METAETHICS AND CORRECTIVE JUSTICE

Richard Arneson*

Like many other intellectual disciplines, in recent years the study of the law has been profoundly altered by increasing use by academic lawyers of the methods of rational choice theory as developed in microeconomics. Within the field of tort law Jules Coleman has been a penetrating critic of this economic analysis of the law, most notably in a series of essays which argued that the pioneer efforts to interpret and assess tort law according to norms drawn from economic theory were plagued by sloppy and imprecise thinking about the relationships among economic norms and moral concepts.[1] Call this Stage I of the Coleman critique. The lesson urged by the Stage I critique is not that we should stop using economic analysis to guide the assessment of tort law, but that we should do it better. In later essays that culminated in the publication of his book *Risks and Wrongs*, Coleman further criticizes the economic analysis of tort law as descriptively and perhaps normatively inadequate and proposes an alternative analysis, the mixed theory of corrective justice.[2] The "perhaps" in that last sentence reflects some uncertainty as to just what Coleman's Stage II critique intends to accomplish.

In a nutshell, the economic analysis of tort law asserts that tort law practices are and ought to be set so as to achieve efficiency.[3] To a large extent (the claim goes), existing tort law practices do in fact facilitate the attainment of efficient outcomes. Where tort law does not operate so as to promote efficiency, the economic analysis can become a normative standard to guide reform. Coleman and some other analysts view tort law in a very different way, as concerned with fairness, not efficiency. Coleman elaborates a set of categories of corrective justice and proposes that corrective justice so construed is the version of fairness that tort law aims to achieve. Coleman's descriptive claim is that to a large extent existing tort law practices are set so as to promote corrective justice. He is not saying that the human agents who established tort law as we know it over a long span of time consciously aimed to achieve corrective justice, but rather that corrective justice norms hypothetically

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* Professor of Philosophy, University of California at San Diego. I want to express my enormous admiration for Joel Feinberg, whose brilliant, original, and humane philosophical writings set an extraordinarily high standard for the rest of us. For the opportunity to participate in this symposium in his honor I am deeply grateful.

1. *See, e.g.*, Jules L. Coleman, *Efficiency, Auction, and Exchange, in* JULES L. COLEMAN, MARKETS, MORALS, AND THE LAW (1987).

2. JULES L. COLEMAN, RISKS AND WRONGS (1992).

3. Efficiency comes in different flavors. For the economic analysis of the law, the pertinent norm is Kaldor-Hicks efficiency. A change from a given status quo is a Kaldor-Hicks improvement just in case the gainers from the change could fully compensate the losers for their losses while still remaining gainers. As is well known, Kaldor-Hicks is a problematic ethical standard for judging policy, far more controversial in this respect than Pareto efficiency.

explain tort practices in the sense that if someone were to design a set of institutions with the aim of achieving corrective justice, she might achieve this aim by establishing (for the most part) the tort institutions we actually have. Another aspect of the purported fit between corrective justice norms and existing tort law practice is that corrective justice norms cohere with the self-understanding of the agents, especially the judges, whose activity constitutes the practice. It is less clear whether or not Coleman wishes to uphold corrective justice as a normative standard to guide reform of tort law in those areas where existing law diverges from corrective justice. He writes, "whether or not corrective justice imposes *moral* reasons for acting will depend on prevailing legal and social practices."[4] In other words, corrective justice as viewed by Coleman is optional for society. The United States implements corrective justice in its tort law practices, and that is morally permissible, but New Zealand does not, and that is also morally permissible. Or at least, the mere fact that a society's practices allocating the costs of accidents and of other forms of tortious conduct do not conform to corrective justice norms is not per se a moral fault. In fact this less than wholehearted commitment to corrective justice is not a new theme in Coleman's writings. In 1974 he burst upon the philosophical landscape with an analysis and moral defense of no-fault insurance schemes.[5] What Coleman seems to have in mind when he hesitates to assert that society ought to implement corrective justice is the possibility that a scheme might be instituted that would compensate the victims of accidents regardless of whose faulty conduct caused the accident in question. But why draw the line here? What is supposed to fix the boundary between optional and obligatory justice norms?

