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Correlativity, Personality, and the Emerging Consensus on Corrective Justice

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Over the last few decades, corrective justice has established itself as central to serious academic discussion of the normative dimension of tort liability. This article describes the consensus about corrective justice that is presently emerging, as is evident from work of the author and from recent work of other tort theorists (Jules Coleman, Stephen Perry, Arthur Ripstein, and Martin Stone).

The framework for discussing this emerging consensus is what the article calls "the juridical conception of corrective justice." The juridical conception seeks to explicate the most general ideas implicit in liability as a normative practice in which the plaintiff makes a claim against the defendant. Under the juridical conception, corrective justice is the synthesis of two complementary abstractions: correlativity and personality. Correlativity articulates at the most general level the relationship between the interacting parties as doer and sufferer of the same injustice. Personality, i.e., the idea of purposiveness regardless of one's particular purposes, similarly articulates at the most general level the conception of the interacting parties that is presupposed in a regime of rights and their correlative duties.

The leitmotif of the emerging consensus is the idea of correlativity, which is now effectively accepted by all of the theorists mentioned, even by those (Coleman and Perry) who initially rejected it. Personality, on the other hand, has gained less support, because of the apprehension that it implies that rational agency, as elaborated by Kant or Hegel, is a

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philosophical truth from which tort theory can be derived. This reason for dismissing personality is insufficient. Corrective justice comes into view not by being derived from a notion of rational agency but by reflection on the most general ideas implicit in liability as a normative practice. Personality is merely the abstraction that represents the parties as the bearers of rights and their correlative duties. Like correlativity, it owes its status within corrective justice to its being implicit in the law's doctrines and institutions. Consequently, whether the Kantian or Hegelian notion of rational agency is plausible is a philosophical question that lies beyond tort theory and that does not affect the place of personality within a corrective justice approach to liability. Moreover, if (as argued in this article) correlativity and personality are indeed complementary, acceptance of the former should lead to acceptance of the latter. Such acceptance would provide the theorists who now reject it with a concept that would be serviceable for their own formulations.

In any case, the consensus about the highly structured notion of correlativity indicates that the main lines of the corrective justice approach to tort law are now firmly established. Although refinements inevitably remain to be made, radical revisions are unlikely to result from further reworking the standard material of corrective justice tort theory. Scholarly attention should instead turn to the examination of the place of corrective justice within the legal order as a whole and to the expansion of the corrective justice analysis from tort law to other bases of liability.

INTRODUCTION

From the perspective of corrective justice, the point of a tort action is to undo the injustice that the defendant has done to the plaintiff. Over the last several decades, this simple and obvious idea has become increasingly important to tort theorists. Its contemporary articulation is the subject of this paper.

Among English-speaking scholars, the recent history of corrective justice has been one of eclipse and rediscovery. Formulated by Aristotle in antiquity, nurtured by the scholastic tradition in the Middle Ages, and then reworked by modern philosophers of natural right, corrective justice had long been a staple of legal theory. However, by the second half of the twentieth century, instrumental conceptions of law largely supplanted it. Having been displaced by policy analysis and its concomitant intellectual disciplines,

the characteristic concepts and underlying assumptions of corrective justice were no longer part of the common intellectual inheritance of academic lawyers. The emergence of tort theory out of the clash between economic analysis and the moral approaches that reacted to it[1] brought corrective justice renewed interest. Because corrective justice treats the relationship between the parties as normative, it readily appealed to theorists who viewed tort law as a repository of moral reasoning about responsibility for harm, rather than as a device for promoting economic goals. In effect, the recovery of corrective justice became a project of contemporary tort theory.

The common orientation of the corrective justice theorists toward the injustice done by the defendant to the plaintiff has not precluded the elaboration of widely divergent views over the last two decades. Disagreements have extended even to the most basic issues, including the characterization of the parties' relationship, the connection of wrong to remedy, the role of distributive justice, and the implications of tort theory for tort doctrine. The inherent fractiousness of academic exchange has naturally highlighted the differences. From these controversies, one might conclude — as scholars unsympathetic to corrective justice are inclined to do[2] — that corrective justice is too contested and indeterminate to be illuminating.

In fact, recent scholarship by corrective justice theorists suggests that a consensus is now emerging. This development is hardly surprising. Because corrective justice is relational, pertaining only to what counts as justice between the parties, it inevitably deploys a relatively limited stock of internally connected ideas. It is therefore natural that intensive reflection about these ideas by a widening circle of sophisticated theorists should have produced extensive common ground. The divergences that remain are now comparatively refined, with differences of principle evaporating into differences of formulation. It is as if the constraints inherent in thinking about justice between the parties are now imposing their discipline on academic discussion.

This paper draws out the shared core of ideas that are explicit or implicit in the work of a number of influential tort theorists. Some of these theorists have come to their present views after abandoning significantly different positions. Others have consistently worked within a single set of ideas. The

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1 Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. Legal Stud. 27 (1980).

2 Allan C. Hutchinson, *The Importance of Not Being Ernest*, 34 McGill L.J. 233, 251 (1989).

common ground reached from these diverse starting points constitutes the emerging consensus that is the subject of this paper.

The leitmotif of this consensus is the idea of correlativity. Under this idea, liability reflects the conclusion that the defendant and the plaintiff have respectively done and suffered the same injustice. Correlativity structures this injustice: the elements of liability can be explicated only in terms of concepts whose normative force applies simultaneously to both parties. In contemporary tort theory, correlativity appears under varying formulations and terminology, but its centrality is now widely accepted. When originally presented, the idea that tort liability involves a conception of fairness that recognizes the equal normative status of the parties as doer and sufferer of the same wrong was regarded as eccentric. Now even initially unsympathetic scholars have acceded to that idea.

Naturally, the version of corrective justice that I have elaborated over the last two decades[3] provides the framework for my discussion. Among the contemporary approaches to tort theory, this version of corrective justice presents the earliest, most continuous, and most extensive attention to correlativity — an attention that includes exhibiting the presence of correlativity in the doctrines of tort law, linking it to ideas of bilateral fairness and coherence, incorporating it into a methodology of enquiry about tort law as a normative practice, and connecting it to classic philosophical expositions of natural law and natural right. Because this version purports to track the most pervasive features of tort law through a series of internally connected concepts that operate coherently within the bipolar relationship of plaintiff and defendant, it has proved to be the most stable of the current articulations of corrective justice and has served as the pole to which they have been drawn. For this reason, its very radicalism[4] makes it a suitable framework for identifying and considering the emerging consensus.

I shall call this framework the juridical conception of corrective justice. The conception is juridical in the sense that it reflects, though at an abstract level, the justifications internal to tort law, treating them as normative in their own terms rather than as the disguised surrogates for extrinsically justifiable social goals. The juridical conception views the determination of liability as a distinctive domain of practical reason that subjects the interaction between the plaintiff and the defendant to a coherent ordering. Because legal argument attests to the law's self-reflective engagement with its own coherence, the principles and concepts already present to tort law

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3 *See especially* Ernest J. Weinrib, The Idea of Private Law (1995).

4 Jules Coleman, *The Structure of Tort Law*, 97 Yale L.J. 1233, 1247 (1988).

can provisionally be regarded as constituents of that ordering. Drawing on the law's own efforts, the juridical conception of corrective justice attempts to exhibit the normative ideas interior to a coherent regime of liability.

Fundamental though it is, correlativity is not the only component of the juridical conception of corrective justice. That conception also features a distinct notion of the person that philosophers in the natural right tradition have termed "personality." Personality in this context is not a psychological but a normative idea: it refers not to the pattern of an individual's behavioral characteristics, but to a presupposition about imputability and entitlement that is implicit in the rights and duties of private law. This presupposition is that as participants in a regime of liability, the parties are viewed as purposive beings who are not subject to a duty to act for any purpose in particular, no matter how meritorious. This capacity for purposive action underlies the rights and duties that are its juridical manifestations. Personality signifies that all persons possess an equal capacity for rights and duties without being obligated to act toward any particular purpose; it thereby reflects the structure of the law of obligations as a system of negative duties of non-interference with the rights of others. This does not mean that so circumscribed, a notion of duty is exhaustive of one's obligations in all moral contexts. Rather, personality encapsulates a normative standpoint that is specific to private law.

In the juridical conception of corrective justice, correlativity and personality are complementary ideas. They are the mutually entailed parts of a single conception, but they highlight different aspects of it. Just as correlativity is the most abstract representation of the terms on which the parties interact in private law, so personality is the most abstract representation of the parties themselves as interacting beings. And just as correlativity exhibits the structure of the justifications that pertain to private law, so personality articulates the presupposition that informs the content of those justifications. Correlativity and personality pass over the same theoretical ground from different directions.

Accordingly, one would have expected that the emergence of a consensus about correlativity would be accompanied by a similar consensus about personality. That, however, has not occurred. Even those who have most readily accepted the juridical conception's notion of correlativity have rejected its notion of personality. This is because of their apprehension that personality, with its roots in the natural rights philosophies of Kant and Hegel, implies both a philosophical claim about the truth of Kant's or Hegel's conceptions of rational agency as well as a methodological claim that tort theory is derived from a more abstract normative theory. They

reject personality because they reject what they take to be these further implications.

In this paper I point out that these further implications do not follow from the presence of personality within the juridical conception of corrective justice. Personality articulates at the high level of abstraction what is implicit in private law as a regime of rights and their correlative negative duties. Personality's status within the juridical conception is no different from that of correlativity. With respect to both personality and correlativity, the juridical conception operates by working back from the principles and concepts of private law to the most general ideas latent within them. Thus the juridical conception regards corrective justice neither as deriving from nor implying the philosophical truth of Kant's or Hegel's conceptions of rational agency. Of course, this does not exclude reference to Kantian and Hegelian texts and ideas as a source of insight about the nature of private law when understood as corrective justice. Nor does it exclude the possibilities of deriving corrective justice from or establishing the truth of rational agency; consideration of those possibilities, however, would require philosophical argument that lies beyond the bounds of tort theory and does not affect it. What the juridical conception of corrective justice asserts is merely that correlativity and personality are implicit in private law as complementary ideas, so that accepting one of them is inconsistent with rejecting the other. Moreover, in view of this complementarity, one might expect that theorists who share the consensus about correlativity might find the explicit acknowledgement of personality — which is, in any case, implicit in their positions — to be helpful in the further development of their views.

This paper proceeds in the following steps. Section I reviews the juridical conception of corrective justice as the synthesis of two complementary ideas, correlativity and personality, that illuminate the normative structure of liability. These two ideas are abstract representations of different aspects of the connection between the parties in a liability regime, with correlativity going to the nature of the connection, and personality to the nature of the parties. The subsequent sections examine the status of each of these ideas in the scholarship of leading corrective justice theorists. Sections II and III look at correlativity in the writings of Jules Coleman and Stephen Perry. The lucidity and sophistication of their work have rendered their views deservedly prominent. They provide particular testimony to the significance of correlativity, because having rejected it in their earlier articles only to embrace it more recently, they have traveled far to reach their present destinations. Sections IV and V explore personality in relation to the work of Arthur Ripstein and Martin Stone, who have consistently accepted correlativity but dismissed personality. Their rejections of personality are

especially striking because they occur in the context of theoretical accounts of tort doctrine that are based on and more or less identical with the one offered by the juridical conception. I suggest that if the specific significance of personality for tort theory is kept in mind, personality might readily find a place within their theoretical approaches. This is because the significance of personality within the juridical conception of corrective justice is not that it is a philosophical truth about rational agency (though it may be), but that it is implicit in liability as a normative practice. Finally, in the last section, I conclude with brief observations about the future direction of scholarship about corrective justice.

I. THE JURIDICAL CONCEPTION OF CORRECTIVE JUSTICE

A. The Complementary Abstractions

The juridical conception of corrective justice is the centerpiece of a theory of liability. The object of the theory is to understand liability as a distinct and familiar normative practice, in which the law assesses and responds to the claim that a plaintiff makes against a defendant. Considered as a normative practice, liability includes both the legal consequences that a court might impose and the grounds that justify those legal consequences.

Within this practice, justification has a pervasive role. The rules, concepts, and principles that figure in the assessment of the plaintiff's claim are the ingredients and the products of a justificatory process. Moreover, the institutions of liability are designed to be fora for the presentation of these justifications and to give effect to the conclusions that may be drawn from them. Consequently, the normative significance of a finding of liability depends on the cogency of the justifications that support it.

The juridical conception of corrective justice takes the justificatory ambitions of this practice seriously by focusing on its internal normative dimension. The juridical conception repudiates the idea that the justifications that figure in private law derive from goals that are desirable independent of the role that they can coherently play in a liability regime. Instead, its eye remains fixed on the practice itself, on the institutional structure through which it unfolds, and on the reasoning through which it expresses its distinctive mode of justification. The juridical conception of corrective justice thus honors the law's reasoning as a good faith attempt — sometimes successful and sometimes not — to make the exercise of official power the product of an internally coherent ensemble of justificatory considerations.

The aim of the juridical conception is to disclose the structure and the

normative presuppositions of the law's internal processes of justification. It takes the doctrinal and institutional features that are characteristic of a regime of liability and asks what must be presupposed about them and about their interconnection if the law is to be (as it claims) a coherent justificatory enterprise. The answer lies in identifying the most abstract unifying conceptions implicit in the doctrinal and institutional arrangements of private law. Thus, the juridical conception of corrective justice purports to bring to the surface ideas that are latent in liability as a normative practice.

