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*A Compensatory Conception of Corrective Justice Revisited*

ABSTRACT:

For Jules Coleman's conception of corrective justice wrongfulness is what matter most. Corrective justice is about correcting the outcomes of actions performed in violation of our duties. In this essay I challenge this view. I argue that Coleman's impossibility to explain our canonical responses to cases of justified harms – harms caused by non-reproachable actions – evidences a fatal problem of his view. I succinctly show that an alternative conception of corrective justice which pivots around causation – a "Compensatory Conception" – does not encounter the kind of problems Coleman suggests and, therefore, should be preferred to Coleman's conception.

KEYWORDS:

Compensatory Justice, wrongfulness, justified harm, causation, responsible freedom, scope of liability

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1.

We were invited to submit a paper for the celebration of the 20<sup>th</sup> year anniversary of the publication of *Risks and Wrongs*<sup>1</sup>. *Risks and Wrongs* is a great book which obviously deserves close attention. At the time of its publication it was the most comprehensive book in the area of corrective justice and tort theory so far written, and it is probably so still now. Furthermore, *Risks and Wrongs* had the required amount of insight, intelligence, originality and knowledge as to become, as it did, into the classic of the field it itself contributed to create, more precisely, the philosophy of private law.

However, *Risks and Wrongs* did not crystalize the intellectual production of its author. *Risks and Wrongs* was not the final contribution offered by Jules Coleman to the field but only condensed the particular view he held of the subject matter at the time of its publication. Indeed, Jules Coleman continued to think and publish in the area covered by *Risks and Wrongs* introducing new ideas that sometimes complemented

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<sup>1</sup> COLEMAN 1992a.

and sometimes frontally challenged and negated what he had previously said always motivated and controlled by the overall aspiration to provide a better account of what was at stake.

The productivity of Jules Coleman poses an initial dilemma for contributions to this volume since we have to decide whether we should celebrate the anniversary of the book giving full consideration to the views thereby defended by its author or, rather, honor the author trying to highlight the contribution he has made to the field analyzing or, in my case, criticizing some of the author's central ideas. I have decided to do the latter. I will take issue with what I take to be the central conviction of Jules Coleman not only in *Risks and Wrongs* but throughout most its academic career, more precisely, that corrective justice is about correcting wrongs.

## 2.

In his seminal 1982 article, *Corrective Justice and Wrongful Gain*<sup>2</sup> Coleman argued that corrective justice consisted in and required, first and foremost, the rectification, annulment or neutralization of those wrongful losses and wrongful gains caused by wrongful actions.

The conception of corrective justice offered by Coleman in *Corrective Justice and Wrongful Gain* was very elegant and persuasive. It was a conception that rested in very few and plausible founding ideas. Indeed, the "Annulment Conception" of Corrective Justice, as he called it, was built out of the conjunction of the well-known principle of unjust enrichment with its mirror principle, more precisely, the principle of unjust loss"<sup>3</sup>.

<sup>2</sup> COLEMAN 1982, 421.

<sup>3</sup> *Ibidem*.

Undoubtedly, the “Annulment Conception” provided us something we all want out of a conception of corrective justice, more precisely, what Coleman called a “ground for recovery and grounds for liability”<sup>4</sup>, that is to say, arguments to, respectively, sustain, both, the claims of those that ask for compensation from specific others and the duties of those that were asked specifically by others to provide compensation.

Ten years later, in 1992, in *The Mixed Conception of Corrective Justice*<sup>5</sup> and later on in *Risks and Wrongs*, Coleman partially changed (or better to say, supplemented) his original view. He argued that the “Annulment Conception” was to some extent lacking because it failed to properly correlate the wrongful loss of the victim with the wrongful gain of the tortfeasor and thereby, it failed to properly explain a very essential aspect of both, corrective justice and tort law, more precisely, its agent-relative nature, that is, the ability of corrective justice and tort law to source reasons that only apply to some people – the tortfeasor and the victim of the harm – but not to others.

A plausible conception of corrective justice, according to Coleman, had to consist in, and provide, not only a “ground of recovery” and a “ground for liability” but also in a “mode of rectification”<sup>6</sup>, that is to say, an indication of the particular way in which compensation has to be effectuated. The “Annulment Conception” did say something in this regard – more precisely, that the rectification, annulment and repairment of the wrongful loss could not add itself a new wrongful gain or a wrongful loss. “It is always wrong to create a corrective injustice in order to rectify a wrongful loss if it is

<sup>4</sup> COLEMAN 1992a, 309.

<sup>5</sup> COLEMAN 1992b, 427.

<sup>6</sup> COLEMAN 2010, 18.

possible to correct a loss without doing so”<sup>7</sup> – but “this constraint (of) the set of possible modes of rectification”<sup>8</sup> was, according to Coleman, radically insufficient since it did not explain why, and if at all, the victim has to be compensated by and only by the tortfeasor.

