago, have very different distributive effects[32]. Consequently, Xenophon will order his preferences as follows: (2) > (1) > (3); while Achilles will order his preferences as follows: (3) > (1) > (2). In a world of strict liability, Xenophon is better off than in a world of fault liability, and the latter is much better for him than a world with no liability. The opposite is true for Achilles.

Regardless of which rule is fair in this case, I am interested in pointing out a conceptual feature of the practice: liability rules distribute resources among the members of the community. Of course, the distributive aspect of tort law was not completely neglected in the literature[33]. Notwithstanding,

[32] See COASE 1960; CALABRESI and MELAMED 1972.

[33] See, among others, CANE 2001 and CANE 1996, 478-481; DAGAN 1999, 139-140, 147-150; LUCY 2007, 328-329; CALNAN 1997, 82, 92 and 98. Moreover, for a presentation about the many ways in which

it is not entirely clear what exactly is distributed by tort law. My idea is that tort law distributes what I shall call *indemnity rights and duties.* These are rights not to be harmed in certain ways, and correlative duties not to harm in those ways. Thus, under a fault liability rule, Xenophon has a right not to be harmed by Achilles' negligent, reckless or malicious actions, and Achilles has a duty not to harm Xenophon in any of those ways. A strict liability rule increases the protection received by Xenophon, since it grants him a right not to be harmed also by Achilles' merely risky activities, and imposes on Achilles a correlative duty not to harm in that way. The content of indemnity rights and duties is given by the set of rules that integrate tort law. Strict liability protects to a greater extent Xenophon's interests than fault liability. In turn, strict liability imposes a heavier burden on Achilles than fault liability. For that reason, their preferences on the liability rules aim at opposite directions[34].

3.2. *The distributive nature of indemnity rights and the corrective basis of compensatory duties in tort law*

Indemnity rights, as I understand them, are part of what Rawls called "primary goods", goods that «normally have a use whatever a person's rational plan of life». These include rights in general, liberties and opportunities, and income and wealth[35]. Obviously, whatever might be our individual project we will need certain protection against the interference

tort law is a matter of distributive justice, see KEREN-PAZ 2007.

[34] The exact content of each pair of indemnity rights and duties depends on the norms of each legal system. My point here is purely conceptual, not substantive.

[35] See RAWLS 1999, 54 and 79.

of others. A liberal State must secure a reasonable or fair share of primary goods, including indemnity rights. After that, the responsibility of the community ends and individual responsibility for the chosen plan of life begins. That is so in virtue of the *principle of division of responsibility*[36].

Many circumstances can weaken our responsibility for how our life results. Bad luck is an important factor. Natural catastrophes, such as fires or floods, can destroy everything we have worked for. The same is true about the interference of others. Were we protected against all these things, we would be able to say that we are fully responsible for how our life results. The less the protection we get, the less our responsibility for our misfortunes. The State, of course, can make a political judgment regarding the extent to which the effects of bad luck in persons' lives is to be neutralized, and it can decide not to neutralize bad luck at all, but it cannot fail to regulate the effects of wrongful interactions. A political community could hardly be built without regulating which harms we have to tolerate from others and which not. If the members of a society are to interact, relate to each other, and cooperate, it is essential for the State to establish the boundaries of individual freedom, in order to achieve a good balance with personal safety.

At this point the theory of indemnity rights must face a problem. If the purpose of indemnity rights is to secure some kind of autonomy space for individuals, what reasons do we have for doing it through tort law? Even worse, what reasons we have for doing it through compensation in general? Why could the State not protect the indemnity of persons through sanctions for injurers? Actually, this problem is twofold. The proper questions are: (1) do indemnity rights include a right to recover? If so, (2) why should compensa-

[36] See RAWLS 1982, 170; RIPSTEIN 2004, 1812.

tion be implemented through tort law and not, for example, through a system of social insurance?