Within the juridical conception, the movement of thought is from the particulars of liability to its most abstract characterization, thus carrying to its extreme the tendency to abstract that marks legal thinking. Although the events that give rise to a legal relationship are particular, the law treats these events in terms of categories. The particularities of the events are legally relevant only inasmuch as they instantiate a category applicable to the legal relationship to which they give rise. Just as legal thinking views particulars in the light of these categories, so the juridical conception of corrective justice abstracts further from these categories to the barest and most general ideas underlying the law's construction of the parties' relationship.

The juridical conception of corrective justice gives voice to the internal structure of a liability regime by presenting its doctrinal and institutional features as the specifications of its most pervasive and general characteristics. If these characteristics can be understood as expressing a set of unifying and complementary ideas, the liability regime will be seen as coherent to the extent of its participation in those ideas. When presented abstractly, these ideas afford an uncluttered view of the nature of liability, because they pertain to liability as such without being confined to any particular doctrine. Their very abstractness brings into view the systematic connections that might obtain among the considerations adduced to support the manifold features of liability. Moreover, they provide a critical perspective internal to the law, because justifications that do not fit within these unifying ideas are problematic from the standpoint of liability itself.

These ideas emerge from the notion that liability is justified when a certain kind of connection obtains between the parties. This description of liability indicates that a theory of liability must comprehend two general features. The first is the nature of the connection between the parties: What is it that allows the law to single out two specific parties from all the people in the world and link them as plaintiff and defendant? The second is the nature of the parties: In view of the diversity of human interests and characteristics, what conception of the parties is normatively capable of serving as the basis of the defendant's liability to the plaintiff? The unifying ideas implicit in

liability are the answers, formulated in the most abstract terms, to these two questions.

The conceptions of the parties and of the connection between them are mutually complementary. In dealing with liability, we are interested in the parties only because of the normative connection between them; and we are interested in that connection only because the parties are normatively capable of association in terms of liability. Accordingly, the parties must be conceptualized in a way that makes liability the necessary mode of connecting them; and the connection between the parties must be conceptualized in a way that makes necessary a certain construal of what, from the standpoint of liability, is normatively significant about them. These two unifying ideas are thus the same idea presented under different aspects. Indeed, if they were not the same idea, the legal phenomenon to which they apply would have to be understood not as a unity but as a pluralism of at least two independent ideas. This conclusion would defeat the aspirations of the juridical conception by indicating that liability — and the justificatory considerations that underlie it — is incapable of being understood as an internally coherent whole.

In the juridical conception of corrective justice, the two complementary ideas are correlativity and personality. Correlativity, which was first highlighted in Aristotle's account of corrective justice,[5] is the abstract formulation of the connection that exists between the parties in a regime of liability. Personality, which was most fully articulated in the philosophical tradition of natural right that culminated in Kant and Hegel,[6] presents in similarly abstract terms what is normatively significant about the interacting parties for purposes of liability. Although the two ideas are ultimately congruent, they start from different aspects of liability. Correlativity abstracts from the institutional framework of the plaintiff-defendant lawsuit and inquires into the structure of the justifications that coherently fit into this institutional framework. Personality abstracts from the doctrinal framework of rights and duties in order to exhibit the content of private law justification in its most general form; it then extends its attention to the institutions that give coherent effect to that doctrinal framework. Together, correlativity and personality are the interlocking foundation stones of a theory of liability.

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5 Aristotle, Nicomachean Ethics at V, 4.

6 G.W.F. Hegel, Philosophy of Right §§ 34-40 (1821); Immanuel Kant, The Metaphysics of Morals 242 (1785).

B. Correlativity

Correlativity highlights the obvious fact that the liability of the defendant is always a liability to the plaintiff. Liability consists in a legal relationship between two parties, each of whose position is intelligible only in the light of the other's position. In holding the defendant liable to the plaintiff, the court is making not two separate judgments (one that awards something to the plaintiff and the other that coincidentally takes the same from the defendant), but a single judgment that embraces both parties in their interrelationship. The defendant cannot be thought of as liable without reference to a plaintiff in whose favor such liability runs. Similarly, the plaintiff's entitlement exists only in and through the defendant's correlative obligation.

The court's finding of liability is the response to an injustice that, accordingly, has the same correlative shape as liability itself. In bringing an action against the defendant, the plaintiff is asserting that they are connected as doer and sufferer of the same injustice. As is evidenced by the judgment's simultaneous correction of both sides of the injustice, the injustice done by the defendant and the injustice suffered by the plaintiff are not independent items. Rather, they are the active and passive poles of the same injustice, so that what the defendant has done counts as the basis of liability only because of what the plaintiff has suffered, and vice versa. Each party's position is normatively significant only through the position of the other, which is the mirror image of it.

This correlativity figures in the way that tort doctrine constructs the tort relationship. Because liability treats the parties as doer and sufferer of the same injustice, tort law elaborates legal categories that reflect the singleness of the injustice on both sides and, consequently, the unity of the relationship between plaintiff and defendant. To this end, it treats the tortious act committed by the defendant as part of a unified normative sequence that includes the wrongful effect on the plaintiff. Thus, the categories that the law applies embrace both parties and bridge the temporal gap between the defendant's wrongful act and the plaintiff's wrongful suffering.

This is the case even in negligence, where the temporal gap can be protracted and the legal inquiry is broken down into a complex set of concepts (duty, breach, proximate cause, cause in fact). When liability for negligence is being considered, the unreasonableness of the risk created by the defendant is seen in terms of the probability and the gravity of its effect on others; the duty not to create the risk is seen in terms of its foreseeable effect on a group that includes the plaintiff; the definition of the risk through proximate cause is seen in terms of the kind of effect that leads us to think of the risk as unreasonable; and the factual causation of

injury seen in terms of the materialization of this risk. Thus, the concepts that constitute the negligence enquiry trace the sequence that begins with the defendant's unreasonable exposure of others to risk and is completed by the materialization of that risk in injury to the plaintiff.[7] Each of the concepts refers both to the defendant's wrongful act and to that act's wrongful effects, potential or realized, on the plaintiff. Together, the negligence concepts form an ensemble that articulates what it is for the same injustice to be done and suffered when unreasonably created risk matures into injury.

Correlativity structures the justificatory considerations that underlie the legal doctrine. Since the defendant, if liable, has committed the same injustice that the plaintiff has suffered, the reason the plaintiff wins ought to be the same as the reason the defendant loses. In specifying the nature of the injustice, the only normative factors to be considered significant are those that apply equally to both parties. A factor that applies to only one of the parties — for example, the defendant's having a deep pocket or being in a position to distribute losses broadly — is an inappropriate justification for liability because it is inconsistent with liability's correlative nature. Normative considerations that reflect the correlative situation of the two parties set terms for their interaction that take into account their mutual relationship and, therefore, are fair to both of them.

Aristotle's original account contrasts the correlativity of corrective justice with the categorically different structure of distributive justice. Corrective justice links the doer and sufferer of an injustice in terms of their correlative positions. Distributive justice, on the other hand, deals with the sharing of a benefit or burden; it involves comparing the potential parties to the distribution in terms of a distributive criterion. Instead of linking one party to another as doer and sufferer, distributive justice links all parties to the benefit or burden they all share. The categorical distinction between correlativity and comparison is certified by the difference between the numbers of parties that each admits. Corrective justice links two parties and no more, because a relationship of correlativity is necessarily bipolar. Distributive justice admits any number of parties, because in principle, no limit exists for the number of persons who can be compared and among whom something can be divided.

The consequence of Aristotle's contrast between corrective and distributive justice is that no distributive consideration can serve as a justification for holding one person liable to another. The correlative structure of liability entails the irrelevance of any factor that is normatively significant

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7 On negligence liability as an expression of corrective justice, see Weinrib, *supra* note 3, at 145-70.

only because of its possible role in a distributive comparison. For purposes of justifying a determination of liability, corrective justice is independent of distributive justice.

Accordingly, the idea of correlativity brings out the interior structure of justification within the connection that liability forges between a particular plaintiff to a particular defendant. In considering liability we might wonder: Why is the plaintiff entitled to recover from this defendant rather than from someone more evil, or why is the defendant held liable to this particular plaintiff rather than to someone more needy? The correlative nature of liability shows that such questions are misplaced. Evil and need are moral categories that may well figure in other contexts, but they are not pertinent to liability. It may make sense as a matter of distributive justice, for instance, to divide benefits or burdens on the basis of a comparison of relative virtue or need. Virtue and need, however, do not connect any two particular persons as correlatively situated.

If such factors as virtue and need are eliminated as justificatory considerations for liability, what remains? These factors, after all, are only examples of a wider principle that applies to anything whose normative significance is not correlatively structured. Similarly excluded are considerations that pertain to anyone's welfare. Deficits in welfare may justify a redistribution that transfers resources from those who have more to those who have less. Such a redistribution, however, operates through a comparison of the welfare of many parties, rather than through a correlative linking of any particular two of them.

For tort law (as well as for the law of obligations more generally), the overarching justificatory categories expressive of correlativity are those of the plaintiff's right and the defendant's corresponding duty not to interfere with that right. The juridical conception of corrective justice regards injustice as consisting in the defendant's doing or having something that is incompatible with a right of the plaintiff. Right and duty are correlated when the plaintiff's right is the basis of the defendant's duty and, conversely, when the scope of the duty includes the kind of right-infringement that the plaintiff suffered. Under those circumstances the reasons that justify the protection of the plaintiff's right are the same as the reasons that justify the existence of the defendant's duty. In contrast, when the defendant breaches a duty that is not the basis of the plaintiff's right, no liability ensues under the

juridical conception, because if it did, the reason for the plaintiff's winning would not be the same as the reason for the defendant's losing.[8]

C. Personality

The question that then arises is this: Given that right and duty are the correlatives structurally appropriate to the juridical conception of corrective justice, how is their content to be understood and presented for theoretical purposes? By attending to correlativity, the juridical conception concludes, first, that the justifications underlying liability require a correlative structure and, second, that right and duty have the requisite structure. However, while correlativity marks the relationship between right and duty, it does not seem to reveal much about the content of any right or of its correlative duty. To be sure, correlativity excludes any content that reflects non-correlative justificatory considerations. But can corrective justice move from a negative characterization of what is excluded to a positive characterization of what is included?

As the attention to correlativity indicates, theorizing within the juridical conception involves abstracting to the organizing idea that illuminates the justificatory coherence implicit in the law's doctrines and institutions. Just as correlativity is the abstraction that presents the many particular relationships between parties to tort actions — and the structure of justification applicable to those relationships — in terms that match the bipolar nature of liability, so we want to know now whether a similar abstraction illuminates the content of the various rights and duties implicit in the workings of tort law. For unless the content of the parties' positions, as well as their structure, can be illuminated through some abstraction that coherently organizes the manifold of tort liability, the theoretical exposition remains incomplete.

It goes without saying that this abstraction must be fully consistent with the conception of liability as correlative, because the content of the rights and duties has to fit the correlative structure that they instantiate. This desideratum means that rights cannot be conceived merely as shorthand references to components of the plaintiff's welfare, for then rights will ultimately be as unexpressive of correlativity as welfare itself. From the standpoint of corrective justice, the advance achieved by introducing the notion of rights and correlative duties would be undone by the non-correlative conception of the content of those rights as being based on welfare.

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8 The leading example is *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), discussed in Weinrib, *supra* note 3, at 158-64.

Thus, under the juridical conception of corrective justice, rights are not normatively significant for tort law simply by virtue of the fact that they enhance the plaintiff's welfare. Of course, having a right contributes to a person's welfare by protecting some interest from wrongful interference. And it is also, of course, true that tort law responds to the infringing of a right by measuring diminutions of the right-holder's welfare under the legally-recognized heads of damages. That, however, does not mean that rights are synonymous with aspects of welfare or that their normative significance is to be understood in terms of it. In the law's contemplation, the increase in welfare through having a right and the decrease through the infringement of a right are the consequences rather than the grounds of the right. That is why (as in cases of negligently caused economic loss)[9] a decrease in welfare that does not violate the plaintiff's rights is not actionable, and conversely (as in cases of nominal damages), a violation of a right that does not decrease the plaintiff's welfare is. Welfare serves only the secondary function of concretizing rights and making them quantifiable in particular cases. The reason that rights matter for tort law lies elsewhere.

The insignificance of welfare as such is also evident on the duty side. Tort law is a regime of negative duties that mandate non-interference with the rights to which they are correlative. If the rights themselves were to represent aspects of welfare, one would expect that certain aspects (human life itself, for instance) would be so important that at least in an extreme circumstance, persons would be under a positive duty to promote or preserve them. As the law's distinction between misfeasance and nonfeasance indicates, this is not the case. The promotion of another's welfare, even the saving of another's life in an emergency, counts merely as the bestowal of a benefit and therefore is not obligatory. The fact that the law deems no aspect of welfare important enough to ground a positive obligation to forward it indicates that welfare as such is not what is significant about the rights that the law recognizes.

The upshot of these considerations is that welfare does not lie at the heart of the abstraction that might capture the organizing idea implicit in the rights and duties that pertain to tort law. What does?

Correlativity can serve as a model for what an answer to this question involves. As an abstraction aimed at illuminating tort law, correlativity presents no novel claims. Nor does it reflect some obscure or hitherto

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9 Peter Benson, *The Basis for Excluding Liability for Economic Loss in Tort Law, in* Philosophical Foundations of Tort Law 427 (David Owen ed., 1995) (analyzing tort law's reluctance to recognize economic loss as a basis of liability in the absence of an infringement of a right).

unnoticed consequence of tort law that, through virtuoso analysis, is worked up to disclose a mysterious but supposedly comprehensive truth.[10] The significance of correlativity is not in the heavens, but before our very noses, inescapably present whenever we consider tort liability. In its reference to correlativity, the juridical conception merely takes the most manifest aspect of private law — that liability links plaintiff and defendant — and works out its theoretical implications. It does this by extrapolating from the plethora of private law causes of action to the feature that is pervasive in and presupposed by all of them. Similarly, in articulating the abstraction pertinent to the content of rights and duties, the juridical conception merely looks for what is obviously and pervasively present in particular rights and duties.