Coleman provided an explanation for what he then saw as the misgivings of the “Annulment Conception”. Indeed, he claimed that the “Annulment Conception” was unduly concerned with the allocation of gain and losses – something that undoubtedly had captured law and economic academics’ interest – when a plausible conception of corrective justice had to focus not on the pair “gain/losses” but rather on the wrongs or wrongdoings that actually caused the loss – something of interest for lawyers and the like<sup>9</sup>.

Of course, Coleman was not at all disinterested with the pair “gain/losses”, after all corrective justice and tort law is pretty much about that too. But he emphasized that there is a deeper reason for duties in corrective justice to direct us to annul gains and losses, deeper than the mere fact that they happen to be gains and losses, and this was that their annulment is itself required by the norms that regulate the relationship that links the person that endured the loss to the person that, while procuring a gain, caused said loss.

Coleman’s two conceptions of corrective justice – the “Annulment Conception” and the “Mixed Conception” – were different in many other important aspects. For the “Annulment Conception”, for instance, the rectification of the loss was not necessarily a duty of the person responsible for it while for the “Mixed Conception” only the person responsible for the wrongful loss could be charged with the

<sup>7</sup> COLEMAN 1992a, 308.

<sup>8</sup> COLEMAN 1992a, 306.

<sup>9</sup> COLEMAN 2010.

duty of nullification and, thereby, the obligation to repair the wrongful loss.

However, beyond the differences pointed out above between the “Annulment Conception” and the “Mixed Conception”, and many more others that are not necessary to mention here, there is something that had remained intact all along Coleman’s academic life, more precisely, Coleman’s conviction that wrongness is the bedrock concept of torts and corrective justice.

Both the “Annulment” and the “Mixed Conceptions” assume that only those losses that are the causal consequences of actions that are somehow wrong should be the subject matter of corrective justice. “Only wrongful losses fall within the ambit of corrective justice” Coleman assertively claims<sup>10</sup>. “It is wrongful losses that must be annulled; and the threat of creating new ones that restricts the institutions we might develop for rectifying existing ones” he adds<sup>11</sup>.

Wrongfulness is obviously an important moral category. It explains and justifies many of our different moral attitudes. Indeed, having being victimized by your wrongs, for instance, entitles me to reproach and resent you for what you have done or, at least, to have a different moral reaction to the one you would expect me to have if I were benefited by your actions, or for that case, if I were harmed, but not wronged, by you.

However, I doubt that wrongfulness shall occupy the central role Coleman assigns to it in a conception of corrective justice and most of what I will say here is due to that conviction. In my view, some of our considered moral judgments, judgments we would want to make after due reflection, are rendered non-intelligible by a conception of corrective justice that puts wrongfulness in the pivotal role.

<sup>10</sup> COLEMAN 1992a, 306/329.

<sup>11</sup> COLEMAN 1992a, 306.

## 3.

In some occasions Coleman himself seems to unintentionally debase the strength of his conviction negating the role he assigns to wrongfulness in his more self-conscious moments. Indeed, in passing he claims, for instance, that he rejects “the view that from the point of view of corrective justice and tort law what matters most about wrongs is that they are wrongs” adding that in his “view (...) what matters most is their connection with loss”<sup>12</sup>. Now, this is debasing because if it were the case that wrongs are not intrinsically important but only because, if at all, they are connected with losses, then, losses should be the dominant moral element of the equation and, thereby, we should be prepared to assert, something Coleman will most likely resist, that the connection between *harmful* actions and losses is equally important than the connection between *wrongful* actions and losses.

However, we should not give too much importance to incidental words since, beyond what Coleman actually sometimes says, his view that wrongfulness matters most can be defended, as he certainly does, resorting to important argumentation.

Corrective justice does not operate in the void. Rather, it exists in a normative background inhabited by a complex set of norms and principles fixing what we have to do and what we have to avoid and, thereby, establishing the distribution of things of value. If so, it will be natural to see corrective justice with Coleman as remedial to the unauthorized alterations made to distributions. Corrective justice, according to this view, corrects wrongs made to rights to distributions or, for simplicity, wrongs to distributive rights.

Coleman endorses this idea. He claims that the “wrongfulness required by corrective justice, therefore, must consist in

<sup>12</sup> COLEMAN 2010.

departures from norms and rights that satisfy (...) [the] condition”<sup>13</sup> of being “worthy of protection against infringement by the action of others, even if they would not be protected against infringement by state action”<sup>14</sup>. Confirming that corrective justice corrects he claims that compensation in corrective justice “is a way of respecting the claims associated with rights ownership in the case of liability rule rights; it is a way of repairing wrongs in the case of property rule rights”<sup>15</sup>.

But, is the view that sees corrective justice as remedial of the current distribution of things we value correct? Is the violation to your distributive rights what explains entirely why you have to be compensated? Is it correct, then, to claim that corrective justice is a response to wrongs made to distributive rights?

