THE MIXED CONCEPTION OF CORRECTIVE JUSTICE

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Jules Coleman's book *Risks and Wrongs*[1] is wide-ranging in scope, analytically lucid, and rich with powerful arguments. Even if we limit our attention to Coleman's theories of corrective justice and tort law, as I propose to do in this paper, we are still left with an immense amount of very fertile ground to till. I shall accordingly be able to consider in detail only a few aspects of those theories here. Before I pursue specific themes, however, it is important to underscore the comprehensiveness and essential soundness of Coleman's overall treatment of corrective justice and tort law. He is both insightful and persuasive in arguing for the following points, an enumeration of which will also illustrate the breadth of his discussion.

For Coleman, the fundamental principle informing the law of torts is corrective justice. But tort law, like other legal institutions, must nonetheless be understood in instrumental terms; hence goals and purposes, in addition to serving corrective justice, are not ruled out on formalist grounds. Corrective justice has a central role because the institutional structure of tort is, like that of corrective justice itself, relational. But reducing and spreading risk are also legitimate goals of the institution. Tort law is thus, in Coleman's phrase, a mixture of markets and morals. Strict products liability in particular must be understood in economic terms.

The appropriate conception of corrective justice involves a moral relationship that is limited to particular injurers and their victims; it is sensitive to both the moral responsibility of the former and the nature of the loss suffered by the latter. Corrective justice is a principle of private morality the enforcement of which, by means of a public institution like tort law, is permitted but not required. Whether corrective justice imposes moral duties on individuals is conditional upon the existence of other public institutions, such as no-fault compensation programs. The state may thus choose to allocate accident costs in a

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1. JULES L. COLEMAN, RISKS AND WRONGS (forthcoming 1992) (manuscript dated October 1991, on file with author; pages cited to manuscript).

number of different ways. The moral force of corrective justice is also partly, but not entirely, dependent on the underlying theory of distributive justice. That theory need not be the best available, but it must meet a condition of minimum defensibility. Finally, the content of the rights that corrective justice reflects is partially determined by "transaction rules" specifying the conditions under which the relevant holdings may legitimately be transferred. Coleman rejects Calabresi and Melamed's view that the content of rights and the conditions of legitimate transfer are independent of one another.[2]

All this strikes me as eminently sensible and correct. Also very sensible are a number of general themes that emerge from Coleman's discussion of corrective justice and tort law. One of these is an emphasis on moral pluralism in the law: The law can legitimately pursue a number of distinct, mutually-irreducible moral principles or goals simultaneously. A second, related theme is a recognition of the moral complexity of legal and political institutions: Some of the distinct principles or goals recognized on a pluralist approach can at least sometimes be pursued within a single institution. Thus, as already noted, Coleman views tort law in particular as a mixture of markets and morals.

A third general theme emphasizes the complex interplay between the independent reasons for action that law reflects, or tries to reflect, and the reasons for action it creates. Coleman draws attention to this interplay not only in his treatment of corrective justice and tort but also in the very interesting discussion of rationality and cooperation in Parts One and Two of *Risks and Wrongs*. In that discussion, the relevant independent reasons for action are grounded for the most part in rational self-interest, whereas moral reasons are generally in play in the account of corrective justice and tort law. Despite this difference, the third general theme is a unifying feature of the book as a whole.

This paper principally concerns Coleman's conception of corrective justice, which he calls the "mixed" conception.[3] My point of departure is the nature of the reasons for action to which corrective justice gives rise—one aspect of the third gen-

2. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

3. COLEMAN, *supra* note 1, at 527.

eral theme just described.[4] Coleman correctly argues that corrective justice generates agent-relative reasons for action, which apply only to particular agents, rather than agent-neutral reasons, which apply to everyone. More specifically, corrective justice gives rise to reasons for action for injurers. For Coleman, these reasons take the form of obligations to repair wrongful losses.

The notion of a wrongful loss can be understood in an absolute or in a relative sense, and I argue that Coleman is best understood as adopting the latter. On this interpretation his theory would not need any independent category of wrongful loss were it not for the account he gives of necessity cases (cases in which one person intentionally damages or destroys another person's property in order to save his own life). Coleman treats such cases as instances of strict liability. I argue that this analysis is mistaken: Given Coleman's premises about fault and the nature of rights, liability arises in necessity cases because the conduct of the property-damager is, in a certain sense, fault-like.

If my argument about necessity cases is correct, an independent category of wrongful losses is analytically and normatively unnecessary within Coleman's theory. With that conclusion in mind, I offer a reconstruction of the mixed conception of corrective justice. Its fundamental elements are, first, a conception of responsibility for all the sufficiently proximate outcomes of one's actions, and, second, a recognition of the normative significance of loss. (This latter phrase is meant to capture the idea that an interference with the well-being of one person can affect the reasons for action of others.) Together these elements form the basis for a potential duty to repair on the part of injurers. At the same time they set the stage for a comparative inquiry to determine whether and when a specific agent-relative duty of this kind arises. One of the most important factors this inquiry will consider is the existence and extent of fault in the injurer: Normally, the existence of a duty of care requires that the injurer's conduct be either faulty or, in a sense to be explored, fault-like.

4. Other related aspects that have already been touched on include the circumstances under which reasons of corrective justice are appropriately given legal backing, and the manner in which existing legal and other social arrangements can affect the moral force of corrective justice.