What is present is the parties' capacity for purposiveness, which assumes legal significance when externalized. On the duty side, this is evident in the trite doctrine that the defendant cannot be liable in tort in the absence of an "act," defined as an external manifestation of the volition.[11] Mere physical movement is irrelevant to liability; there must be the outward expression of an inwardly determined purpose. However, although tort law insists that the wrong originate in an exercise of purposiveness, it does not condition liability on the failure to act for a particular purpose, however meritorious. As the nonfeasance doctrine attests, tort law makes obligatory no particular purposes not even purposes that would preserve another's most fundamental interests. Thus the indispensable presupposition of the defendant's having breached a duty is the sheer purposiveness of the defendant's action, rather than a conception of some set of particular purposes that should have guided the defendant's conduct.

The same picture appears in connection with rights. The acquisition or transfer of a right involves the exercise, in a legally cognizable manner, of the acquirer's or the transferor's purposiveness toward the subject matter of the right. As in the case of acts that violate rights, an external manifestation of the volition is necessary if the law is to ascribe consequences to what one has done. Moreover, acquisition creates (and transfer terminates) the legal basis for the thing's being used in the exercise of the owner's purposive capacity. Accordingly, the law regards a right as the power to treat something as subject to one's will as a consequence of an antecedent connection that one's will has established with the thing in question. Yet the law regards as irrelevant the specific purpose that motivates the acquisition, transfer, or use. Nor does it require that the right, once acquired, be used for any

10 In this respect, contrast the economic analysis of law.

11 Restatement (Second) of Torts § 2 (1965).

particular (and arguably laudable) purposes, such as to increase the utility of all or to maximize wealth or to produce an equality of resources. Of course, the acquisition, transfer, and use of one's entitlements are fuelled by one's particular needs, interests, and desires, but the law pays these no heed when determining the entitlements' validity. The law responds merely to the external indicia of an exercise of purposiveness, rather than to a schedule of required or desirable purposes.

Thus, in the acquisition, transfer, use, and violation of a right, tort law (and private law generally) presupposes the exercise of one's capacity for purposive activity without specifying any set of necessary purposes. In this respect, a liability regime differs from other normative domains. While morality, for example, also presupposes purposiveness in the moral actor, it aspires to specify particular purposes essential to living a moral life. Similarly, distributive justice requires the identification, at least at some level of generality, of the particular purposes at which a distribution ought to aim. In contrast, the presupposition of purposiveness without regard to particular purposes is specific to a regime of liability.

As the basis of the private law's attention to the parties, purposiveness without regard to particular purposes defines the conception of the person that underlies liability. This conception is what the natural right tradition called "personality."[12] Just as the ancient Roman legal texts use "person" when discussing the indicia of one's legal standing, so personality refers to the capacity for purposive agency that forms the basis for the capacity for rights and duties in private law. Personality encapsulates the normative standpoint from which private law has to view the parties if it is to regard them as having its rights and being subject to its duties.

The rights and duties in a coherent liability regime specify the manifestations of personality in the parties' legal relationship. Because personality signifies the capacity for purposiveness without regard to particular purposes, no obligation exists to exercise this capacity toward any particular end. Any duties that reflect personality are, therefore, the negative correlates of rights. These rights arise insofar as the capacity for purposive agency is not merely an inward attribute, but achieves external existence in social interactions through its exercise by or embodiment in an agent. Among these rights are the right to the integrity of one's body as the organ of purposive activity, the right to property in things appropriately connected to an external manifestation of the proprietor's volition, and the right to contractual performance in accordance with the mutually consensual

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12 *See especially* Hegel, *supra* note 6.

exercises of the parties' purposiveness. The existence of these rights gives rise to correlative duties of non-interference whose content and application depend on the nature of the right. Moreover, these rights and duties are actualized through a set of judicial institutions that endows them with a determinate shape, makes public the mode of reasoning that accords with what is presupposed in them, and undoes the consequences of conduct inconsistent with them.

Personality is the abstraction that captures the conception of the person presupposed in the justifications appropriate to the doer-sufferer relationship. The correlativity of doing and suffering means that welfare as such, because it is not correlatively structured, does not serve as the basis of liability; accordingly, the agency of the parties cannot be conceived in terms of the importance of their welfare to them. Instead, the parties' interaction presupposes a conception of the person in which doing and suffering are each normatively significant because of their relationship to the other. Personality offers such a conception. From the standpoint of the doer of injustice, personality as the capacity for purposiveness contains the indispensable conditions for the ascription of responsibility for the effects of one's action. From the standpoint of the sufferer, personality is the basis of the rights that mark out a sphere that others must treat as inviolate. Injustice occurs when what one person has or does is inconsistent with another person's rights.

Personality thus operates in interaction only in a correlative and not a comparative mode. Personality is the abstraction that illuminates the injustice done and suffered as the infringement of a right. Not every harm or disadvantage counts as an injustice for purposes of corrective justice. The mere doing and suffering of something that adversely affects the sufferer are not in themselves significant. What is done and suffered must be an injustice, with the specific kind of injustice being the infringement of a right. Personality models this kind of injustice by presenting a conception of the parties for whose normative status welfare does not matter except insofar as it forms the content of a right. For persons conceived in this way, being better or worse off does not, in itself, constitute an injustice. In this respect, the idea of personality replicates at an abstract level the law's own distinction between *damnum* and *iniuria*.

Thus, personality is the conception of the parties formulated at a high degree of abstraction. This conception organizes and unifies the justificatory considerations that pertain to liability. It organizes them by exhibiting the content of rights and duties as expressive of the capacity for purposiveness that they presuppose. It unifies them by exhibiting the single abstraction implicit in private law's multiplicity of rights and duties. Personality can then function as a conception to which the legal reasoning that underlies the

various rights and duties must conform if they are to fulfill the possibilities for coherence that are latent within them.

Its attention to personality brings the juridical conception of corrective justice into contact with the natural right philosophies of Kant and Hegel. These philosophies locate personality in private law and then, in their different ways, reconstruct the entire normative realm on the basis of conceptions of rational agency for which personality is the indispensable first stage. The juridical conception draws on the notion of personality articulated in these philosophies. One might conclude that the juridical conception thereby purports to derive tort theory from a supposedly correct philosophical account of rational agency. That conclusion would be a mistake for two reasons.

First, the juridical conception does not proceed by postulating a conception of agency and then deriving tort theory from it. Rather, the juridical conception always works backward from the doctrines and institutions of tort law to the most pervasive abstractions implicit in it. These abstractions (correlativity and personality) then serve to illuminate the justifications that figure in a coherent tort law. The argument moves from tort law as a normative practice to its presuppositions, which then serve as vehicles of criticism and intelligibility that are internal to the practice. Personality matters to tort theory not because personality is the source from which tort theory is derived, but because personality is latent in the normative practice that tort theory aims to comprehend.[13]

Second, the juridical conception does not depend on the correctness of any philosophical account of rational agency. The juridical conception of corrective justice is concerned only with the normative perspective specific to private law, not with rational agency as such. To be sure, in their accounts of rational agency, Kant and Hegel formulated the notion of personality and analyzed its significance for private law, thereby providing exemplary expositions of the rights and duties of corrective justice. However, their treatments of personality as an aspect of rational agency would have been nugatory even for their own purposes unless personality were, indeed, immanent in the conceptual structure of private law. It is this immanence that the juridical conception highlights. Accordingly, the Kantian and Hegelian accounts of private law are available to the juridical conception not because

13 For an example of the mistaken view that the juridical conception works by derivation, see Jules Coleman, Risks and Wrongs 478 n.1 (1992). For a description of the movement of thought in the juridical conception as a process of working back from the juristic experience of private law, see Weinrib, *supra* note 3, at 19.

they reflect the correct view of rational agency (though they may), but because they bring out the internal connections integral to a coherent understanding of tort liability.[14]

In sum, then, the juridical conception of corrective justice offers the

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14 For readers of my book *The Idea of Private Law* (Weinrib, *supra* note 3), it might be helpful to explain the relationship between the present exposition of personality and the treatment there of Kantian right. In the book, Kantian right served two functions through a single movement of thought. The first function was to elucidate (and to apply to contemporary private law) the references in Aristotle's discussion of corrective justice to the notions of gain, loss, and equality. Some scholars (*e.g.*, George Fletcher, *Corrective Justice for Moderns*, 106 Harv. L. Rev. 1658, 1668 (1993); Stephen Perry, *The Moral Foundations of Tort Law*, 77 Iowa L. Rev. 449, 557 (1992)) have mistakenly asserted that Aristotle's insistence that gains and losses be equal means that the theoretical value of corrective justice was limited to cases of takings and could not deal with negligence. On that view, Aristotle's corrective justice could not constitute the structure for the parties' relationship across the full range of liability. In reply, my book contended that one should understand gain, loss, and equality in terms of the conception of correlative right and duty laid out in Kant's account. *See also* Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 Duke L.J. 227 (1994). The idea of personality is an element in that conception. Thus, one function of the account of Kantian right in the book was to spell out the normative presuppositions about agency that are implicit in corrective justice and then to use the resulting conception of rights in explicating particular legal doctrines. My presentation of personality here corresponds to — and, indeed, merely summarizes — this function of Kantian right in the book. A second function was to elucidate the nature of normativeness itself as present in a system of liability. The book accordingly attempted to demonstrate the connection between private law and Kant's conception of the will. This involved treating Kant's notion of rational agency as correct. The book thus situated private law in a single tradition of philosophical thought, stretching from Aristotle to Kant and his followers. Whether the book successfully executed this second function depends on whether Kant's argument about the will (or similar arguments by other philosophers of natural right) is sound. It goes without saying that many do not share the conviction that it is, either because they think that the question about the nature of normativeness is unintelligible or because they think that Kant does not provide the correct answer. However, it would be a misapprehension to reject the work done by personality under the first function because one rejects the Kantian role under the second function (though it would be a misapprehension that the book facilitates, because I failed to anticipate it by clearly demarcating these two functions). Kant became relevant to the exposition in the first place only because of the claim that purposiveness without regard to particular purposes is implicit in private law. This is a claim about the presuppositions of a liability regime rather than a claim about the correctness of Kant's argument. The claim about presuppositions has to be assessed on its own merits, even by those who would disagree with me about Kant. I believe that if one accepts that personality is implicit in private law, none of the observations in *The*

following account of liability. Liability is the normative practice through which the law responds to the doing and suffering of an injustice. Implicit in this practice are two ideas that are the most abstract representations of the practical reasoning specific to justification within private law. The juridical conception arrives at these ideas by working back to them from the most general features of liability, including the bipolarity of tort litigation, the distinction between nonfeasance and misfeasance, and the role of rights and correlative duties. The first idea, correlativity, represents the connection between the parties as doer and sufferer of an injustice. Correlativity structures the fair terms on which the parties interact and to which the justifications that pertain to their interaction ought to conform. When regarded correlatively, doing and suffering form a single normative unit in which the injustice imputed to the doer is the same as the injustice done to the sufferer. The second idea, personality, represents the parties who interact on the basis of correlativity. Personality signifies the capacity for purposive action without regard for particular purposes. This capacity is implicit in the rights and duties of private law.

These two ideas are complementary, each implied by the other. Correlativity is the most abstract conception of the structure that connects rights to duties in private law; personality is the most abstract conception of the content of those rights and duties. Correlativity represents the interrelation of the parties; personality represents the parties in their interrelation. For each of them, liability is the response to the doing and suffering of an injustice, but they highlight a different aspect of it: correlativity highlights the connection of doing to suffering, and personality highlights the nature of the injustice as conduct inconsistent with a right. Together they exhibit the doing and suffering of injustice as an internally unified and normatively coherent phenomenon.

II. COLEMAN ON CORRECTIVE JUSTICE

Jules Coleman is the most prominent tort theorist to have adopted the correlativity prong of the juridical conception. Reacting against his own earlier views, he has moved from a conception of corrective justice that categorically rejected correlativity to one that fully incorporates it.

Coleman's first idea was that corrective justice requires the annulment

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Idea of Private Law concerning the internal features of private law are affected by skepticism about the Kantian account of the will.

of wrongful gains and wrongful losses.[15] He considered wrongful loss to be the basis of the victim's recovery and wrongful gain the basis of the injurer's liability. Wrongful gain and wrongful loss he regarded as analytically distinct, adducing the example of negligent injury, where the victim's wrongful loss is not matched by the injurer's wrongful gain. Accordingly, he saw no necessity for the injurer's liability and the victim's recovery to be simultaneously annulled through a tort action. In his view, identifying the gains and losses to be rectified and determining the mode of rectification were different issues, with tort damages being only one of the possible modes of rectification.

Coleman presented the annulment thesis as a conception of corrective justice, because he thought that the annulment of wrongful gains and losses could be distinguished from distributive operations. Annulment was unaffected by the justice of the underlying distribution, because the wrongdoer could not properly invoke the Robin Hood argument that the wrongdoing had resulted in a more just overall distribution, even if in fact it had. In sharply distinguishing corrective from distributive justice, Coleman's annulment thesis and the juridical conception of corrective justice stood shoulder to shoulder.