Distributive rights do not seem to imply as a matter of meaning the right to be compensated for their violation<sup>16</sup>. For instance, think about property rights. You may have full ownership over your car but you cannot argue that compensation is due to you for harm suffered by your car when I, for instance, destroy it in order to prevent your attempt to run over me with your car. To be entitled to ask for compensation something additional to being the owner of the car is needed. Furthermore, ownership is an apococate way of referring to the compound of rights to possess, to use, to

<sup>13</sup> COLEMAN 1992a, 354.

<sup>14</sup> COLEMAN 1992a, 352.

<sup>15</sup> COLEMAN 1992a, 341-34. In some occasions Coleman seems to reject the idea that corrective justice is subservient to distributive justice. Thus, in *The Normative Structure of Tort Law*, Coleman claims “the first thing to note is that the domain of corrective justice is losses owing to human agency not losses whose normative significance depends on their relationship to distributive justice”. COLEMAN 2012.

<sup>16</sup> See, in general, ZIMMERMAN 1994, 426.

destroy, to prevent and to exclude other over things but neither the compound of rights ownership consists in nor each one of the compounded rights individually considered entails by itself the right to be paid for the harms suffered.

If compensation is not, logically speaking, part of the compound property or other distributive rights consists in, then the view that corrective justice is remedial and consists in a response to wrongs made to distributive rights cannot be explained just by reference to the meaning of rights.

But meaning, or “syntax” as Coleman puts it<sup>17</sup>, is not all. John Gardner<sup>18</sup> has offered a substantive normative argument that aim to show that the right to be compensated is certainly implied by our distributive rights. Gardner’s arguments, if true, could help Coleman to sustain the claim that corrective justice is a response to wrongs made to our distributive rights required by our distributive rights themselves.

Gardner has argued that when, for instance, we break a promise our general obligation to honor promises continues exerting pressure on us to do something as close as possible to perfect performance of the promised we uttered. This is so, Gardner claims, because the reasons that sustain the general obligation to honor our promises also sustain the obligation to mitigate the consequences of breaching our promises. “Those reasons not having been satisfied by performance of primary obligations, Gardner says, are still with us awaiting satisfaction and since they cannot be satisfied by performance of that obligation they call for satisfaction in some other way”<sup>19</sup>. Gardner calls this argument the “Continuity Thesis”. Coleman seems to subscribe this argument. Indeed, in *The Normative Structure of Tort Law* he argues that the “nearest best alternative to taking

<sup>17</sup> COLEMAN 1992a, 337.

<sup>18</sup> GARDNER 2011, 28.

<sup>19</sup> GARDNER 2011, 28.

the care necessary to avoid damaging” to the victim’s property is compensation and that “the failure to do what one has reasons or a duty to do (...) grounds a change in the content of what one must do in order to comply with reasons that already apply (...) [to us]”<sup>20</sup>.

If Gardner and Coleman are right and the obligation to compensate the harms caused by us “continues” from our obligation to honor and respect the distributive background rights the victim has, the idea that corrective justice is remedy to wrongs made to distributive wrongs will certainly gain momentum.

I am inclined to think that the “Continuity Thesis” is in general a plausible moral principle. However, I doubt that it can do the required job of showing that corrective justice is just a response to the failure to honor distributive rights.

Indeed, the “Continuity Thesis” does not prove that the obligation to pay compensation for harm continues from the distributive background rights we have – rights that, both, directly determine what we are entitled to possess, to use, to destroy, to prevent and to exclude and indirectly establish what others should do and avoid.

Therefore, it cannot help to sustain Coleman’s conviction, that is, that corrective justice is a remedial response to wrongness.

If I justifiably broke my promise to take my kids to the beach today, to use McCormick’s example Gardner labors, I may have reasons to do something tomorrow to alleviate the frustration that I may have caused to my kids today by breaking my promise. But my wife will also have reasons to do something equally or similarly remedial. This fact – my wife also having reasons to remedy the situation I created – shows, I think, that my new obligation (and my

<sup>20</sup> COLEMAN 2012, 34.

wife's) – to do something to alleviate the frustration of my kids – does not derive from the wrongness of my breaching my promise – if that were so my wife would not have any reason to remedy the frustration I caused since she didn't wrong anyone – but, rather and if at all, from the factual conditions my breaching has created, more precisely, the frustration of my kids.

But even if I am wrong here, and I happen to have an obligation to do something with my frustrated kids for being the one that today broke the promise to take them to the beach, as the “Continuity Thesis” maintains, this will not show that corrective justice is better explained as a remedy for the violation of distributive rights. Indeed, the “Continuity Thesis” does not say enough since it does say whether I have to apologize to my kids, take them to the beach on some other occasion or compensate them for not taking them to the beach today and, therefore, it cannot sufficiently connect the compensation corrective justice provides with the wrong that presumably grounded it.