There is a puzzle here. Many of us suppose that norms of justice are overriding. In arguing for utilitarianism back in the mid-nineteenth century, John Stuart Mill felt obliged to address the presumption that if the pursuit of utility conflicts with justice, the pursuit of utility must give way to the claims of justice, which are of greater moral importance and urgency. (Mill does not so much argue against the presumption as argue that the pursuit of utility and the pursuit of justice—so far as the latter is not a hopelessly unclear goal—actually coincide.)[6] More recently John Rawls echoes common sense in stating that, "Justice is the first virtue of social institutions" and that "laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust."[7] The puzzle then is that if corrective justice is really justice, one should not view it as optional, and if corrective justice is really optional, one should not view it as a fundamental norm of justice. Norms of justice whose implementation is optional would have to be subsidiary norms that are alternative ways of fulfilling fundamental norms that are themselves nonoptional. Of course one fundamental norm of justice might be overridden by another justice norm that takes priority in a given context, but Coleman at one point suggests that a state is permitted to forego the pursuit of corrective justice if it merely has a good reason to do so.[8] The picture of the tort law

4. COLEMAN, *supra* note 2, at 394–95.
5. Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473 (1974).
6. JOHN STUART MILL, UTILITARIANISM ch. 5 (George Sher ed., 1988).
7. JOHN RAWLS, A THEORY OF JUSTICE 3 (1971).
8. COLEMAN, *supra* note 2, at 393–94.

situation presented by Coleman appears incomplete.

It is hard to imagine an analyst of retributive justice holding that criminals deserve punishment for their offenses and that we ought to punish criminals in proportion to the magnitude of their offenses and then adding in the next breath that retributive justice is optional for society. And it would be similarly hard to grasp a take-it-or-leave-it attitude toward distributive justice urged by a theorist of this subject unless she was advancing a debunking skeptical analysis. Coleman's attitude toward the norms he identifies as corrective justice principles is elusive.

The fact that Coleman declines wholeheartedly to endorse the norms he identifies as corrective justice norms leaves it unclear to what extent he is opposed to the normative thrust of the economic analysis of tort law. After all, if upholding corrective justice is optional, then it might not be wrong for a society to scrap any attempt to implement corrective justice and instead to rearrange tort law practices to whatever extent is necessary so that they work so as to promote efficiency. This is the normative recommendation of economic analysis, interpreted as a standard and guide for reform. Perhaps Coleman's view is that it would be morally permissible for society to implement corrective justice even at the expense of efficiency and equally permissible for society to implement efficiency even at the cost of corrective justice.[9]

A further unclarity in the situation is that it is not at all clear that implementing corrective justice and implementing efficiency are counterposed alternatives as Coleman's writing sometimes seems to presuppose. Perhaps current tort practices to a large extent fulfill norms of corrective justice and also to a large extent fulfill a norm of efficiency. And perhaps tort practices could be reformed so that they more fully achieve both corrective justice norms and efficiency. Corrective justice norms are backward-looking: past wrongs should be corrected; those who have suffered wrongful losses should be made whole by compensation. An efficiency norm is forward-looking: institutions should be set so as to achieve a desirable future where the desirable future consequences are those picked out as such by the efficiency norm. But for all that, perhaps the practical recommendations of backward-looking corrective justice norms and forward-looking efficiency norms coincide to a large extent. As William Landes and Richard Posner suggest, "Maybe in this area fairness equals efficiency."[10] At least the question is open. Coleman points out that current tort law practice is as though designed to achieve corrective justice and also that public officials charged with the implementation of tort law see their task as doing justice, not as facilitating economic efficiency. But these claims, even if they should prove true, leave it entirely open whether or not the implementation of corrective justice is compatible with the achievement of efficiency.

Corrective justice according to Coleman "is the principle that those who are responsible for the wrongful losses of others have a duty to repair them."[11] Wrongful losses fall into two categories: (1) violations and infringements of

9. Something close to this is the conclusion of the discussion in *id.* at 390–95.

10. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 9 (1987).

11. Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15 (1995).

rights, and (2) wrongful conduct that harms someone's legitimate interests without violating any rights. Those responsible for wrongful losses are the violators and infringers of rights and the perpetrators of wrongful harmful conduct. This characterization of corrective justice is intended to be a schema, which different conceptions of corrective justice might elaborate with different contents. One possible response to Coleman's view of corrective justice is to suspend judgment pending further elaboration of the schema. But even at the level of abstraction at which Coleman's analysis proceeds, questions arise.