I. The Mixed Conception of Corrective Justice

Coleman previously defended the "annulment thesis," according to which "the point of corrective justice is to eliminate, rectify, or annul wrongful (or unjust) losses."[5] As he now acknowledges, corrective justice understood in these terms "creates reasons for acting in the same way (and of the same type) as does distributive justice."[6] Both are plausibly thought to give rise to agent-neutral reasons for action, applicable to all members of a moral community, although for purposes of coordination, the responsibility in question may be delegated to the state.[7] According to the annulment thesis, the person who creates a wrongful loss has no special reason to repair it. The thesis instead holds that "justice requires that a certain state of the world be brought about, not that anyone in particular has a special reason in justice for bringing it about."[8] Coleman says that we also think of distributive justice in this way, so that the reason-giving properties of corrective justice become, on the annulment conception, indistinguishable from those of distributive justice.

Coleman's present position, by contrast, is that corrective justice is best understood in terms of agent-relative reasons for action that arise as a result of actions undertaken by the individual agent. Only the person who harms another, and not everyone in the community, can have a responsibility in corrective justice. Coleman's preferred conception of corrective justice shares this relational approach with what he calls, appropriately enough, the "relational" view. But the relational view denies, according to Coleman, that "corrective justice has any point or purpose with respect to the category of gains and losses."[9] Rather, it simply specifies "a framework of rights and responsibilities between individuals" that regards wrongs, not losses, as the appropriate candidates for annulment.[10] Coleman's theory incorporates what he calls the central insight of the relational view, which is the idea that "there is a difference between the reasons for acting we have as a result of the actions we under-

5. Coleman, *supra* note 1, at 506.
6. *Id.* at 515-16; *cf.* Stephen Perry, *Comment on Coleman: Corrective Justice*, 67 Ind. L.J. 381 (1992).
7. Coleman, *supra* note 1, at 514.
8. *Id.* at 511.
9. *Id.* at 516.
10. *Id.* at 516-17.

take and those we have in virtue of our being members of a particular community."[11] But he rejects the thesis that corrective justice is concerned not with loss as such, but only with the annulment or repair of a wrong. Coleman thus retains the claim of the annulment conception that responsibility in corrective justice is a matter of repairing wrongful losses. Now, however, that responsibility belongs only to those persons who *cause* wrongful losses, and not to persons generally or to the community as a whole. The result is the "mixed" conception of corrective justice.

The idea that corrective justice seeks to annul wrongs rather than to repair losses lies, in my opinion, at the heart of Ernest Weinrib's theory of corrective justice,[12] and Coleman is right to reject it. His reasons for doing so are convincing, but I shall not reproduce them here.[13] I wish, rather, to examine the mixed conception itself. Coleman sums up the mixed conception in the following terms:

> The argument has two parts. First, the losses are the concern of corrective justice because they are wrongful. They are wrongful because they result from wrongs or wrongdoings. The wrong does not ground the duty to repair. It grounds the claim that the losses are wrongful (and thus within the ambit of corrective justice.) Secondly, the duty to repair those wrongful losses is grounded not simply in the fact that they are the result of wrongdoing, but in the fact that the losses are the injurer's responsibility, the result of his agency. The duty to repair those losses under corrective justice is grounded in the injurer's connection to them. They are, in a suitable sense, his responsibility; they are his, and, therefore, his to repair.[14]

Coleman defines a wrong as action contrary to a right.[15] Actions contrary to rights, or rights invasions, are of two kinds: rights violations, which involve wrongful conduct, and rights infringements, which involve innocent or justified conduct. Wrongdoing consists of unjustifiable or impermissible conduct

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11. *Id.* at 521.

12. *See, e.g.*, Ernest Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989).

13. I have offered different, but at points overlapping, reasons for rejecting Weinrib's understanding of corrective justice in Stephen Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. (forthcoming 1992).

14. COLEMAN, *supra* note 1, at 530.

15. *Id.* at 544.

that results in harm. A harm is a setback to a legitimate interest. A wrongful loss is harm that results from either a wrongdoing or a wrong.[16]

At this point an important question arises. Within the mixed conception of corrective justice, is "wrongful loss" an absolute or a relative notion? Is a particular loss, in other words, only to be regarded as wrongful vis-à-vis the injurer whose wrong or wrongdoing caused it, or is it wrongful *tout court*? Coleman's present characterization of a wrongful loss is similar to the one he accepted when he held the annulment thesis,[17] and at that time he clearly regarded the notion as an absolute one: A wrongful loss was wrongful vis-à-vis the world at large and not just the injurer, which is one reason why it could plausibly be thought to give rise to agent-neutral reasons for action. But if the notion of a wrongful loss continues to be understood in the same way within the mixed conception, the following difficulty arises.

Suppose that actions of two persons, *A* and *B*, both causally contributed to a harm suffered by *C*, but that only *A*'s action was a wrong or wrongdoing. *C* has thus suffered a wrongful loss. Coleman claims that an injurer's duty to repair is grounded in her agency or causal powers, and while he does not elaborate on what this means, we can for present purposes assume that both *A* and *B* are responsible for *C*'s loss in the appropriate sense, whatever it is. If the notion of wrongful loss is absolute, then *B* as well as *A* has a duty to repair the loss, even though *B* neither acted impermissibly nor invaded any of *C*'s rights. This analysis seems to yield a form of strict liability conditioned on the wrongfulness, understood in an absolute sense, of the loss caused. Such an understanding of reparation would not coincide with that of the common law. More importantly, it is unacceptable because it is morally arbitrary. If causal agency constituted a sufficient basis for a duty to repair a wrongful loss, the wrongfulness of which was completely unconnected with the nature of the agent's conduct, why would it not ground a duty whether the loss was "wrongful" or not? This seems to be the only stable alternative to the position that

16. *Id.*

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

wrongful losses are wrongful because in causing loss the agent acted wrongfully.