Regarding the first question, indemnity rights, like any right, are a set of valid claims[37]. Which claims define the content of each right depends on a normative theory[38]. The content of indemnity rights could be given, among many others, by any of these alternatives: (a) any person who harms another shall be liable to imprisonment; (b) victims have the power to demand an adequate compensation in case they are harmed; (c) victims may demand an injunction to protect themselves against the interference of others that produce a setback to their legitimate interests; and so on. However, if indemnity rights are *primary goods*, and thus they must be useful for individuals to pursue their reasonable plans of life, we should discard that sanctions to injurers exhaust their content. Criminal sanctions could reinforce the protection to persons' resources, but could not constitute the only protection granted by the State. It seems that alternative (b), in some cases backed up by (c), is closer to what is required by the normative notion of "indemnity" that I am advancing here. In short, my thesis is that indemnity rights (rights not to be harmed), given the normative theory that defines their nature, necessarily include a right to recover once the harm is suffered. Only compensation keeps the victim in a constant level of resources that allows her to continue with her plan of life as if the interaction had never happened (at least in the ideal case)[39].

[37] Like Coleman, I think Feinberg's conception is appropriate. See FEINBERG 1970, 253.

[38] COLEMAN 1992a, 337-338.

[39] I cannot provide a complete account of the nature of indemnity rights here. For a more detailed explanation, see PAPAYANNIS 2010. However, I would like to point out that the relationship between in-

As to the second question, it is true that from the point of view of distributive justice there are no reasons to secure indemnity rights through tort law. The State might fulfill its duty to secure a reasonable level of indemnity by implementing a social system of compensation for the victims, and criminal sanctions for injurers. But if the State did that, it would not recognize the binding force of *justice between the parties* and, consequently, would not honor the principle of *division of responsibility*.

These principles require the implementation of institutions of corrective justice. As I understand corrective justice, its purpose is to rectify unjust interactions, and unjust interactions are those in which the parties' indemnity rights and duties are violated[40]. In ideal conditions, the principle of corrective justice would be accepted for free and equal persons to regulate their private interactions[41]. How does corrective justice regulate private interactions? Regardless of

demnity rights and the rest of the rights is complex. In effect, the content of the rest of the rights, such as property, is fixed among other things by whether they include a right to recover or not. The property right I have over my car, for example, depends in part of whether I have a right to recover when it is destroyed by *any conduct*, by *dangerous activities*, or by *negligence.* Each alternative provides a different degree of protection. This shows that the level of indemnity recognized by the State has a bearing on the value of the interest protected by other rights. In this sense, it could be said that indemnity rights are "second order primary goods", because their function is to increase the value of the rest of primary goods.

[40] These rights and duties are correlative. In this way, to say the Xenophon has a right not to be harmed by Achilles' negligence, implies that Achilles has a duty not to harm Xenophon with his negligent actions. There is no possible world in which someone's indemnity right is violated and no person has violated her duty not to harm.

[41] See BENSON 1992, specially section III.

the situation one enjoys in society, of how well one's life results, individuals would recognize that they must reciprocally respect their rights. Whatever the outcome of the distribution, it would grant each individual a distributive share, a set of primary goods that includes indemnity rights. In their private interactions, individuals ought not to use someone else's resources without consent[42]. That is, the principle prohibits the use of the rights of others to pursue one's own ends; for that reason, every interaction must respect indemnity rights. When an individual harms another does exactly what the principle condemns: he uses the victim's resources as a means to carry out his own plan of life. In Kantian terms, the harm constitutes an instrumentalization of the victim, whose rectification is required by private justice.

This scheme suggests that tort law is a very complex institution, since it fulfills different functions. First, it secures certain levels of indemnity by means of compensation, and so the State satisfies its duties of *distributive justice*. Second, it allows the realization of justice between the parties, and in that way it satisfies *corrective justice*. Finally, it honors the principle of *division of responsibility*, given that the State stays aside of individual's private transactions, and only offers its assistance to enforce the fair terms that regulate the interactions between particular persons.

