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**The Practice of Principle:
In Defense of a Pragmatist Approach to Legal Theory**

Jules L. Coleman

New York: Oxford University Press, 2001 (226 pp)

Reviewed by Robbie Moser[†]

In this densely-packed book¹ purporting to cover all significant areas of contemporary jurisprudence, the author's goal seems to be twofold: First, he seeks to cast doubt on the popular Dworkinian wisdom that the project of explaining the law is conceptually tied up with the project of justifying it. Second, by employing a novel version of conceptual analysis, he aims to advance a "pragmatic" account of the central concepts in jurisprudence.

The book is comprised of twelve chapters, or 'Lectures', each of which was presented in lesser or different form at Oxford University in 1998 as part of the Clarendon Lectures in Law series at which the author defended his version of inclusive legal positivism. The first move in the book is an application of the pragmatic method to tort law, and Coleman's target is any purported 'economic analysis' of law. The author's claim is that economic analyses misconstrue important parts of legal practice by treating law as a matter of efficiency. Indeed, a *pragmatic* conceptual analysis of tort law reveals, on the contrary, that torts are best understood as embodying a principle of corrective justice, whose moral ideal is independent of its role in explaining tort law. Next, the author goes on to argue that the law's normativity (its claim to authority) can be explained in terms of its giving us reasons for action that can be further specified by the notion of 'shared cooperative actions'. Last, Coleman defends his theory against several alternative accounts of the goals of jurisprudence. As he sees it, the overall project

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¹ Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (New York: Oxford University Press, 2001).

of jurisprudence is to identify “normatively significant” components of legal practice by explaining them as the embodiment of principle.

Coleman puts his pragmatic conceptual analysis to work on tort law. On his analysis, tort law *embodies* or makes explicit the principle of corrective justice inasmuch as the principle identifies specific pieces of the practice as “normatively significant”. The central concepts of tort law – harm, cause, repair, fault, etc. – construct a web of inferential relations that articulate corrective justice and define its requirements. As Coleman sees it, economic analysis gives rise to various “function-based” economic explanations of tort law, all of which fail to adequately or consistently describe a working jurisprudence. According to economic analysis, the function of law is to optimally reduce accident costs. How well the law does this depends on a) the degree to which it reduces the cost of accidents, and b) the cost of its doing so. Coleman’s complaint is that concepts like negligence that conceptually accompany tort law have been reduced to the economic terms of cost and risk. It follows, then, that if tort law were practiced the way the economist describes it, plaintiffs would gather evidence not to the effect that there is a failure to comply with a duty, but rather to the effect that the defendant will absorb the least costs. But our actual practices suggest that “the wrongfulness of the act, the fact of the harm, and the causal relation between the two are all pertinent to the outcome of the lawsuit.”²

In the end, Coleman undertakes a rigorous examination of economist claims and concludes that no economic analysis has successfully argued a) that the outcome of torts really is efficient cost reduction, nor b) that a causal story exists which can use this purported outcome to explain the very structure and existence of tort law. Without either of these arguments in place, Coleman worries further whether ‘efficiency’ as the function of torts is even *morally desirable* in (roughly) a justice-as-fairness sense; that is, a sense that is part of our “pretheoretic” conceptions about tort law.³ Coleman’s view is that a non-reductive theory can better explain these concerns by showing how the law figures in the wide-ranging context of our moral and social practices. A certain principle (corrective justice) is “embodied” by the practices that constitute tort law, and in turn, tort law is explained by this principle.

² *Ibid.* at 20.

³ *Ibid.* at 32, 15.

Coleman's account of tort law results in an innovative understanding of the nature of legal systems since it commits him to an innovative understanding of the positivist rule of recognition. In the remainder of the book, Coleman advances this understanding against the arguments of both exclusive legal positivists like Joseph Raz and quasi-naturalists like Ronald Dworkin.⁴ To discharge the book's promise to offer a full jurisprudential theory, Coleman must defend a conception of law's conventionality and authority, a *rival* to the accounts of these concepts as advanced by Raz and Dworkin.