#### 4.

Think about the famous USA case *Vincent v. Lake Erie Transportation Co*<sup>21</sup>. In *Vincent* the court imposed upon the defendant the duty to compensate the plaintiff for damages caused by the defendant's ship while docked to the plaintiff's dock to avoid an incoming sea storm. The docking of the ship was a perfectly justified action since the defendant had an all-things-considered reason to perform it. Furthermore, the court noted, correctly I would add, that it would have been wrong for the dock owner to undock the ship and

<sup>21</sup> 10 Minn. 456 124 NW 221 (1910).

that if the dock owner ventured to do so notwithstanding it would be appropriate to impose upon him the duty to compensate the damages the ship would have suffered by the incoming storm.

The decision in *Vincent* is already part of the canon of what most of us would regard as morally correct. This, it seems to me, is beyond doubt. *Vincent* though brings discomfort for those that, like Coleman, endorse the view that wrongfulness is at the core of corrective justice. *Vincent*, as I see it, is a case where compensation is due even when there is nothing wrong in the doer and nothing wrong in the action performed by the doer.

But, let's pause. We may be running to fast through what is otherwise a complex conclusion. Coleman could claim that *Vincent*, precisely because there is nothing wrong in the doer or in the action performed by the doer is not a case of corrective justice but, rather, an instance of unjust enrichment and, thereby, claim that the way in which *Vincent* was decided do not pose any problem for his views. This is a non-starter. In cases like *Vincent*, as Gardner claims for all cases of unjust enrichment, "correction is called for and the norm that regulates the correction is a norm of corrective justice"<sup>22</sup>.

Furthermore, Coleman could, as he does, challenge the assertion that in *Vincent* there is nothing wrong. Indeed, he argues that even when the docking of the ship was all things considered justified there was wrongness present in the case since the ship captain did infringe the dock owner's right. By "keeping the ship moored to the dock, Coleman argues, the ship's captain infringes the dock owner's right and commits, in that sense, a wrong"<sup>23</sup>.

<sup>22</sup> GARDNER 2011, 22.

<sup>23</sup> COLEMAN 1992a, 372.

This is the point to introduce some interesting subtleties Coleman offers us that I have been sidestepping so far. For Coleman wrongful losses are not only those losses caused by blameworthy actions or omissions – e.g. actions or omissions that were performed without the proper motivation or as a consequence of a defect in character in the doer<sup>24</sup>. Coleman, rightly, claims that in the domain of corrective justice fault is strict<sup>25</sup>. What defines wrongful losses then is not improper motivation or defect in character but, rather, a breach of duty.

According to Coleman there are two kinds of duties we could breach. First, duties to not unjustifiably or impermissible injure others' legitimate interests<sup>26</sup>. You violate this duty when, for instance, you incur into unfair business practices that impose losses upon someone – e.g. you cheat. Second, duties to neither violate nor infringe other's rights<sup>27</sup>. You violate a right when, for instance, you deprive someone of his property for not good reasons, while you infringe a right when, for instance, the deprivation of property you caused is done with reasons good enough to justify your doing – e.g. to save a much bigger loss.

The breach of the first kind of duties – duties to abstain from unfair practices that impose losses upon others – constitutes a “wrongdoing” in Coleman's words while the violation or the infringement of the second kind of duties a “wrong”; a “wrongful wrong” – if it is the case of a violation of a right – or a “justified wrong” if it is the case of an infringement<sup>28</sup>.

Let's go back to *Vincent*. Coleman uses the distinction between a “wrongful wrong” and a “justified wrong” to

<sup>24</sup> COLEMAN 1992a, 324.

<sup>25</sup> *Ibidem*.

<sup>26</sup> COLEMAN 1992a, 331.

<sup>27</sup> COLEMAN 1992a, 332.

<sup>28</sup> COLEMAN 1992a., 299 ff.

assert that, even when we may not see it at first sight, there is wrongness in cases like *Vincent*. He claims, again, that “by keeping the ship moored to the dock, the ship’s captain infringes the dock owner’s right and commits, in that sense, a wrong”<sup>29</sup> that is, a “justified wrong”.

I am not persuaded by Coleman’s argument. Indeed, in *Vincent* there is no all-things-considered reason for the ship captain to do otherwise than to dock the ship to the dock. Coleman shares this conviction and that is why he claims that the wrong of the case is a “justified wrong”. But, further, there is no reason whatsoever for the ship captain not to dock the ship. Indeed, as the Court suggested, it would be wrong for the dock owner to undock the ship (and, thereby, to prevent the ship from docking) which, if correlation holds here as I think it does, it necessarily entails that by docking the ship the ship owner did neither violate nor infringe any of the dock owner’s rights. There is certainly a loss in the case – the dock owner will be left with damages in his dock after the storm – but there is certainly not a wrong.