Consider the application of corrective justice to the portion of tort law that is concerned with compensation for accidents, and more specifically the part of accident law that is governed by negligence rules. According to negligence rules one is liable for the costs of an accident if the plaintiff can show that she suffered a loss, that one's conduct caused the loss foreseeably or proximately, and that one's harmful conduct was faulty. Coleman means to characterize the norm of corrective justice so that negligence rules are a paradigm of corrective justice. Tort law links injurers, those who cause harm, and the injured, those who suffer this harm, and assigns liability for harm to the particular injurer who caused it provided that injurer's behavior was faulty (for simplicity I ignore contributory and comparative negligence and other complications). This limitation of liability for a particular harm to the particular agent who caused it impresses Coleman as a major reason for suspecting that the principles of corrective justice embedded in tort law will part company with the implications of an efficiency analysis which would have the law set so as to minimize the total costs of accidents, accident prevention and accident compensation administration. There is no reason to think that the individual who could by his behavior prevent an accident at the cheapest cost will inevitably or usually be the injurer or the injured. Tort law narrowly restricts the set of people on whom the costs of accidents might appropriately be made to fall. If there is a justification for this, Coleman thinks, it must lie in the region of common-sense norms of corrective justice, not economic efficiency analysis.

Unfortunately, the limitation by tort law negligence rules of liability for a particular accident to a particular injurer lacks a rationale from a perspective of justice or fundamental considerations of fairness. There are two sorts of significant arbitrary luck that operate to determine who causes which accidents, and tort law negligence rules take the moral acceptability of this luck for granted and do not make any attempt to mitigate it. First of all, the standard of "faulty conduct" operative in negligence law is an objective liability standard. To avoid a determination that one's conduct has been faulty, one must conduct oneself with due care, behaving as a reasonably watchful, competent person would have behaved under similar circumstances. But individuals whose conduct might cause harm vary enormously in their possession of personal traits that render them more or less capable of adhering to a due care standard and that render their adherence more or less costly or difficult. These traits that make it easy, difficult, or impossible to behave with due care are themselves traits that one is generally lucky or unlucky to have and for which one cannot reasonably be held morally responsible.

A second type of arbitrary luck that determines whether one will be liable for compensating someone injured in an accident is the luck that

determines (1) whether or not one's faulty conduct causes someone harm, (2) whether one's faulty conduct that does cause harm gives rise to a larger or smaller amount of damage, and indeed (3) whether or not the traits in one's character that dispose one to faulty conduct are exposed to circumstances that do in fact trigger faulty conduct, and if so, (4), how faulty is the conduct so triggered.

If it is reasonable to hold individuals morally responsible only for what lies within their voluntary control, not for what happens as a result of good or bad luck that befalls them, then tort law practice, which ties responsibility to objectively faulty agency that causes particular harms, and corrective justice, mirroring the contours of tort law practice, do not seek to apply a reasonable norm of moral responsibility. At least there is a striking apparent lack of fit between liberal norms of distributive justice and corrective justice rooted in tort law practice as characterized by Coleman. Liberal principles of distributive justice strive to mitigate and offset the impact of morally arbitrary luck on people's life prospects. For example, the well-known theories of John Rawls and Ronald Dworkin impose on society the obligation to correct for the natural lottery that distributes personal talents by a counterbalancing distribution of resources. In contrast, corrective justice embodies the coarse-grained notions of responsibility for outcomes that underlie tort law practice. Perhaps there is and ought to be a social division of labor between distributive and corrective justice, such that only the former attempts to implement a fine-grained conception of responsibility that corresponds to considered intuitions about fairness. But the justifiability of any such division needs to be addressed.

