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Comment on Coleman: Corrective Justice†

STEPHEN R. PERRY*

I

In his paper *Tort Law and the Demands of Corrective Justice,* Professor Coleman puts forward a richer and more rigorously defended version of the theory of corrective justice that he has been developing for some years now in a series of well-known articles. He also discusses a number of other topics, including the proper understanding of the existing social institution of tort law. It is upon Coleman's theory of corrective justice that I wish to focus in this Article, but I would like to make some preliminary comments on the nature of tort law and one or two other issues whose scope extends beyond corrective justice as such. This is appropriate in light of the fact that it is neither easy nor desirable to separate completely a consideration of the normative principles of corrective justice from a discussion of how those principles are or should be incorporated into a particular social practice. It will also make clear that there is much that Coleman and I agree about and that our differences, when viewed within a somewhat larger framework, are narrower than might otherwise appear to be the case.

First of all, I agree with Coleman when he says that the principle of corrective justice cannot provide a full explanation of tort practice, at least if he means by this that that principle, however it is ultimately to be

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3. *Corrective Justice,* supra note 1, at 361 n.12, 364, 379.
understood, does not necessarily provide such an explanation. Coleman says that tort law is a mixture of markets and morals, that is, a mixture of grounds for decision that are drawn from both corrective justice and economics, and so far as contemporary American tort law is concerned, this is very probably true. I am less certain, however, that English and Commonwealth tort law has ever been significantly influenced by economic considerations. Prior to the second half of the twentieth century, the common law of torts arguably came close even in the United States to instantiating pure corrective justice. Coleman is making a normative, not just a descriptive, claim when he suggests that tort law can be based on more than one fundamental principle. This immediately places him at odds with Ernest Weinrib, another important contemporary corrective justice theorist. Weinrib not only develops an account of corrective justice but also insists, in accordance with the formalism that has become the hallmark of his legal theory, that tort law must embody corrective justice only; a hybrid tort regime would, he claims, be unavoidably incoherent.

There are, of course, certain practical constraints on the normative considerations that can be taken into account in a tort action. These are for the most part imposed by what Coleman has called the structure of tort law, a subject on which he has written very illuminatingly in a recent article of that name. The most important of these constraints is the bilateral, case-by-case nature of tort litigation: a plaintiff seeks compensation from a defendant who she alleges has caused her harm, and, with limited exceptions, no one else besides these two is granted standing in the matter. Coleman in effect concludes, in my view rightly, that while these structural constraints do indeed constrain they do not have the effect of inevitably banishing all normative considerations besides corrective justice from the domain of tort. In the present paper he makes the related point that while corrective justice constrains tort law in both its validating (i.e., claim-determining) and its compensating functions, it neither identifies tort as a uniquely suitable institution for pursuing corrective justice nor restricts it to that objective alone. Weinrib, on the other hand, maintains that there is a fundamental connection, one that runs deeper than the practical constraints just mentioned, between the form of corrective justice and the form of the institution of tort law. The upshot of this connection is, according to Weinrib, that corrective justice completely determines the

8. Corrective Justice, supra note 1, at 361 n.12.
institutional character of tort, thereby eliminating the possibility of hybrid regimes. The argument designed to establish the connection is complex, however, and cannot be considered here.

I am very much in sympathy with Coleman's views at a number of other points as well. His critical analysis of the general economic understanding of tort law is strong and insightful. His objections to the Calabresi-Melamed model of rights, which were first developed in a paper he co-authored with Jody Kraus, are also very forceful and, in my opinion, essentially correct. Coleman also offers valuable and illuminating discussions of methodology in tort theory, of the relationship between tort and property, and of the distinction between welfare-based and autonomy-based rights that I think point in each case toward the correct approach or solution to the problem being considered.

Before I discuss the account of corrective justice Coleman gives in the present paper, it will be helpful to summarize the three different ways in which he says the justifiability of an agent's conduct can relate to his victim's claim to repair. The first category of cases comprises those in which compensation is owed only if the loss the agent causes to the victim is the result of unjustifiable or unreasonable conduct. Injury arising from negligence would be an instance. The second category covers cases in which the agent's conduct is justifiable, but the victim is still entitled to claim compensation. In Coleman's example, Hal takes some of Carla's insulin in order to keep from falling into a coma. Hal's action is justifiable, but Carla is still entitled to reparation. I presume that Coleman would place the famous case of Vincent v. Lake Erie Transportation Co. into this category as well. The third category covers cases in which the agent's conduct is justifiable only if compensation is paid to the victim. In such


13. Id. at 376-77.

14. Id. at 375-76.

15. Id. at 355.

cases compensation is rendered not to rectify a wrong in any sense, but to make conduct permissible which constitutes a wrong in the absence of compensation. One important subcategory of this group of cases permits the infliction of risk or loss without the victim's consent because the victim is entitled only to compensation, never to forbearance. (Coleman occasionally calls such cases private takings, although he also applies that term to the third category as a whole.) Another subcategory comprises cases in which compensation is a surrogate for consent; these involve the ex post construction of a hypothetical contract.

Coleman says that the theory of strict liability groups all cases of justified recovery together in the second category. By strict liability, he means a libertarian theory of strict liability of the sort defended by Richard Epstein in his early articles. The economic analysis of tort law, on the other hand, sees all torts in terms of category three. Coleman himself thinks that tort law covers cases falling under all three categories, but that only the first two are a matter of corrective justice. The third category must, in his view, receive an economic interpretation.

II

Let me turn to Coleman's analysis of corrective justice itself. In his view, the principle of corrective justice "demands that wrongful (or unjust) gains and losses be rectified, eliminated, or annulled." As is well known from his earlier writings, Coleman distinguishes between the grounds of recovery and the grounds of liability in corrective justice. The former specify the reasons for providing someone with compensation for a loss, while the latter specify the reasons for imposing such costs on a particular person. Whether these coincide is a normative question, since the distinction itself is an analytic one that does no justificatory work. Coleman also draws a distinction between the grounds and the modes of recovery and liability. The mere fact that a victim is entitled to repair does not tell us what the appropriate mode of rectification is. Perhaps the injurer should, as tort law requires, make the victim whole, but perhaps not; it might be that the loss is best compensated by funds from a general insurance scheme, or should

19. Corrective Justice, supra note 1, at 357.
20. Id. at 351.
21. Id. at 351-52.
COMMENT ON COLEMAN

even be left on the victim. Similarly, simply to say that an injurer ought to pay damages does not tell us whether her liability should be directly to the victim, as in tort law, or whether she should be made to pay into a general fund of some kind. Finally, Coleman distinguishes between the grounds and the scope of recovery and liability. There are a number of different aspects to this distinction, but they do not figure prominently in Coleman's argument in the present paper and so need not be considered here.

Coleman thus maintains that tort law is one institutional method for giving effect to the principle of corrective justice, but not the only one. In earlier articles he said that the mode of rectification represented by tort law, in which injurers are required to bear their victims' losses, must be justified on grounds independent of corrective justice, such as considerations of deterrence and accident-cost avoidance. In the present paper he similarly states that economic efficiency and the theory of rational bargaining support existing tort practice.