When we claim that there is a wrong we presuppose that somebody should have done something different than what she did, that an action shouldn’t have been performed because there is an all-things-considered reason or, at least, a *pro tanto* or defeasible reason against said action being performed. Since in *Vincent* there is neither of these two kinds of reasons the ship owner couldn’t do any wrong.

Furthermore, in *Vincent* not only no action shouldn’t have been performed but, given the background of the case, nothing shouldn’t have happened. Docking the ship was the only means to save the more valuable – the ship *vis a vis* the

<sup>29</sup> COLEMAN 1992a, 337.

dock – and, thereby, an absolutely necessary step to avoid undesired consequences all-things-considered.

If the ship owner should not have acted differently and the docking of the ship was a result we shouldn't avoid, how could we see that a wrong happened or that a right was infringed, as Coleman claims? Again, where is the “wrong” in this case? And if there is nothing wrong here, how could it be true that corrective justice and wrongness are intimately linked as Coleman thinks?

## 5.

Coleman has further ammunition to defend the view that wrongness is what matters most in the context of corrective justice. He claims that we should reconceive the distinction originally owed to Calabresi & Melamed<sup>30</sup> between property rules and liability rules. Instead of understanding property rules and liability rules as rules denoting rights differing in their content, as they are usually understood, Coleman suggests that we should see these rules as distinguishing rights for the conditions of their legitimate transfer<sup>31</sup>. So conceived, the rights granted by property rules would refer to rights which transference should respect the consent of the right holder while rights granted by a liability rule, instead, would refer to rights which transference should secure, not the holder's consent, but his compensation.

Based upon the distinction of Calabresi & Melamed so reconceived, Coleman suggests that what triggers compensation is, in cases of rights granted by property rules, the wrong of not securing consent before transference and, in

<sup>30</sup> CALABRESI, MELAMED 1972, 1089.

<sup>31</sup> COLEMAN 1992a, 338.

the case of rights granted by a liability rule, the wrong of not securing compensation (though Coleman does not say so explicitly we could be sure that the wrong he refers to is the failure to secure *ex-ante* compensation).

With this expedient at hand Coleman aims to link Corrective justice to “wrongness” more precisely to the wrong of failing to respect the different “conditions of legitimate transfer” of each of the rights of the victim<sup>32</sup>. In *Vincent* there is a wrong since the ship owner docked the ship without previously paying the loss inflicted. Does Coleman’s answer work?

I think it does not. Failing to secure compensation before the ship owner uses the dock for his own benefit could not be the wrong corrective justice responds to just because to secure compensation is precisely the remedy corrective justice requires and wrong and remedy cannot be the negation of one another.

Now, you could add a further distinction. You could say there is also a distinction between *ex-ante* and *ex-post* liability rights (a distinction Coleman does not but could make). You may argue then that corrective justice requires the remedy of *ex-post* compensation as a response to the wrong of failing to honor and respect *ex ante* liability rights.

In *Vincent* the dock owner cannot exclude the ship owner from docking the ship (the court suggested that it would be wrong for the dock owner to undock the ship). The prohibition to exclude the ship owner necessarily entails that the dock owner does not have the right to ask for *ex ante* compensation among other reasons because no wrong had yet occurred and, if correlation holds here as I think it does, said prohibition also entails that the ship owner does not

<sup>32</sup> *Idem*, p. 343.

have to pay compensation and that her failure to do so cannot constitute the wrong compensation responds to.

This is clear in a case like *Vincent* but even clearer in cases where the rights in question have very different bite like, for instance, the backpacker case Joel Feinberg popularized<sup>33</sup>.

Indeed, in *Vincent*, where the rights in question for both sides are property rights, we may think that not to pay in advance when it is quite certain that the ship owner will impose a loss on the dock owner, or not to offer to pay when for the circumstances of the case payment is not possible, is a wrong to the dock-owner. If the ship owner does not have the money to pay for the losses caused we may think proper to revise the conclusion expressed by the court in *Vincent* that the dock owner did not have the right to prevent the ship owner from docking the ship and if the dock owner could prevent the ship owner from docking the ship, the docking of the ship will be a violation or infringement of the dock owner's right (even when it may be a violation or infringement that cannot be prevented by the dock owner for lack of appropriate remedy). After all, as Coleman suggests, if you sit in a restaurant but "you are not prepared to purchase the meal you are not justify in eating it"<sup>34</sup>.

In the backpacker case, however, the backpacker inability to pay for the harms he causes the lodge owner by lodging himself in the cabin in order to escape secure death by the avalanche does not revive the property right of the owner of the cabin to exclude the backpacker. The owner of the cabin does not recuperate this right even when he may be willing to assume responsibility for the damages that the backpacker

<sup>33</sup> FEINBERG 1978.