Through forceful, and at times repetitive argument, Coleman asserts that the conventionally accepted criteria of legality can be (and in fact are) expressed by a rule (the rule of recognition) that imposes an obligation on officials to evaluate cases only according to those norms that satisfy the made-explicit criteria.⁵ Coleman maintains, with H.L.A. Hart, that the very possibility of law is to be explained in terms of social facts, and the possibility of legal authority is to be explained in terms of a convention, namely, an adherence to a rule of recognition. As Coleman sees it, his reading of this 'conventionality thesis' avoids reducing legal authority to social facts, by themselves devoid of any explanation of law's normativity, and instead explains legal authority in terms of normative social practices. The virtue of this shift is that it allows Coleman to capture the normativity essential to legal authority.

Utilizing contemporary Wittgensteinian views on the possibility of rule-following, Coleman advances his notion of 'principle embodied by practice' as a way of making intelligible the claim that officials in a legal system adhere to the rule of recognition through their convergent behaviour. Generally, if the same rule is being followed by two or more officials, then they must share a grasp of the rule that is reflected *both* in convergent behaviour and in broadly shared grasps of the rule's application. They must share what Coleman calls a "framework of interaction."⁶ Relating this notion of rule-following back to the 'internal point of view' that Hart used to explain convergent behaviour, Coleman purports to explain both how the rule of recognition exists and how it

⁴ Natural law jurisprudence is mentioned only in passing, amid concerns of whether morality can figure in the content of a legal system.

⁵ Coleman, *supra* note 1 at 72.

⁶ Coleman, *supra* note 1 at 82.

provides governance. Further, an individual taking the internal point of view toward a rule is provided a reason for action distinct from and in addition to the reason a person already has for obeying that rule, namely, by turning habitual behaviour into a rule.

A worry surfaces here that a person may unilaterally extinguish a rule as such in a way that she may not extinguish a duty imposed by a law. If this is true, Coleman's argument for the role of the internal point of view does not do the necessary work for explaining the possibility of legal authority. Coleman wrestles with this problem,⁷ (which he attributes to social theory and not to jurisprudence) and in so doing, he imports the notion of a shared cooperative activity (SCA).⁸ A SCA is an activity that involves participation with a shared intention converging on a common goal. Still, Coleman wonders whether he may have just offered an account of an extra *reason* to obey a law without unpacking the notion of duty in a way illuminated by the rule of recognition. He does not think, however, that his theory stands or falls with this claim. Having argued that legal authority is to be explained in terms of social conventions, Coleman fleshes out whether or not an inclusive rule of recognition, that is, a rule of recognition that includes moral norms as criteria of legality, is consistent with his model, or, indeed with any model, of law's authority. After some analysis and consideration of opponents' claims, Coleman concludes that what is conceptually true of law *per se* need not be true of every individual law, leaving his account of authority open to criticism on this point.

In the latter part of the book,⁹ Coleman takes up a defence of his method of conceptual analysis, one which he believes he shares in spirit with H.L.A. Hart, and in method, broadly conceived, with W.V. Quine. This lively and thoughtful account of analyticity-skepticism and pragmatism provides a pleasant and helpful way to close and to collect one's thoughts around Coleman's. Arguments advanced by Ronald Dworkin as well as contemporary exclusive legal positivists are responded to in turn, and it is at least a virtue of Coleman's thought that he strives for consistency in his method and manner of replies.

⁷ Coleman, *supra* note 1 at 92-93.

⁸ Coleman, *supra* note 1 at 96.

⁹ Coleman, *supra* note 1 at 151.

The book is not written for the beginner in legal theory; it presupposes at least an intermediate familiarity with concepts in the philosophy of law. Since a good deal of the argument rests on post-Quinean epistemology, it also helps to have a general understanding of concepts in contemporary philosophy of language and theory of knowledge. The interested reader can set these details aside, however, and still be impressed by Coleman's original and lucid account of the relationships between corrective justice, legal authority and normativity, and of the role of moral concepts in legal discourse.