What, according to Coleman, is a wrongful gain or loss? He does not tell us very much about wrongful gains, since "rectifying wrongful losses is at the heart of tort law in a way in which rectifying wrongful gains is not." A loss is wrongful in the corrective justice sense if it is the result either of a wrongful harming, which Coleman also refers to as an instance of wrongdoing, or of an invasion of a right. An invasion of a right he also calls a wrong. Losses are setbacks to interests, harmings are setbacks to legitimate interests, and harmings are wrongful when the injurer acts wrongfully or impermissibly. Rights may be invaded either wrongfully, in the sense just indicated, or innocently or permissibly. When the invasion is wrongful, it also constitutes a wrongful harming. Wrongful rights invasions are called rights violations, while innocent or permissible invasions are called, following Judith Jarvis Thomson, rights infringements. Coleman thus identifies two types of wrongful loss, one flowing from the injurer's wrongful conduct and the other from an invasion of the victim's rights. To some extent they overlap. Wrongful harmings, including rights violations, constitute the first of the three categories of cases identified earlier. So far as tort law is concerned, these are cases of fault liability. Rights infringements, that is, innocent or permissible invasions of rights, make up the

22. Id. at 352-54.
23. See, e.g., Coleman, Corrective Justice and Wrongful Gain, supra note 2, at 426-27.
25. Id. at 358.
26. Id. at 369.
28. Corrective Justice, supra note 1, at 369.
second of the three categories. In tort law these fall under the rubric of strict liability.

In the present paper, Coleman limits his defense of his conception of corrective justice to two elements. The first is the thesis that corrective justice requires that wrongful gains and losses must be annulled (the "annulment thesis"), and the second is a particular understanding of wrongfulness. He offers surprisingly little, however, in the way of direct argument for the annulment thesis, which is the core of his conception of corrective justice. Most of the substantive argument takes the form of a critique of an alternative conception which holds, according to Coleman's characterization, "that those who create unjust or wrongful losses have a duty to annul them and that, in order to be just, compensation must flow from particular injurers to their particular victims." Let me label this alternative conception, which Coleman says makes a particular mode of rectification part of the concept of corrective justice, alternative A.

The most important point to be noted about alternative A is that it regards corrective justice as giving rise to rights to repair and duties to pay damages that are correlative of one another, so that the victim's right would be held against her injurer and the injurer's duty would be owed to his victim. Coleman's conception of corrective justice, by contrast, clearly rejects such correlative. But this is not the only difference between the two conceptions. Alternative A requires that "compensation must flow from particular injurers to their particular victims," and this clearly yields a requirement in addition to correlative; it is one thing to say that an injurer has a duty corresponding to his victim's right, and quite another to say that payment actually has to come out of the injurer's pocket. It is this further requirement, henceforth to be referred to as "direct defendant payment," which permits Coleman to say that alternative A is committed to a particular mode of rectification. There is, however, no compelling reason why alternative A must insist that compensation be directly forthcoming from the injurer. Tort law itself does not demand that a defendant pay the plaintiff out of his own pocket. It is perfectly acceptable, for example, that an insurance company rather than the defendant pay the plaintiff's damages.

Interestingly, Coleman offers a generalized version of this same point as a criticism of alternative A. Even if corrective justice imposed correlative rights and duties of repair, this, he says,

29. Id. at 362; see also id. at 365-66.
30. In the final version of his paper, Coleman describes a number of other alternatives to the annulment thesis. Id. Those that are not just variations on alternative A do not figure in his argument, however.
31. Id. at 362.
32. See id. at 367-68.
would not establish that justice requires one and only one institutional mechanism for having that duty discharged and that right satisfied. . . . After all, the duty to make good another’s loss is a debt of repayment, and there are many debts of repayment that can be discharged by individuals other than the indebted party with no affront to justice.33

This is certainly true, and, as I have just noted, it holds of judgments in tort cases. Coleman is also correct to regard this fact about debts of repayment as an argument against alternative A, but that does not take him very far because there is another, more plausible alternative to Coleman’s own account of corrective justice. Let me refer to the conception of corrective justice that insists on correlativity between injurers’ duties to pay damages and victims’ rights to repair, but that rejects direct defendant payment, as alternative B. As I shall show, alternative B is immune not merely to the argument just considered but to all of Coleman’s other arguments against alternative A as well.

For example, in his critical comparison of his own conception of corrective justice with alternative A, the main argument that Coleman offers in favor of his account is that distinctions analogous to the one between the grounds and modes of recovery figure in both retributive and distributive justice, and that it would be odd if a similar distinction did not have a place in corrective justice.34 It is certainly true that many versions of retributive and distributive justice leave various institutional details open. As Coleman says, “[i]n general, we distinguish between the duties and rights that a principle of justice imposes and confers and the variety of institutional forms, both public and private, that are best suited to discharge the duties and to vindicate the rights.”35 This is fair enough, so far as it goes, but the argument it grounds against conceptions of corrective justice other than Coleman’s extends only to alternative A, not B, since B has little or nothing to say about institutional form. B is concerned simply with “the duties and rights that [corrective justice] imposes and confers.”36 We still have no reason to conclude that alternative B is superior to Coleman’s own conception of corrective justice, of course, but at least he cannot claim the field by default.

Coleman anticipates an objection that he thinks a proponent of alternative A would want to make to his argument based on retributive and distributive justice. It is that these are public principles of justice, whereas corrective justice is an aspect of private justice, or justice between the parties. Coleman’s reply to the objection is that “[t]he public/private distinction is not nearly so rigid as this response makes it out to be.”37 He goes on to

33. Id. at 368.
34. Id. at 366-67.
35. Id. at 366.
36. Id.
37. Id. at 367.
say that "[t]ort law is itself sometimes used as a private scheme by which public norms are enforced; regulation is often a public measure for reducing the incidence of private wrongs." These observations about tort law and regulation are no doubt true, but it is important to notice that there is more than one public/private distinction to be drawn: Coleman's reply to the objection looks to the fuzziness of the boundary between public and private law, whereas the objection itself is framed in terms of public and private justice. A tolerably clear distinction between public and private justice is in fact presupposed by Coleman's reply, since his point is that principles of either sort can figure in both public and private legal regimes. Furthermore, it seems quite plausible to think that there are reasonably distinct—although no doubt related—principles of private justice on the one hand, which would be valid even in a state of nature, and principles of public justice on the other, which pertain to matters of political morality. It is, of course, possible and perhaps inevitable that certain institutions of the state will find themselves enforcing principles of both types, whence the fuzziness of the public/private law distinction, but that is not relevant to the objection to which Coleman is responding. By replying to the proponent of alternative A in the way that he does, Coleman is guilty of the same sin of which he had accused her earlier, namely, confusing normative principles with their institutional embodiment.

Most of Coleman's arguments against alternative A are in fact aimed at direct defendant payment rather than correlativity, and at times he seems not to be distinguishing very clearly between the two. The one argument that he directs against correlativity as such is as follows. Alternative A can, according to Coleman, be strengthened by embedding it in an account of rights. Suppose we accept that your having a right that I not harm you means, inter alia, that I have a duty not to harm you. This is correlativity at the primary level, as Coleman labels it. On this account of corrective justice, though, "part of what it means for you to have such a right is that you have a variety of secondary rights as well," one such secondary right being "the right you have that I compensate you in the event that I violate your first-order right that I not harm you." To this second-order right of yours corresponds a second-order duty on my part to compensate you if I fail to discharge my duty at the primary level. Coleman's main response to this strengthened version of alternative A is to say that even if it were true that correlative of every right is some specifiable set of duties, "it hardly follows that the existence of certain primary rights entails . . . the particular

38. Id.
39. See id. at 365.
40. Id. at 367.
41. Id. (emphasis in original).
list of secondary rights . . . that includes the claim to repair." The manner in which rights protect interests is a matter not of logic but of substantive moral argument, and it is not obvious what principle could supply the missing normative link. It could not be the principle of corrective justice itself, since that would be circular, and there are no other likely candidates waiting in the wings.

