

CORRECTIVE JUSTICE, LIABILITY FOR RISKS, AND TORT LAW

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INTRODUCTION

In an earlier article in this Review, I explored whether corrective justice and liability for risk-creation are compatible, or if corrective justice requires that recovery be based solely on causing harm.¹ In constructing the main arguments, I examined some issues in moral theory, the question of what is private about private law litigation, and the role of causation in tort.

As is always the case, I might have said more about many of these issues. Finding my argument "plausible but incomplete," Professor Simons has raised a number of questions about the article and its claims, thus supplying me an early impetus to address some of them again.² I cannot respond point by point to Professor Simons's rich remarks. Instead, I shall focus on issues where a response seems most helpful in illuminating the basic structure of the argument.

I. THE CENTRAL ARGUMENT AND THREE CLAIMS

At the heart of my analysis is an account of corrective justice that contains three conditions: (1) an individual's liability must be

* Professor of Law, Duke University. A number of individuals have been particularly generous in helping me struggle through the issues addressed in this and my previous article, although they all can find something to disagree with in the final products. They include Jerome Culp, Donald Horowitz, David Kaye, Tom Rowe, Gary Schwartz, Gerald Postema, Geoff Sayre-McCord, and Richard Epstein. Kate Bartlett helps me in all my endeavors, including those that are represented here.

1. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990).

2. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 113 (1990). I thank the editors of the UCLA Law Review for the opportunity to respond to Professor Simons's comments in this space.

assessed consistently with moral norms of responsibility for one's actions; (2) victims must be made whole (compensated); and (3) the resources for satisfying (2) must come exclusively from the liability payments required by (1).³ These three requirements can be identified, respectively, as action-based responsibility, just compensation, and internal financing.⁴ When these conditions are met, I argued, corrective justice is satisfied.

This interpretation of corrective justice supports three claims about causation and risk-creation as bases for liability in tort: one negative, one positive, and one comparative.⁵ The negative claim is that corrective justice does not require liabilities in tort to be based on cause-in-fact. The positive claim is that a system which satisfies corrective justice can be constructed around the principle that actors are liable for the risks they create. The comparative claim is that the demands of corrective justice often can be satisfied better by a liability-for-risk system than by a harm-caused system. With respect to the negative and positive claims, the three conditions of corrective justice function as necessary conditions. With respect to the comparative claim, they function as regulative ideals, sometimes enabling us to say which of two doctrines more nearly approaches that ideal.⁶

Professor Simons's major reservations can be organized according to which of the three claims they principally contest. I will review briefly the reservations I shall be addressing; then I will return to a more complete treatment of them.

1. *The negative claim.* Professor Simons questions whether the three conditions of action-based responsibility, just compensation, and internal financing actually amount to an account of corrective justice at all.⁷ Mine is merely one of a number of theories of corrective justice. Tort scholars such as Jules Coleman, Ernest Weinrib, Catherine Wells, Richard Epstein, and George Fletcher

3. Schroeder, *supra* note 1, at 450.

4. *Id.* In the original article, the third requirement initially was labelled "internal financing of compensation," *id.*, but later in the article it appeared simply as "internal financing." *E.g., id.* at 468. I shall use the shorter term here.

5. While these claims can be found in the earlier article, they were not separated explicitly. Doing so now may facilitate understanding the overall argument and will also help organize my replies to Professor Simons.

6. Such a comparison is unambiguous only when one doctrinal regime is superior to the other with respect to each of the conditions. Quite possibly, however, one regime may, for example, do better than the other in providing just compensation but worse in meeting the action-based responsibility condition. In cases like this, the comparison will be inconclusive.

7. Simons, *supra* note 2, at 118, 124.

each have their own distinct theory of corrective justice. First, what is it that makes mine an account of corrective justice, and, second, on what grounds do I contend that my interpretation of corrective justice requirements is better than any of these?

2. *The positive claim.* A good number of Professor Simons's questions probe whether the liability-for-risk system I propose actually satisfies my own account of corrective justice. He says liability for risk is not clearly congruent with my notion of responsibility. He observes that liability for risk does not actually calibrate liability to personal culpability, which he believes the condition of liability based on responsibility requires.⁸ Professor Simons also thinks that the mechanisms for determining pay-ins and payouts to and from a compensation fund reveal tensions among my conditions, that the system for balancing pay-ins and payouts is underdeveloped and problematic, and that maintaining a balance between pay-ins and payouts may cause the system to violate the principle of action-based responsibility.⁹ Not only does my proposal fall short of my own criteria, it also reintroduces causation to the picture, despite my protestations that I eliminated it from the system.¹⁰ Causation sneaks back in because I postulate a system permitting plaintiffs to recover for harm caused. Should I not have the courage of my convictions to limit recovery to compensation for risk exposure rather than harm caused, thereby denying causation any role in tort?

3. *The comparative claim.* Finally, Professor Simons quite correctly notes that at times I argue my proposal is consistent with the conditions of corrective justice, whereas at other times I claim that my proposal fulfills those conditions better than the current cause-based system.¹¹ Exactly how do I see the relationship between corrective justice and tort? Does corrective justice entail a particular set of tort doctrines or not? In claiming that my proposal is consistent with the requirements of corrective justice, I might be meaning to claim that those requirements uniquely determine the system of liability and compensation I describe, so that any other system is incompatible with those requirements. If that were so, however, then the comparative claim, which seems to suggest not

8. *Id.* at 121. For example, under my proposal, a wantonly reckless individual who engages in risky behavior seemingly will be liable to the same extent as a momentarily negligent individual engaging in the same risky behavior; yet we judge the former more culpable than the latter. *Id.*

9. *Id.* at 129-32.