While Coleman's discussion at times seems to suggest the absolutist interpretation of wrongful loss, his language can for the most part be read either way.[18] Because the absolutist interpretation is unacceptable, I shall assume that he means to adopt the relativist understanding: For the purposes of grounding a duty of repair, a loss can be characterized as wrongful only with reference to a particular wrong or wrongdoing that causally contributed to it.[19] There could, of course, be more than one such wrong or wrongdoing in a given case, although in the hypothetical presented a moment ago *C*'s loss would be wrongful with respect to the harm-causing activity of *A* only: *A*'s conduct constituted a wrong or wrongdoing, but *B*'s did not.

II. The Role of Wrongful Loss in the Mixed Conception

Two further questions must now be addressed. First, why does Coleman need a separate category of wrongful loss at all? Why is it not enough simply to speak of the harms that result from wrongs or wrongdoings? Second, why does Coleman say that the duty to repair wrongful losses "is grounded not in the fact that they are the result of wrongdoing, but in the fact that the losses are . . . the result of [the injurer's] agency"?[20] After all, the relativist interpretation of wrongful loss suggests that a

18. *See* Coleman, *supra* note 1. The closest Coleman comes to an explicit statement of the absolutist position is the following: "[T]he wrongfulness of the loss is an independent aspect of corrective justice, independent, that is, of the wrong or wrongdoing itself." *Id.* at 527. In the context where this statement occurs, however, Coleman is concerned simply to show that the proposition that wrongs should be annulled does not automatically entail the proposition that a loss caused by a wrong should also be annulled. This idea is completely compatible with the relativist conception of wrongful loss. Coleman restates the same point in language more congenial to the relativist position when he says that it would be an error to treat a loss "as only coincidentally connected to the duty to repair." *Id.*

19. Ernest Weinrib and Richard Wright have both recently argued that the mixed conception of corrective justice is problematic for reasons similar to those considered in the preceding paragraph. *See* Ernest Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 Iowa L. Rev. (forthcoming 1992); Richard Wright, *Substantive Corrective Justice*, 77 Iowa L. Rev. (forthcoming 1992). Although both implicitly assume that wrongful loss must be understood in the absolute sense, this is not a necessary assumption.

20. Coleman, *supra* note 1, at 530.

duty to repair must rest on *both* the injurer's agency and the fact that her action was a wrong or wrongdoing.

Let me begin with the first question. There are two reasons why Coleman might have retained a category of wrongful loss in the mixed conception of corrective justice. First, the category may simply be a verbal convenience with no substantive implications. Having the single phrase "wrongful loss" to refer to harms that result from both wrongs and wrongdoings is, on this view, helpful but unnecessary. For Coleman, however, the notion of wrongful loss is clearly more than a verbal convenience. The second reason why he might have adopted the category, and the one I think applies, is that even though the wrongfulness of a wrongful loss is relative to particular wrongs or wrongdoings, there is a sense for Coleman in which wrongfulness is sometimes independent of the agent's conduct. This sense is exemplified by rights invasions and, more particularly, by infringement cases involving necessity. Consider Coleman's Hal-Carla hypothetical. At a time when Carla is unavailable to give him permission, Hal takes and uses some, but not all, of her insulin to prevent himself from falling into a coma. Coleman maintains both that Hal has done nothing wrong and that he owes Carla compensation. In the following passage he clarifies the presuppositions on which this position depends:

> In effect, my thesis is that we can assess separately the moral permissibility of what the injurer does and the claims of the victim to reparation. The underlying moral claims may be that the injurer is justified under certain conditions in appropriating another's property *and* the victim is entitled in justice to repair in the event she suffers a loss as a consequence of the injurer's conduct. These are the moral claims justified under the relevant moral principles, principles that apply separately to the injurer's conduct and to the victim's claims.[21]

Later Coleman adds that we should not press for tidiness in the form of a thesis that no further claims (for example, of repair) can be sustained once someone's conduct has been judged justifiable.[22]

Here, then, is the reason why Coleman requires a separate category of wrongful loss. He does not think that liability in corrective justice can be grounded on the mere fact of having

21. *Id.* at 406.
22. *Id.* at 417.

acted and caused loss; it cannot, in other words, be grounded in agency alone. But he also contends that conduct that is completely justified can, for independent reasons, sometimes give rise to a claim of compensation. Coleman recognizes that liability in corrective justice must in part rest, perhaps indirectly, on what might be called a general requirement of wrongfulness. Given the contention that claims to repair can flow from justifiable actions, however, there will be cases in which wrongfulness can only plausibly be predicated of the victim's loss, not the injurer's conduct. Hence the need for an independent category of wrongful loss.