A number of comments are in order here. First, this allegedly strengthened version of alternative A has not, contrary to Coleman's claim, been embedded in an account of rights, if what is meant by that is a general account of rights. Coleman has simply specified a particular formal structure of rights and duties for a particular normative problem, where that structure is compatible with more than one general account of rights. (Later I shall consider the question of what kind of theory of rights is held by Coleman himself.) Second, I think it is quite plausible to say that something like this structure of rights and duties does capture the form of corrective justice. Neil MacCormick, for one, has argued persuasively for a similar view, and accordingly I would accept that a normative structure like this characterizes alternative B as well as alternative A. Third, because it is clear that this structure is simply formal in character, of course it fails to provide us, in and of itself, with a substantive reason why we should accept it. Coleman is right about this, but he makes little attempt to discover whether a substantive argument of the appropriate sort could be made. He apparently feels that it is for a defender of alternative A to come up with her own argument, which would be fair enough were it not for the fact that he offers very little in the way of a positive argument for his preferred conception of corrective justice.

Why does Coleman apparently insist that it is for his opponents to make all the normative running, even to the extent of not providing a positive substantive argument for his own position? I think that the answer to this question has to do with the fact that alternative A carries yet more baggage, in addition to correlativity and the direct defendant payment requirement, than we have yet uncovered. Coleman states of alternatives to the annulment thesis that for them "it is not enough to hold that wrongful gains and losses be annulled." He is thus apparently assuming that alternative conceptions of corrective justice, including alternative A, must begin by accepting the annulment thesis itself, that is, the principle that wrongful gains and losses should be annulled. This is a requirement that clearly

42. Id. at 368.
44. Corrective Justice, supra note 1, at 365.
45. In earlier versions of his paper, Coleman stated this assumption in much more explicit terms.
differs from both correlativity and direct defendant payment, since it imports some kind of general social responsibility, the nature of which is not altogether clear, to see to it that something is done about wrongful gains and losses. As a conceptual matter, however, this is not a requirement that any conception of corrective justice is obliged to accept, and I shall further characterize alternative B as not accepting it. Corrective justice, according to alternative B, is concerned solely with the relationship between a victim and her injurer (or injurers), and hence the rights and duties it imposes do not at any point extend beyond the members of that group.46

It is plausible to think that the requirement that wrongful gains and losses should be annulled treats corrective justice as giving rise to agent-neutral reasons for action which therefore apply, at least initially, to everyone (although, as alternative A implicitly assumes, such reasons could no doubt be subsequently modified or channelled by collective political action), whereas alternative B regards corrective justice-type reasons as agent-relative only.47 On the agent-relative understanding, the duties of repair that fall, under conditions still to be specified, upon injurers are the only reasons for action that corrective justice generates. Corrective justice is, on this view, a principle of private, rather than public, morality (which is not to say that it is not properly enforceable by public institutions like courts).

I shall come in a moment to the implications of the requirement that wrongful gains and losses must be annulled for Coleman's own theory of corrective justice. The main point I want to make at this stage is that Coleman apparently regards the annulment requirement as specifying something like an irreducible minimum content for any conception of corrective justice, so that other theories will begin with what is in essence his account and simply add bits to it.48 If this is indeed Coleman's view, that might explain why he apparently thinks that it is for his opponents to make all the normative running. He is merely putting forward the core thesis which, because it is implicitly accepted by all corrective justice theorists, requires no defense, at least within that group. It is only the bold spirits who wish to venture beyond the core who must account for themselves. I do not accept that matters would be this simple even if Coleman were right that his account captures the irreducible minimum of corrective justice, since the addition of a principle can sometimes strengthen what might otherwise be

46. This is clearly the view of Ernest Weinrib. See, e.g., Weinrib, Understanding Tort Law, supra note 6.

47. This way of characterizing the difference between the conceptions of corrective justice discussed in the text was suggested by Joseph Raz. On the distinction between agent-neutral and agent-relative reasons for action, see D. Parfit, Reasons and Persons 143 (1984), and T. Nagel, The View from Nowhere 152-53 (1986).

an implausible or unappealing theory. As we have just seen, however, Coleman's account of corrective justice does not provide a core thesis of this sort, and alternative B, as I have characterized it, does not accept a general social requirement that wrongful gains and losses must be annulled. Coleman's view is more eccentric than he allows.

Coleman is of course right that it is no easy matter to come up with a substantive normative foundation for alternative A, and let me concede immediately that the same is true of alternative B. Even granting a general duty not to harm others which is correlative of a general right not to be harmed, it is by no means obvious why someone who breaches that duty should be liable to pay compensation to the victim rather than simply be subject, say, to punishment. I shall nonetheless attempt later in this Article to present at least the sketch of an argument that would support the existence of an agent-relative secondary duty to repair which arises for someone who, as a result of breaching a primary duty, causes harm to another person, where the secondary duty is correlative of a right on the part of the injured person to receive compensation.

The difficulties in coming up with a satisfactory normative argument to ground one's preferred conception of corrective justice are not all on one side, however. Once we set aside the idea that Coleman's conception is located on neutral and uncontested ground, he too must produce an appropriate substantive argument for his position, and, as I have already indicated, he does not proceed very far in that direction in the present paper. There is, however, one obvious possibility that suggests itself, and it deserves a brief mention. In an earlier article, Coleman said that corrective justice is a matter of justice because "it protects a distribution of wealth ... from distortion through unwarranted gains and losses. It does so by requiring annulment of both." One might think that the rationale for protecting a given distribution of resources and entitlements was that the original distribution was itself just and should for that reason be restored or maintained. But Coleman explicitly rejected this possibility, asserting instead that the function of corrective justice is to preserve prevailing distributions regardless of whether they are distributively just: "Corrective justice is an independent principle of justice precisely because it may be legitimately invoked to protect or reinstate distributions of holdings which would themselves fail the test of distributive justice." Coleman does not discuss the relationship between corrective and distributive justice in the present paper, but I shall suggest in a few moments that it would be problematic for him to continue

49. Coleman, Mental Abnormality, Personal Responsibility, and Tort Liability, supra note 2, at 123.
50. Coleman, Moral Theories of Torts: Their Scope and Limits: Part II, supra note 2, at 7; cf. Coleman, Mental Abnormality, Personal Responsibility, and Tort Liability, supra note 2, at 132 n.10.
to maintain that corrective justice, as he characterizes it, is indifferent to the distributive justice of the holdings and entitlements it works on.

It is noteworthy that at one time Coleman accepted that if an injurer's wrongful gain and a victim's wrongful loss were "correlative of" one another, to use his phrase, then corrective justice yielded correlative rights and duties of repair. The examples he gave were fraud and theft, where the injurer's gain simply is the victim's loss. But if the injurer's gain and the victim's loss were "logically distinct," to use another of Coleman's expressions, then any right to repair on the part of the victim would not be correlative of a duty to pay damages on the part of the injurer. This, he said, was true of instances of negligence, where whatever gain the injurer makes is just an ex ante saving, in the form of forgone precautions, that occurs independently of any subsequent loss. In a recent exchange with Ernest Weinrib, however, Coleman concedes, in response to a criticism by Weinrib, that wrongful gains and losses can be correlative of one another more often than he has previously acknowledged: he is now prepared to say that negligent imposition of risk itself constitutes a wrongful loss for the person at the receiving end, regardless of whether she has been physically injured, since her security has been diminished even in the absence of actual injury. Coleman would thus seem to be pushed by his own previous position toward recognizing more cases of correlative rights and duties, but in his response to Weinrib he instead takes a different line: regardless of whatever analytic connections hold between wrongful gains and losses, it does not follow that we cannot normatively distinguish recovery from liability. He does not, however, present the requisite normative argument in that paper, nor does he present it here.