10. *Id.* at 116.

11. *Id.* at 127 nn. 55-56 (citing Schroeder, *supra* note 1, at 442, 449-50, 451, 465-66, 473).

that a cause-based system is incompatible with those requirements, but only that a risk-based system is superior, is confusing.

I shall examine each set of these objections in turn.

II. CORRECTIVE JUSTICE

Scholars have articulated corrective justice in various ways. By and large, however, they continue to believe they are all still talking about the same concept, despite articulated differences. This uneasy consensus occurs because corrective justice is itself a contested concept, loose enough to invite continual debate, valuable enough to be worth fighting over, and comprehended enough to produce some shared agreement on its content.

The history of disputes over other contested concepts, such as fairness, liberty, and democracy, ought to warn against expecting that a single definition of any such term suddenly will sweep away all other views. That warning applies to my interpretation of corrective justice as well. Still, Professor Simons presses me first to justify calling mine an interpretation of corrective justice at all, rather than, perhaps, the "discovery" of some new principle of justice (actuarial justice?) and, second, to say more about the grounds on which I claim my interpretation is better than its competitors.

One avenue of response is not open to me here. I cannot point to instances of corrective justice being satisfied in the world and then claim that my definition supplies the meaning or interpretation most congruent with those referents. I cannot turn to such examples partly because, being normative, my argument makes a claim about how corrective justice should be understood; hence I want to be able to say that some instances of corrective justice, as understood by others, should be reinterpreted. In addition, scholars disagree just as much over to what corrective justice refers as they do over what it means. We cannot use reference as the yardstick for meaning, because both the yardstick and the item to be measured are contested. Articles advancing theories of corrective justice thus are arguing also over the yardstick against which the authors want their theories measured. Lacking a yardstick to measure the yardsticks, how do we proceed?

We need to engage in a kind of practical reasoning, what Charles Taylor calls "a reasoning in transitions."¹² Three basic ele-

12. C. TAYLOR, *SOURCES OF THE SELF* 72 (1989):

Practical reasoning . . . is a reasoning in transitions. It aims to establish, not that some position is correct absolutely, but rather that some position

ments are involved in the idea of persuasive practical reasoning: first, the new conception should retain enough of the old idea to be recognizably a re-interpretation of it; second, the move must gain us something in terms of understanding, explanatory power, or intelligibility; and, third, the move should not result in a loss that negates the gain.¹³ Such reasoning can be done only by working through specific accounts and comparing them to one another. Here, I shall restrict my attention to two different and widely discussed views of corrective justice, those of Jules Coleman and Ernest Weinrib.

There is enough common ground between Coleman, Weinrib, and myself so that my interpretation should be accepted as *an* interpretation of corrective justice by anyone who accepts Coleman's and Weinrib's as interpretations of corrective justice. Both authors seem to share my understanding of the two "recurring themes" of corrective justice: corrective justice founds liability on moral principles of individual responsibility and defends liability on noninstrumental grounds, freed from consideration of purposes external to the tort process, such as distributive justice.¹⁴

First, Coleman and Weinrib both believe that a theory of corrective justice must be noninstrumental. Weinrib espouses a theory that grounds liability and compensation in justifications other than external purposes¹⁵ or external ends.¹⁶ Coleman, in a recent book review evaluating the economic analysis of tort, refers to corrective justice as a noneconomic theory.¹⁷ I am confident that he would likewise contrast corrective justice with any instrumentalist interpretation of tort law.

is superior to some other. It is concerned, covertly or openly, implicitly or explicitly, with comparative propositions. We show one of these comparative claims to be well founded when we can show that the *move* from A to B constitutes a gain epistemically. This is something we do when we show, for instance, that we get from A to B by identifying and resolving a contradiction in A or a confusion which A relied on, or by acknowledging the importance of some factor which A screened out, or something of the sort. The argument fixes on the nature of the transition from A to B. The nerve of the rational proof consists in showing that this transition is an error-reducing one.

Id. (footnote omitted).

13. *Id.*

14. See Schroeder, *supra* note 1, at 447, 449.

15. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949 (1988).

16. Weinrib, *Causation and Wrongdoing*, 63 *CHI.-KENT L. REV.* 407, 409 (1987). Weinrib explicitly describes his theory as noninstrumental. *Id.*

17. Coleman, *The Structure of Tort Law* (Book Review), 97 *YALE L.J.* 1233, 1246 (1988).

Similarly, Coleman and Weinrib both believe that an account of tort based on corrective justice requires consistency with conditions for the moral responsibility of actors. In defending the centrality of causation to a corrective justice understanding of tort, Weinrib argues that to understand causation noninstrumentally is to grasp its role in the moral relationship between the litigants.¹⁸ A defendant's "wrongful risk creation" creates the "moral aspect" of the transactional relationship between herself and the plaintiff by "violat[ing] the equal status of those whom [the wrongful act] might affect."¹⁹ Coleman sees the relationship between morality and tort law differently, yet he too argues that if the basic conditions for attributing moral agency to a defendant are lacking—as, for example, when the defendant is pushed into the plaintiff by another party—then corrective justice must excuse her.²⁰

So far, then, the three accounts share the features of noninstrumentalism and a grounding in some understanding of personal responsibility. These points of agreement establish the initial plausibility of my account. The argument that my account is better than the other two depends on an examination of the points on which we differ.