This analysis also provides the means to answer the second question: Why does the duty to repair depend on the injurer's agency rather than her wrongdoing? The first part of the answer is that a duty to repair can flow from a wrong, and while a wrong *can* involve wrongdoing, it need not do so. The second part of the answer is that even in cases not involving wrongdoing, the wrongfulness of the loss still depends on the injurer's agency: The loss is wrongful in the relative sense with respect to the particular injurer because her action, although perhaps justified, invaded the victim's right. Thus there is a clear sense in which Coleman is justified in treating agency as the basis of a duty to repair. It is a fundamental requirement of liability in its own right, and even in rights infringement cases, the exercise of agency is a ground for the wrongfulness of the loss. The action of the particular injurer being held to the duty, and not just the action of a co-injurer, must constitute the invasion of the right. Of course, it would make sense to speak of wrongdoing on the part of the injurer as a separate (albeit related and ancillary) requirement for liability, in addition to that of agency, in cases in which the action itself is wrong. But once the category of wrongful loss has been introduced, it is analytically neater simply to say, as Coleman does, that agency always directly grounds the duty to repair, which in turn applies only to wrongful losses. The overall result is no different on this analysis, however, because in cases of wrongdoing, as in cases involving wrongs, wrongful losses are only wrongful relative to the particular injurer's actions; their wrongfulness is not at large or in the air.

This interpretation of the mixed conception of corrective justice makes clear that it is more thoroughly relational than it

might initially appear. Although the conception involves a duty formally grounded on agency alone, which applies to an apparently independent category of wrongful loss, the wrongfulness of such losses turns out to be an aspect of the injurer-victim relationship; it is independent only in the very limited sense that the injurer's action need not be an instance of actual wrongdoing. For reasons to be explained below, this understanding of corrective justice, although it will require some minor modification, is essentially correct.

As I have characterized it, the mixed conception of corrective justice makes the existence of a duty to repair turn on two criteria. The first is an exercise by the injurer of her powers of agency so as to cause the victim harm (the agency requirement); the second is the recognition of a relational conception of wrongfulness, which Coleman translates into a demand that the victim's harm be categorizable as a wrongful loss (the wrongfulness requirement). As I shall argue later, two requirements similar to these are central to corrective justice. The difficulty with the mixed conception is not so much with the requirements as it is with Coleman's formulation of the second of them in terms of a category of wrongful loss. While the wrongfulness of a loss is relational for Coleman in the sense that it depends on the particular injurer's action being either a wrongdoing or a wrong, it can be, in rights infringement cases, independent of the injurer's having acted in any particular way; that is why it is necessary to predicate wrongfulness of the victim's loss rather than of the injurer's conduct. This, I wish to argue, is a mistake. The wrongfulness requirement, properly understood, demands that we always look at *how* the injurer acted and not just at the fact that he did. As we shall see later, recognition of this point begins to undermine Coleman's distinction between wrongs and wrongdoings. To appreciate this point, we must examine Coleman's account of necessity cases more closely.

III. Rights Infringements and Necessity

Coleman's chief example of a necessity and infringement case is the Hal-Carla hypothetical. He views Hal's duty to compensate Carla as independent of the nature of Hal's action, which was completely justifiable; the duty arises from the fact that his exercise of volition, although permissible, infringed her

right. But this approach requires us to define the content of Carla's right. For purposes of his argument, Coleman assumes an interest theory of rights, according to which "rights are conferred in order to protect or maximize the value the agent places on the relevant interest."[23] The reference to maximizing value is an unnecessary complication, which I will consequently ignore; the point of rights will be taken to be the protection of the value of interests. Ordinarily, Carla's property right includes a power to exclude others from using or taking her property. In Coleman's view, necessity both makes Hal's action justifiable where it would otherwise not be so and alters Carla's right by eliminating this power.[24] This is, I think, correct. Thus, Carla could not exclude Hal from taking her insulin even if she were present.

The fact that rights are assumed to protect value means, according to Coleman, "that even under conditions of necessity, others have no authority to diminish the value of the relevant property interest to the right holder."[25] Later, he adds that "it is the reduction of the value of the interest that constitutes the wrong."[26] But this suggests that the liability to which the wrong gives rise is strict: Any reduction of value that the agent causes will generate a duty to repair, whether the situation is one of necessity or not. Moreover, Coleman cannot argue that in cases not involving wrongdoing the duty only arises if the injurer is in a necessitous state; his insistence that the basis of compensation is independent of the justifiability of the injurer's action precludes any such move. Hal would thus owe Carla compensation even if he unintentionally and non-negligently damaged her insulin, reducing its value to her, under any circumstances whatsoever. Coleman's argument commits him to regarding every instance of value-reduction caused by the voluntary action of another person as an invasion of the property right that protects the interest in question. This is not the assumption of the law, however, nor does it seem to coincide with Coleman's own understanding of corrective justice.