<sup>34</sup> COLEMAN 1992a, 295.

may suffer if he is excluded by the owner from the cabin. Therefore, it will be of little or no avail Coleman's suggestion that in *Vincent* "rather than saying that the (...) [dock owner has] no power to exclude under conditions of necessity, we might say instead that the (...) [dock owner] has the power to exclude, but that (...) [she] may be responsible for the consequences of wrongfully exercising that power"<sup>35</sup>.

6.

Doesn't the practical function a conception of corrective justice is supposed to play impose that wrongness or something functionally equivalent to it should be an always present element?

Corrective justice is not aimed to explain the world as it is or as we see it. Its function, rather, is to provide incentives and deterrents to guide behavior. We want a conception of Corrective Justice because we need what we consider to be desirable and undesirable actions to be performed or avoided. Given the practical function of corrective justice it seems natural to see it as dependable from the concept of wrong since "wrong" is the standardized label we use to express our conviction that an action is undesirable and, as such, it shouldn't be performed.

Sometimes Coleman seems to suggest an argument of this sort. In the *Epilogue to Risks and Wrongs*<sup>36</sup>, for instance, Coleman affirms that "the paradigmatic tort is the one that most vividly captures and illuminates what it is that makes a tort a tort"<sup>37</sup> and, then he adds, that "the better view

<sup>35</sup> COLEMAN 1992a, 301.

<sup>36</sup> COLEMAN 2010.

<sup>37</sup> COLEMAN 2010.

[...] (of torts) is that insofar as torts are wrongs the paradigmatic tort is a trespass or a battery – an intentional tort”<sup>38</sup>.

Intentional torts could be the paradigm of the tort class – as opposed to, for instance, massive torts – if intention is the intentional element “that makes a tort a tort” and this will be the case if corrective justice were mostly concerned with what it should not be done or with that we want to deter the most, that is, with wrongs.

## 7.

But, is it possible to articulate a conception of corrective justice without wrongness at the pivotal role? Further, what could be the point of said conception? Does it encounter even more challenging problems than the mere inability to explain marginal cases like *Vincent*? Obviously, I cannot attempt here to give full response neither to these nor to other question of equal consequence but I cannot afford to sidestep them altogether since I need to show (or at least gesture) to you that there is an alternative conception to Coleman’s that explains what remains unexplainable to him – e.g. cases where there is nothing wrong and compensation nevertheless is due – but does not encounter the problems he suggests and, still, makes both moral and legal sense.

We know that the dock owner has to be compensated and that it is the ship owner, and only she, the one who has to pay compensation. The reason that grounds both aspects of this assertion – more precisely, that compensation is due and that it is due by the ship owner alone – is not, as Coleman would be inclined to say, that the ship owner and only him violated or infringed the dock owner’s right. The reason why in *Vin-*

<sup>38</sup> COLEMAN 2010.

cent the dock owner has to be compensated is because the ship owner, and only him, caused the dock owner's loss.

Pre-theoretically we are all convinced that causation matter. When A causes herself harm, either willingly or non-avertedly, we naturally conclude that there is a powerful reason for A and only for A to bear the harm caused since she caused it. Similarly, if A causes B's harm, either willingly or non-avertedly, we will take the fact she caused B's harm as a strong reason to sustain that A and only A has to bear B's harm.

Why is this so? J.J. Thomson has argued that causation matter because freedom "understood as the freedom to plan on action in the future for such ends as one chooses for oneself"<sup>39</sup> matters. We want A and only A to bear the harms caused by her because we are concerned with freedom. If A causes B's harm but we allocate to B the costs of the harms she suffered, B's freedom of action would be impaired. "A, Thomson says, is not entitled to disrupt B's planning to reverse an outcome wholly of his own planning which he now finds unsatisfactory"<sup>40</sup>.

Honoré has offered two additional reasons that aim to explain why "not only are actions and outcomes conventionally allocated to people but (why) we and others are entitled to insist that they should be allocated"<sup>41</sup>. First, in general we benefit from what we do. Therefore, we have to afford the cost of the outcomes of our harmful actions. If we accept responsibility for positive outcomes, as most of us would be inclined to do, consistency requires that we also accept responsibility for causing harm to others, even when the harmful outcomes of what we do is well beyond our control. Sec-

<sup>39</sup> THOMSON 1986, 199.

<sup>40</sup> THOMSON 1986, 201.

<sup>41</sup> HONORÉ 1988, 500.

only, if the outcomes of what we do were not attributed to us, our agency would be undermined to the point of leaving us without “history (...) identity and character”. “Human bodily movements and their mental accompaniments (...) are ascribed to authors” Honoré argues “and it is by virtue of these ascriptions that each of us has a history, an identity and a character”<sup>42</sup>. Who we are depends on a series of results that arise out of our actions, and outcome responsibility accounts for all of them. If our actions were not attributed to us, Honoré says, we would be just “half-persons”<sup>43</sup>.