First, Professor Coleman argues that corrective justice is preoccupied exclusively with annulling wrongful gains and wrongful losses.²¹ Wrongful loss consists of the injuries sustained as a result of (caused by) the defendant's action. Wrongful gain consists of whatever advantage the defendant personally acquires by violating the relevant norm of individual behavior. It may be, for example, the time saved by driving in excess of the posted speed limit. As Coleman emphasizes, wrongful gain frequently may accrue to a de-

18. Weinrib, *supra* note 16, at 409.

19. *Id.* at 430.

20. Coleman, *Mental Abnormality, Personal Responsibility, and Tort Liability*, in *MENTAL ILLNESS: LAW AND PUBLIC POLICY* 107, 127–29 (B. Brody & H. Engelhardt, Jr., eds. 1980) [hereinafter Coleman, *Mental Abnormality*]. In this article, Coleman refers to his views as "compensatory justice," *see id.* at 122, but later he identifies them alternatively as a theory of corrective justice. *See, e.g.*, Coleman, *Corrective Justice and Wrongful Gain*, 11 *J. LEGAL STUD.* 421, 423 (1982) [hereinafter Coleman, *Corrective Justice*], *quoted infra* note 21.

21. *See* Coleman, *Mental Abnormality*, *supra* note 20, at 123. According to Coleman, "compensatory [corrective] justice is concerned with eliminating undeserved or otherwise unjustifiable gains and losses. Compensation is therefore a matter of justice because it protects a distribution of wealth—resources or entitlements to them—from distortion through unwarranted gains and losses. It does so by requiring annulment of both." *Id.* (footnotes omitted); *see also* Coleman, *Corrective Justice*, *supra* note 20, at 423 ("In my view, corrective or compensatory justice is concerned with the category of wrongful gains and losses.").

fendant without regard to whether anyone is injured by the action.²² This feature of Coleman's corrective justice account, which disconnects what a plaintiff must pay from what a defendant is entitled to, explains why causation is dispensable as a condition of liability. It also explains Weinrib's sharp disagreement with Coleman's account, as we shall see.

To articulate his views, Coleman develops the distinction between the ground and the mode of rectification. Corrective justice, he argues, provides a valid ground for a plaintiff's insisting that her wrongful loss be annulled. However, on the defendant's side, corrective justice insists only that the defendant's wrongful gain be annulled. This result often will be inadequate to annul the plaintiff's loss. Therefore, corrective justice itself does not provide the mode or means for covering the plaintiff's loss. That task, Coleman claims, is a matter governed by other considerations, including administrative ones. Whatever those other considerations are, the upshot of this construction of corrective justice is either that the necessary funds will be extracted from the defendant, but not on corrective justice grounds, or that they will come from other sources, again not on corrective justice grounds.

Coleman's theory is commendable in many respects, and my own views are in most areas closer to his than to Weinrib's. However, the inability of Coleman's theory of corrective justice to justify the actual compensation of a wrongfully injured party, as opposed merely to grounding an abstract right to compensation, must count against the power of his theory. Is it not a central feature of corrective justice that the plaintiff actually be made whole from funds themselves extracted by the demands of corrective justice? If an injured party's actual receipt of compensation depends necessarily on non-corrective justice considerations, then corrective justice theory cannot typically explain the complete cycle of compensating the plaintiff while holding the defendant liable.²³ The theory is either importantly incomplete or necessarily dependent on instrumental arguments which it is supposed to be avoiding.²⁴

22. Coleman, *Corrective Justice*, *supra* note 20, at 425.

23. Others also have stressed this problem. *E.g.*, Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 197 (1980).

24. In an early article, Coleman did say that one's violating a standard of reasonable care, and hence being negligent, supplies a moral reason for imposing liability. Coleman, *Mental Abnormality*, *supra* note 20, at 121. However, this moral reason seems relevant only when we face a forced choice between just two alternatives: either the entirely blameless plaintiff bears the whole loss or the negligent defendant does. *Id.* Once that constraint is relaxed, as I have argued it must be, to permit other options,

My account avoids this difficulty because it construes corrective justice as requiring just compensation—that the plaintiff be compensated—and internal financing—that the dynamics of the system produce the funds necessary to provide that compensation.²⁵ Satisfying these conditions means that in theory we need not go outside the confines of corrective justice to explain where the money comes from to pay the plaintiff. I count that as an improvement on Coleman.

Where Coleman's theory is too weak, Weinrib's is too strong. A system meeting Weinrib's account of corrective justice, unlike one meeting Coleman's account, would satisfy internal financing because Weinrib holds that under corrective justice, defendants are liable for the harms they cause. However, the cause-in-fact requirement results in trenching on the first of my conditions, that of action-based responsibility. This factor counts against Weinrib's theory. Weinrib's corrective justice is committed to the often arbitrary results produced whenever the cause-in-fact requirement treats two similar actors in wildly disparate manners simply because one caused harm and the other did not.²⁶ Symmetrically, it also denies plaintiffs recovery for their wrongful losses because of the unavailability of an identifiable or solvent harm-causer. Under Weinrib's approach to corrective justice, we are committed to these arbitrary results as a matter of justice. This construction of the demands of a system of justice is undesirable and implausible, whatever the particular label we attach to it. It is particularly troublesome because we started with the presumptively shared ground that corrective justice incorporates a defensible notion of individual responsibility for actions.