3.3. *The connection between distributive justice and corrective justice in tort law*

The explanation I have offered is grounded on the idea that the practice of tort law admits two readings: one distributive, and the other rectificatory. In holding this institution

[42] See GORDLEY 1995, 138; RIPSTEIN 2004, 1833.

the State secures the indemnity rights of the parties. Liability rules in each community determine the content of indemnity rights and duties. Thus, every adjudicative process in which the victim seeks compensation for the loss she suffered contributes to the preservation of a system that fulfills an important distributive function. Does this make corrective justice a part of distributive justice? Certainly not! When someone suffers a loss from a wrongful interaction, in violation of her indemnity rights, there are reasons of distributive justice for the victim to receive compensation[43]. There is not a specific reason for the injurer to make good on the victim's loss. But imposing on him the obligation to repair satisfies at the same time corrective justice's demands. Tort law is one of many examples of institutional economy. The State avails itself of the effects of corrective justice to fulfill its duties of distributive justice. It just has to ensure that the imposition of the loss on the causal agent does not constitute an injustice from the distributive point of view.

To that purpose, it must be shown that the allocation that results of the normal operation of corrective justice, if this is a true principle of liberal justice, is not objectionable for distributive justice. In fact, how could it be? Any negative effect that the injurer must bear for the application of corrective justice is *his responsibility.* In any case, the violation

[43] After all, Coleman's annulment thesis seems to provide a powerful insight here. I must say that, despite all the criticism aimed at the annulment thesis, it always seemed to me a very interesting idea. Only after finishing my doctoral dissertation I realized the strong influence the annulment thesis had on my distributive reading of tort law. This led me to think that, when confronted by Perry's arguments, Coleman could have just said: «So what? The annulment thesis is plausible; hence, tort law must be about distributive justice!».

of his indemnity duties, even when his action creates a disproportionate loss, does not produce for him different results than a bad investment whose effects has to internalize. Distributive and corrective justice are part of a general theory of liberal justice. The effects of the operation of corrective justice can only be rejected at the price of rejecting the effects of *individual responsibility*.

My account could also be suspected of incurring in a vice of circularity. According to what I said, indemnity rights and duties are a matter of distributive justice. Therefore, the definition of what counts as a wrongful interaction belongs to the world of distribution. Only after this is defined, corrective justice can be applied. But, at the same time, the practice of securing indemnity rights and duties is carried out mainly by tort law, by individual adjudicative processes, which are supposedly a matter of corrective justice. This would imply that corrective justice contributes to the definition of the fair terms of interaction that then would fix the basis of rectification. How can corrective justice rectify the same that it contributes to define? Is my reasoning not fatally circular? Again, the answer is negative. First, we could hold a practice other than tort law, which secured indemnity rights and enforced indemnity duties. This shows that tort law is not necessary for defining the parties' indemnity spheres. However, a way in which the State can define these spheres is by making use of the ongoing rectificatory practice. Now, adjudication processes in tort law are complex. At least two things are clearly established: (1) that if someone has the obligation to compensate the victim, that person is the injurer (and no one else); (2) the conditions in which recovery should be granted. The clarification of the distributive/corrective aspects of the adjudication process depends on understanding this last point.

Imagine a case like the one of Xenophon and Achilles with the dogs and the chickens. If there was not regulation for it and

the case was presented to a judge, he would have to specify under which conditions compensation is required. He would have to define whether Achilles is free from liability or, on the contrary, whether he is responsible and in what way. Is he strictly liable or by fault? These decisions are based on purely distributive judgments, because they define the terms of interaction between them and secure a different degree of indemnity for each party. Once taken this decision, the judge would be able to order Achilles, for example, to pay damages for the loss he caused. Suppose that after these rules are defined, Telemachus and Persephone have a similar problem, and they also end up in front of a judge. For the judge, this is a much easier case than the first one, for he will simply apply the *already established* liability rule according to which Persephone has to pay damages to Telemachus. The second judge has not created a new distribution. He has simply rectified the wrongful interaction in light of the set of rules endorsed by the State. From the point of view of every individual adjudicative process, based on preexisting norms, the best reading of the practice is the rectificatory one. Compensation brings forth an allocative outcome between the parties, it moves resources from one to the other, but it does not alter the distribution of indemnity rights and duties at all. It does not modify the underlying distribution of rights. Therefore, it is purely corrective. It is private justice. Clearly, whenever the liability rules are completed, changed or revised by judges, they make distributive judgments (or, at least, judgments that can only be evaluated by distributive justice and not by corrective justice). Practices may change over time, so will the distribution of rights and duties. Corrective justice's contribution in the preservation of a scheme of indemnity rights and duties should not lead us to think that corrective justice is indistinguishable from distributive justice. Although this is an autonomous principle, the State can choose to "use" it, by *enforcing* or *failing to enforce* such principle, to maintain or change the current distribution of rights.