III

One of the underlying difficulties with Coleman's defense of his account of corrective justice is that his general theory of rights has not been formulated sufficiently explicitly. In light of his discussion of welfare-
based and autonomy-based rights, it is plausible to assume that he accepts an interest theory of rights, and he also states that he rejects the view that "correlative of every right is some specifiable set of duties." Beyond that and the critique of Calabresi-Melamed, however, he does not give us a great deal to go on. The issue of greatest immediate concern is the relationship between rights and duties. It is possible to envisage duties with no corresponding rights, although it is not clear what ground there could be for them in a theory of corrective justice. But the idea that there could be rights with no corresponding duties does not seem to make sense. Let me therefore assume that when Coleman says that he does not accept that "correlative of every right is some specifiable set of duties" what he means is, not that there can be a right to which no duties correspond, but rather that while there will always be such duties they may simply not be specifiable. We may not be able, in other words, to enumerate at a given time all the duties that correspond to the right.

This analysis would be consistent with Joseph Raz's influential version of the interest theory of rights, which maintains that a person has a right if, inter alia, his interest or well-being is a sufficient reason to hold someone else to be under a duty. According to Raz, rights are grounds of duties in others, but even so there need not be a closed list of duties corresponding to the right. Raz calls this the dynamic aspect of rights. A right can be, according to this view, both a reason for judging a person to have a duty and a reason for imposing a duty on him. It may also be possible to know that a right exists without knowing exactly who is bound by duties based on it; Raz's example is the right to an education, which, it is to be assumed, every child possesses. His subsequent comments about who owes the duty are very pertinent to our present concerns:

This question involves principles of responsibility. It is part of the function of such principles to determine the order of responsibility of different persons to the right-holder. Does the primary responsibility rest with the parents, with the community stepping in only if they cannot or will not meet their obligations? Or does the primary responsibility rest with the community?

This general account of rights and, in particular, Raz's remarks about principles of responsibility, are of great assistance in helping us think clearly about corrective justice. Let me assume, to begin with, that a person who

55. Id. at 368.
57. J. Raz, supra note 56, at 172.
58. Id. at 184-85.
59. Id. at 185.
suffers a wrongful loss at the hands of another has a right to receive compensation; the interference with an interest of hers which the loss represents is sufficient reason for holding someone else to be under a duty to make good the loss.\(^\text{60}\) Let me suppose next that the primary responsibility in this regard rests with the injurer, who consequently has a duty to repair that is correlative of the victim's right. We would have, in effect, a conception of corrective justice like alternative \(B\). (I hasten to add that I do not suppose that I have provided the necessary substantive argument to demonstrate that the primary responsibility does rest with the injurer; I am assuming it for the sake of argument.) The fact that corrective justice, as I am at present conceiving it, places the primary responsibility for repair on the shoulders of the injurer does not mean that corrective justice demands a particular mode of rectification, namely, that the damages be forthcoming directly from the injurer's pocket. Quite apart from the possibility that a third party such as an insurer might pay, the dynamic quality of rights might mean that, depending on social circumstances, the right constitutes a ground for imposing additional duties on others so as to establish, say, a victim compensation scheme.\(^\text{61}\)

Coleman has in the past discussed victim compensation schemes in which victims are compensated out of general tax coffers, suggesting that they implicitly recognize his central distinction between the grounds and the modes of rectification.\(^\text{62}\) That is in a sense true, but if the primary responsibility does indeed rest with the injurer this fact is of little or no assistance to Coleman in demonstrating the superiority of his conception of corrective justice over alternative \(B\). All that such schemes show is that the rights of victims in corrective justice might also ground further duties, in Raz's sense of a secondary responsibility, on the part of someone other than the

\[\text{\textsuperscript{60}}\] This will obviously be true for some interests only.

\[\text{\textsuperscript{61}}\] So far as alternative \(B\) is concerned, the recognition of such additional duties would require a more careful formulation of the thesis that corrective justice gives rise to reasons for action for injurers only. There are a number of possibilities here, one of which is this. Considered purely as a principle of private morality, corrective justice does not generate reasons for action for anyone but injurers. The formal possibility of secondary responsibilities exists, but there is no normative basis for them. A normative basis for secondary responsibilities comes into being, however, when the state undertakes to enforce the private principle in public courts. The claim would be that the possibility of secondary responsibilities is normatively grounded not in corrective justice itself, but in whatever aspects of political morality authorize (or obligate) the state to take that action. Perhaps it is entitled (or even required) to ensure some measure of equality of outcome for persons who have rights under the principles it enforces. This would be consistent with the fact that the secondary responsibility in victim compensation schemes falls upon the state itself. It is also possible, of course, that such schemes cannot be justified as a matter of corrective justice at all, but only under the head of distributive justice. In that case the possibility of secondary responsibilities in corrective justice would remain a completely formal one.

\[\text{\textsuperscript{62}}\] See, e.g., Coleman, Mental Abnormality, Personal Responsibility, and Tort Liability, supra note 2, at 107; Coleman, The Morality of Strict Liability, supra note 2, at 264-65.
COMMENT ON COLEMAN

individual who breached the primary duty. It is also a noteworthy character-

istic of existing victim compensation schemes, such as those which compensate victims of crime, that the state takes over the victim's right to recover in tort from the criminal. Ordinarily this right is worthless, of course, which is exactly the social circumstance that justifies the recognition of the secondary responsibility. But the fact that state compensation is regarded as a second-best substitute for compensation paid by the criminal and not as a mode of rectification that is conceptually and normatively on a par with it demonstrates that these schemes implicitly recognize the criminal's duty to repair as having primacy.

Let me next suppose that a primary responsibility for making good wrongful losses rests with the state. (The reason for saying a primary responsibility rather than the primary responsibility will, I hope, become clear in a moment.) If the state had for some independent reason already set up a tort system, then that might also serve to discharge the responsibility we are now discussing to make good wrongful losses. On the other hand, the state could presumably decide to carry out this responsibility directly, in part or in whole, by instituting a no-fault insurance plan, a workers' compensation regime, a public health insurance program, or any of a number of other social insurance or welfare schemes. What is noteworthy about all of these schemes besides the tort system is that they do not distinguish between wrongful and nonwrongful losses, and in some of them the victim's loss might not even be the result of human agency. Furthermore, it is typical of such schemes that they do not provide what would be regarded by tort law as full compensation. This suggests that the primary responsibility that we are supposing rests with the state is a matter of distributive rather than corrective justice, and that any limitation of the losses that are capable of triggering the relevant principle to those Coleman labels wrongful might well be arbitrary. The victim's right to participate in the relevant distribution scheme is based on that interest of his which has been detrimentally affected by his injury, and the reason that this right grounds a duty on the part of the state has to do with the state's general responsibility to allocate resources to its citizens in accordance with some fair scheme of distribution designed to serve their interests and well-being.