Weinrib's view, apparently, is that we must put up with whatever arbitrariness causation entails because private litigation must exhibit the bipolar structure of sufferer against doer, and must reflect the immanent rationality of the morality of interaction.²⁷ As

such as recovery from a pool of risk premiums, see Schroeder, *supra* note 1, at 448–49, then this moral reason loses its force. More recently, Coleman has written that it “may be a matter of administrative efficiency” to decide the question of who is owed payment and who pays in the same proceeding. Coleman, *supra* note 17, at 1250. In any event, “it is not a requirement of justice.” *Id.*

25. Thus, if one is looking for a corrective justice theory that urges a radical disconnection between a defendant's liability and a plaintiff's right to compensation, see Simons, *supra* note 2, at 122, I suggest that Coleman's theory is a better candidate than mine.

26. Professor Simons agrees that cause-in-fact can sometimes produce liability that is morally arbitrary. *Id.* at 120–21.

27. See Schroeder, *supra* note 1, at 446–48.

to the claim of immanent rationality, I share Richard Epstein's view that such talk of immanent order borders on the obscure.²⁸ Even if such talk carries weight, Weinrib makes the mistake of thinking the world has a unique "transactional" or "interactional" structure that carries normative force. Weinrib appears to think that, once grasped, his concept of interaction will underwrite the uniquely just form of bipolar litigation. But why this definition of interaction between doer and sufferer? It certainly does no violence to language to say that a defendant interacts with the world when he generates risk. A liability-for-risk system may mirror real worldly interactions to the same extent as Weinrib's bipolar system.

Assuming that my construction of the substantive ambitions of corrective justice is sound, Weinrib's argument becomes a plea for the supremacy of form over substance. This is so because Weinrib contends we ought to sacrifice the substantive coherence we gain by rejecting causation in order to retain the bipolar form. I think the advocate of formal supremacy in these circumstances bears the burden of persuasion. Weinrib defends the bipolar litigation form by asserting that it is required to express the law's integrity.²⁹ If the idea of integrity has no substantive content, in that it advances no discernible tort objective other than maintaining a structural analogy between the lawsuit and the interaction of the doer and sufferer, then it is hard to see this argument as much more than an aesthetic preference for symmetry.³⁰ Until we hear a better argument, the articulation of corrective justice as immanent rationality ought to be rejected.

To recap, Coleman's theory leaves us unable to explain how plaintiffs actually get compensated as a matter of justice, while Weinrib's leaves us committed to morally arbitrary results as a matter of justice. Accordingly, I continue to think good reasons exist

28. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713, 713 (1989).

29. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 687 (1985) (asserting the "integrity" of his private law vision); see also Coleman, *supra* note 17, at 1253 (noting the importance of the concept of integrity in Weinrib's formalism and remarking that "[t]he problem with his formalism is not, then, that it seeks to reduce normative questions to ones of structure, but that it simply ignores normative questions completely").

30. So far as integrity goes, the system I advocate possesses integrity too—just a different kind. (Weinrib acknowledges that systems other than his can possess integrity. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 687 (1985).)

for seeing the move from either Coleman's or Weinrib's theory to mine as an improvement in our conception of corrective justice.³¹

III. ACTION-BASED RESPONSIBILITY

Whatever he might think of my critique of Coleman and Weinrib, Professor Simons questions whether my proposal for liability based on risk-creation coupled with compensation from the fund thus created sufficiently complies with my own conditions. One problem, he suggests, is that "Schroeder's strong emphasis on norms of moral responsibility makes one wonder whether his theory is a corrective justice theory at all. . . . [T]he view that an actor deserves to pay a tort fine based on her culpable choice fits more comfortably within a theory of *retributive* justice."³² Having strayed from corrective justice into retributive justice, furthermore, I have not done so very competently, because when the "tort fine" equals expected harm, as I propose, that amount does not reflect "the degree to which the defendant has deviated from the reasonable person standard, or the social benefits of the defendant's tortious conduct."³³

I agree that liability for expected harm does not square with retributive justice, which "would at a minimum permit and at a maximum demand that wrongdoers suffer in proportion to their [moral] culpability."³⁴ An analysis of culpability addresses whether and to what degree an individual is subject to moral blame. It is a judgment about the moral character of the actor.³⁵ If two negligent drivers pose the same risks, but one does so in order to rush a child to the hospital, while the other is joyriding, our judgments of moral blame about the two will differ, but the expected harm of each ac-

31. The work of both Coleman and Weinrib is exemplary in that they recognize the importance of justifying causation in relation to corrective justice, rather than simply defining corrective justice in terms of causation, as many statements in the literature seem to do. See *Schroeder*, *supra* note 1, at 445 n.28. This definitional approach begs the question entirely, and does so at a high cost. As Larry Alexander has ably demonstrated, equating corrective justice and causation commits one to a kind of justice that is incoherent in important respects. See Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 *LAW & PHIL.* 1 (1987).