In every other respect, however, the two conceptions were diametrically opposed. What the juridical conception joined together, the annulment thesis put asunder. First, the juridical conception sees the victim's entitlement as correlative to the injurer's liability; for purposes of tort law, one cannot be conceived without the other. The annulment thesis, in contrast, treated the victim's entitlement and the injurer's liability as logically discrete, because a wrongful loss could occur without a corresponding wrongful gain. Second, the juridical conception regards the wrong and the remedy as together forming a conceptually integrated whole in which the doing of a correlatively structured injustice triggers the correlatively structured undoing of the same injustice. The annulment thesis, in contrast, denied the conceptual connection between the tort remedy and the wrongfulness of the gain or loss. Third, the juridical conception claims to be implicit in tort law as a normative practice. The annulment thesis, in contrast, presented an analysis of wrongful gain and loss that arose independently of tort law and was then applied to it from the outside. In view of the distinction he posited between the grounds of liability and the mode of rectification, Coleman maintained that tort law is committed to a particular mode of rectifying wrongful gains and losses that is "in no sense required by the principle

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15 *See especially* Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. Legal Stud. 421 (1982).

of corrective justice."[16] Developed originally as part of an argument about no-fault insurance schemes, the annulment thesis was supposed to reveal the gap, rather than the continuity, between tort law and Coleman's conception of corrective justice.

The source of these differences was a disagreement about the significance of correlativity. For the juridical conception of corrective justice, the correlative structure of the injustice allows the law to connect a particular plaintiff to a particular defendant. The annulment thesis rejected correlativity in favor of the mutual independence of wrongful gain and wrongful loss. The result was that neither tort doctrine nor the tort remedy nor tort law as a normative practice could get a foothold in Coleman's theory. Even where wrongful gain and wrongful loss were equivalent, as in the case of a wrongful appropriation, the fact that the loser recovered from the gainer was merely a convenient happenstance that had no basis in principle. Thus if A wrongfully harmed B and C wrongfully inflicted the equivalent harm on D, the annulment thesis provided no reason for thinking it inappropriate that B recover from C and D from A.[17]

Coleman revised his view for two interconnected reasons.[18] The first was that the annulment thesis failed to accomplish even the minimal goal of differentiating corrective from distributive justice. Once the victim's recovery is separated from the injurer's liability, no reason exists for treating the wrongfulness of the loss — i.e., the fact that the loss originates in the injurer's wrongdoing — as something that matters to the victim. The loss becomes merely an undeserved misfortune, like a natural disaster or an undeserved disability, that might figure among the misfortunes that society ought to alleviate as a matter of distributive justice. The second was that any conception of corrective justice must (contrary to what Coleman claimed in the annulment thesis) posit a specific mode of rectification in which the particular person who perpetrated the wrong is under a duty to repair it. Corrective justice gives rise, as Coleman puts it, to reasons for action that are agent-relative.

Its agent-relative nature, Coleman now believes, is what distinguishes corrective justice from distributive justice. Distributive justice is agent-general: it imposes duties on everyone without singling out anyone in

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16 *Id.* at 426.

17 Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 J.L. & Phil. 37, 39 (1983).

18 Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 Iowa L. Rev. 427 (1992).

particular. Corrective justice, in contrast, imposes a duty to repair that is relative to the particular agent who caused the wrongful loss.[19]

In the wake of his repudiation of the annulment thesis, Coleman put forward a general notion of corrective justice that highlights the closeness of his new approach to the juridical conception.[20] He observes that all accounts of corrective justice have a common core. First, corrective justice deals only with harms resulting from human agency. Second, corrective justice gives rise to claims to the rectification of those harms. Third, corrective justice involves correlativity; its claims are "restricted to parties who bear some important normative relationship to one another."[21] These three features have always characterized the juridical conception of corrective justice as it applies to tort law. In particular, Coleman's inclusion of correlativity and rectification within the common core — both of which had been explicitly rejected by the annulment thesis — shows the extent of his movement toward the terrain occupied by the juridical conception.[22]

Of course, as Coleman points out, accounts of corrective justice can share the same core constituents and yet disagree on their meaning and role. The centrality of correlativity both to Coleman's new approach and to the juridical conception of corrective justice does not, in itself, make their notions of correlativity identical. In fact, however, the two seem to be substantially the same.

To see this, consider the two converse functions — negative and positive — of correlativity within the juridical conception. The negative function excludes justificatory considerations that are not correlatively structured; the positive function requires all justificatory considerations to be correlatively structured.

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19 By formulating the difference in this way, Coleman rejoins the Aristotelian tradition, on which the juridical conception draws, where distributive justice is understood as a relation between a part of the community and the whole of it, and corrective justice as a relation between part and part. Aquinas, Summa Theologiae, II-II, Q. 61, art.1.

20 Jules Coleman, *The Practice of Corrective Justice, in* Philosophical Foundations of Tort Law, *supra* note 9, at 66.

21 *Id.*

22 There are also other features common to the juridical conception and Coleman's new approach: (i) In both accounts, corrective justice is non-instrumental. For Coleman's articulation of the idea that corrective justice is intelligible without the positing of any collective goal, see *id.* at 70. (ii) In both accounts, corrective justice is extracted from the practice or practices in which it figures. *Id.* at 62-66. Coleman misses this point about the juridical conception because he thinks, mistakenly, that it is "derived" from some more abstract normative theory, Coleman, *supra* note 13.

The negative function is manifest in the disqualification of considerations that do not treat the parties as equals in the relationship. Correlativity entails the equality of the correlated elements. As Aristotle observed in his account of corrective justice, "the law treats them [the parties] as equals if one commits and the other suffers injustice."[23] Accordingly, corrective justice rejects considerations whose justificatory force extends to only one party. By paying attention to one-sided considerations, the law would in effect be allowing one of the two parties to demarcate the boundary between their respective normative positions. The fair terms of a bilateral interaction cannot be set on this unilateral basis. Accordingly, the juridical conception of corrective justice confirms negligence law's rejection of the subjective standard for negligence, which makes the defendant's purity of heart decisive for the parties' relationship. Similarly incompatible with corrective justice is strict liability, which one-sidedly refers to the plaintiff's injury. This exclusion of considerations whose normative force extends to only one of the parties has for many years been a standard move within the juridical conception.[24]

The positive function of correlativity is manifest in explications of the bilateral significance of legal concepts. In the law of negligence, Cardozo's treatment of duty in the *Palsgraf* case[25] provides a paradigmatic instance for the juridical conception. Cardozo's judgment presents and integrates several expressions of correlativity: in the meaning of wrongfulness for tort law (as contrasted with the criminal law); in the correlativity of the defendant's duty and the plaintiff's rights; and in the elucidation of risk as a relational concept. By requiring that the plaintiff's injury be within the risk that renders the plaintiff's action unreasonable, Cardozo makes liability depend on whether the unreasonable risk that materialized in the plaintiff's harm is the same as the unreasonable risk that was initiated by the defendant's act. Because unreasonable risk is the basis of negligence liability, Cardozo thereby insists that the injustice suffered by the plaintiff be identical to the injustice done by the defendant. So closely does Cardozo's conception of duty correspond to correlativity within the juridical conception that acceptance of the former amounts to endorsement of the latter.

Coleman's treatment of tort doctrine reflects both the negative and positive functions of correlativity. When Coleman describes correlativity as a general feature of the core of corrective justice, his characterization is appropriately broad: correlativity refers to "some normatively important

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23 Aristotle, *supra* note 5, at 1132a5.

24 *See, e.g.*, Weinrib, *supra* note 17, at 51.

25 Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

relationship" between parties.[26] Moreover, his own version of corrective justice is also formulated generally in terms of responsibility for wrongful losses.[27] But when he applies his version of corrective justice to negligence, his view of correlativity turns out to be identical with the correlativity of the juridical conception. For instance, Coleman criticizes the Learned Hand formula for making the victim's entitlement to security dependent on the value that the injurer attaches to his own liberty, in violation of the principle of fairness that forbids one of the parties unilaterally to set the terms of their interaction.[28] This argument exemplifies the negative function of correlativity. Moreover, Coleman adopts a conception of fault that, like Cardozo's, requires the plaintiff's loss to be within the scope of the risks that make the defendant's conduct faulty.[29] He thereby signals that he subscribes to the positive function of correlativity as well. No difference exists between Coleman's present view of correlativity and the one entrenched in the juridical conception of corrective justice.

By acceding to the significance of correlativity, Coleman has decisively transformed his theory of tort law. Having linked the defendant's action to the wrongful loss suffered by the plaintiff, he can now also see the defendant's duty to rectify the loss as the normative consequence of the plaintiff's suffering of the loss. The presence in tort law of these connections between plaintiff and defendant and between loss and remedy allows Coleman now to regard tort law (or at least some of it) as a practice in which corrective justice figures. No longer do the elements of his approach travel in separate analytic compartments. As is the case with the juridical conception, synthesis becomes possible.

The fact that Coleman has brought his conception of corrective justice into line with the idea of correlativity within the juridical conception does not, of course, make the two conceptions as a whole congruent. The juridical conception claims a more stringent and comprehensive application to private law.[30] It also has no place for Coleman's notion of tort liability

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26 Coleman, *supra* note 20, at 66-67.

27 Coleman, *supra* note 13, at 329.

28 Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method, in* Philosophy and the Law of Torts (Gerald J. Postema ed., forthcoming June 2001).

29 Coleman, *supra* note 13, at 346. Strictly speaking, Coleman's formulation is one of proximate cause rather than duty (as in *Palsgraf*), but this makes no difference to the issue of correlativity; *see* Weinrib, *supra* note 3, at 158.

30 For Coleman, corrective justice applies to the core of tort law but not to tort law as a whole; Coleman, *supra* note 13, at 386.

for wrongs where there has been no wrongdoing.[31] Furthermore, it identifies a different practice as the embodiment of corrective justice.[32] Nonetheless, the convergence of the two approaches is now substantial. For the juridical conception, correlativity is the abstraction that exhibits the normative structure of liability. For Coleman, correlativity is a core feature of corrective justice, and corrective justice, in turn, is reflected in much of tort law. The fact that both approaches regard correlativity as central and treat it in the same way is a strong indication of the emerging consensus about corrective justice.[33]

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31 *Id.* at 324-26.

32 For the juridical conception, the practice is tort liability (or, more widely, private law itself), with corrective justice as a structuring idea implicit in the justifications internal to that practice. Tort law is a justificatory enterprise; it accordingly provides a standpoint for criticism that is internal to itself. *See* Weinrib, *supra* note 3, at 16. For Coleman, the practices of corrective justice are the convergences of behavior animated by the shared understandings of their participants. These practices include not only some of tort law, but also claims to repair that are part of our ordinary extra-legal moral practices. Coleman, *supra* note 20, at 63-66. Coleman argues that the existence of such extra-legal practices allows corrective justice to be a criterion for assessing existing tort law, because the idea of fairness in other practices of corrective justice exerts normative pressure on tort law. However, the identity and significance of the moral practices to which Coleman is referring are not clear. Coleman thinks, for instance, that the Learned Hand formula for negligence is defective because it adopts the one-sided standpoint of the potential injurer. But this critical assessment is not the product of an extra-legal practice, i.e., of some behavioral convergence informed by a shared understanding about the unfairness of the Learned Hand formula. Rather, it is simply the product of an argument based on the idea of fairness in corrective justice.

33 Coleman himself describes the principal difference between his account and the juridical conception as follows: the former requires the repair of wrongful losses, whereas the latter requires the repair of wrongs, i.e., culpable acts, conceived independently of the occurrence of their injurious consequences; see his description of what he calls "the relational view" in Coleman, *supra* note 13, at 318-24. This characterization of the juridical conception is fundamentally mistaken. The juridical conception has always opposed the view that Coleman ascribes to it. *See, e.g.*, Ernest J. Weinrib, *Causation and Wrongdoing*, 63 Chi.-Kent L. Rev. 407, 411-16 (1987); Weinrib, *supra* note 3, at 155-58 (arguing that the imposition of an unreasonable risk by the defendant calls for no correction until it materializes into injury to the plaintiff). From its first formulation, the juridical conception has emphasized that corrective justice deals with the doing *and* suffering of an injustice. The wrong that is to be corrected is always the sequence from doing to suffering, conceived as a single normative unit. From the perspective of the juridical conception, the attempt by tort scholars to isolate the doing of wrong from the suffering of the same wrong makes tort law unintelligible. That in fact had been the defect of Coleman's annulment thesis.

III. PERRY'S OUTCOME RESPONSIBILITY

A similar movement toward the correlativity of the juridical conception appears in the elegant scholarship of Stephen Perry. Again, this movement can be seen in the difference between the view that Perry originally proposed and the one that he has more recently articulated.

The central theme of Perry's work is the moral significance of the notion of responsibility for the outcomes of one's actions.[34] Perry roots this notion in the phenomenon of regret, where the sense of having made a difference in the world through the exercise of one's agency leads the agent to wish that he or she had acted otherwise. The experience of regret carries with it a moral evaluation that may affect one's reasons for action with respect to the outcome in question. This transformation of the agent's regret into a conception of the agent's responsibility for the outcome gives rise to the possibility that the agent should undo the harm through compensation.

Perry observes that the notion of outcome responsibility does not in itself lead to a moral obligation to repair the damage.[35] Outcome responsibility marks a normatively significant connection between the agent and the consequent loss. It thereby provides the agent with a reason for action of some sort, but it does not in itself specify what the agent might have reason to do. Repairing the damage is merely one possibility, as is expressing regret or seeking assistance. The question for tort theory is: What additional considerations transform reparation by the agent from a possibility into a requirement?