It should now be clear why I spoke of a primary responsibility on the part of the state rather than the primary responsibility. For there is no reason why the primary responsibility of the injurer in corrective justice could not co-exist with the primary responsibility of the state in distributive justice. Even though the interest that grounds the victim's right is in each case the same, the rights are different because the reasons they ground

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63. As was remarked supra note 61, it may be that victim compensation schemes are not justifiable as a matter of corrective justice at all, but only in terms of distributive justice.
duties are different. In the case of corrective justice, the reason would have to do with the moral consequences that follow for an individual who has wrongfully injured another. (I emphasize once again that I have not spelled out the necessary argument here.) In the case of distributive justice, the reason would derive from the state’s general responsibilities with respect to resource allocation. The two principles could nonetheless interact in interesting ways. I said previously that the state might be able partially to discharge its responsibilities of distributive justice by setting up a tort system on independent, nondistributive grounds; as we can now see, those grounds could be the public enforcement of the private principle of corrective justice. But the state could only succeed in partially discharging its distributive responsibilities this way if the tort system in fact worked, that is, actually delivered compensation to those who had suffered wrongful losses. If the tort system began to break down due to, say, the regular occurrence of mass toxic torts of a kind that made it virtually impossible to establish causation in individual cases, then the state might have to step in with a more overtly distributive scheme such as a social insurance plan of some sort.

IV

I have not, as I say, purported to provide the necessary substantive foundation for a conception of corrective justice such as alternative B. We are nonetheless now in a position to see that a principle of corrective justice that recognized correlative rights and duties of repair is consistent with, and indeed could help to explain, certain institutions such as victim compensation schemes; we are not forced to conceive of such institutions in terms of Coleman’s annulment conception of corrective justice. Bearing that in mind, let us return to Coleman’s theory. If we assume that he does implicitly accept something like Raz’s interest theory of rights, then we can go on to ask who, in Coleman’s view, has the primary responsibility in corrective justice to repair wrongful losses: is it the injurer alone, all members of the community together, the state alone, or perhaps the injurer and state together?

It could not be the injurer alone who has the primary responsibility, because this would lead directly to something like the conception of corrective justice I have called alternative B. The idea that corrective justice demands the annulment of wrongful gains and losses presupposes, as we have seen, some kind of general social responsibility, and it is this which is most plausibly regarded as the primary responsibility within Coleman’s theory. If the annulment requirement gives rise to agent-neutral reasons for action, as was suggested earlier, then the responsibility in question would be initially shared by all persons. Presumably, though, a diffuse individual responsibility of that kind would pose a collective action problem, and so
would eventually be delegated to the state. It is also possible that the general social responsibility underlying the annulment requirement would only come into being with the state, so that the state's obligation was original rather than mandated; it would be a creature of political morality alone. But whatever the ultimate nature of the social responsibility we are considering turned out to be, it would clearly be for the state to decide whether and when there was justification for imposing on other persons a Razzian secondary responsibility that took the form of, say, a tort regime, or a compulsory, privately funded insurance plan.

If the primary responsibility to annul wrongful losses has come to rest with the state, then regardless of whether that responsibility is original or mandated, Coleman is best regarded, for reasons we have already considered, as talking not about corrective but about distributive justice.\(^4\) I note in passing that if this is right, then Coleman's theory as a whole seems to be inconsistent with his earlier claims that corrective justice is concerned with the preservation of the status quo regardless of whether it is distributively just. This difficulty cannot, of course, be evaded simply by calling the theory one of corrective rather than distributive justice. Furthermore, if Coleman's theory is really about distributive justice, then he must produce an argument showing that there is a distributive principle that singles out certain kinds of losses resulting from human agency as different in some morally significant respect from other kinds of losses, and hence as warranting the special treatment the theory accords them. It is possible that there is such a principle, although it seems more plausible to think that the fundamental moral category applicable here—that is, the category that cannot be further partitioned in a morally nonarbitrary way—is loss as such, or possibly even need.\(^5\)

One final possibility which must be considered is that Coleman sees the primary responsibility in what he calls corrective justice as resting jointly with the injurer and with the state. This will not do, however, because he must still give a reason why the victim's right to repair grounds these two

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64. In leaving open the question of whether the general social responsibility that underlies the annulment requirement is original or mandated, I am also leaving open the difficult question of whether distributive justice is ultimately a matter of private or political morality. The argument in the text makes no assumptions about how either question should be answered.

65. This is not quite accurate as it stands, but the necessary refinements do not affect the point being made in the text. The appropriate moral category would presumably not be loss or need as such, but loss or need that pertains to only a limited range of particularly significant or fundamental human interests. The issues that the point in the text raises have often been considered in the literature on no-fault compensation schemes. See, e.g., Trebilcock, Incentive Issues in the Design of "No-Fault" Compensation Systems, 39 U. TORONTO L.J. 19, 20-22 (1989) (discussing "horizontal equity"). It is not surprising that these issues should surface in that context, since many advocates of no-fault regard tort law as just a defective compensation system, that is, as a mechanism which is designed to implement a certain kind of distributive justice but which has shown itself to be unfair, inefficient, or both.
allegedly equivalent duties. If the reason has to do with the moral responsibility of the injurer, then the duties are not equivalent: the injurer has the primary responsibility, even though it is possible that circumstances might justify imposing a secondary responsibility on the state in the form of, say, a victim compensation scheme. If the reason has to do with the state's general responsibilities of resource allocation, then again the two duties are not equivalent: the primary responsibility rests with the state, even though the injurer might be pressed into service by having a secondary responsibility imposed upon him to contribute to a compensation plan funded by wrongdoers or something similar.  

Coleman does recognize that a claim on the part of an individual to recover for a loss might arise on the basis of other grounds besides corrective justice, mentioning considerations of benevolence and charity on the one hand and of utility and distributive justice on the other. But he has, I have argued, already introduced elements of distributive justice into what is ostensibly an account of corrective justice, and the result is a theory with diverging tendencies. If one focuses on the aspect of the theory that seems to place a primary responsibility for rectifying wrongful losses on all members of the community generally or on the state, then Coleman's conception of corrective justice is best understood as an account of the implications of distributive justice for certain losses that result from human agency. The divergent elements in the paper are noteworthy, however, because they introduce a discordant strain into the overall account which points instead toward a true conception of corrective justice, that is to say, toward something like alternative B. Let me explain why this is so.

The most significant divergent element is precisely Coleman's insistence that the losses which fall under the principle of corrective justice must be the result of human agency. This suggests a concern with individual moral responsibility, traditionally regarded as the province of corrective justice. That concern, which is underlined by Coleman's characterization of wrongful losses as losses that result either from rights invasions or wrongful conduct, points in the direction of correlative rights and duties of repair. This is because the responsibility in question, whether it is for invading a right or acting wrongfully, is that of a particular individual, namely the injurer. This tendency in Coleman's thought is reinforced by his argument that an objective standard of care provides the appropriate conception of wrongful conduct in cases involving negligence. Coleman says in defense of the objective standard that the wrongfulness that matters in corrective justice

67. Corrective Justice, supra note 1, at 371.
68. Id. at 371-72.
"is the shortcoming in the doing, not in the doer." At one point he takes this to mean that "[t]he central concern of the principle of corrective justice is the consequences of various sorts of doings, not the character or culpability of the doers." But we cannot simply focus on consequences as such, since that would fail to distinguish between losses wrongfully inflicted by human agency and losses that are the result of disease or accidents not involving others. We would be led back, in other words, to distributive justice. On the other hand, Coleman quite rightly says that while a wrongful loss must be the result of an agent's action the action need not be a blameworthy or culpable one. This seems correct, but it still does not tell us what exactly it is that gives rise to a shortcoming in a particular doing so as to bring it within the ambit of corrective justice.