32. Simons, *supra* note 2, at 121 (emphasis in original).

33. *Id.*

34. Alexander, *supra* note 31, at 2; see also Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 *CORNELL L. REV.* 313, 326-27 (1990).

35. See, e.g., Coleman, *Mental Abnormality*, *supra* note 20, at 119 ("Because they are offered to fix moral blame, judgments of moral fault" often represent "judgments about the character of the accused.").

tion will be identical.³⁶ In this regard, expected harm is no different from liability for harm caused: neither one can be squared with retributive justice.³⁷

This is as it should be. Corrective justice is something distinct from retributive justice (as well as from distributive justice) because a crucial function of corrective justice is to specify what is owed to individuals who have been harmed. Retributive justice, on the other hand, is concerned exclusively with how individuals who are morally culpable or blameworthy ought to be punished.³⁸ Thus, I do not take issue with the observation that liability for expected harm deviates from retributive justice.³⁹

Apparently, however, my emphasis on "moral responsibility" has led to the conclusion that I meant to head in the direction of retributive justice.⁴⁰ Given one interpretation of the earlier article it is easy to see why this is so. If "moral norms of responsibility" and "individual responsibility" were intended to refer to considerations of moral blame or moral culpability, then I may have committed myself to some notion of retributive justice as part of my proposal.⁴¹

36. The example is Professor Simons's. Simons, *supra* note 2, at 121.

37. See Alexander, *supra* note 31, at 4.

38. It is thus inappropriate to speak of wrongs, even moral wrongs, as requiring correction if they do not create risks to other persons. *But cf.* Simons, *supra* note 2, at 127 (suggesting the contrary). Additionally, the connection between harm and corrective justice explains why corrective justice has nothing to say on the subject of punitive damages. See *id.* at 138 (speculating on how punitive damages would be handled under my theory). These and other silences about tort doctrines other than the cause-in-fact requirement in my original article result from a combination of the project of the original article and its assumptions about the justificatory basis of tort doctrine. The project was to understand the requirements of corrective justice, not to see whether existing practices could be justified in terms of a theory of corrective justice. See Schroeder, *supra* note 1, at 443. My assumption, as Professor Simons notes, is that tort doctrine cannot in fact be explained by any single theory or principle. *Id.* at 442; Simons, *supra* note 2, at 127; see also *infra* text accompanying notes 66–68. Thus, a theory of retributive justice may be necessary to explain punitive damages.

39. Because corrective and retributive justice are distinct, and each are distinct from instrumentalist theories of tort, I must resist Professor Simons's suggestion that I simply call my theory a noninstrumental theory of tort, rather than more specifically a corrective justice theory. See Simons, *supra* note 2, at 127–28.

40. See *supra* text accompanying note 32.

41. Coleman, for instance, uses the term "moral responsibility" to refer to moral blame or fault, such that "to be at fault is thought to represent a moral shortcoming or defect in one's conduct. Legal fault is grounded in moral fault in the sense that those at fault in torts are morally responsible for the damages they cause." Coleman, *Mental Abnormality*, *supra* note 20, at 111. In the sentence quoted, Coleman summarizes a common account of the shift *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850), was thought to represent, from a standard of strict liability to one of fault. Coleman, *Mental Abnormality*, *supra* note 20, at 111. Coleman goes on to show, however, that tort liability cannot be squared with moral fault or moral blame. *Id.* at 111–12. I agree.

That is not what I intended, however. The condition of action-based responsibility requires merely that the *ex ante* conditions of prediction and control be satisfied before an individual is held liable. If an individual cannot predict sufficiently whether her actions will subject her to liability, or if she cannot control her actions sufficiently so as to avoid liability, she cannot be held liable. Having control and foreseeing harm do not determine whether one is morally blameworthy, however, nor are they usually sufficient conditions for personal liability in legal theory. As Professor Simons notes, additional questions about the operative force of doctrines such as contributory negligence and proximate cause must be addressed, as well as questions about whether the standard of liability will be strict or based on negligence.⁴²

Prediction and control, then, are minimum conditions.⁴³ Failing to supply a complete theory of legal responsibility is not, however, fatal to my argument about the demands of corrective justice. As others have noted, corrective justice specifies how individuals should be treated by the law when they have suffered or committed a wrong, but it does not itself specify what constitutes wrongful behavior.⁴⁴ Thus corrective justice is itself not a complete theory of legal responsibility.

Professor Simons has other grounds for wondering whether the system I propose satisfies my own three conditions, but it will be easier to address them in the context of the comparative claim. Before going there, however, I want to make explicit the implications of this discussion of action-based responsibility.

42. Simons, *supra* note 2, at 113, 134–37, 139–42.

43. Coleman is in limited agreement here. He argues that a necessary condition of responsibility, and hence liability, is that an actor must have “internal control,” that is, he must be able to form intentions and to act on them. Coleman, *Mental Abnormality*, *supra* note 20, at 128. If one lacks internal control, says Coleman, one lacks responsibility because one lacks personal agency. *Id.* (An example: Jones crashes hard into Smith solely because Jackson has pushed Jones violently; Jones is not responsible.) My conditions encompass Coleman’s but are stronger at least some of the time because under my conditions, an individual must have internal control plus the ability to see enough of the future to realize that liability may be imposed on her. Where liability is based upon the sheer commission of an action, and the individual knows it, these conditions may merge. Where liability is dependent on the foreseeability of harm, as in most areas of tort law, they diverge.