The upshot of this brief discussion is that Coleman's hesitation regarding the strength of the affirmation of corrective justice he wishes to make begins to look reasonable and the justice in corrective justice appears attenuated. But now reconsider Coleman's descriptive and normative critique of the economic efficiency analysis of current tort law. On the descriptive side, the issue is still open. Coleman's arguments to date certainly do not establish the claim that corrective justice better explains existing tort law than the economic efficiency analysis. On the normative side, I have argued that the norms of corrective justice as interpreted by Coleman are not really fair. But of course this argument offers no support to the surmise of Landes and Posner that maybe in the area of tort law "fairness equals efficiency." The efficiency norm that Landes and Posner are invoking is wealth maximization or Kaldor-Hicks efficiency (a change from a status quo is efficient just in case those who gain from the change could fully compensate the losers while still remaining gainers). This norm is counterintuitive for familiar reasons, so real fairness is not Kaldor-Hicks efficiency.[12] What seems to be called for is deeper critical exploration of norms that might regulate practices of compensation for losses due to human agency.

In *The Practice of Corrective Justice* Coleman significantly clarifies his position. It turns out according to Coleman that those critics who demand further justification for proposed norms of corrective justice beyond their fit with human practice are presupposing a suspect metaethics. At least Coleman

12. A rehearsal of some of these familiar reasons is in Richard J. Arneson, *Rational Contractarianism, Corrective Justice, and Tort Law*, 15 HARV. J.L. & PUB. POL'Y 889, 896-898 (1992).

identifies what he evidently takes to be a plausible metaethical position that coheres with his views on corrective justice. The challenge to his critics is to do the same. One may ask what renders a proposed analysis of corrective justice correct or incorrect, if indeed a proposal about the nature of corrective justice is capable of being correct or incorrect at all. Coleman's answer is to embrace a sophisticated form of conventionalism about morality. What makes a given moral claim true or false for a particular society is human agreement within that society, as reflected in practices or accepted ways of conducting their affairs. From this standpoint it is a mistake to look beneath or beyond human practices to justify them by the invocation of more abstract principles that explain them. Human practices determine what is true and false in ethics.

This invocation of conventionalism clarifies Coleman's attitude toward the enterprise of "middle-level theory" which he favors. Middle-level theory interprets human practices and institutions by positing principles that explain features of practices by showing that if someone were striving to fulfill the principle, establishing practices with just these features would be an effective means to this goal. Middle-level theory eschews the aspiration to rationalize or justify practices by showing that the middle-level principles that explain them can be justified by deriving them from fundamental moral principles taken to be self-evident or supported by argument in some other way. No sharp line separates middle-level theory from fundamental-level theory. A preference for the former bespeaks an attitude that fruitful work in ethics is done close to the surface of rules of existing practices.

One reason for pursuing middle-level theory and eschewing grand moral theorizing is suspicion that there is not much to be said at the level of grand theoretical abstraction that substantially strengthens the case that can be made for middle-level principles and the practices they interpret by examining their implications for conduct and policy in a wide range of settings and showing that these policy implications match our intuitions. This suspicion about the likely futility of grand moral theorizing seems to animate the work of a philosopher who happens to be one of Coleman's teachers, Joel Feinberg. Feinberg explicitly dissociates his rationale for middle-level theorizing from conventionalism. The complex version of the liberal harm principle that Feinberg painstakingly elaborates asserts an ideal of individual rights that purports to be just as valid in a dictatorial regime of Islamic fundamentalism as in a North American or European democracy.[13] Feinberg's position rests on a partly moral, partly empirical hunch concerning the ways of doing ethics that are most likely to be productive. The moral basis of the hunch is his adherence to intuitionism, the view that there are a plurality of sound moral principles and that these principles cannot be ordered by a master principle that assigns each principle and moral value its proper precise weight. For the intuitionist, to discover right policy one must weigh competing moral principles and values against each other sensitively on a case by case basis. In order to defend middle-level theorizing as practiced by the intuitionist like Feinberg, in the end one would have to do fundamental-level theory in order to show that the aspiration to elaborate a successful master principle cannot be fulfilled.

In contrast, Coleman flirts with a metaethical reason for opting for

13. *See* the concluding chapter of HARMLESS WRONGDOING, 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW (1988).

middle-level theory. If one assumes conventionalism then grand ethical theorizing in search of ultimate justifications lacks a point. "Middle-level" theory is as deep as it gets.