Perry's initial answer to this question was that an obligation to repair arises when outcome responsibility is supplemented by an operation of distributive justice. Because more than one person could be responsible for a harmful outcome, outcome responsibility functions to create a pool of persons (which could include the victim) who might have to bear the costs of the outcome. Perry then postulated that those within this pool who are

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34 Perry, *supra* note 14, at 488-514; Stephen Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice, in* Tort Theory 24, 40-47 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993) [hereinafter Perry, *Loss, Agency, and Responsibility for Outcomes*]; Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts, in* Philosophy and the Law of Torts, *supra* note 28 [hereinafter Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*]; Stephen Perry, *The Mixed Conception of Corrective Justice*, 15 Harv. J.L. & Pub. Pol'y 917 (1992); Stephen Perry, *The Distributive Turn: Mischief, Misfortune, and Tort Law*, 16 Quinnipiac L. Rev. 315 (1996).

35 Perry, *Loss, Agency, and Responsibility for Outcomes, supra* note 34, at 42.

at fault should bear the costs in proportion to their fault. Consequently, he viewed tort liability as a localized scheme of distributive justice constrained by outcome responsibility. Outcome responsibility creates the normative link between the agent and the loss. The localized distributive argument for fault then creates a general obligation to compensate among those who are outcome responsible. Together, outcome responsibility and the localized distributive argument for fault constituted, Perry contended, an adequate justification for correlative rights and obligations of reparation.[36]

However, Perry failed to provide an argument that would overcome the challenge he had posed for himself. Perry made outcome responsibility thematic to his theory, while readily conceding that outcome responsibility does not itself supply sufficient reason for an obligation to repair. His challenge then was to move from responsibility to repair. The agent's fault was somehow supposed to accomplish this. But why should the combination of outcome responsibility and fault place the agent under the specific moral duty to repair when outcome responsibility without fault does not? Perry merely declared, without argument, that it is "morally preferable that [the loss] be borne by whoever acted faultily in producing it."[37]

Moreover, even if fault does have the relevance that Perry claimed, why was fault situated within a distributive argument? Perry characterized action that is faulty due to its intended or foreseeable effects on another as an improper exercise of autonomy at another's expense.[38] On this conception of fault, the outcome seems to constitute a wrongful loss suffered at the agent's hands that is independent of any faulty action on the part of anyone else. Accordingly, if the fault gives rise to a duty of repair, as Perry thought, this duty also is independent of similar duties incumbent on others whose fault contributed to the outcome. Thus, the duty to repair is prior to the distributive operation that Perry postulates. The formation of the distributive pool of faulty agents who bear the costs of the outcome already presupposes that those who are in the pool are under an obligation to repair. What creates the obligation is the fault that caused the adverse outcome, not the existence of a distributive pool. Consequently, even if fault solves the problem of grounding the duty to repair within a theory of outcome responsibility, the distributive argument is superfluous.[39]

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36 For a summary of the argument, see Perry, *supra* note 14, at 497-500.

37 *Id.* at 499.

38 *Id.*

39 Perry claimed that his argument, in which loss is apportioned among all outcome-responsible agents (including the victim), mirrors "exactly what happens in tort law under modern schemes of comparative negligence and contribution among

From the standpoint of the juridical conception of corrective justice, Perry's attempt to combine outcome responsibility with localized distributive justice was doomed from the beginning. As an idea that articulates the relationship between agency and its effects, outcome responsibility deals with the correlativity of doing and suffering. It therefore fit readily into Perry's effort to justify correlative rights and duties of reparation. Localized distributive justice, in contrast, requires the costs of the outcome to be borne among outcome-responsible agents in proportion to their fault; it operates comparatively rather than correlatively. In view of Aristotle's demonstration of the categorical difference between correlative and comparative structures of justification, the duty of reparation cannot coherently be based on their combination. The very form of Perry's argument showed that the argument could not succeed in the terms presented.

However, the juridical conception also points to a way forward. A major step would simply be to eliminate localized distributive justice. To fill the resulting gap, one would have to formulate a specific conception of outcome responsibility that, on its own, would give rise to a duty of reparation. This would require, of course, further elucidation of the conditions under which the agent plausibly could be regarded as responsible for the consequences of one's agency. In particular, agency and outcome would have to be linked in a conception of responsibility that makes the possibility of the outcome, even if unintended, count as a reason for regarding the agent as responsible for the action that produces it. The result would be a conception of outcome responsibility that connects the agent's conduct to the victim's loss through a correlatively structured ensemble of arguments. Moreover, these arguments could run parallel to — and indeed draw upon — tort law's own treatment of unintended harms, because tort law (at least as understood under the juridical conception of corrective justice) forges exactly the same connections between agency and loss that such a conception of outcome responsibility postulates.

This indeed has been what occurred. Perry's more recent work has jettisoned localized distributive justice. Correspondingly, outcome responsibility has expanded to fill the space between the agent's conduct and

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tortfeasors"; *id.* at 512-13. This view of the law is mistaken. Modern tort law repudiates the notion that the tortfeasors and the victim form a single distributive pool; *see, e.g.*, Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899 (Cal. 1978); Fitzgerald v. Lane, [1988] 2 All E.R. 961 (H.L.). Moreover, contribution among tortfeasors applies only because each tortfeasor is under a duty to compensate the victim of the tort; that duty is not affected by the right of the tortfeasors to contribution among themselves.

the victim's loss. Perry now proposes what he calls "the avoidability-based conception of outcome responsibility." Under this conception, the agent is responsible for an outcome if the agent causally contributed to it, had the capacity to foresee it, and had the ability based on such foresight to avoid it. This conception allows Perry to incorporate many of the central doctrines of tort law, including the objective standard, foreseeability-based notions of duty and proximate cause, factual causation, and nonfeasance. Outcome responsibility has thereby become an account, formulated in terms of responsibility, of the elements that correlatively connect the doing of harm to the suffering of it.

One can gauge the significance of this development by reference to the *Palsgraf* case. As I noted in commenting on Coleman's views, Cardozo's opinion in *Palsgraf* is paradigmatic of the positive function of correlativity. To accept Cardozo's opinion is to endorse correlativity as the organizing idea for the relationship between agency and harm.

The shift in the assessment of *Palsgraf* that follows from the revision of Perry's approach is striking. Perry's original views were consistent with the dissenting judgment of Justice Andrews. The defendant could be regarded as outcome responsible for the plaintiff's injury, which closely followed the defendant's action. Since the defendant's conduct was faulty and the plaintiff's was not, an allocation of the costs of the injury in proportion to the parties' fault would justify the defendant's being under a duty to repair. Thus, in Perry's original presentation, Andrews' conclusion would follow from the conjunction of outcome responsibility and localized distributive justice. Under Perry's revised view, however, Andrews' judgment is wrong and Cardozo's is correct. The coexistence of outcome responsibility and fault no longer suffices for liability. Perry now requires that fault be integrated into, and arise out of, outcome responsibility. Because outcome responsibility involves the capacity to foresee injury and the ability to take steps against it on the basis of that foresight, the fault that justifies an obligation to repair must be defined by reference to the risk that gives rise to the outcome responsibility. This linking of the injury to the ambit of the foreseeable risk is precisely Cardozo's point. Thus Perry's recent view fills out the idea of outcome responsibility so that the plaintiff's injury must be of the very sort that makes the defendant's action faulty. This condition establishes the requisite moral link between what the defendant has faultily done and what the plaintiff has faultily suffered.

As a result, Perry's revised view resembles the correlative structure of negligence under the juridical conception. For Perry, fault now arises out of the very idea of outcome responsibility; it is no longer merely juxtaposed to outcome responsibility in a localized operation of distributive justice.

Consequently, the sequence from faulty action to injurious outcome can be considered as a single normative unit in which the agent and the victim are correlatively situated. The two parties are the poles of a relationship in which the faulty injury suffered by the victim is identical to the faulty injury perpetrated by the agent. And because fault refers both to the kind of outcome that the agent should have foreseen and to the outcome that the victim in fact suffered, fault now establishes a moral connection between the doer and the sufferer of the injury.

Despite Perry's incorporation of correlativity, differences remain between outcome responsibility and the juridical conception of corrective justice. The two approaches arrive at correlativity from different directions. The juridical conception starts from liability as an existing normative practice and works back to correlativity as the abstraction implicit in it. The point of the juridical conception is to show how correlativity, in union with the complementary idea of personality, allows private law to be understood as a coherent normative phenomenon. So far as tort law is concerned, correlativity is the operation through which responsibility for unjust outcomes affecting the victim is imputed to the tortfeasor. Legal responsibility thus emerges from reflection on the nature of liability. The juridical conception is concerned with responsibility for outcomes only in the context of liability. Ascriptions of responsibility for adverse outcomes in other normative contexts remain unaffected.

In contrast, Perry's argument is concerned with outcome responsibility as a moral idea fundamental to the understanding of our agency. Because he views outcome responsibility as "underlying" tort law,[40] he thinks that he can account for tortious liability in terms of outcome responsibility. He also draws on tort doctrine to flesh out his notion of outcome responsibility. Hence his account incorporates the notion of correlativity as it appears in tort decisions such as the *Palsgraf* case. Yet he regards outcome responsibility as a moral idea independent of the institutional structure of tort law. The movement of thought in his works always purports to be from outcome responsibility as an aspect of agency to tort liability as its instantiation.

Nonetheless, because of unresolved tensions between outcome responsibility and tort law, the relationship between the two remains uncertain. Is Perry's argument driven by tort law or by an independent moral theory? Are the fundamental components of tort doctrine (or at least a correct version of tort doctrine) constitutive of outcome responsibility, or

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40 Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *supra* note 34.

does outcome responsibility generate tort doctrine? And how are differences between outcome responsibility and tort liability to be reconciled?

For example, outcome responsibility seems to capture harms for which, as a matter of principle, no liability exists in tort law. Perry's conception of outcome responsibility treats the capacity to foresee a harm and the ability on the basis of such foresight to avoid it as the necessary and sufficient conditions for responsibility for the occurrence of that harm.[41] Under this conception, it seems, liability should result from carrying on an activity to which one knows one's neighbor is extra sensitive[42] or from harming the important economic interests of another through competition. No such liability exists. To that extent, the law works with a different notion of responsibility than the one articulated by Perry.[43]

The converse difficulty arises when Perry follows in the tracks of liability to a conclusion that appears to be either at odds with outcome responsibility or morally implausible. Consider the bystander who refuses to throw a rope to someone who is drowning. Tort law notoriously holds the bystander not liable for the resulting death. One would think that the conditions of outcome responsibility — the bystander's capacity to foresee the harm and to take steps to avoid it — are present. After all, these conditions matter for Perry because they signify that the agent had control over the outcome;[44] in the drowning example, the bystander seems to have such control. But Perry claims that omissions do not give rise to outcome responsibility, because an omission is not an exercise of agency.[45] This position is questionable on three grounds. First, it presents the oddity that a willful refusal to toss the rope does not count as an exercise of agency. Second, this view of omissions is at odds with Perry's own formulation of foresight and avoidability as the sufficient conditions of outcome responsibility. Third, even if Perry could reconcile the claim about agency with the role he assigns to foresight and avoidability in his own theory, it would prove too much to be morally plausible. Being an aspect of agency, outcome responsibility governs ascriptions of responsibility for harmful outcomes in all normative contexts, not merely in tort law. Thus the conclusion that there is no outcome responsibility for failing to undertake an easy rescue means that the bystander should not be regarded as even morally

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41 *Id.*

42 *See, e.g.*, Rogers v. Elliot, 15 N.E. 768 (Mass. 1888).

43 For this criticism of Perry, see Arthur Ripstein, Equality, Responsibility, and the Law 101 (1999).

44 Perry, *Responsibility for Outcomes, Risk, and the Law of Torts, supra* note 34.

45 *Id.*

responsible for the death.[46] Perry here follows the law, but without the law's limited notion of responsibility. Presented in terms of outcome responsibility, the absence of a duty to rescue acquires implausibly extreme moral scope.

Perplexity about the relation between outcome responsibility and tort law also arises in connection with the obligation to repair. As noted above, Perry's original presentation denied that outcome responsibility triggers an obligation to repair. The challenge for him then was to articulate the basis for such an obligation as the specific consequence of a harmful outcome. That self-imposed challenge remains unsatisfied. Of course, once one elucidates outcome responsibility through reference to tort doctrine, it is easy to assume the existence of the obligation to repair that tort law itself imposes. But the assumption is unjustified so long as Perry considers outcome responsibility to be independent of the institutional structure of tort law.

Possibly Perry now thinks that his original challenge has been dissipated by the revised conception of outcome responsibility. Perhaps the correlative linking of the harm to agency itself supplies the basis of the obligation to repair. Such an obligation might be entailed in the very attribution of the loss to the injurer's agency as being what the injurer could have foreseen and avoided. Repair would then be considered part of the meaning of outcome responsibility as now reconfigured. However, unless legal institutions were themselves entailed by agency (a Hegelian move that Perry would presumably find repellent), this would still not bring outcome responsibility to tort law, because it would not illuminate the specifically legal nature of the obligation.

The source of these difficulties lies right at the threshold of Perry's thinking. For Perry, the adverse outcomes to which outcome responsibility refers are harms, i.e., diminutions of pre-existing levels of welfare. This immediately creates a disjunction between his theory and tort law, since tort law does not deal with all harms but only with infringements of rights. The reason that the law imposes no obligation to repair the effects of commercial competition is that merchants do not have rights to the economic advantages of their pre-existing market shares. Similarly, the reason that tort law imposes no obligation to rescue is that tort law does not conceive of the need, however desperate, of the drowning person as creating a right to which others have correlative duties. These examples confirm that rights in tort

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46 Perhaps aware of this difficulty, Perry suggests that positive duties might be rooted in distributive justice; *id.* However, most people would consider the bystander's duty to toss a rope to a specific individual who is drowning to be a matter of morality rather than distributive justice.

law are not synonymous with the welfare enjoyed by the parties previous to their interaction. Perry's concern with harms rather than with rights has the unsurprising result of creating difficulty regarding harms to which private law attaches no importance.