Let me try to sketch an argument, building on Coleman's own, that will support his claims about the objective standard. This will also provide the previously promised outline of a justification for an agent-relative duty to repair on the part of injurers that is correlative of a right on the part of victims to receive compensation. Corrective justice deals with harmful interactions among persons. Those who causally contribute to a harmful interaction in a sufficiently proximate way have, simply for that reason, a special responsibility with respect to the outcome that other people do not have. While this responsibility is capable of affecting reasons for action, it does not by itself give rise to a duty to repair. Its existence nonetheless raises the possibility that from the point of view of private morality the most justifiable course is not to leave a given loss where it falls, but to shift it to someone who has this special responsibility because his conduct in contributing to the harm makes it morally more appropriate that he rather than the victim bear it. What exactly makes it "morally more appropriate" to shift a loss would have to be spelled out by the details of the theory of corrective justice, but Coleman is surely right in thinking that a designated loss-bearer need not have done anything blameworthy or culpable. The issue is a comparative one: who among the group comprised of the victim and those persons who have this special responsibility should most appropriately suffer the interference with interests that either the original loss or the payment of compensation necessarily entails? I see no way to make sense of the otherwise somewhat enigmatic saying "[t]he wrongfulness that matters is the shortcoming in the doing, not in the doer" except in terms such as these.

69. Id. at 370.
70. Id. (emphasis in original).
72. Corrective Justice, supra note 1, at 370.
I do not deny that as an inchoate theory of corrective justice this approach faces many difficulties on the path to maturity, but I nonetheless think that an argument along these lines both throws light on Coleman's discussion of the objective standard and also offers the most promising account of the moral foundations of corrective justice. The point I wish to emphasize for present purposes is that the direction in which the argument takes us is toward secondary rights to receive compensation that are correlative of agent-relative duties on the part of injurers to repair, that is, toward something like my preferred alternative B. This is because the thrust of the argument is to determine whether there is, among a certain restricted group of persons, an individual besides the victim who is morally obligated to relieve him of his loss. To the extent, then, that we ignore the strands of distributive justice in Coleman's discussion and concentrate on those that seem to be truly connected with corrective justice, the conception of corrective justice that ultimately emerges is very similar to the one I have called alternative B.

V

A comprehensive theory of what kind of "shortcomings in the doing" will give rise to a right to repair in corrective justice is beyond the scope of this Article, but I would like to make clear what I think is the correct approach to this problem through an assessment of Coleman's distinction between rights invasions and wrongful harmings. Coleman maintains that a loss is wrongful in the corrective justice sense when it is the result either of a violation or an infringement of a right (a rights invasion), or of a setback to a legitimate interest that has been brought about by wrongful conduct (a wrongful harming). In my view, there is no significant distinction to be drawn between rights invasions and wrongful harmings, since a claim to repair only ever arises if a primary right has previously been invaded. To show this I shall discuss in turn each of Coleman's two categories of cases in which wrongful losses can occur.

Let me begin with rights invasions. So far as rights infringements are concerned, Coleman seems simply to take over the approach of a libertarian strict liability theorist such as Richard Epstein. Coleman denies that this approach is sufficient to account for all claims to repair in corrective justice,
but he accepts that it accounts for at least some.\textsuperscript{74} He seems to agree with the strict liability theorist that property rights protect legitimate interests in order to ensure a sphere of autonomy for the rights-holder, and that they do this by imposing duties of strict liability on the rest of the world vis-à-vis the interest in question. One difficulty with this position is that Coleman nowhere makes clear why the boundaries of a person's sphere of autonomy have to be drawn in terms of strict liability. Fault-based liability regimes can also be conceived as protecting autonomy,\textsuperscript{75} even if this is not how fault fits into Coleman's own account of corrective justice.

There is a more serious difficulty with theories of strict liability of this kind, however, which is that they typically assume that causing harm is sufficient to ground prima facie liability or, in rights-based versions, that causing harm by interfering with the interest the right protects constitutes an invasion of the right.\textsuperscript{76} But causation alone is not capable of providing a sufficiently determinate basis for grounding liability or ascertaining when a right has been invaded. This is because causation is best understood in terms of either strong or weak necessity (the but-for test and Richard Wright's NESS test,\textsuperscript{77} respectively), and regardless of which of these approaches is adopted, actions of both parties to a harmful interaction will in general be labelled as causes of the harm: causation by itself is incapable of picking out one party or the other as an appropriate loss-bearer.\textsuperscript{78}

Consider, for example, Epstein's early work on torts, in which he attempted to develop a theory of general strict liability based on causation alone.\textsuperscript{79} As

\textsuperscript{74} Corrective Justice, supra note 1, 356-57, 378-79.

\textsuperscript{75} Cf. Weinrib, Toward a Moral Theory of Negligence Law, 2 LAW & PHIL. 37, 60-61 (1983).

\textsuperscript{76} Coleman distinguishes three versions of the theory of strict liability, which respectively hold that prima facie liability is based on (1) causing loss, (2) causing harm, and (3) invading a right. Corrective Justice, supra note 1, at 350. In an earlier article, Coleman interprets Epstein as having moved in his work on tort from something like version 1 or 2 to version 3. Coleman, Moral Theories of Torts: Their Scope and Limits: Part II, supra note 2, at 31-32. It is clear that Coleman's own limited adoption of strict liability is of version 3 as well.

\textsuperscript{77} According to the NESS (Necessary Element of a Sufficient Set) test, \(A\) is a cause of \(B\) if \(A\) is a necessary element in a set of conditions that together are jointly sufficient to bring about \(B\). See Wright, Causation in Tort Law, 73 CALIF. L. REV. 1737 (1985); Wright, The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics, 63 COLUM. L. REV. 533 (1987); Wright, Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts, 73 IOWA L. REV. 1001 (1988).

\textsuperscript{78} I develop this argument at greater length in Perry, The Impossibility of General Strict Liability, 2 CAN. J.L. & JURISPRUDENCE 147, 154-59 (1988). See also Perry, The Moral Foundations of Tort Law, supra note 73. As I note in both articles, a similar point was made by Ronald Coase in his classic discussion of the economic problem of externalities. See Coase, The Problem of Social Cost, 3 J.L. & ECON. 1, 13 (1960). The argument also receives support from Richard Wright's recent sophisticated work on causation in tort law, supra note 77, although as mentioned in the text, the argument works for accounts of causation based on strong as well as on weak necessity.

\textsuperscript{79} See supra note 18.
a number of commentators have pointed out, the account of causation embedded in the theory incorporates hidden presuppositions about moral responsibility.\textsuperscript{80} It implicitly assesses the moral significance of the conduct of each of the interacting parties that causally contributed to the injury suffered by one of them. Such an assessment is necessary, I claim, in order to overcome the indeterminacy of result to which reliance on causation alone would lead. A smuggling-in of normative elements is especially obvious with respect to Epstein's so-called paradigm of dangerous conditions, but it also occurs at many other points in his account of causation.

Coleman's version of strict liability treats a rights invasion, rather than the mere fact of causing harm, as the basis of recoverability, but this does not avoid the problem just described. It simply pushes it back a step. Causation of harm, in the sense of occasioning a setback to the interest that the right protects, will remain the criterion for determining when a right has been invaded; otherwise, it would no longer be clear that the duty of repair arising out of rights infringements could properly be characterized in terms of strict liability.\textsuperscript{81} It is possible that Coleman thinks that causing harm to a legitimate interest does not by itself constitute the invasion of a right protecting the interest, assuming there is such a right, and that causation and some further, as yet unstated, factor together serve as necessary and jointly sufficient conditions of liability. If so, however, the onus is on him to state what that factor is, defend its role in a theory of corrective justice, and show that it does not carry with it a hidden requirement of fault. As will become clear in a moment, I think that what Coleman calls rights invasions do involve such a further factor, but the result is a standard of liability that cannot be characterized as strict.