For my part, although I acknowledge that what metaethical theory one accepts might have implications for one's normative theory and vice versa, I doubt that in our present state of understanding the two types of theory fit together as closely as Coleman supposes. So at the end of the day Coleman's middle-level theory of tort law hangs in mid-air and requires either a detailed showing that the principles match our intuitions about cases a la Feinberg or the support of defensible fundamental principles if it is to be credible. The interesting excursion into abstract ethical theory in *The Practice of Corrective Justice* does not rebut the claim that Coleman's analysis needs further normative support of a kind he does not try to supply.

Coleman's discussion proceeds by developing an elaborate and instructive taxonomy of metaethical ways in which one might conceive of corrective justice. According to Coleman, a discourse is cognitive if its declarative judgments are fact-stating, capable of being true or false. A discourse is noncognitive just in case (what purports to be) its declarative judgments (1) are not fact-stating and (2) are used to express approval or disapproval. Coleman's first claim is that all of the theories of corrective justice currently being advanced including his own must be committed to the view that corrective justice discourse is cognitive. Moreover, these theories must also regard corrective justice assertions as objective in the sense that the asserter's mere beliefs do not definitively settle the truth of her assertions.

Why think this? Coleman seems to be presupposing that if a discourse is noncognitive, there can be no content to its claims beyond the registration of speaker's approval or disapproval. In other words, if a theory of corrective justice were noncognitive, its claims would amount to no more than expressions of approval or disapproval regarding specified features of tort law. But noncognitivism comes in many flavors, and not all of them insist that moral claims, being noncognitive, thereby lack semantic content. For example, one flavor of noncognitivism holds that to assert a moral judgment is to express one's acceptance of a norm that implies that judgment, where to "accept" a norm is to be disposed to have a negative emotional response when someone acts in violation of it.[14]

So far as I can see, disagreements among tort law theorists such as Coleman, Richard Epstein, George Fletcher, Ernest Weinrib, and Stephen Perry as to the nature of the standard of fairness (corrective justice) that dictates the rulings of tort law (to the extent that actual dictates are acceptable) can be represented equally well on a Gibbard-style norm-expressivist noncognitivist account of moral norms as on a cognitivist account. On the noncognitivist account, the squabbling theorists are expressing their acceptance of norms for tort law that conflict and arguing about which set of norms is better and should be accepted, whereas on the cognitivist account, the theorists are asserting conflicting norms and arguing about which ones are true.

Coleman's taxonomy further divides theorists of moral claims into the

14. *See* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT (1990).

camp of moral realists and the camp of moral antirealists. The moral realist is one who holds that moral properties are "logically and constitutively" independent of human beliefs about them and the evidence one can adduce in favor of those beliefs. The moral antirealist denies that moral properties are independent of beliefs and evidence in this way. On these definitions, the moral antirealist might but need not deny the existence of moral facts. The moral antirealist must hold that if there are moral facts, they are fully determined by human beliefs and evidence.

Most people are probably realists with respect to common sense and scientific discourse about the natural world. They believe, for example, that the existence of the planet Mars is not somehow constituted by human beliefs and evidence about this phenomenon. Mars might continue to exist even if all human beings and a fortiori all human beliefs were suddenly to disappear and might have existed even if the earth had always had the wrong type of atmosphere to support life and humans with their beliefs had never come to be. But with respect to moral claims a realist position is more doubtful. Is the fact that slavery is wrong properly conceived as logically and constitutively independent of all human beliefs and evidence? Not so, the moral antirealist holds.

Coleman writes, "Because I am an anti-realist about moral predicates, I am committed to the view that the core of corrective justice is drawn from the practices in which it figures."[15] But this cannot be his considered view, because according to his own account, the moral antirealist is not committed to deference even to the total ensemble of existing practices. This is so because the moral anti-realist might also consistently embrace cognitivism and modest objectivity about moral properties. For convenience, let's label this combination of positions *weak antirealism.* Weak antirealism is opposed both to *strong antirealism,* which combines cognitivism and minimal objectivity about moral properties, and *noncognitivist antirealism.* According to modest objectivity in this domain, the truth about a moral claim is determined by how it "would be regarded by individuals under idealized or appropriate epistemic conditions."[16]