It is true that Coleman equates liability for rights infringements with strict liability, and he allows that corrective justice

23. *Id.* at 413.
24. *See id.* at 414.
25. *Id.* at 415.
26. *Id.* at 416.

has room for strict liability thus understood.[27] But he also says that strict liability "misses the importance of wrongdoing or fault as a basis of liability and recovery in justice."[28] Certainly he appears to share the law's assumption that property damage cases normally are dealt with by the fault principle. Coleman in fact seems to limit the domain of rights infringements and strict liability to necessity cases. But as we have just seen, the justification he gives for recovery in these cases precludes that very limitation. I think that Coleman's intuition that compensation is due in necessity cases is correct. This conclusion cannot be explained, however, simply by reference to the fact that Hal's conduct has reduced the value of Carla's interest, at least not unless we are prepared to accept that a theory of general strict liability applies to all property damage cases. I have argued elsewhere that a theory of general strict liability, according to which, in Coleman's words, "[c]ausation provides the appropriate theory of [rights] invasion,"[29] will inevitably be subject to pervasive indeterminancy.[30] I shall not press that point here, however, because it depends on an understanding of causation that Coleman appears not to accept.[31] Rather the present point is that Coleman—in common, I imagine, with most people who have thought about the matter from a rights-based, non-economic perspective—does not believe that all property damage cases are subject to a theory of general strict liability. The governing principle is, ordinarily, one of fault. But in that case, for the reasons explained, Coleman cannot rely on the account he gives of necessity cases.

What is it about necessity cases that justifies the intuition that Hal owes Carla compensation? The crucial point seems to be that Hal *intentionally* took the insulin. Coleman states that Hal was justified in taking it, and there is clearly a sense in which this is correct. Coleman is undoubtedly also right in thinking that Carla could not refuse him permission. But our intuition that compensation is owed seems to be clearly tied to the intentional nature of Hal's act; thus it does not automatically extend to cases where he unintentionally or non-negligently damages

27. *See id.* at 385-87, 585-86.
28. *Id.* at 560.
29. *Id.* at 558 n.15.
30. *See* Stephen Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURIS. 147, 154-59 (1988); Perry, *supra* note 13.
31. *See* COLEMAN, *supra* note 1, at 373.

Carla's property. It is thus somewhat strange to label necessity cases as instances of strict liability, especially because they are apparently the only such instances that Coleman's theory of corrective justice recognizes. In any event, the fact that Hal deliberately and without permission took Carla's insulin for his own use renders his action *fault-like*, if not exactly faulty, and our intuition that he owes compensation depends on this fact.

Coleman says that we should not always expect tidy solutions to moral problems, and in particular we should not expect a tidy resolution to the question whether compensation is owed in necessity cases.[32] He is right on both counts. Coleman's own untidy solution to the necessity problem is the thesis that "we can assess separately the moral permissibility of what the injurer does and the claims of the victim to reparation."[33] My solution is to say that our concepts of permissibility and justifiability are themselves complicated, ambiguous, and untidy. We clearly think that Hal acted permissibly in taking Carla's insulin, and we also think that his action was neither culpable nor blameworthy. At the same time, however, we do not regard it as innocent in a completely unambiguous way; we do not, in particular, regard it in the same light as other damage-causing but innocent acts that involve neither an intention to harm nor negligence. To use the helpful terminology Coleman introduces in discussing the objective negligence standard, Hal's intentional taking of the insulin may not have been a fault in him, the doer, but it was still a fault-in-the-doing.

How does the distinction between fault-in-the-doing and fault-in-the-doer apply to necessity cases? To begin with, note that acts of property damage seem to be justified in such cases, not by the state of necessity itself, but by factors internal to the actor. Consider the following variations on Joel Feinberg's famous backpacker example.[34] The cold and hungry backpacker who breaks into a cabin in the wilderness does not really need to burn the cabin owner's furniture to stay alive because, unbeknownst to him, the cabin has functional central heating. The mechanism and controls are hidden, however, and the backpacker could not easily discover them or be reasonably ex-

32. *See id.* at 416-18.

33. *Id.* at 406.

34. *See* Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 102 (1978).

pected to know that they exist. Under these circumstances we would still say, I think, that his action in burning the furniture was justified, even though he was not actually in a state of necessity that would require this. Now suppose there is no functional central heating, but the backpacker thinks there is; the cabin contains what appear to be operational radiators and a thermostat. Despite his reasonable belief that he could simply turn on the central heating, the backpacker immediately proceeds to burn the furniture. Here, I think, we would say that his action was not justified, even though he really was in a state of necessity. The justifiability of acts of damage in property cases, and also our determination whether there was a fault-in-the-doer of the damage, thus turns on whether the person *reasonably believed* that he was in a state of necessity and that his action was the only way, or the least objectionable way, to alleviate that necessity. A similar analysis applies to acts of killing or wounding in self-defense. As one would expect, the existence of fault-in-the-doer turns on factors internal to the doer.

We have just considered, in a crude and preliminary way, what constitutes a fault-in-the-doer in cases of intentionally damaging property. The crucial question for present purposes, however, is whether such cases always involve a fault-in-the-doing. Coleman introduces the fault-in-the-doing/fault-in-the-doer distinction in the context of discussing the standard of reasonable care in corrective justice and negligence law. This standard, he claims, is "objective or external to the actor."[35] There is a sense in which we can say the same of the norm that property should not be intentionally damaged. It is almost always regrettable when one person intentionally damages the property of another, even in a situation of necessity, because we would prefer that the necessity be alleviated if possible in some other way. Moreover, the act itself is regrettable, and not just the fact that damage occurred. Similar points apply to intentional acts of killing or wounding that are done in self-defense. Intentionally damaging property, or intentionally killing another person, is thus an act that can always sensibly be viewed as fault-in-the-doing, regardless of the circumstances. This point is reinforced by our previous conclusion that the factors that would justify a particular act are internal to the ac-

35. COLEMAN, *supra* note 1, at 546.

tor; they concern fault-in-the-doer, not fault-in-the-doing. Coleman's own distinction between fault-in-the-doer and fault-in-the-doing thus helps to show how Hal's action of deliberately taking Carla's insulin, although justifiable, is nonetheless in a certain sense fault-like. It was justifiable insofar as there was no fault-in-the-doer, but it was fault-like because intentionally damaging property is always, from an external perspective, a regrettable fault-in-the-doing.

