

Book Review

Risks, Wrongs, and Responsibility: Coleman's Liberal Theory of Commutative Justice

Risks and Wrongs. By Jules L. Coleman.* Cambridge University Press, 1992.
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I. INTRODUCTION

In *Risks and Wrongs*, Jules Coleman investigates what Aquinas called "commutative justice"—the dimension of justice that arises from and governs transactions between individuals.¹ Aquinas' term conveniently captures the object of Coleman's inquiry because it brings concerns of justice in contracts and in torts together under a single rubric, permitting an exploration of their general similarities and specific differences.²

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1. 37 THOMAS AQUINAS, *SUMMA THEOLOGIAE* 87-101 (Thomas Gilby trans., Blackfriars 1975).

2. The term "commutative justice" also has the advantage over "corrective justice" of emphasizing the interpersonal or transactional dimension of justice in this domain without begging substantive questions about its focal aim.

Coleman outlines and defends a distinctively liberal theory of commutative justice. While he works squarely within the rational choice tradition,³ his work follows no party line. Indeed, readers of *Risks and Wrongs* will be surprised to find that, while Coleman embraces the basic principles of individual and social rationality at the foundations of rational choice theory and the economic analysis of law, he rejects the idea that the perfectly competitive market is the paradigm of rational social interaction. Coleman's "rational choice liberalism" focuses on forms of cooperation instead of institutional attempts to mimic perfect competition. In his view, the market is central to liberal political and legal theory not because it is paradigmatically rational or because it allocates goods and evils most efficiently, but because it serves social stability and local coordination of social interaction. This service enhances the ability of individual citizens to live out their chosen plans and projects.

Having articulated and defended this revisionist rational choice political theory, Coleman turns to the task of providing normative-interpretive theories of commutative justice that embrace contract and tort law. He argues, first, that contract law is best understood as safeguarding and enhancing market transactions by helping parties to solve problems of uncertainty that are endemic to the bargaining process. His interpretation of tort law, in contrast, takes a decidedly "anti-market" approach. Tort law, he argues, seeks to secure justice between parties by imposing the duty to compensate victims' wrongful losses on the injurers; it is not designed to enhance market transactions. For Coleman, the fundamental goal of tort law is not efficient accident-cost avoidance, fair cost-spreading, or the annulment of wrongful losses;⁴ rather, it is corrective justice between the injurer and the victim. Although it is "backward-looking," tort law can be justified within rational choice liberalism, he maintains, because it sustains local coordination and promotes stability just as the market does, albeit through strikingly different means. While this decidedly "anti-market" account of tort law applies to the core of current practice, Coleman argues that market-oriented principles already govern many other parts of tort practice, and may even come to dominate it in the future. Contemporary tort practice, he argues, is thus a mix of markets and morals.

This is only the barest sketch of Coleman's bold, richly colored, and subtly nuanced theoretical picture. Coleman makes important contributions to each of the theoretical areas he addresses, and his analysis has such a clarity of focus that it should redefine contemporary debate in those areas. The signal virtue of his work, however, is its inviting intellectual honesty and modesty. The work has no fixed agenda. Coleman identifies and challenges opposing views, but still makes room for many of them, newly revised, in his theoretical

3. The main theses of this tradition are discussed below. See *infra* Part II.A.

4. Coleman has argued for the annulment thesis for years, even as recently as 1992. See Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349 (1992).

mansion. His analysis is guided by firm theoretical and substantive intuitions, but he follows the argument where it leads him, sometimes even into untidy complexity. No reader will find all of his arguments persuasive, but each will come away from this work with a clear map of the theoretical terrain and a firm sense of the interest and importance of Coleman's thesis.

In this Review, I discuss two important parts of Coleman's project. First, I explore the foundation of Coleman's jurisprudential theory and his use of rational choice theory as the basis for a liberal approach to moral and political justification. Next, I focus on Coleman's interpretations of corrective justice and modern tort practice, setting them out in some detail and trying to uncover their deeper theoretical motivations.

II. RATIONAL CHOICE LIBERALISM

A. *Rational Choice Theory and the Market Paradigm*

In *Risks and Wrongs*, Coleman works self-consciously within that branch of the liberal tradition that seeks to ground liberal institutions and fundamental liberal values in a nonmoral notion of rational choice.⁵ Coleman's view is that rational choice theory supplies the best available set of conceptual and normative tools for articulating and defending liberal commitments. Moreover, he maintains that it does so in a way that best captures and expresses liberal commitments concerning the mode of justification appropriate to rational moral agents and citizens.