44. *E.g.*, Posner, *supra* note 23, at 190, 203 (1980) (“[W]hat is wrongful or unjust—*adikos*—is not defined in Chapter 4 [of Book V of the *Nicomachean Ethics*, where Aristotle develops the concept of corrective justice];” instead, it is assumed that “corrective justice is a procedural principle; the meaning of wrongful conduct must be sought elsewhere”).

In circumstances in which an agent can calculate the expected harm of her action and can control her actions to avoid that liability if she desires, imposing liability for expected harm is consistent with action-based responsibility construed as a minimum condition.⁴⁵ Coleman's position that corrective justice insists on annulling wrongful gains also satisfies these minima in circumstances in which the actor can predict that such gains may result from her action and can control her conduct accordingly. Moreover, a system of liability for harm caused also satisfies these minima in circumstances in which the actor can predict that harm may result from her action and can control her actions accordingly. In each case, an agent normally can predict liability and control her actions to avoid it, if desired. Thus the conditions of action-based responsibility are minimally satisfied. Of course, the agent's ability to predict and control the amount of liability differs in each case. This is one reason that being able to compare competing systems against a regulative ideal is valuable.

IV. COMPARING AND JUSTIFYING TORT DOCTRINES

In addition to setting minimum conditions, the conception of corrective justice offered in the first article functions as a regulative ideal that permits comparisons among different doctrinal systems. The regulative ideal, not attainable in any functioning legal system, is to place the moral agent in complete control of the conditions under which, and the extent to which, legal liability results from her choices, while still satisfying the remaining conditions of just compensation and internal financing. One can, however, attempt to approximate that ideal. One can also assess which of several systems comes closest in its attempt.⁴⁶ In particular, judged against the conditions of corrective justice as a regulative ideal, liability for expected harm is superior to a system of liability for harm caused, because the value of expected harm is more amenable to *ex ante* prediction than is the value of harm caused.

45. The individual need not actually make an expected harm calculation. She might refer to a published schedule of expected harm associated with certain recurring kinds of behavior, such as auto driving, or she might engage the services of experts to assist in making the calculation, in situations such as toxic discharges. The calculations would resemble those made by the insurance industry in setting rates and determining coverage classifications. The problems associated with the calculations would be similar. For analysis of these problems generally, see K. ABRAHAM, *DISTRIBUTING RISK* (1986). For an inquiry into the fairness of liability insurance that touches on several matters germane to the present discussion, see Schwartz, *supra* note 34.

46. See *supra* note 6.

Whereas we can better determine expected harm than harm caused, frequently we will learn after the fact that expected harm was erroneously calculated.⁴⁷ In such cases, pay-ins under my liability-for-risk system will not equal payouts. Professor Simons supplies the example of a drug thought to create risk *ex ante*, but determined to be harmless *ex post*.⁴⁸ Symmetrically, payouts might exceed pay-ins if actions proved to be more harmful than anticipated.⁴⁹ Other factors, including the insolvency of risk creators, also can contribute to a mismatch between pay-ins and payouts.⁵⁰

In the earlier article, I acknowledged the first two types of problems, which I termed problems of imbalance.⁵¹ As we learn about imbalances, we can gain relevant information from them, so that a more accurate risk premium can be assessed for future actions of the same type. Adjusting *ex ante* pay-ins in light of this new information is quite legitimate, to that extent. I also suggested, however, that in the case of pay-ins proven to be deficient, adding a premium over and above expected harm in order to replenish the depleted fund would be appropriate.⁵² Professor Simons objects to adding such a premium because it "imposes liability beyond the

47. In individual cases, expected harm very seldom will equal actual harm, because expected harm is the sum of the magnitude of each possible harmful consequence discounted by the probability of that consequence occurring, whereas actual harm is just the magnitude of the consequence that does occur. Over a large number of repetitions, however, the expected harm from all events, if calculated correctly, should approximate the actual harm from all those events. See, e.g., D. BRADFORD, UNTANGLING THE INCOME TAX 161-64 (1986); Cooter, *Torts as the Union of Liberty and Efficiency: An Essay on Causation*, 63 CHI.-KENT L. REV. 523 (1987); Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1241 n.98 (1987); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984). One recurring reason expected harm will not equal actual harm is that we make mistakes about the probabilities. See Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 YALE J. ON REG. 89 (1988); McGarity, *Regulatory Analysis and Regulatory Reform*, 65 TEX. L. REV. 1243 (1987); Vidmar, *Assessing the Impact of Statistical Evidence, A Social Science Perspective*, in THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS IN THE COURTS 280 (1989).

48. Simons, *supra* note 2, at 119.

49. *Id.* at 129.

50. *Id.* at 129-30.

51. Schroeder, *supra* note 1, at 468. Professor Simons terms part of my argument here peculiar. Simons, *supra* note 2, at 129 n.66. I think he does so because he has misunderstood me. When I was concerned about what the tort system would do if it observed an imbalance between pay-ins and payouts, I was speaking of a tort system that adopted the doctrine of liability for expected harm, not of the current system. I agree with Professor Simons that the current tort system is blind to such imbalances because equating the sum of *ex ante* expected harms and the sum of *ex post* actual harms is irrelevant to its operation.

52. "[D]efendants might have to pay more than they should until the fund rebalances." Schroeder, *supra* note 1, at 469.