The arguments offered by Thomson and Honoré are powerful but not powerful enough. Thomson’s argument is not sufficiently specific and Honoré’s are somehow incomplete.

Thomson suggests that causation matters because B’s freedom matters. However, in her view B’s freedom matters because it is freedom and not necessarily because its B’s. Consequently, there could be circumstances where freedom, not B’s or C’s freedom but freedom aggregated is maximized if causation is ignored. When the freedom of A together with the freedom of people like A, for instance, is expanded if A does not shoulder the costs of the harm she caused to B, Thomson would have to recommend that B’s harm be not shifted to A which, of course will undermine the idea that causation matters.

Honoré’s both arguments are specific; both are concerned specifically with the attribution of outcomes to the actions of A and B. However, his first argument is only contingently complete. Indeed, someone who does not benefit from the ascription of all the outcomes of his actions – imagine her balance in life is negative – may resist Honoré’s proposal, as the imaginary critic Honoré argues with in his article reminds us. His second argument is certainly very attractive but still incom-

<sup>42</sup> HONORÉ 1988.

<sup>43</sup> HONORÉ 1999, 67.

plete: we cannot ascribe outcomes to us if only because otherwise our history, identity and character will be obliterated. After all, if we have so far a negative balance in life we may very well welcome to be obliterated from our unhappy past.

Is it possible to complement Honoré's arguments? Certainly it is and I have tried to do it myself in a different article<sup>44</sup>. In order to surpass the challenged posed by the imaginary critic that reminds us of the incentives we may have to cut with our past, we could add to Honoré's scheme a further argument, more precisely, the assertion that outcomes should be ascribed to us not just because history, identity and character matter to us but also because they should matter. Leading a life where our actions impact our future – where we afford the cost and realize the benefits of what we do – is a better life than the one where what we attain in life remains insensitive to our doings. We care about causation then because we care and value “responsible freedom”.

8.

Even when the idea that causation, and not wrongness, is what matters most, for a conception of corrective justice, it has encountered strong academic resistance. Many lawyers and jurist believe that if we take causation as the bedrock for a conception of corrective justice difficult problems will arise that can only be resolved at the cost of reintroducing wrongfulness. Coleman, for instance, after analyzing some of these problems states “reliance on *wrongfulness* as a condition of justice and recovery once again puts the defense of strict liability in doubt”<sup>45</sup>.

<sup>44</sup> ROSENKRANTZ 1997, 147.

<sup>45</sup> COLEMAN 1992a, 277.

The nature of the problems that arguably causation cannot solve by itself is basically twofold. On the one hand, there are problems that flow from the theory of causation itself and, on the other, problems arising out of the theory of responsibility.

Perhaps in the simple cases I so far used the question of who caused what is easy to untangle. We can assert that the ship owner caused the dock owner's harm resting in our pre-theoretical knowledge without the need to resort to a theory of causation. But in most real cases singling out the cause of an event (or the outcomes of our actions) is something, the skeptics argue, that requires a pretty elaborated causal theory. But think, for instance, where A's, C's, D's, E's and F's causal contributions to the harm of B are all *sine qua non* – the harm would not have occurred without them – our pre-theoretical knowledge of causation would, most likely, not be enough to single out the cause of the harm. To progress in the ascription of outcomes to those involved in the case – and to make causal judgments – we need a theory of causation and it is just impossible, the skeptics say, to articulate a theory of causation without making normative judgments ultimately referring to what is that we have to do and what is what we have to avoid<sup>46</sup>. If this is so, the whole project of articulating corrective justice around causation alone will collapse because whether A caused B's harm, for instance, will be determined by whether A did something she should have avoided or whether she did not do something she should have done, precisely the idea that lies at the center of the conviction of corrective justice as a remedy for wrongs.

Since the theory of causation is the most raveled field of legal theory it will be just impossible to attempt to respond in full to the challenge I just described to above. However,

<sup>46</sup> PERRY 1992, 464.

the field could be leveled out, or even better, slightly inclined against skeptics like Coleman and all those that claim that a theory of causation is parasitic of and subservient to wrongfulness, showing that this idea, when duly considered, is just unintelligible.

Think again in the case where A's, C's, D's, E's and F's causal contributions to the harm of B are all *sine qua non*. The skeptics assert that to ascribe outcomes to any of the parties involved – and conversely to make final causal adjudications – we would need to use in the endeavor normative criteria – who wronged the victim, for instance – to be provided by norms setting our rights and obligations.

But this cannot be so: if to assert who causes what we have to rely on norms that determine who wronged whom as the skeptics argue, by transitivity, what we do – which is determined by what we cause – will also depend on these norms. Since this conclusion is ridiculous – what we do cannot depend on what we do not have to do – and what we do is undoubtedly determined by what we cause (unless you maintain the implausible idea that everything we do is to move our body) the idea of the skeptics that who causes what depends on norms determining who wronged who has to be rejected and, if so, the plausibility of the project of conceiving a conception of corrective justice where causation is what matters most could be reestablished.