Acknowledging the possibility of weak antirealism opens the door to an antirealist position that denies that the correct conception of any given moral concept is fixed by current human practices of any sort. Take the example of corrective justice, understood as that type of fairness that tort law practices ought to exemplify. The weak antirealist believes that the truth about corrective justice is constituted by individual beliefs about this subject, as they would be if they were to be formed under ideal epistemic conditions. The only human practice that by definition is involved in this determination is the practice of deliberation that forms people's moral beliefs. Moreover, the moral deliberation practice that fixes the truth about corrective justice is not current moral practice but moral deliberation as it would be under ideal conditions. Different analyses of the ideal of ideal conditions will yield different accounts of modest objectivity and weak antirealism. But notice that the primacy of practice on this view of the matter does not commit one even to modest deference to existing human practices and is fully compatible with the position that they need to be entirely rebuilt from the ground up.

15. Coleman, *supra* note 11, at 23.
16. *Id.* at 21.

For example, an account of epistemically ideal conditions for moral judgment might identify moral truth with what would be believed in ideal reflective equilibrium as characterized by John Rawls.[17] The content of ideal reflective equilibrium is what would be believed after ideally extended moral deliberation canvassing all relevant moral arguments while reasoning perfectly with full relevant information. The perspective of ideal reflective equilibrium is difficult to reach, if reachable at all, and surely has not been achieved to date by any moral agent or moral theorist. On this view, just as the moral truth about slavery is not fixed by what even the best positioned observers in slave regimes happened to believe, and just as the moral truth about appropriate relations between men and women is not fixed by the beliefs of seemingly ideally placed commentators at times when male dominance had not yet been subjected to sharp challenge, so too the truth about the fairness that tort law should exemplify is not fixed by prevailing tort law practice even if detached and competent observers affirm such practices and believe that tort law is pretty much all right as presently constituted. Prevailing tort law practices may be just fine or deeply flawed. We are not yet in a favorable epistemic condition that would permit firm judgment on this matter.

In *The Practice of Corrective Justice* Coleman hints that he believes that if the moral antirealist has a cognitivist understanding of moral discourse, she must defer to current human ways of arranging their affairs and accept that the core content of moral truth must be drawn from these current practices. But given the possible viability of weak antirealism and the further possibility that the most defensible form of weak antirealism identifies moral truth with what would be affirmed in ideal reflective equilibrium, this doctrine of deference to current practice needs a lot more argumentative support than Coleman provides.

In effect Coleman uses his taxonomy to make an argument: If any view that takes corrective justice to be something beyond approval or disapproval of features of current tort law practice must be cognitivist, and if moral realism is ruled out of court on the ground that it is implicated in murky moral metaphysics, then cognitivist moral antirealism is the only viable game in town. If cognitivist moral realism in turn endorses the primacy of practice, then something very close to the middle-level moral theorizing that Coleman carries out must be the correct method for the moral theorist. To reiterate my counterclaim: This chain of reasoning collapses at several points. It has not been shown, and to my mind could not be shown, that a noncognitivist account of corrective justice could not be viable. Moreover, even if we accept cognitivism and moral antirealism, these commitments are compatible with accepting a form of moral antirealism that does not concede any presumption that current practices are morally acceptable or close to acceptable. Since Coleman does nothing to discredit this set of options, the taxonomical argument for middle-level theorizing does not succeed.

One possibility not yet considered is that even though Coleman does not argue explicitly against weak antirealism, perhaps there are good arguments to show either that strong antirealism is the more defensible doctrine or that weak and strong antirealism do not have such different implications regarding the primacy of practice and middle-level theorizing as I have supposed. For the

17. RAWLS, *supra* note 7, at 46–51.

sake of the argument let us simply assume that this possibility holds true, that weak antirealism accordingly drops out of the picture, and that we must consider the implications of strong antirealism. Where are we then? Strong antirealism differs from weak antirealism by the substitution of minimal for modest objectivity. According to minimal objectivity with respect to moral claims, a claim by a given speaker might be true or false, depending on whether the claim agrees or disagrees with the beliefs on this matter held by most competent language speakers. On this view the community as a whole cannot be mistaken regarding the moral meaning of its practices. Coleman accordingly identifies this position with the doctrine of conventionalism about morality (which I will call *unsophisticated conventionalism*), which holds that what is true and false in ethics is fixed by what is regarded as true and false by most members of the community. On this view middle-level theorizing can make sense. Such theorizing interprets existing social practices by discovering their underlying principles. Bringing these principles into plain view exposes the implicit convictions of community members who participate in the practices and accept them. But Coleman rejects unsophisticated conventionalism on the reasonable ground that competent language users and participants in our moral practices do not regard the current judgments of competent language users as settling the normative truth about our practices. Unsophisticated conventionalism is false to the phenomenology of moral experience in our culture.