[amount] that [the] defendant could accurately assess *ex ante*, and thus contradicts Schroeder's norm of *ex ante* moral responsibility."⁵³

A problem worth talking about exists here, but I think it is not the one that Professor Simons isolates. As I understand him, he argues that if an actor has already paid the requisite risk premium, I cannot return and extract more from her in order to make up for the amount the original calculation was mistaken. I agree. If this adjustment were permitted, we might as well revert to liability for harm caused, for we could construe imposition of that liability as simply correcting our *ex ante* risk assessment in light of the *ex post* certainty that harm was caused.⁵⁴ On the other hand, is undercompensating plaintiffs not the only alternative to such retroactive adjustments of risk premiums, because the fund will contain insufficient monies?⁵⁵

I do not think so. The system proposed in the earlier article would react to errors in risk premiums in two ways. First, it would adjust the premiums from the present forward to reflect the improved calculations of expected harm. Second, it would bring expected harm premiums in line with payouts to achieve internal financing.⁵⁶ For a time, then, risk payment would exceed expected harm in order to replenish the fund. After a discovered error in the fund balancing process, risk creators would thus face the prospect of paying for their expected harm plus some pro rata premium necessary to replenish the depleted fund.

Does the addition of this pro rata premium contradict the condition of *ex ante* action-based responsibility? Certainly it would not in cases where the amount of the pro rata premium was ascertainable in advance. Even if the pro rata premium were not precisely ascertainable (for example, because a payment-extracting computer continually was recalculating total premiums to reflect fund balance), the question of how to judge such a system is a comparative one. For instance, in comparison with a liability-for-harm-caused system, which one would produce the greater predictability? In al-

53. Simons, *supra* note 2, at 131.

54. *See id.* at 118-19 (discussing a related kind of omniscience).

55. *Id.* at 131.

56. Schroeder, *supra* note 1, at 469. The total amount necessary to balance out the fund would be spread across the class of actions covered. It is an open question how widely spread, both in terms of actions covered and the time taken to replenish the fund.

most all circumstances, the liability-for-risk system still would turn out to be more predictable.

I hope that this explanation clarifies how imbalances would be addressed. Can such a system any longer lay claim to the designation "private," and avoid the charge that it "collectivizes" tort liability? It does seem that if an individual must in this way pay amounts over and above the expected harm of her action, she bears a collective responsibility—a responsibility for someone else's actions for which she bears no action-based responsibility.⁵⁷

Indeed, the larger the pro rata premium, the less a risk taker is being charged only for her risks. Such a system is, therefore, further from the regulative ideal than a system that can operate without such pro rata premiums. Moreover, given the imperfections in our risk assessment capabilities, and administrative constraints,⁵⁸ eliminating pro rata premiums entirely seems extremely unlikely. Still, even this imperfect system satisfies the minimum conditions of corrective justice: it achieves just compensation and internal financing very well, and its premium assessments meet the minimum conditions of prediction and control. Additionally, as I have said, the premium amounts likely would remain *more* predictable than damages under a harm-caused approach. The question is, then, whether the comparative claim still holds. All that can be said in this space is that even such a system of liability for risk has strong points in its favor.⁵⁹

The final specific question Professor Simons asks that I shall address here concerns whether a system that imposes liability for

57. Professor Simons questions whether my proposal is more collectivized than I originally admitted, although for a somewhat different reason than suggested here. See Simons, *supra* note 2, at 116.

58. Because Professor Simons refers to it, I want to address briefly one administrative constraint not mentioned in the original article. This is the problem of moral hazard. See *id.* at 138 n.96. In theory, moral hazard problems arise for a liability-for-risk system, just as they do for systems of third-party insurance, whenever a risk taker can alter his behavior so as to increase risks after he has made his last premium payment. This possibility arises because of limitations in monitoring technology and thus can be considered an administrative constraint. Some activities are more prone to moral hazard problems than others. It is easier to drive less carefully without being detected after making a risk payment for excessive speed, for instance, than it is to create more risk from toxic discharges after the discharge has occurred and one has paid the risk premium for it. Considerations like these are, of course, germane in comparing the desirability of one set of tort doctrines over another, and serve to reinforce the observation that such comparative judgments can be made only about sub-systems within the overall field of tort. See Schroeder, *supra* note 1, at 473–78.

59. Again, my purpose was not to argue for the superiority of such a system in all cases. See Schroeder, *supra* note 1, at 473–78.

risk-creation and compensates for risk-exposure might be an even better system—in the sense of being more consistent with the conditions of corrective justice—than the system I discuss, which compensates for harm caused.⁶⁰ Stressing again the difference between those conditions functioning as minimums and those conditions functioning as regulative ideals, I note that Professor Simons correctly assumes a system of compensation for risk-exposure could be designed to satisfy the minimum conditions. To that extent, I am perfectly willing to entertain such a system. I was not concerned in the earlier article with finding a “best” system, but rather with showing that causation is not essential to corrective justice and that liability for risk is superior to a cause-based system under certain circumstances. Still, it is fair to ask whether a compensation-for-risk-exposure system would be superior to one that compensates for harm caused.