The solution to the difficulty that has been described is to recognize that an adequate theory of corrective justice must always take the injurer's conduct into account in determining when primary rights have been invaded, and hence when secondary rights to repair arise.\textsuperscript{82} It is not sufficient, as Coleman seems to assume, to specify a particular interest as being protected by a right and then regard all interferences with the interest, as determined by the concept of causation, as constituting invasions of the right. On a Razzian view of rights, we need a sufficient reason, beyond the existence


\textsuperscript{81} Coleman says that for all versions of the theory of strict liability "the causal condition," rather than fault, is "the essential element of liability and recovery." \textit{Corrective Justice}, supra note 1, at 350. In earlier versions of the paper, he stated more explicitly that causation provides the appropriate theory of when a right has been invaded.

\textsuperscript{82} In fact, as suggested earlier in the text, it will also be necessary to take account of the victim's conduct, but I shall ignore that further complication here.
of the protected interest itself, to be able to say that the right grounds a particular duty. In corrective justice this reason will always be found in the moral implications of some specific aspect of the injurer's conduct toward the victim, so that the injurer will not have an absolute duty to make good any loss whatsoever that another has suffered as a result of his actions. A duty to repair will only be owed when the injurer has, in causing harm, behaved in a way that is morally significant so far as the comparative inquiry that was described in the previous section is concerned. This is the further factor required for liability that was mentioned earlier.

Consider Coleman's example of Hal justifiably taking a portion of Carla's insulin in order to keep from falling into a coma. What is morally most significant about this interaction is not the fact that Hal played a causal role of some kind, the details of which we can safely ignore, in the depletion of Carla's insulin supply. What matters is that Hal deliberately took some of her insulin for his own use. Coleman says that he was justified in taking it, and hence classifies this case as a rights infringement rather than as a rights violation. But we should be careful with the words "justified" and "justification," which have a number of different meanings. Hal's action was indeed justified, in the sense that it was humanly understandable and neither blameworthy nor culpable. At the same time, however, it constituted a "shortcoming in the doing," to borrow the phrase that Coleman uses in his discussion of the objective standard of care; Hal intentionally and without consent took someone else's property for his personal use. This is the aspect of his behavior that the comparative inquiry would find gives rise to a duty to repair. Moreover, even though there is a clear sense in which Hal's conduct was justified, there is nonetheless something like fault here, and it is that fault-like aspect of his actions which makes him the morally preferable bearer of the loss. The determination that he has invaded a primary right of Carla's depends not only on his having interfered with her property interest, but also on the fact that he did so intentionally.

83. Corrective Justice, supra note 1, at 355.
84. Id. at 370.
85. Determining the precise content of the primary right in necessity cases like this gives rise to difficult questions that I am not able to answer completely satisfactorily. Is Carla's right simply that her property interest not be intentionally interfered with? That would suggest that Hal acted in a way that he should not have in taking the insulin, which does not seem correct. Perhaps the content of the primary right involves something more than the specification of an interest and a mode of invasive conduct. One possibility is that, contrary to what Coleman himself suggests in the present paper, there are primary rights in corrective justice that have the general structure of the third of his three categories of ways in which the justifiability of an agent's conduct can relate to a victim's claim to repair. The result would be something like this: Carla has a primary right that Hal not intentionally take her property when in a necessitous state without paying her compensation afterwards. (Obviously this would not be the only primary right that Carla had with respect to her property.) A complicating factor here is that the secondary right to repair would not be triggered by a breach of the
Let me conclude this discussion of Coleman's understanding of a rights invasion with the following observation about the positive law. Wherever strict liability is said to have a hold in the common law of torts, it is never general strict liability, by which I mean liability simply for causing harm, that is in question. There is always incorporated into the relevant doctrine a criterion of liability that focuses on some more specific aspect of the defendant's conduct. Consider the rule in *Rylands v. Fletcher,* for example, which looks to whether the defendant kept something on his land that would be dangerous if it escaped. Or think of strict product liability, which requires not only that the defendant's product caused harm to the plaintiff, but also that the harm came about through a defect that the defendant was responsible for introducing into the product. That the positive law singles out in this way some relatively specific aspect of the defendant's conduct as a criterion of liability should not be surprising if a theory of strict liability based solely on causation does, as I claim, lead to serious indeterminacy. I would also argue that these doctrines bear a resemblance to Coleman's resolution of the Hal and Carla hypothetical (as well as to the common law's own resolution of essentially the same problem) in that they always single out as a criterion of liability conduct which is fault-like, if not actually faulty. I shall not try to establish that conclusion here, however, except to note that other writers have argued that some or all of the supposed instances of strict liability in modern law, such as the rule in *Rylands v. Fletcher,* the ultrahazardous activities rule, and strict product liability, are best understood as relying on conceptions of fault.

This brings us to wrongful harmings, Coleman's second category of corrective justice cases. Coleman maintains that if $X,$ as a result of acting wrongfully or impermissibly, sets back a legitimate interest of $Y$'s, then $Y$ has a claim to repair even if $X$ did not invade one of $Y$'s primary rights in corrective justice. The question that naturally arises here is this: what primary duty; neither the primary nor the secondary duty would be violated unless Hal failed to compensate Carla. But the two rights, and hence the corresponding duties they ground, are still distinct from one another, since Carla has the primary right before Hal takes her insulin, whereas the secondary right only arises afterwards. The complexity of such a primary right does not seem to be problematic, however, because its content is an ex post construction of the essentially retrospective, comparative inquiry previously described. As I explain in Perry, *The Moral Foundations of Tort Law,* supra note 73, there is no assumption that a primary duty sets out a norm that is necessarily intended or able to guide conduct prior to the occurrence of harm. I have been much assisted in my thinking about necessity cases by conversations with Jules Coleman, which is not to say, of course, that he agrees with the views I express here.

does Coleman mean by wrongful or impermissible conduct? In particular, is the wrongfulness of conduct in wrongful-harming cases determined independently of the nature of the legitimate interest that we can assume has been detrimentally affected? Coleman’s discussion of wrongfulness, which focuses on the defense of the objective standard in negligence cases, suggests that conduct is wrongful when it is negligent or accompanied by an intention to harm. As for the role of interests, Coleman has little to say about what constitutes a *legitimate* interest, remarking at an earlier point that the theory of which interests fall within the scope of corrective justice is not a part of corrective justice but rather sets its boundaries. Taken together these points suggest that wrongful conduct consists of intentional wrongdoing or negligence, including negligence in the objective sense, and that its wrongful character is independent of the interest affected (so long as that interest is “legitimate”). While Coleman does make certain statements which might be taken as pointing in a different direction, let me assume for the moment that he does not conceive of the wrongfulness that gives rise to claims in corrective justice as being interest-sensitive.

It will be helpful to begin by considering the law of torts, where it is clear that harm resulting from intentional wrongdoing or negligence does not automatically give rise to a claim to repair. To adapt one of Coleman’s examples, I can intentionally harm your interest in a generous review of your book, so long as I tell the truth about it or present my views in a way that could be objectively regarded as fair comment. Of the many other examples that could also be given, let me mention just a few. I can intentionally harm your interest in the use and enjoyment of your land, so long as what I am doing falls within the bounds set by the law of nuisance, although if I do exactly the same thing maliciously the law may call it a nuisance anyway and hold me liable. The law accords your interest in mental or emotional tranquillity a very limited protection, in the form of the tort of assault, against intentional interference, but none at all against negligence. Certain of your economic interests are protected from intentional interference, a few are protected against negligence, and yet others are completely unprotected no matter how badly I behave in interfering with them. I can, for example, have the worst motive in the world when I set up a business to compete with yours—perhaps I want to drive you into bankruptcy and penury—but that fact gives you no right of repair against me if I am eventually successful in achieving my disreputable ends. Only a few interests,

89. *Corrective Justice*, supra note 1, at 369-70.