IV. Wrongs and Wrongdoing

I shall later say a little more about the proper accommodation of necessity and self-defense cases within the theory of corrective justice. The point I wish to emphasize for present purposes is that the conclusion that compensation is owed cannot depend simply on the fact that the claimant's interest suffered a setback or a reduction in value; it must turn at least partly on the nature of the injurer's setback-inducing conduct. This claim can be generalized in the following way. A right to repair in corrective justice only arises if the conduct that led to the harm in question was either faulty, or in some appropriate sense fault-like. The conduct must, at a minimum, have been, in Coleman's terminology, a fault-in-the-doing. I cannot provide here a complete theory of what a fault-in-the-doing is,[36] nor can I even offer a general argument in support of the generalized claim, because it is most likely to be established by rebutting putative counter-examples. The claim nonetheless strikes me as plausible. If it is true, however, as I shall provisionally assume to be the case, then the distinction between wrong and wrongdoing is called into question: A wrong cannot simply be equated with a setback to an interest, or with a reduction in the value of an interest, as Coleman's account suggests. The conclusion that an action was a wrong must, as in the case of wrongdoing, take account of how the injurer's conduct caused the harm. In a rights infringement case, this conduct might not be blameworthy or culpable, but it must still be fault-like; it must at least be a fault-in-the-doing.

Not only are wrongs more like instances of wrongdoing than Coleman's discussion suggests, but the reverse is also true.

36. I have considered the nature of fault in corrective justice at greater length in Perry, *supra* note 13.

Coleman's notion of a wrong is primarily concerned with the interest affected. His notion of wrongdoing is primarily concerned with the conduct of the wrongdoer. But just as the characterization of a wrong must take account of the injurer's conduct, so must the characterization of a type of wrongdoing take into consideration, for purposes of doing corrective justice, the nature of the interest the conduct sets back. Coleman states that "[t]he failure to abide by the relevant norms of conduct is enough to render the action a form of wrongdoing . . . and the losses that result wrongful . . . ."[37] But the reference to *relevant* norms of conduct—Coleman also speaks of "appropriate" norms—means that there is no distinct category of reprehensible behavior that can be characterized as wrongdoing in the abstract, in isolation from the interest affected.

Consider Coleman's example of business competition. As he rightly says, a businesswoman who is driven out of business by a competitor using permissible means—that is, means that conform to the norms governing competition in the marketplace—has no claim in justice to repair.[38] This is true even though the competitor may have deliberately set out to drive her out of business. Wrongdoing cannot be characterized, for the purposes of corrective justice, apart from the context in which the relevant conduct occurs. One important aspect of that context is the nature of the interest the conduct detrimentally affects—in the example, a certain kind of economic interest. So far as corrective justice is concerned, wrongdoing is, we might say, interest-sensitive. Tort law reflects this: Some interests are protected against intentional harm but unprotected against negligence, while others that are protected against malicious harm may, under otherwise similar circumstances, be unprotected against intentional or negligent interference.[39]

The gulf between wrongs and wrongdoings is thus narrower than Coleman suggests; in fact, it may be non-existent. This line of thought, if taken further, leads in my view to the conclusion that, contrary to Coleman's claim,[40] conduct that constitutes wrongdoing for the purposes of corrective justice always involves the invasion of a right. I shall not pursue the argument

37. COLEMAN, *supra* note 1, at 547.
38. *Id.* at 544.
39. *See* Perry, *supra* note 6, at 404-06.
40. *Id.* at 388.

in that direction here, however.[41] The point I wish to emphasize at present is that a claim to repair in corrective justice always depends on an overall moral assessment of the harmful interaction that occurred between the parties. This assessment takes account of the nature and relative importance of the victim's adversely affected interest, on the one hand, and the existence and extent of fault in the injurer's behavior, on the other. The validity of the claim is a function principally of these two factors, although there may be room for others. This conclusion applies to both wrongs and wrongdoings, assuming there is a viable distinction between the two. As for the category of wrongful losses, a loss can be characterized as wrongful if it is the object of a valid claim to repair. The wrongfulness of a victim's loss vis-à-vis her injurer is thus itself a function of the two factors previously described. It is never completely independent of the nature of the injurer's conduct, as Coleman suggests. We thus neither have nor need the semi-autonomous category of wrongful losses that Coleman believes is required to ground a claim to repair in infringement cases. Wrongful loss is a shadow concept, so to speak. Its contours are necessarily and completely determined by a global moral assessment of the harmful interaction that took place between the parties.