Moreover, Perry's emphasis on harms shows that he has incorporated correlativity without recognizing its radical implications for understanding tort law. The problem with harm is that it is not, as such, a consideration that is correlatively structured. The fact that someone has less welfare now than previously (for example, by being exposed to commercial competition or to the danger of drowning) is simply a misfortune to that person; it implies no duty on anyone else in particular. To require another to alleviate that misfortune is to allow a unilateral need to determine a bilateral relationship. That would be inconsistent with what I called above the negative function of correlativity. By focusing on harms, Perry assumes that under a corrective justice approach to tort law, correlativity is satisfied by the doing and suffering of something adverse, whatever it is. That assumption is false. The doing and suffering must be of an injustice that is itself immediately intelligible in correlative terms.

These observations indicate that Perry can now resolve these problems in a single stroke. He needs a conception of rights that are understood as operating within a regime of correlative duties and as reflecting a conception of purposive agency that abstracts from welfare. Because such rights find expression within a system of private law, they allow for a ready transition to the institutional arrangements of tort law from the normative foundations that Perry seeks.

This is merely to say that having in effect acceded to the idea of correlativity, what Perry now needs is the complementary idea of personality. Perry's abandonment of the dead-end of localized distributive justice was a major advance in his elucidation of outcome responsibility. As a result, he now regards the moral link between agency and outcome in terms of the correlativity of doing and suffering harm. The next step is to refine the notion of harm so that it refers to the rights that are necessitated by the idea of correlativity. These rights are the juridical expressions of personality. If correlativity and personality are indeed complementary ideas, one can anticipate the elucidation of something resembling personality as the inevitable sequel to Perry's current formulation of outcome responsibility.

IV. RIPSTEIN AND THE REASONABLE

I now turn to the significance of personality for tort theorists who accept the central role of correlativity. I begin with Arthur Ripstein's penetrating discussion of the reasonable.

Basic to Ripstein's approach is what he calls the principle of reciprocity.[47] Reciprocity is identical to what was designated above as the negative function of correlativity, which excludes treating the parties' bipolar relationship on the basis of one-sided considerations.[48] Under the principle of reciprocity, the normative task of tort law is to set the fair terms of interaction between the defendant's interest in liberty and the plaintiff's interest in security. This principle precludes favoring the interest of either party to the interaction. A tort doctrine that assigns preeminence to either the defendant's liberty or the plaintiff's security would be unfair, for it would allow one of the interacting parties to determine unilaterally the normative implications of the interaction as a whole. Instead, Ripstein asserts, tort law must treat both parties equally by striking a balance between the defendant's liberty and the plaintiff's security.

To explain this balancing operation, Ripstein invokes the well-known figure of the reasonable person.[49] The reasonable person has an interest in both liberty and security and, thus, functions as the representative of all interacting parties. The reasonable person serves as a device for representing the weighing of interests within a single party rather than across parties. Because all are presumed to have interests in both liberty and security, the relative weight that the reasonable person assigns to these interests holds for all interactions.

Given the congruence of reciprocity and correlativity, it is hardly surprising that Ripstein's account of tort law is essentially the same as the one that emerges from the juridical conception of corrective justice. However, the very closeness of the two accounts raises questions about the significance of the one theoretical difference between them. Ripstein explicitly rejects the notion that the equality of the parties is to be articulated in terms of a conception of the person that features the capacity for purposiveness without regard to particular purposes.[50] Instead, he regards the reasonable person as presenting a fully adequate idea of the operation of reciprocity. From the standpoint of the juridical conception, one may wonder

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47 Ripstein, *supra* note 43, at 2.

48 That Ripstein also accepts the positive function of correlativity is evident from his approval of Cardozo's judgment in *Palsgraf*; *id.* at 65-70.

49 *Id.* at 50-54.

50 *Id.* at 53, 103.

how, on the assumption that reciprocity is equivalent to correlativity, Ripstein can posit correlativity while avoiding its necessary conceptual concomitant. And from Ripstein's standpoint one may ask whether (as I am about to suggest) the idea of personality might nonetheless be of service for his own account.

Consider, for instance, a perplexity in Ripstein's account concerning the specification of the liberty and security interests that tort law protects. Ripstein indicates that this specification depends on substantive views about the importance of various interests for leading an autonomous life.[51] One might expect that this formulation would involve comparing the importance of a specific liberty interest for the particular defendant with the importance of a specific security interest for the particular plaintiff. Indeed, one might think that the plausibility of formulating the protected interests in terms of importance would stem from the consideration that these interests are important for the particular interacting parties. Of course, this plausibility would be undermined if importance were subjective to the parties, for then one would not be able to hold liable the defendant who finds the meaning of his life in reckless actions that endanger others. However, importance could be determined on some objective basis. For example, one could think (as Ripstein in fact does[52]) that life itself is an interest sufficiently important to justify circumscribing the liberty of others. One might then think that what renders this interest important is that it is important for the person whose life it is.

This, however, is not the way Ripstein construes importance. Ripstein accepts the categorical distinction in common law between nonfeasance and misfeasance. Consequently, he thinks that tort law correctly denies the existence of an obligation to take even the easiest steps to rescue another from imminent death. If one compares the interests at stake in terms of their importance for the potential rescuer and the person drowning, this conclusion makes little sense. Obviously the drowning person's interest in life is more important for the drowning person than the non-rescuer's liberty interest in not bestirring himself to toss the rope: the autonomy of the drowning person will be wholly extinguished by death, whereas a duty of easy rescue would amount only to sporadic, transient, and non-onerous diminution of the potential rescuer's interest in liberty. Nonetheless, Ripstein rejects an obligation of easy rescue.

Ripstein's reason for this is that an obligation of an even easy rescue would be incompatible with his principle of reciprocity. On the rescuee's

51 *Id.* at 7, 50, 55, 268.

52 *Id.* at 116.

side, an obligation dependent on the ease with which it could be discharged would make an interest in security dependent on considerations about the welfare of the potential rescuer. On the rescuer's side, such an obligation would make liberty dependent on exigencies of another's welfare needs. Thus, on both sides, one's tort duty would be tied to "shifting welfare considerations."[53]

Ripstein's treatment of the rescue problem indicates that under the reciprocity principle, the interests in liberty and security are conceived in a way that abstracts from the welfare of the particular parties. One specifies which interests in liberty and security are to be protected on the basis of their importance to leading an autonomous life, but autonomy itself is not identical with the welfare of particular persons, no matter how objectively that welfare might be understood. What is involved is not importance for the particular person, but some more general idea of importance. However, Ripstein gives no affirmative account of this more general idea, under which what is important for leading an autonomous life may differ from what is important for the welfare of particular interacting parties.

In making these comments, I should not be understood as criticizing Ripstein's approach to tort law. His explanations of tort doctrine are completely in accord with — and, indeed, largely replicate — those offered under the juridical conception of corrective justice. His comments on rescue formulate in terms of reciprocity the argument that since welfare is not correlatively structured, it cannot in itself be normatively significant for the correlatively structured relationships of tort law. Moreover, as with the juridical conception, Ripstein postulates an absence of a duty of even an easy rescue, on the grounds that one is not obligated to act for another's welfare. Similarly he conceives of tort law as rising above shifting welfare considerations to a more stable set of normative categories, locating this set (as does the juridical conception) in the idea of rights, which (as Ripstein says) "are not defined in terms of welfare."[54] The only matter at issue between the two approaches is whether Ripstein has provided a fully adequate theoretical account of what, from the standpoint of the juridical conception, he has correctly noticed. Hence the question: What is the point of reference for the general idea of importance that governs the reasonable person's balancing of interests?

The source for Ripstein's notion of reasonableness in contemporary political theory indicates where one might look for an answer. Ripstein's

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53 *Id.* at 92.

54 *Id.*

reasonable person imaginatively amalgamates the familiar figure of tort law with John Rawls' idea of the reasonable.[55] For Rawls, the reasonable is relevant to the conception of the person when society is viewed as a cooperative enterprise. Since this conception of the person is evidently congenial to Ripstein, it may be worthwhile to outline how it is to be adapted to a theory of tort law. What Ripstein's general idea of importance might refer to will then become clearer.

For Rawls, the reasonable and the rational are two companion ideas that make up the conception of the person appropriate to a society considered as a scheme of cooperation.[56] Rationality consists in acting according to one's conception of the good; reasonableness consists in acting out of a desire for a world in which all cooperate as free and equal persons. Each of these ideas is connected to its respective moral power: rationality to the capacity for a conception of the good, and reasonableness to the capacity for a sense of justice. Both the reasonable and the rational are necessary to the conception of the person in Rawls' theory. Merely reasonable agents would have no ends of their own to pursue through cooperation; merely rational agents would not be able to recognize the validity of claims of others. Together, the reasonable and the rational define the notion of the person that underlies society considered as a scheme of cooperation. Such a society works out the principles that obtain when the reasonable frames and constrains the rational.[57] These principles in turn secure the political and civil liberties and the primary goods necessary for the adequate development and the full exercise of the two moral powers constitutive of the conception of the person.[58]

Rawls' conception of the person is fitted to his analysis of society as a scheme of social cooperation; it does not apply directly to private law.[59] Rawls' subject is the basic structure of society, by which he means the main political and social institutions that maintain background justice and how they hang together as a single system of cooperation. He postulates a

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55 *Id.* at 7.

56 John Rawls, Political Liberalism 48-54 (1993).

57 *Id.* at 339-40.

58 *Id.* at 106.

59 *Id.* at 268. For an attempt to apply Rawls directly to tort theory despite the difference between the subject matter of Rawls' political theory and tort law, see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 Stan. L. Rev. 311 (1996). On the relation of Rawls' theory to the understanding of private law, see especially Peter Benson, *The Basis of Corrective Justice and its Relation to Distributive Justice*, 77 Iowa L. Rev. 515, 601-24 (1992) [hereinafter Benson, *The Basis of Corrective Justice*]; Peter Benson, *Rawls, Hegel, and Personality*, 22 Pol. Theory 491 (1994) [hereinafter Benson, *Rawls, Hegel, and Personality*].

division of labor between the principles of background justice that animate the basic structure and the rules of private law that apply directly to particular transactions. The principles of background justice give voice to fair terms of cooperation among persons conceived as reasonable and rational. The persons that private law governs are not cooperators concerned with the basic structure of society as a whole. Rather, they are all pursuing their individual purposes subject only to limits of permissible impingement on each other. Accordingly, Rawls' concept of the person has to be adjusted to the nature of private law if it is to be transposed to tort theory.

These adjustments affect both the rational and the reasonable. For tort law, the formulation of the rational in terms of the agent's conception of the good is misplaced. Tort law is indifferent to judgments about goodness. It therefore does not view the parties' actions as manifesting even personal conceptions of the good, but merely as executing the actor's purpose on a particular occasion. Thus, for tort law, the relevant moral power that runs parallel to Rawls' conception of rationality is not the capacity for a conception of the good, but the bare capacity for purposive action without regard to any particular purpose. In this context, rationality consists simply in the projection of the agent's purposiveness into the external world.

The formulation of the reasonable must similarly be adjusted. Tort law is concerned not with whether the person has a sense of justice, but with whether the person's actions are consistent with justice. The reasonable consists solely in not infringing the rights of others. Through the negative duties correlative to those rights, the reasonable frames and constrains the rational. Both the reasonable and the rational are necessary to this conception of the person: since the reasonable is constituted by the negativity of duty, a merely reasonable agent would make no positive exercise of his or her purposiveness; conversely, a merely rational agent would exercise purposiveness, but without the constraint of tort norms. The result of the transposition is that when the reasonable is joined to the rational for purposes of tort theory, the person can exercise his or her capacity for purposiveness to execute any purpose whatsoever provided there is no infringement of the rights of another,

It is evident that what has emerged from this transposition to tort theory of Rawls' conception of the person is the idea of personality that figures in the juridical conception of corrective justice. The major difference is the following. For Rawls, the rational and the reasonable are connected to two separate moral powers (the capacities for a conception of the good and for a sense of justice). For the juridical conception of corrective justice, the rational and the reasonable together are united in a single moral power: the capacity for purposive action that is the basis of the capacity for both rights

and duties.[60] This is because in tort law, the reasonable, taken on its own, cannot be connected to a moral power, since under the objective standard, it operates regardless of the agent's capacity to appreciate the reasonableness or unreasonableness of the act.[61]

The point of linking personality in tort theory to Rawls' conception of the person is to shed light on Ripstein's reliance on a general idea of importance for specifying the interests in liberty and security that tort law protects. Rawls' political theory is apposite because Ripstein himself draws on it to elucidate the concept of reasonableness in tort law. I now want to suggest that a further move within Rawls' political theory indicates how Ripstein's general idea of important interests might be explicated.

The parallel issue for Rawls is this: How is one to specify the kinds of claims that citizens may appropriately make when questions of political justice arise? Rawls' answer is that such claims are to be worked out by reference to an index of primary goods, which include basic rights, liberties, and opportunities; all-purpose means like income and wealth; and the social bases of self-respect.[62] Rawls insists that the primary goods are not intended as measures of overall psychological well-being or as a list of the basic values of human life. Rather, primary goods consist in what citizens, as free and equal persons, need in order to satisfy their interests in developing and exercising their two moral powers. The conception of the person is the point of reference for the specification of the primary goods.[63]

A similar move might resolve the perplexity concerning Ripstein's comments on the interests in liberty and security protected by tort law.