Preliminarily, it would be wrong to suppose that such a system is superior to the one I proposed solely because it more completely eliminates causation from the tort system. As Professor Simons notes, my proposal does not eliminate causation from tort, and such was not my design.⁶¹ Rather, I have been concerned with the deficiencies of the current system in the way it treats the liability of potential defendants. Cause still must play a role in a tort system on the plaintiff’s side if you wish to maintain a distinction between tort and social insurance for injuries or illnesses. There may, indeed, be arbitrariness involved in a social structure that continues to maintain that distinction, because such a society that does not provide adequate social insurance ends up treating differently two injured plaintiffs who are otherwise similarly situated, entirely on the grounds that one was injured by another person’s action while the other was injured by natural causes. This is not, however, a relevant arbitrariness for corrective justice, because the trigger for requiring that some people pay for the care of others who have been injured by natural causes cannot be action-based responsibility, which corrective justice requires. It must be some other principle, most likely a principle of distributive justice.

Still, a system of recovery for risk-exposure might be consistent with corrective justice insofar as it simply represents a better way to insure that plaintiffs who are eventually injured receive compensation for their injuries. Perhaps exposed individuals could take the

60. Simons, *supra* note 2, at 122–25.

61. *Id.* at 116.

risk exposure payments and purchase liability insurance more efficiently than a centralized compensation fund. Whether this method of accomplishing the ends of corrective justice is superior to the earlier article's proposal depends entirely on which scheme presents fewer practical difficulties of the sort I discussed in the article.⁶²

Alternatively, recovery for risk-exposure might be justified on the ground that exposure to the risk of harm was itself a violation of plaintiff autonomy sufficient to trigger recovery. Professor Simons remarks that I do not say much about the idea of plaintiff autonomy in my original article,⁶³ and he is right. In the earlier article, I simply assumed that physical harm caused by wrongful or unjust action constitutes an intrusion into plaintiff autonomy sufficient to trigger corrective justice compensation. Does imposing risks on someone constitute a similar intrusion? In other words, is the risk of harm itself a harm? The answer may be yes, but less obviously than in the case of physical injury.⁶⁴ If paying for risk-exposure is to be justified on the ground that plaintiff autonomy is violated by the risk itself, one must have a much more developed theory of autonomy than I have presented thus far. This discussion highlights yet again the point that corrective justice is fundamentally a procedural principle: not only does a theory of corrective justice not contain a theory of wrongful or unjust behavior, it does not contain a theory of what constitutes harm.⁶⁵

CONCLUSION

Although I have by no means answered all of Professor Simons's questions, I hope I have clarified the main structure of my argument. In concluding, I shall say several things about the relationship between the conditions of corrective justice and the enterprise of justifying tort doctrine. I agree with Professor Coleman that a justificatory theory of tort would articulate how tort doctrine is entailed by the theory. I also agree that corrective justice will provide only a partial explanation for tort doctrine.⁶⁶ A complete theory will have to consider other arguments focusing on distributive justice, retributive justice arguments, administrability, and

62. See Schroeder, *supra* note 1, at 473-78.

63. Simons, *supra* note 2, at 128.

64. For an entry into some of the difficulties here, see the work of Judith Jarvis Thomson. *E.g.*, J. THOMSON, RIGHTS, RESTITUTION, AND RISKS 155-91 (1986).

65. See *supra* text accompanying note 44.

66. See Simons, *supra* note 2, at 127-28 (citing Coleman, *Property, Wrongfulness, and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451, 464 (1987)).

practicality.⁶⁷ Moreover, the question remains whether corrective justice considerations ought to take precedence over these others, in the sense that it operates as a side-constraint that tort must satisfy but can sometimes go beyond as long as it does so within the side constraints.⁶⁸

However, this view of corrective justice as a side constraint is a powerful one in contemporary jurisprudence.⁶⁹ Indeed, this view motivated the earlier article. I sought to probe to what extent contemporary proposals for liability-for-risk systems, especially in the context of toxic exposures, violated the considerations of corrective justice. My preliminary conclusion was that such systems could be implemented without violating the minimum conditions of corrective justice and, perhaps somewhat surprisingly, such systems in all likelihood better approach those conditions as regulative ideals than does a cause-based system.

This conclusion, I think, was reasonably clear in the first article. The article articulated less well, however, that my methodology was necessarily comparative, in a way that requires one to work through as many distinctions between rival theories of corrective justice as possible. Professor Simons courteously has treated the first article as a proposal worth examining critically, and has raised an abundance of potential problems with it. Some of these I have had the time and capacity to respond to here; others must await another place. I hope our exchange has prompted others to take a fresh look at the demands of corrective justice, and especially the role of causation in it. I invite them to join in the debate.

67. See Schroeder, *supra* note 1, at 442 n.14.

68. The side-constraint interpretation of corrective justice is suggested by Robert Nozick's side-constraint view of moral rights generally. Under that view, all other goals society wishes to pursue are constrained by the requirement that no person's moral rights can be violated. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-29 (1974). Thus, the side-constraint view of corrective justice is that corrective justice must be satisfied by tort and that its satisfaction constrains society's pursuit of any other goals it may wish tort law to satisfy.

69. See, e.g., Coleman, *supra* note 17, at 1248 (emphasis in original):

In my view, tort law is a social construct designed by humans to serve certain purposes. Its ability *legitimately* to serve those purposes depends on its satisfying certain side-constraints, in particular the principle of corrective justice. While it does not require a particular form of litigation, the principle of corrective justice constrains the forms of litigation.