The second problem, as I announced it above, is a problem that arises out of the theory of responsibility. Imagine that A and B compete fairly in the market – nobody cheats – but A is much more productive and cheaper than B to the extent that A sends B into bankruptcy. We all know that A is not responsible (in the sense that it has not to compensate) for B's harm. This conclusion could be easily sustained if A did not cause B's harm. I think this is the case. B's harm is not something that

fits a paradigmatic causal case<sup>47</sup>. However, let's assume *ex arguendo* that A is the cause of B's bankruptcy. If that were so, where causation matters more than wrongfulness, A would have to compensate B, something difficult to sustain.

To avoid the implausible conclusion that A has to compensate B, Coleman suggests that we use the "Right Thesis". For the "Right Thesis", to harm is "to violate or infringe a right"<sup>48</sup>. The right thesis, Coleman states, is a distinct theory, which establishes that "liability and recovery are for rights invaded, not for harms done". Since A neither violates nor infringes B's rights, she does not harm B and as a consequence thereof she cannot have the obligation to compensate B's. "Thus, the right thesis – Coleman concludes – can provide the needed defense of the theory of strict liability"<sup>49</sup>.

The "Right Thesis" is obviously a Trojan horse. If the partisan of causation accepts it, she is lost. The "Right Thesis" presupposes that compensation is morally due only when and if you violate someone's rights and, thereby, reintroduces the distinction between what we have to do and what we have to avoid as the basic element of a conception of corrective justice. If the "Right Thesis" is the only available means to sustain the conclusion that B should not be compensated by A, my conviction that corrective justice should dispose of wrongfulness would be in trouble. Is that the case?

<sup>47</sup> I have defended a conception of causation according to which the cause of a particular event is the *sine qua non* condition of said event that in the paradigmatic causal case this particular causal case is an instance thereof among all those *sin que non* conditions that are foreseeable and controllable for the agent is expected to be avoided. See ROSENKRANTZ 1997.

<sup>48</sup> COLEMAN 1992a, 281.

<sup>49</sup> COLEMAN 1992a, 282.

Let's go back to Thomson. As I said above, Thomson's view is that causality matter because freedom matters, not A's nor B's nor C's freedom, but freedom aggregated. Here, though, I want to consider another aspect of Thomson's view.

Thomson argues that sometimes it is incorrect to hold the causer of the harm liable – for instance when she was not at fault – not out of fairness to her but because there are “rule-utilitarian argument(s) issuing from our concern for freedom of action for all of us”<sup>50</sup>. Thus, she says, you could restate “Epstein's point – who is also a supporter of liability based upon causation alone – (...) as follows; in general B must pay the costs of any injury of A's which B causes – but that is not so where utility (...) [or freedom] is maximized by the adoption of a rule which relieves B of liability”<sup>51</sup>.

Thomson wants to show that it is possible to limit the scope of liability without jettisoning the idea that in the domain of corrective justice causation matter most. I suggested above that Thomson's view ultimately undermines the relevance of causation because causation would cease to determine who should compensate what whenever that is necessary to serve better the value of freedom. However, we could easily adopt Thomson's suggestion.

When our concern for causation stems from a concern, not for freedom but, for “responsible freedom” we could offer a principled way that explains why A's should not compensate B's for B's bankruptcy without undermining the importance of causation itself. We could claim that A should be liberated from compensating B because that is a *sine qua non* requirement for the existence of a practice or institution – in this case a free market – that could help us to create the conditions within which “responsible freedom” could be most likely maximized.

<sup>50</sup> See THOMSON 1986, 205.

<sup>51</sup> THOMSON 1986, 206.

The kind of rule utilitarian argument we are hereby using to restrict the scope within which compensation is due, inspired by the structure though not the substance of Thomson's idea, does not undermine causation as the guiding principle of liability and is not, as the "Right Thesis" suggested by Coleman is, parasitic on rights. What liberates A from B's demands here has nothing to do with A's rights to compete with B in the market or B's rights that A does not compete with her, but rather to something altogether different, more precisely, the conviction that it is better both for A's and B's "responsible freedom" – the value behind our appreciation of causation – that A be so liberated.

9.

In one of his most recent studies Coleman uncovers his most basic convictions and argues that he now sees corrective justice as a post-political social practice of responding to losses due to human agency that, therefore, does "not apply in the Nozickian Robinson Crusoe world"<sup>52</sup>. I, instead, see corrective justice as the most basic norms of moral behavior – even more basic than distributive justice – specifying what is expected from each one of us in our relations with each one of all the others which, as a consequence thereof, would have a hold on us even in the state of nature. These different starting points explain, I think, why we disagree and, more important than that, why we should not expect our disagreement to subdue unless either of our basic convictions proves to be wrong.

<sup>52</sup> COLEMAN 2012.

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