90. *Id.* at 369.

91. *Id.* at 357.

92. *Id.* at 369.

93. I have argued elsewhere that the common law of torts not only does, but also should, distinguish between the way that negligent conduct affects different kinds of interests. Economic
such as bodily integrity and tangible property, are protected against the full range of wrongful conduct that Coleman describes.

The positive law has its own pragmatic exigencies, and in any event can sometimes be mistaken. I think that most people would nonetheless agree that the general approach of the common law, which makes claims of repair sensitive to the nature of the interest affected as well as to the character of the injurer's conduct, is a morally appropriate one. That suggests, however, that there are no categories of reprehensible behavior that automatically give rise to a moral right or claim to receive compensation on the part of anyone whose legitimate interests are adversely affected. This is so even if we leave aside situations where wrongful conduct is directed at A but in fact affects B. (These might be called Palsgraf cases.) Whether a moral right to repair arises in the cases Coleman calls wrongful harmings seems to be a rather complex function of the particular interest of the victim that was interfered with, on the one hand, and the particular way in which the injurer's conduct was wrongful, on the other. One interest may be protected against a certain range of wrongdoing, whereas another is protected against a different range.

If the points urged in the preceding paragraph are correct then there is no reason, on a Razzian account of rights, for refusing to recognize that the interest at stake in a wrongful-harming case is protected by a primary right against the relevant kind of wrongful conduct. On the Razzian understanding, a person has a right if his interest or well-being is a sufficient reason to hold someone else to be under a duty. We have seen that in rights invasion cases, the specific legitimate interest protected by a given primary right grounds a duty not to interfere with that interest in certain ways. A failure to comply with the duty will involve faulty or fault-like behavior, and if harm results the victim will have a claim to repair in corrective justice. We can see now, however, that wrongful-harmings cases have essentially the same normative structure. A specific legitimate interest is protected against specific kinds of faulty conduct, and if an instance of such conduct results in harm to the interest then the victim has a claim to repair in corrective justice. Parity of reasoning calls for recognition of a primary right that grounds a duty not to engage in conduct of the proscribed kind in this category of cases as well, especially since the conduct in question is, by hypothesis, wrongful. Given the existence of interest-sensitivity, broad generalizations about the relationship between wrongful conduct and repa-

interests, unlike the interests that people have in their bodily integrity and tangible property, should not in general be protected against negligent interference. See Perry, Protected Interests and Undertakings in the Law of Negligence, 42 U. Toronto L.J. ___ (1992) (forthcoming).

94. I ignore here the possible complication, described supra note 85, that in certain circumstances a secondary duty of repair might arise before the primary duty was actually violated.
ration cannot be drawn; the characterization of wrongful harmings will thus necessarily involve an enumeration of many different kinds of cases. If this heterogeneity is not rationalized by positing primary rights within a general theory of rights like Raz's, then it is bound to seem arbitrary and ad hoc.

Coleman does not assume that claims to repair in corrective justice are necessarily rights, but even for him the claims in rights invasion cases, at least, presumably are. I do not myself see how claims arising in justice could ever not be rights, but I shall not argue for that thesis here. For the most part it does not affect the argument presented in this Article. If, however, we assume as a premise that the thesis is true in all corrective justice cases and not just those involving rights invasions, then another argument for the existence of primary rights in wrongful-harming cases presents itself. By hypothesis Y has a secondary right to repair that arises when a particular substantive interest of his is adversely affected by some specific form of wrongdoing on the part of X. The interest that the secondary right directly protects is perhaps capable of being described in different ways, but ultimately the Razzian justification for the right must be traced back to the substantive interest with which X interfered. There is no apparent reason for refusing to recognize the middle term of the equation, so to speak, which is a primary right on the part of Y that X not interfere with Y's substantive interest in the specific manner that, by hypothesis, triggers a secondary claim to repair.

As I noted earlier, Coleman does make some remarks which suggest that the characterization of wrongfulness in wrongful-harmings cases is interest-sensitive. He states that "[a]s long as an actor complies with the relevant norms of conduct, his harming of another creates no grounds in justice to recovery or liability." The examples which accompany this statement are of harms to legitimate interests that occur through a negative book review, business competition, and competition between suitors for the affection of another. I assume that Coleman would want to say, as does the law, that even negligently or intentionally causing such harms should not ordinarily ground liability or recovery. If so, that suggests that "the relevant norms of conduct" that are determinative of wrongfulness are sensitive to the nature of the interest affected. In that case, however, it becomes possible to rely on the argument for the recognition of primary rights in wrongful-harmings cases that has already been presented.

If we put together the points we have gleaned from our discussion of rights invasions and wrongful harmings, we arrive at the following understanding of when a right to repair will arise in corrective justice. On the
one hand, the existence of such a right is always consequent upon an injurer having invaded a primary right of the victim's with respect to some particular substantive interest that the primary right protects. There is no separate category of wrongful harmings in which a right to repair arises simply because the injurer's conduct can be characterized as reprehensible without reference to the interest affected. On the other hand, something like fault on the part of the injurer will always be present when a primary right is invaded even in those cases Coleman calls rights infringements, which are said to involve only innocent or justifiable invasions of rights. This fault-like conduct will necessarily enter into the characterization of the primary right and corresponding duty, which accordingly are not defined, as Coleman suggests, by reference only to the interest protected and a concept of invasion based on causation alone.

The content of primary rights, the invasion of which gives rise to secondary rights and duties of repair, is thus always a function of two elements: first, the nature of the interest that the primary right protects, and second, the type of conduct on the part of the injurer that will count as a breach of the corresponding duty. To put the point in a different way, the determination that \( Y \) has a right to repair against \( X \) always depends on an overall moral assessment of the harmful interaction that occurred between them. This assessment takes account of the relative importance of \( Y \)'s adversely affected interest, on the one hand, and the existence and extent of fault in the behavior of \( X \), on the other. This is consistent with the previously outlined foundational understanding of corrective justice, which holds that the justification of a right to repair depends on a comparative assessment of the conduct and interests of the various parties involved. The conclusion that naturally follows from all this is that the distinction between rights invasions and wrongful harmings must be abandoned. A place remains, however, for a distinction between rights violations and rights infringements, although it will be drawn in a slightly different way from how Coleman draws it.

Perhaps I can summarize my critique of Coleman's account of the way that claims to repair arise in corrective justice by saying that it is simultaneously too complex and too simple. It is too complex in the sense that it recognizes two discrete categories of cases—wrongful harmings and rights invasions—when there is in fact only one: \( Y \) obtains a right to repair against \( X \) if and only if \( X \) causes \( Y \) loss by invading one of her primary rights, where the content of the primary right is a function of the two elements previously described. But Coleman's account is also too simple for the reason that those categories are conceived too inflexibly to allow for the indefinitely large number of possible variations on the abstract theme I have just outlined. The range of normative considerations that can be brought to bear in assessing the impact of particular types of conduct on particular types of interests is just too great to be captured by Coleman's rather rigid
distinction between wrongful harmings on the one side, which ostensibly make compensation turn on the injurer’s conduct alone, and rights invasions on the other, which make compensation turn simply on whether someone has caused the interest protected by the right to be adversely affected. The moral phenomena of reparation are much more complex than Coleman’s account either suggests or allows.