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60 For the contrast between Rawls' two moral powers and personality as the single moral power that underlies private law, see Benson, *Rawls, Hegel, and Personality, supra* note 59, at 494.

61 Vaughan v. Menlove, [1837] 132 All E.R. 490 (C.P.).

62 Rawls, *supra* note 56, at 179-81.

63 *Id.* at 106, 187-88. In his Preface to the French edition of *A Theory of Justice*, Rawls outlines the significance of so conceiving the primary goods as follows:

> A ... serious weakness of the original English edition was its account of primary goods. These were said to be things that rational persons wanted whatever else they want ... . Unhappily that account left it ambiguous whether something's being a primary good depends solely on the natural facts of human psychology or whether it also depends on a moral conception of the person that embodies a certain ideal. This ambiguity was resolved in favor of the latter: persons are to be viewed as having two moral powers ... and in having higher order interests in developing and exercising those powers. Primary goods are now conceived as what persons need in their status as free and equal citizens, and as normal and fully cooperating members of a society over a complete life.

John Rawls, Collected Papers 41 (1999).

The specification of these interests, in his view, depends on their importance to leading an autonomous life, but in a way that abstracts from the welfare of particular parties. In the light of Rawls' treatment of primary goods, we might say that tort law invokes no independent conception of an autonomous life. The only conception of autonomy that matters for tort law is that contained in the idea of personality itself. The general idea of importance can then be taken to refer to what is required by personality if it is to operate within a coherent regime of interaction. On this construal of Ripstein' view, tort law protects such interests in liberty and security as is required if persons are to exercise their moral power of purposiveness on the basis of their equality with other persons.

Kant and Hegel, the classic expositors of natural right, elucidated the plaintiff's protected interests in personal security and property in precisely this way. Drawing out the conceptual connection between rights and personality and between personality and the agent's moral power of purposiveness regardless of particular purposes, they spelled out the personal and proprietary rights that, under the conditions of human life, are necessary for the exercise of purposiveness on terms of equality. Each person has a right to bodily integrity because the body is the organ through which purposive action occurs. Property rights in things (i.e., in whatever lacks personality) are also available, because purposive beings cannot — consistently with their personality — be denied access to what is both unstamped with another's right and necessary for the exercise of their purposive capacity. Since the moral power in play in the liability context is indifferent to welfare as such, no person is obligated to promote the welfare of any other person or even to preserve the subject matter of another's rights. A person's only legal duty is the negative one of not infringing the rights of other persons.[64]

Accordingly, I suggest that despite Ripstein's rejection of personality, it may, nonetheless, be serviceable for his own theoretical purposes. Ripstein holds that the parties' interests in liberty and security are specified according to their importance for an autonomous life. Personality provides the reference point for considering what the autonomy appropriate to private law is and what is important for it.

Perhaps the point can be put more provocatively. Given his acceptance of correlativity and the extent to which his treatment of tort doctrine overlaps the juridical conception, there is no need to introduce into Ripstein's work

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64 For a detailed account of the corrective justice entitlements in the classic treatments of natural right, see Benson, *The Basis of Corrective Justice, supra* note 59, at 550-601.

the complementary idea of personality. One merely has to notice that despite Ripstein's intentions, personality is already there, implicit in and required by the account he presents.

V. STONE ON EXTERNAL VALIDATION

Among contemporary theorists, no one has articulated the disquiet occasioned by the idea of personality with greater clarity than Martin Stone.[65] Stone combines a familiarity with the classic expositions of natural right, a reflectiveness about the nature of tort theory, and an underlying sympathy with the juridical conception of corrective justice. Taking over the idea of correlativity, Stone sees the doing and suffering of the same wrong as the defining theme of corrective justice. However, he rejects personality on the ground that the place that the juridical conception assigns to it rests on a mistake about the theoretical significance of corrective justice.

Stone understands corrective justice as describing "an abstract framework for arguments concerning the terms on which one person is responsible for the harmful effects of her actions on another."[66] The theoretical significance of corrective justice is that it makes us aware of the contours of a practice in which a distinctive sort of reason is in play; by grasping this sort of reason, one understands the contours of the practice.[67] Corrective justice exhibits "a characteristic sort of reason *already* captured in the ongoing activity of argument and judgment directed towards the situation to which modern liability rules are a judicially evolved response."[68] The idea of correlativity constitutes "the abstract framework" for the sort of reason in question, by showing that the requisite kind of reason is present when the grounds for saying that the defendant has done wrong are the same as the grounds for saying that the plaintiff has suffered wrong.

So far, Stone and the juridical conception are *ad idem*. For the juridical conception, tort law is an ongoing normative practice characterized by a distinctive exercise of practical reason. The task that the juridical conception sets for itself is to exhibit at an abstract level the organizing ideas internal to

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65 Stone's view of the matter is accepted by Ripstein, *supra* note 43, at 5. *Cf.* Coleman, *supra* note 13.

66 Martin Stone, *On the Idea of Private Law*, 9 Can. J.L. & Jurisprudence 235, 253 (1996).

67 *Id.* at 258.

68 *Id.* at 259.

that exercise of practical reason. Correlativity, formulated in precisely the terms that Stone uses, is one of those ideas.

Stone, however, thinks that by introducing personality, the juridical conception goes off the rails. Personality is an idea formulated by Kant and Hegel as an aspect of what Stone calls rational agency.[69] The purpose of invoking it within the juridical conception, Stone claims, is to provide a grounding from which corrective justice can be derived. Personality functions to satisfy a demand for the external validation of corrective justice by pointing to a ground — rational agency — that is available in advance of the legal practice that is derived from it.

This demand is misplaced, Stone points out, because no external validation of corrective justice is called for. One's interest in corrective justice only arises once one accepts that tort law expresses genuine reasons; corrective justice then brings one to a better understanding of what it is that one has accepted. Corrective justice does this by being the abstract framework that exhibits, in the words quoted above, "a characteristic sort of reason *already* captured in the ongoing activity." In this way the relationship between corrective justice and tort law "traces a circle."[70] However, this very circularity might engender the baseless but unnerving suspicion that one has failed to make contact with genuine matters of reason. In the effort to remedy this non-existent deficiency, someone within this circle might suppose that "there might be some set of considerations to which one could appeal that would rationally compel *anyone* to enter the circle."[71] The introduction of personality, Stone suggests, is the unnecessary response to this unnecessary thought.

Stone allows that personality, although in his view external, is not reductive.[72] The paradigmatic instance of a reductive validation is economic analysis. This is because economic analysis reduces the kind of reasons that figure in determinations of liability to something else. Instead of seeing tort law through a characterization of what it is, economic analysis sees it in terms of goals (wealth maximization, market deterrence, and so on) that are desirable independently of it. Economic analysis thus deflects attention from practical

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69 The term "rational agency" in this connection refers to Kant's notion that the will rationally generates rules for its own conduct or Hegel's notion that the will realizes itself by willing a content that is appropriate to its own rational form. This is not the idea of the rational in the Rawlsian conception of the person mentioned in the discussion of Ripstein in *supra* Section IV of this paper.

70 Stone, *supra* note 66, at 263.

71 *Id.*

72 *Id.* at 264.

reason as operative within tort law to some other exercise of practical reason. The juridical conception does not do this. The account it produces matches the kind of reasoning that figures within the normative practice that it is an account of.

What makes personality external, in Stone's view, is that it validates corrective justice through derivation. His thought seems to be that arguments purporting to validate corrective justice in this way go beyond what is necessary to understand liability as the kind of normative practice that it is. Such arguments are external even if they are non-reductive, because they invoke considerations that are not themselves part of the self-contained intelligibility of tort law. Corrective justice "goes beyond" the distinctive sort of reason found in tort law "only in being more general and reflective."[73] Validation, however, goes beyond tort law in a different way. It locates the outside source of the normativity that feeds into corrective justice and from which corrective justice can be "derived" in a subsequent intellectual operation.

How, on this supposition, does personality, as an aspect of rational agency, validate corrective justice? One can conceive of rational agency as constituting the entire order of juridical, moral, and political values through the activity — actual or ideal — of practical human reason.[74] (In their different ways, Kant and Hegel held some such view.) By being constitutive of the entire order of values, rational agency can be seen as validating the particular order of values that characterizes corrective justice. Corrective justice would then have normative significance just by virtue of its derivation from rational agency. Conversely, if reference to the constitutive nature of rational agency were lacking, corrective justice would be devoid of normative significance.

Stone does not rule out the possibility that corrective justice could be derived from rational agency. He remarks that, "[o]f course, a perspicuous grounding of corrective justice could only be a plus by Aristotle's or anyone else's lights."[75] One can surmise that Stone doubts that the grounding that Kant and Hegel provide is in fact perspicuous. To put the point at its strongest, this does not mean merely that the Kantian/Hegelian concept of rational agency is not perspicuous to Stone as a professional philosopher. Even if *he* found it

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73 *Id.* at 265.

74 This formulation is taken from Rawls' discussion of constitutive autonomy in Political Liberalism; Rawls, *supra* note 56, at 99. This section of my paper owes much to Rawls' elucidation of the difference between constitutive and doctrinal autonomy; *id.* at 98-100.

75 Stone, *supra* note 66, at 265.

convincing, it would still not have the clarity appropriate to private law. For it would be odd if the normative significance of something as immediately accessible to our moral sensibilities as private law were to depend on something as arcane and contested as the constitutive conception of rational agency.

Stone concludes that once one overcomes the longing to derive corrective justice from rational agency, personality ceases to matter. The sole reason he sees for introducing personality into the juridical conception is to satisfy a mistaken feeling that only by breaking out of the circularity of corrective justice can one establish its rational credentials.

This reconstruction of the motivation for including personality within the juridical conception is suspect for a number of reasons. First, if corrective justice were the product of a derivation from rational agency, one would expect that the juridical conception would consider private law — the institutionalized form of corrective justice — to be as necessary as rational agency itself. Replacing tort law or some part of it with a compensation scheme would be anathema. But as Stone himself notes with some perplexity, the juridical conception of corrective justice entails no opinion about whether a liability regime should actually exist.[76] It merely claims to be the mode of understanding such a regime if it does exist.

Second, the juridical conception has no embarrassment about circularity. The juridical conception can be summed up in the brazenly circular proposition that the only purpose of private law is to be private law.[77] The juridical conception treats liability as a self-contained normative practice that it seeks to understand in terms of its internal unity. Circularity it regards as a virtue. To step outside the circle in search of a source from which to derive what is inside it risks leaving unintelligible the starting point on which the rest depends.[78]

Third, the juridical conception of corrective justice already has a means of validation and does not need the one that Stone ascribes to it. What validates the juridical conception is its success in representing at an abstract level the coherence of practical reason as it operates to determine liability. This in turn requires that the complementary ideas of correlativity and

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76 *Id.* at 272. This abstemiousness has been criticized by proponents both of constitutive rational agency and economic analysis; *see, e.g.*, Alan Brudner, The Unity of the Common Law: Studies in Hegelian Jurisprudence at ch. IV (1995); Don Dewees et al., The Domain of Accident Law 9 (1995).

77 Weinrib, *supra* note 3, at 5.

78 Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949, 974 (1988).

personality cohere with each other and that together they make explicit how the injustice connects the doer and the sufferer as parties to a coherent normative relationship. Coherence implies a self-contained circle of mutual reference and support among the elements of what coheres. It validates what is within this circle by pointing not outward to some transcendent ideal, but inward to the harmonious interrelationship of its constituents. In contrast to the notion of validation that Stone criticizes, this notion of validation does not go beyond what is necessary for understanding liability as the kind of normative practice it is.

Contrary to what Stone suggests, the role of personality within the juridical conception is in fact not to ground a derivation. Its status is no different from that of correlativity, which Stone himself accepts as central. Personality only articulates the conception of agency presupposed in a regime of liability. It is merely private law's own notion of entitlement and obligation distilled to its most abstract formulation, just as correlativity is private law's own notion of the nexus between the parties similarly distilled to its most abstract formulation. As it does with correlativity, the juridical conception reaches personality by working backward from the features of liability through reflection on juristic experience, not by working forward to private law from a validating notion of rational agency. The significance of personality within the juridical conception is that it exhibits the conception of the person appropriate to liability as a specific mode of association. Personality remains entirely within the circle traced by corrective justice.[79]

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79 Consider the carefully formulated remarks of Peter Benson on the role of the juridical conception of the person in what he calls "the public justification of contract" (The public justification of contract elucidates for contract law a set of ideas not dissimilar to the juridical conception of corrective justice.):

> The conception of the person is also a fundamental normative idea that is implicit in the way that private law construes and accounts for the rights and duties of parties in private transactions. It should be emphasized that this conception specifies an idea of the person that is intended for private law only, and for this reason I shall refer to it as a *juridical* conception of the person. For purposes of the public justification we need not suppose that it holds for other domains of moral and political life which may have their own distinctive conceptions of the person.

Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 Osgoode Hall L.J. 273, 316 (1995). In a subsequent passage, Benson seems to anticipate Stone's concerns:

> To prevent misunderstanding at this point, I should emphasize that, in the public justification, neither the fundamental normative ideas (the principle of no liability for nonfeasance, the juridical conception of the person, and the idea of a transaction) nor the fixed points (such as the availability of expectation damages)

Although the juridical conception takes its inspiration from the Kantian and Hegelian elucidation of personality as an aspect of rational agency, the juridical conception itself has no stake in rational agency. Rational agency is constitutive of the entire normative order of values. The juridical conception of corrective justice, in contrast, does not concern itself with any values except those that reflect the distinctive nature of justification in private law. It therefore views capacity for purposiveness regardless of one's particular purposes simply as the moral power that is implicit in the rights and duties of private law. No more ambitious claim is necessary for a theory of liability. It may well be (as Kant and Hegel thought) that personality so conceived is, after all, an aspect of the constitutive notion of rational agency and that rational agency is constitutive of the entire order of normative values. Those conclusions, however, require a further philosophical argument, which, even if successful, would not itself be part of the juridical conception of corrective justice. In other words, the cogency or truth of the constitutive notion of rational agency is a matter for philosophy and not for tort theory.[80]

Despite this, the Kantian and Hegelian accounts of private law are extremely serviceable in the elaboration of the juridical conception of corrective justice. These accounts, after all, focus on the manifestations of personality in private law. From that starting point, Kant and Hegel systematically worked out the relationship among various concepts that figure in a regime of liability, as well as among various kinds and aspects of legal ordering and among different forms of moral experience. Moreover, because they articulated their accounts under the most rigorous constraints of coherence, they provided a repository of insights, often ignored by English-speaking scholars, about the nature of coherence within legal relationships and about the role of specific doctrines in achieving that coherence. One need not subscribe to their ideas of rational agency to mine their insights about law.[81]

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are to be viewed as foundational or conceptually primary. The validity of the other elements does not rest on, or derive from, the prior validity of these ideas. However basic or significant a given element in the justification may be, it does not play a conceptually privileged or foundational role vis-à-vis the other parts. While we begin with fundamental normative ideas, we do so only because it seems natural and appropriate to start with ideas that are at once pervasive and regulative in the analysis of private law.

Id. at 318.

80 On the distinction between theory and philosophy, see John Rawls, *The Independence of Moral Theory, in* Collected Papers 286 (1999).

81 For Hegel, the science of right is a part of philosophy, in which rational agency has to be established in terms of the proper immanent development of Mind. Accordingly, the philosophical grasp of rational agency requires attention to the stages of this

The consequence of these observations is that personality does not function as the means of externally validating the juridical conception of corrective justice. Personality is as much inside the circle traced by corrective justice as is correlativity. In treating whatever is outside the circle as immaterial to its purposes, the juridical conception of corrective justice remains ad idem with Stone's conception of the theoretical enterprise.

By in effect arguing for the elimination of personality from the juridical conception of corrective justice, Stone may also be making a further point. Perhaps he is also claiming that personality has no necessary place even within the circle. From his detailed account of negligence law solely in terms of doing and suffering,[82] one might infer that Stone thinks that correlativity alone is sufficient to exhibit the distinctive sort of reason that animates tort law. This might explain his preoccupation with the supposed link between personality and external validation. Being unable to discern a role for personality on the inside, he assigns it the spurious task of validating corrective justice from the outside. Conversely, because he views personality solely as an aspect of rational agency, he does not see its significance as the moral power presupposed in a regime of liability.

On this reading of Stone, his criticism of the juridical conception is that one of its two complementary ideas is superfluous. All the work can be done by correlativity. By not mentioning personality in his treatment of tort doctrine, he might be taken as challenging the juridical conception to tell him what he is missing.

I have already identified a gap in the correlativity-based explication of private law. The function of correlativity is to exhibit the structure that justifications must have if they are coherently to connect the plaintiff to the defendant. Accordingly, it disqualifies considerations (such as welfare) that do not have the requisite structure and insists on considerations (such as rights and their correlative duties) that do. Indeed, unless rights were

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development that are antecedent to rational agency. Yet Hegel also indicates that it is possible to have a certain non-philosophical appreciation of the features of rational agency: "[I]t is possible to form an idea of them by consulting the self-consciousness of any individual. In the first place, anyone can discover in himself an ability to abstract from anything whatsoever ... ." G.W.F. Hegel, Elements of the Philosophy of Right § 4R (H. Nisbet trans. & Allen Wood ed., 1991). The juridical conception views personality not as a part of philosophy but as something that "anyone can discover in himself," in the sense that any lawyer can discover it as a presupposition of his or her own legal thinking. I am grateful to Peter Benson for reminding me of the relevance of this statement of Hegel's.

82 Martin Stone, *The Significance of Doing and Suffering, in* Philosophy and the Law of Torts, *supra* note 28.

available, corrective justice would be impossible in practice, because it would set a structural standard with which private law could not comply. But while correlativity needs rights, it gives no positive indication of their content. Personality fills this gap. Drawing on the law's doctrines concerning the role of purposiveness in the acquisition and transfer of rights, the juridical conception of corrective justice postulates personality as the abstraction that brings out the connection between the content of any person's right and the external manifestation of that person's volition.

The significance of personality for representing the content of rights provides the answer to Stone's supposed inquiry as to what he is missing by his single-minded focus on correlativity. Stone, in common with the juridical conception, sees corrective justice as providing a "more general and reflective"[83] understanding of the distinctive kind of reason found in tort law. Hence his interest in correlativity. However, tort law's distinctive kind of reason also presupposes the existence of rights, whose content cannot be elucidated through the idea of correlativity. Unless Stone, contrary to his theoretical aims, is willing to forgo a more general and reflective understanding of these rights, he will have to appeal to some such idea as personality. This is because personality (to use Stone's language about correlativity) "continues in a more abstract way ... the sort of practical thinking instinct in the law's everyday elaboration."[84] The idea of personality, in other words, represents precisely the kind of explanation that Stone seeks.

It is worth noting that although correlativity and personality are complementary abstractions, an asymmetry apparently exists between them. Correlativity leaves a gap in the understanding of the parties' relationship that personality fills, but personality fills no similar gap for correlativity. Correlativity draws attention to the requirement that the justificatory considerations of private law must be equally relevant to both parties within a given transaction. This requirement of transactional equality is present within personality. Personality is the abstraction that underlies both the plaintiff's right and the defendant's duty, thus having equal relevance for both parties. Moreover, in attending to purposiveness without regard to any purposes in particular, personality abstracts from any feature that could be a ground of inequality. Accordingly, when the law views the interacting parties in the light of their personality, it necessarily recognizes their equal normative standing within the transaction. This equality is incompatible with justificatory considerations that pertain to only one of the parties.

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83 Stone, *supra* note 66, at 265.

84 Stone, *supra* note 82.

Thus, through its own conceptual resources, the idea of personality implies the same notion of transactional equality that characterizes the idea of correlativity.

If this is so, personality turns out to be the more fundamental of the two ideas. Personality adds something to the understanding of the parties' relationship that cannot be teased out of correlativity, but the converse does not apply. Stone's putative challenge points in the wrong direction. Instead of asking what a theoretical exploration misses by including correlativity but not personality, one should wonder what correlativity has to contribute in the presence of personality. Of course, correlativity may well have an advantage for purposes of exposition: as compared with personality, correlativity may deal with a certain range of issues more graphically or be more familiar to a certain community of scholars. Conceptually, however, correlativity seems to do no work that is not also done by personality. This is perhaps why Hegel formulated his detailed conceptual account of private law in terms of personality without mentioning correlativity.

This conclusion points to a paradox in the emerging consensus about corrective justice. That consensus clusters around correlativity while dismissing personality. It thereby anchors itself in the less fundamental of the two complementary ideas. Why is this so?

A significant reason for this, I think, is that the participants in this consensus come to corrective justice through tort theory. A tort theorist naturally focuses on the correction of the wrong rather than the nature of the right. It then becomes relatively easy to see that the structure of the correction must mirror the structure of the wrong and that consequently, because the former involves correlativity, the latter must also. Just as tort law assumes the existence of rights but concentrates on specifying what constitutes an infringement of those rights, so tort theorists preoccupy themselves with the role of wrongdoing while ignoring the significance of rights or taking them for granted. Then the abstraction that reflects the nature of the wrongdoing assumes greater salience than the abstraction that reflects the nature of the infringed right. Stone's own work provides an example. His most recent article[85] gives an elegant and instructive exposition of the operation of correlativity in the law of negligence. In this article, he sums up corrective justice as affording "a reflective awareness the configuration of a legal practice in which a certain kind of case (involving doing and suffering and *claims of right*) are central."[86] Despite this affirmation of the centrality of

85 *Id.*

86 *Id.* (emphasis added).

rights, these words of summation are the sole mention of them. Throughout his article he simply takes them for granted.

CONCLUSION

The purpose of this tour through the scholarship of some of the leading tort theorists has been to discern the emerging consensus concerning corrective justice. The juridical conception of corrective justice, with its complementary ideas of correlativity and personality, has provided the organizing framework for this enterprise.

It is evident that correlativity has now become more or less thematic in the treatment of tort theory from a corrective justice perspective. The revisions by Coleman and Perry are confessions of the implausibility of attempts to understand tortious wrongdoing without attending to the correlativity of the parties' normative positions. In contemporary scholarship, correlativity makes its appearance under different names: Coleman and Stone refer to it expressly; Ripstein uses such terms as "reciprocity" and "reasonableness"; Perry in effect includes it in his most recent exposition of outcome responsibility. Under whatever name correlativity is referred to, its presence is shown by arguments manifesting what I have called the negative and positive functions of correlativity. The negative function rejects the subordination of one party's interests to the other's interests. The positive function, illustrated by Cardozo's opinion in *Palsgraf*,[87] conditions liability for negligence on the requirement that the injury suffered by the plaintiff be within the risk unreasonably created by the defendant. In their most recent versions, all the approaches considered in this paper incorporate correlativity with respect to both these functions.

Personality has gained less approval. A reason for this is the suspicion that personality involves deriving corrective justice from a foundational notion of rational agency. I have argued that personality need not be understood in this way. It is merely the abstraction that represents the parties as bearers of rights and their correlative duties. As with correlativity, it owes its status within corrective justice to its being implicit in and presupposed by the law's doctrines and institutions. If correlativity and personality are indeed complementary, acceptance of the former should lead to acceptance of the latter. In any case, even those who most explicitly reject personality acknowledge that tort law deals with the wrongful infringement of another's

87 Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

rights. This aspect of the emerging consensus means that even if they dispute the significance of personality, they will have to suggest some other notion that serves the same theoretical function of capturing the centrality of rights for corrective justice.[88] In this respect too, the consensus about the role of rights may be more noteworthy than the disagreement about personality.

Given this consensus about correlativity and the rights-based quality of the injustice, the principal structural features of corrective justice seem firmly in place. Within the space of a quarter century, corrective justice has received a rich theoretical treatment that has established it as central to serious academic discussion of the normative dimensions of tort liability. Yet it also remains the comparatively simple idea of doing and suffering injustice that Aristotle first outlined more than two millennia ago.

In the light of this emerging contemporary consensus, where do corrective justice theorists go from here? On this I want to make two very vague comments, one about theory, the other about law.

First, the emergence of this consensus seems to me to indicate that further working out of the internal dynamics of corrective justice will not lead to large gains. Of course, refinements inevitably remain to be made. But once correlativity is established as the basic motif, radical revisions in our appreciation of corrective justice are unlikely. The idea of correlativity has too definite a structure for that.

More promising is the effort to see how corrective justice fits within a more general notion of justice. On the one hand, only a libertarian believes that corrective justice is the only justice there is. On the other hand, as Aristotle was the first to notice, the categorical differentiation between correlatively- and comparatively-structured justifications means that there is no overarching structure of justification that integrates corrective and distributive justice (let alone any other kind of justice that may exist). How then is the relationship between corrective justice and distributive justice to be conceived?[89]

Second, for all its theoretical sophistication, the exploration of corrective justice by tort theorists has involved a comparatively narrow set of legal doctrines. Over the past twenty-five years, certain issues and cases seem to have become canonical: the objective standard; the standard of care;

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88 As I argued in *supra* Section IV, Ripstein's understanding of rights as interests that are important for leading an autonomous life seems to imply the idea of personality as the reference point for what is important in the context of a liability regime.

89 Varying views on this are presented in Benson, *The Basis of Corrective Justice, supra* note 59; Alan Brudner, The Unity of the Common Law: Studies in Hegelian Jurisprudence (1995); Ripstein, *supra* note 43, chs. 8-9.

proximate cause and duty; factual causation; nonfeasance; *Vincent v. Lake Erie*,[90] *Rylands v. Fletcher*,[91] nuisance, and perhaps a few others. If, however, corrective justice really is as important for the understanding of law as is implied by the energy and output of the corrective justice theorists, one would expect it to illuminate more than this. My point is not merely that corrective justice should be able to cast light on a wider range of tort problems.[92] Rather, I suspect (as my remarks at the end of the last section indicate) that the popular academic association of corrective justice with tort law may be impeding our appreciation of both. Corrective justice is not engaged solely by tortious wrongdoing. Other grounds of obligation in private law, such as contract[93] and unjust enrichment,[94] have their respective modes of correlatively structured injustice. A true understanding of tort law involves understanding its place within private law generally. Corrective justice, in turn, opens the door to a more comprehensive understanding of the normative character of private law. Only when we aim at that more comprehensive understanding will contemporary scholarship have paid adequate attention to the insight that Aristotle first formulated.

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90 124 N.W. 221 (1910).

91 52 P. 274 (1898).

92 For an attempt to extend the analysis to the junction of tort law and restitution, see Ernest Weinrib, *Restitutionary Damages as Corrective Justice*, 1 Theoretical Inquiries L. 1 (2000). For criticism, see Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 Mich. L. Rev. 138 (1999).

93 Peter Benson, *The Unity of Contract Law, in* The Theory of Contract Law: New Essays 118 (Peter Benson ed., 2001).

94 Abraham Drassinower, *Unrequested Benefits in the Law of Unjust Enrichment*, 48 U. Toronto L.J. 459 (1998).