Coleman then wants to combine weak moral antirealism with the further substantive claim that in the end the truth of morality and a fortiori the truth of the corrective justice component of morality are fixed by our moral practices. What Coleman might mean by this primacy of practice thesis is clarified by his response to an objection he imagines. He writes, "Corrective justice is fixed by our practices, and, if that is the case, how can corrective justice serve as a criterion or standard for assessing our practices?"[18] Coleman has an elegant and simple reply to this objection. First, even if the content of corrective justice is set by the ensemble of the practices in which this concept figures, tort law is just one of these practices, and the best interpretation of the ensemble may postulate norms that tort law practice does not satisfy. The best interpretation of the whole may require the revision of the part. Second, it may simply be part of the conventional shared understanding of some social practices that the actual behavior of community members in terms of the practice does not exhaust the moral meaning of the practice. Our conventional understanding of corrective justice may imply that lawyers specializing in accident law should not be ambulance-chasers even though in current practice most lawyers specializing in accident law are ambulance chasers. So corrective justice norms can be fixed by current practices and beliefs yet also serve as a standard for assessing and criticizing current tort law practice.

Coleman's metaethical position is then a sophisticated version of conventionalism. Ultimately, normative truth is determined by convention or human agreement. But in our legal culture there is an important convention of articulate consistency. We do not regard the beliefs of competent language users as fixing the truth with respect to legal norms. Rather our practice is to suppose that the legal policies enforced in a given regime must be explicable in terms of

18. COLEMAN, *supra* note 11 at 23.

a consistent set of principles that it is the task of middle-level theory to discover. The best middle-level theory, the one that best makes sense of our current practices, might imply that some of these practices are inadequate, should be revised (whether or not a majority of competent language users now believe this).

However, there is a tension between Coleman's seeming embrace of antirealist conventionalism so construed and his overarching view of legal philosophy as a branch of practical reason concerned to discover good reasons for action. Conventionalism of the sort Coleman embraces is hard to reconcile with the normativity of moral judgments. If the content of corrective justice is entirely fixed by how current members of a particular society happen to arrange their mutual affairs and carry on their practices (which facts in turn determine what the articulate middle-level theory of these practices will assert), why do the requirements of corrective justice generate reasons for action for any individual who happens to fall under the practice? According to conventionalism, what renders a particular set of moral rules morally binding is not any intrinsic reasonableness of the rules but simply the fact that they are accepted in a particular society or culture. The fundamental underlying norm becomes "When in Rome, do as the Romans do!" or rather, "Whatever the Romans do determines what is moral for the Romans (but not for anyone else)." This looks to be tending toward an expression of skepticism, a subversive undermining of the supposed normative force of moral reasons rather than an account that explains it. Such skepticism may be perfectly correct for all that I say here. My worry is that even sophisticated conventionalism is incompatible with normativity, the thought that norms provide genuine reasons for an agent for conformity with their demands.

It also looks mysterious why the normative force that conventions generate is generated at the level of the political society rather than more locally or globally. Why should not the conventions of my village, neighborhood, family, club, mutual acquaintance circle, or e-mail network generate the same or greater claims on my allegiance than the conventions of the surrounding political society? The political society's norms are likely enforced with more effective military and police power, but so what? "This is the way we do things around here," the principle of conventionalism, does not in any obvious way generate any reason for conforming to the way we do things.

Coleman quite correctly senses that the corrective justice norms that he identifies, rooted in current tort law practice, lack the intuitive appeal we associate with norms of justice. Coleman responds by proposing that corrective justice is optional for society in the sense that our conventions and practices might have been different, and that the normative force of corrective justice as with that of all norms rests on current practice, and conventional shared understanding. This response seems to me to be a misdiagnosis of the sources of the weak authority of corrective justice norms.