V. The Mixed Conception Reconsidered

Recognizing these points about claims to repair and wrongful losses places us in a better position to assess the mixed conception of corrective justice. Coleman states that the mixed conception draws on elements of both the pure relational and the annulment conceptions. It borrows from the relational view the idea that corrective justice gives rise to agent-relative reasons for action that result from actions people undertake individually.[42] Corrective justice is thus a matter of rights to receive compensation that are correlative of obligations on the part of particular injurers to pay it. This element of the mixed conception survives our reassessment of the circumstances under which claims to repair in corrective justice can arise. From the annulment conception the mixed conception is said to borrow the importance of the notion of wrongful loss for corrective justice. Thus, a duty to repair in corrective justice is a duty to

41. I pursue it a little further in *id.* at 406-07.
42. *See* Coleman, *supra* note 1, at 521, 529.

repair wrongful losses, not wrongs as such.[43] I have interpreted the mixed conception as relying on a relativized notion of wrongful loss, and this represents a tacit departure from the absolutist understanding employed by the annulment conception. But even this relativized notion of wrongful loss is unacceptable, I have argued, because it posits too great a degree of independence between the nature of an injurer's conduct and what I earlier called the wrongfulness requirement of corrective justice.

This does not mean, however, that the mixed conception, once it has been reconstructed so as to take account of the points made above about wrongfulness, borrows nothing from the annulment conception. It borrows the notion of loss as such, rather than the idea of *wrongful* loss. Coleman is right to say that the pure relational view, as exemplified in the work of Weinrib, does not tell us why corrective justice should be concerned to annul the losses that result from wrongs, as opposed to the wrongs themselves. The pure relational view cannot, in other words, explain why losses have a normative significance that is capable of affecting individuals' reasons for action.[44] Implicit in the annulment conception, by contrast, is the idea that losses are of normative significance because they represent interferences with human well-being. The maintenance and promotion of well-being is, on this implicit understanding, a pervasive concern of morality. Hence, interferences with well-being can affect our reasons for action.

Where the annulment view goes wrong is in assuming that losses can only give rise to agent-neutral reasons for action. Losses that persons have suffered can, of course, give rise to such reasons. These fall, as Coleman now acknowledges, within the province of general distributive justice, and when the responsibility they represent is collectively delegated to the state it can implement social insurance or welfare schemes of various kinds. But the occurrence of a loss can also give rise to agent-relative reasons, and this brings us within the province of cor-

43. *See id.* at 527.

44. This is true of Weinrib's version of the relational view because Weinrib maintains that corrective justice has its normative roots in an Hegelian form of rationalism that abstracts from all considerations of human well-being. Such considerations are treated as without normative significance in their own right. *See* Weinrib, *Right and Advantage in Private Law*, *supra* note 12. I criticize this aspect of Weinrib's theory in Perry, *supra* note 13.

rective justice. In both cases, though, losses are regarded as normatively significant—that is, as reason-affecting—precisely because they constitute interferences with human well-being.

With these points in mind, let me try to set out the basic elements of my proposed reconstruction of the mixed conception.[45] We have, to begin with, a loss suffered by one person as a result of action undertaken by another person. The fact that the injurer caused the loss through an exercise of volition is normatively significant because, as Coleman says, the loss is "in a suitable sense, his responsibility."[46] There is, I wish to argue, a sense in which we are responsible for all the (sufficiently proximate) outcomes of our actions, regardless of whether we were at fault in bringing them about. This conception of responsibility, which Tony Honoré has called outcome-responsibility,[47] involves an element of moral luck. We can be responsible in a non-culpable sense for outcomes that we could not intend or foresee because the fact of having made a difference in the world, through a voluntary exercise of volition, is itself of normative signficance. Coleman is getting at a similar idea when he says that "[i]t is through the exercise of the powers of autonomous agency that individuals make their mark in the world."[48] This is the basis of the agency requirement for a duty to repair that was discussed earlier. Coleman suggests that a conception of responsibility along these lines gives rise automatically to a duty to repair, albeit a duty that operates only on the category of wrongful losses.[49] This, I wish to argue, is not quite correct. Outcome-responsibility affects our reasons for action in various ways—for example, someone who non-faultily injures another has a duty to obtain assistance of a strength and kind that others do not have—but it does not necessarily or automatically generate a duty to repair.

Outcome-responsibility does not automatically give rise to a duty to repair, but it does give rise to the possibility of such a duty. A person who is outcome-responsible for a loss has a normatively significant connection with it that is capable of affect-

45. This reconstruction yields essentially the same conception of corrective justice as the one I advance in Perry, *supra* note 13. It is described and defended in much greater detail there.

46. COLEMAN, *supra* note 1, at 530.

47. Tony M. Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 530 (1988).

48. COLEMAN, *supra* note 1, at 530 n.15.

49. *See id.* at 530.

ing her subsequent reasons for action. The victim who has suffered the loss has experienced a reduction in his level of well-being. The loss can effectively be transferred, moreover, at least up to a point, by the payment of compensation. While there is no reason to think that outcome-responsiblity by itself gives rise to a duty to compensate, an outcome-responsible injurer whose harm-causing action exhibited certain other morally relevant features might well have strong moral reasons, amounting to a peremptory duty, to take the loss upon herself. The present suggestion is that it is normally a necessary condition for such reasons to arise that the injurer's conduct in bringing about the victim's loss have been faulty or in an appropriate sense fault-like. Let me refer to this as the fault requirement of corrective justice.