3.4. *The objections to the mixed conception revisited*

The most serious charge I made against the mixed conception is that it does not offer a normative foundation for tort law. As part of the same argument, I suggested that the problem is that the mixed conception does not offer a sufficiently deep *analysis* of the practice that might have explanatory power. The other two charges are less serious, but nevertheless important. I argued that the mixed conception is incapable of accounting for every case of strict liability, which is a growing feature in contemporary systems. Finally, I argued that even if reading Coleman as unconcerned with primary rights and duties is hardly charitable, it is clear that he does not think their definition in tort law is a matter of distributive justice. In fact, he never specifies what kind of justice is involved in their development. He has just claimed that within corrective justice practices certain conventions emerge that give content to these rights and duties, and that being local conventions it is impossible to offer a general normative theory from which we can derive the rights and duties present in tort law. My objection is that this content, even though it cannot be directly derived from a general normative theory, it can be evaluated in light of some theory of distributive justice (the most plausible or defensible we can think of). Local conventions are relevant because they give expression to the social cooperation schemes, and that allows us to evaluate whether the way in which indemnity rights and duties are distributed also reflects a reasonable framework for private interaction of free and equal persons. The conceptually relevant point is not that we can inquire in each practice about the justice of conventional rights and duties, but that every convention *defines* a set of indemnity rights and duties. Definition of rights is not a matter of corrective justice, since these are presupposed for its operation.

Therefore, they must be a matter of distributive justice[44].

In what follows, I will try to show (very briefly) how the theory I presented solves these problems in a consistent way with the values of human well-being and individual responsibility, that seem to inspire Coleman's mixed conception.

The theory of indemnity rights and duties explains tort law by showing the way in which a practice like the one described by the mixed conception can be understood in more fundamental moral terms. It shows the connection between an institution that imposes the duty to compensate certain losses on those who caused them, and the State's concern in securing a reasonable scheme of personal safety and liberty of action, on one hand, and implementing the demands of private justice, on the other. Establishing a scheme of indemnity rights and duties is a matter of distributive justice. The particular normative link between the victim and the injurer in tort law adjudication is a matter of corrective justice. At the same time, this theory shows how both principles expressed in tot law integrate a broader conception of liberal justice. In this sense, it is informative. Furthermore, for liberalism it might even offer a plausible justification of the practice.

In other words, the explanation reduces tort law discourse to the language of a moral and political practice. In this sense, indemnity rights and duties theory can account

[44] I tend to reject the idea that it might be simply a matter of morality in general. I think that the delimitation of personal indemnity against the actions of others – and, ultimately, of the terms that regulate interaction – is closely related to the constitution of a political community. Moreover, decisions adopted on this matter imply a balance between personal safety and liberty, as well as a judgment regarding the protection of the interests of different persons with different plans of life. These features of what is at stake in defining the liability rules suggest that the relevant kind of discourse is that of distributive justice, not plain morality.

for the salient features of tort law. Regarding primary rights and duties, the theory understands that tort law distributes indemnity rights and duties among individuals. These rights are of a special kind: rights not to be harmed in certain ways, and duties not to harm in those same manners. In this aspect my theory differs from others that locate the concept of right and liberties at the core of tort law[45]. Tort law is not a remedy for the invasion of rights in general, but for the invasion of indemnity rights and duties. Indemnity rights and duties are correlative. Consider the following propositions: (I) Xenophon has a right not to be harmed by Achilles' negligent (or dangerous) conducts; and (II) Achilles has a duty not to harm Xenophon with his negligent (or dangerous) conducts. Note now that the truth conditions of both propositions are identical. But even more important is that whenever Xenophon suffers a violation of his indemnity right, Achilles violates his indemnity duties, and when this happens all the requirements for recovery are met: (a) Xenophon suffers a loss; (b) the loss is caused by Achilles; and (c) Achilles actions pertain to the class of actions subject to liability by the law of torts (depending on the indemnity right affected or, what is the same, on the liability rule that regulates the case, Achilles would have performed a negligent or a risky action)[46].