The fault requirement is one aspect of a more general *comparative* inquiry: Who among the group comprised of the victim and those persons who are outcome-responsible for his loss should most appropriately suffer the interference with well-being that *either* the original loss *or* the payment of compensation necessarily entails? (There might be more than one person who is outcome-responsible for the loss, and the victim himself might be one of these.) This inquiry involves what I referred to at the end of Part IV as "the global moral assessment of the harmful interaction that took place between the parties."[50] In general, a faulty injurer is a morally preferable loss-bearer to an innocent victim, although as we saw in Part IV, fault is, so far as corrective justice is concerned, interest-sensitive; the nature of the victim's detrimentally-affected interest—the aspect of his well-being that was set back—is the other main concern of the comparative inquiry. With respect to some interests, it is suffi-

50. Elsewhere I have characterized the comparative inquiry discussed in the text as an instance of localized distributive justice. *See* Perry, *supra* note 13. A similar comparative inquiry has been described by Richard Epstein in the following terms: "As only the plaintiff and the defendant are parties to the suit at hand, only the equities between them should be taken into account in its resolution. These equities . . . must . . . show why it is that the loss is better placed upon one party than another." Richard Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 167 (1974). In the same paper he similarly speaks of "the comparative equities between the parties." *Id.* at 173. Epstein concludes, of course, that the comparative approach supports strict liability, a position I criticize in Perry, *The Impossibility of General Strict Liability*, *supra* note 30. In *Risks and Wrongs*, Coleman states that *tort law* involves a comparative inquiry, and he may also be suggesting that corrective justice does not. COLEMAN, *supra* note 1, at 336, 549 n.5. I am arguing that corrective justice itself involves such an inquiry, even before the institutional structures of tort law have been put in place.

cient if the injurer's harm-causing act only exhibited fault in the doing and not in the doer. Coleman is thus correct to conclude that the fault requirement in corrective justice need not involve blameworthiness or culpability; it is, as he says, quite compatible with the objective negligence standard. Of course, if an injurer's action does happen to be faulty in the sense of fault-in-the-doer, then the case for shifting the loss to her just becomes stronger.

We saw earlier that Coleman builds the mixed conception of corrective justice upon two requirements: an agency requirement and a wrongfulness requirement. Wrongfulness is predicated not of action, however, but of loss. According to my proposed reconstruction of the mixed conception, the agency requirement, together with the fact of loss understood as an interference with human well-being, sets the stage for consideration of what I have called a fault requirement. Fault, which is taken into account in the context of the comparative inquiry just described, is predicated of the injurer's action rather than the victim's loss. In effect, Coleman's wrongfulness requirement, which concerns a category of wrongful loss, has been broken down into two further requirements, one of which concerns wrongfulness—fault, in my terminology—and the other of which concerns loss. The latter of these two requirements is simply an explicit recognition of the fact that the victim must have suffered a loss: His well-being must have been detrimentally affected by the injurer's conduct.

Let me conclude by briefly discussing how the comparative approach applies to the necessity and self-defense cases considered earlier. Where one person intentionally damages the property of another in order to alleviate a state of necessity, the moral equities seem clear. As the discussion above demonstrates, the act of intentionally damaging property will generally involve fault-in-the-doing, even if it does not involve fault-in-the-doer. The act is a regrettable one, even if it is understandable and, in a certain sense, justifiable. Moreover, by engaging in the damage-causing act, the person in the necessitous state intentionally benefits herself, or attempts to benefit herself, at the victim's expense, and fairness seems to require that she compensate the victim after the fact for this intentionally-imposed cost. On a comparative approach these factors are sufficient to justify shifting the loss, at least where the property

owner is, so far as this particular interaction is concerned, a morally innocent party. This is the result advocated by Coleman and supported in the case law.[51]

Matters become more complex with intentional acts of killing or wounding in self-defense, even though these, too, will generally involve fault-in-the-doing. The reason is that the victim, who by hypothesis was an aggressor whose aggression was resisted by force, was not himself totally innocent, and on a comparative approach this is a relevant factor. If the aggressor-victim was guilty of culpable fault in mounting the attack, then his resister-injurer should not have a duty to repair. The appropriate result is less clear, however, when the aggressor's actions were not culpable—say, because he was psychotic. In negligence law, modern doctrines of comparative negligence split the loss on a proportional basis when both parties were nonculpably at fault, and this seems to be an appropriate result on the comparative approach. This may not be the right answer in the self-defense case just described, however, because there are further complexities involved that cannot be considered here. Even so, I hope it is clear that the comparative inquiry provides the appropriate framework for determining whether or not a duty to repair is owed. As I have tried to show, an inquiry of this kind is an implicit but integral element of Coleman's mixed conception of corrective justice, or at least of a reconstructed version of the mixed conception that most satisfactorily captures the spirit of his important and illuminating enterprise.

51. *See, e.g., Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910). Coleman says that necessity cases fit into the second of his three categories of ways that an injurer's conduct can relate to her victim's claim to repair. That category covers cases in which the agent's conduct is justifiable, but the victim can still claim compensation. The first category comprises cases of unjustifiable conduct, while the third consists of cases in which the agent's conduct is justifiable only if the victim is paid compensation. I would argue that, on the analysis of necessity cases presented here, they are most appropriately included in the third category. The idea of conditional fault seems to capture best the sense in which the injurer's conduct is both justifiable and fault-like. *See* Perry, *supra* note 6, at 403-04 n.85. Coleman rules this category out because he assumes that it can only extend to cases of hypothetical contract. This seems to me to be a mistaken assumption.