Also, indemnity rights and duties theory explains secondary or compensatory rights and duties. Indemnity rights include, for normative reasons, a secondary right to recover.

[45] See, e.g., STEVENS 2007.

[46] For simplicity, I am not including in the analysis all doctrines that determine the obligation to repair, such as the so called *legal causation,* in the Civil Law tradition, or *proximate cause*, in Common Law systems. However, it is clear that all these instruments for restricting the scope of liability give content to indemnity rights and duties.

As I said before, a right not to be harmed that did not include a right to recover would not keep its holder's resources in a constant level to pursue a reasonable plan of life; in other words, it would not leave the person *unscathed*. This indemnity right, as a matter of distributive justice, has no specific correlative duty. It just implies that *someone* has the duty to compensate the harm suffered. When the State decides to correlate indemnity rights with obligation on the injurer, it satisfies its duties of distributive justice. Secondary compensatory duties, in turn, can only be explained as a matter of corrective justice. In ideal conditions, individuals would accept the principle of corrective justice to regulate their private interactions. Corrective justice demands the parties to respect their indemnity rights. When the victim's indemnity right is violated, the injurer has a duty to repair the loss. That is so because the violated right already includes a right to recover. It is a right to remain unscathed against the interference of others. If the agent is to respect the victim's right, he must leave her unscathed, and for that he must repair her loss.

As it can be seen, indemnity rights theory can account for the special link between the victim and the injurer in tort law adjudication. It can also account for the correlativity of primary and secondary rights and duties in tort law.

Finally, for reasons that should be obvious at this point, the theory can also explain fault liability and strict liability cases, and the distinction between these two forms of responsibility. Fault liability and strict liability are two ways of defining, following some criteria of justice, the parties' indemnity rights and duties. The distinction between them is that while fault liability assumes that the injurer has the duty to repair (and the victim the right to recover) just in case the action that causes the loss is in some sense wrongful or violates a relevant standard of care, strict liability does not require any breach of duty. Certain lawful actions, like those

conventionally deemed to be dangerous (typically, driving in the civil law countries or the use of efficient but risky technologies in production), might be subject to liability. This way of framing the problem shows that debates on whether liability in tort law is essentially strict or based on fault are deeply misleading. Tort law is neither organized by the notion of fault, nor by the idea of strict liability. Instead, the central concept is the violation of indemnity rights and duties and its rectification by the operation of corrective justice.

4. *Conclusion*

The mixed conception of corrective justice ultimately relies on two important ideas for liberalism: protection of human well-being and individual responsibility. As I tried to show, these values are incapable by themselves of explaining the bilateral structure of tort law. I think the indemnity rights and duties theory I have offered accommodates these values, because it is essentially a theory based on liberal discourse. The idea that tort law distributes and secures indemnity rights expresses a central concern for human well-being. Although it is not a direct concern, in the sense that it does not purport to ensure a constant level of individual well-being, securing rights not to be harmed is a way of seeing after that people dispose of the necessary resources to live a good life. Maybe, this is the only genuinely liberal way of promoting persons' well-being.

Likewise, tort law implements corrective justice. When it does, it honors the equality of the parties as autonomous moral agents. Individual responsibility is of a fundamental importance to the idea of autonomous agency. Corrective justice imposes on injurers the consequences of their actions, makes them bear the effects in the world of exercising their agency. At the same time, it frees victims from the

detrimental consequences of others' decisions and actions. In this sense, it secures a reasonable scheme of interaction in which each person lives according to the consequences of their choices.

These two values do not inspire my explanation of tort law. They do not constitute its ultimate ground, but for conceptual reasons are necessarily present. Thus, I hope to have shown how Coleman's intuitions can be preserved by a different theory that eludes the difficulties of his mixed conception of corrective justice.

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