Received rational choice theory proposes to justify moral, political, and legal norms or institutions by showing that they meet the demands of rationality defined in terms of individual interest. This interest-based notion of rationality takes shape in two familiar principles: (a) a norm is collectively rational if and only if it is Pareto optimal, enabling persons constrained by it to exploit the full welfare-enhancing potential of their interaction; and (b) a norm is individually rational for any agent governed by it if and only if it is welfare-enhancing, or not welfare-decreasing, for that agent.⁶ A set of norms, then, is rational in a group if and only if compliance with it is both Pareto optimal and advantageous to each member. Satisfaction of each principle is necessary to the justification of norms or institutions. Coleman adds to this standard account of conditions of rationality a third principle, which explains what he terms the "distributive" dimension of morality.⁷ Because rational

5. Coleman says that rational choice theory seeks a "nonnormative" foundation for moral and political institutions, but the foundation is not outside all normative principle. Rather, he seeks "a grounding outside of morality, yet within reason." JULES L. COLEMAN, *RISKS AND WRONGS* 45 (1992) [hereinafter *RISKS AND WRONGS*]; see also *id.* at 47-48.

6. *Id.* at 18-21.

7. *Id.* at 22-26.

choice theory stands outside the framework of moral notions and standards and seeks to defend those standards in terms of rationality alone, it cannot appeal to a notion of fair division. Instead, it must define a principle of divisional rationality, according to which a scheme of constraint and cooperation is rational only if the division of gains of productive cooperative activity is determined by each party's relative resistance to making concessions to the others.⁸

In Coleman's view, these three principles of rational choice represent the demands of rationality on social norms and institutions, and offer a precise and compelling interpretation of a fundamental principle of liberal political theory. This liberal principle holds that norms or institutions that regulate individual conduct or affect individual well-being are valid only if they can be justified to each individual affected. Rational choice principles meet this liberal demand in two respects: (a) they only recognize arguments that are articulated in terms of promoting the interests of individuals, and (b) they require that the norm or institution work to the advantage of each individual affected. The principle of individual rationality thus represents a welfarist interpretation of the liberal demand for ad hominem justification.⁹

Coleman parts company with standard rational choice theorists when they embrace what he calls "the market paradigm." The market paradigm holds that the perfectly competitive market is the ideal institutional embodiment of the above principles of rationality.¹⁰ Under conditions of perfect competition, individual and collective rationality converge. The market paradigm assumes that rational agents are not fundamentally interested in cooperation. According to this view, cooperation is defensible or intelligible only if viewed as a solution to failed competition.¹¹ Coleman challenges this assumption by arguing that it is just as reasonable to regard competition as the result of failed cooperation.¹² Successful competition presupposes cooperative collective action, he argues; indeed, competitive market activity—setting prices, bidding, bargaining, and forming a stable set of preferences for a range of goods—is intelligible only against a background of stable and enforceable property rights and an ethos of mutual forbearance of force and fraud. These public goods are

8. In Chapter 5 of *Risks and Wrongs*, Coleman develops a "resistance-concession theory" of divisional rationality. For this purpose the divisional problem is construed as a bargaining problem for parties wishing to divide the benefits and burdens of cooperation. Coleman observes that bargainers will resist making concessions to their counterparts in negotiation to a degree determined by three factors: (a) the cost of the concession to them, (b) the cost of failing to achieve a cooperative agreement, and (c) their best hoped-for outcome. In view of this, Coleman argues that a concession is rational for a bargainer if and only if that bargainer's resistance, determined as a function of the three elements just mentioned, is less than or equal to the resistance of everyone else. *RISKS AND WRONGS*, *supra* note 4, at 114-15.

9. *Id.* at 29-30.

10. *Id.* at 17.

11. *Id.* at 42.

12. *Id.* at 60-61, 65.

products of prior cooperative activity.¹³ Thus, he concludes, rational choice theory must treat cooperation rather than competition as the model of rational social interaction.

In contrast to the agents posited by standard rational choice theory and its market paradigm, Coleman's ideal agents are not merely rational utility maximizers, but also rational cooperators.¹⁴ Coleman's rational choice liberalism combines the three principles of rationality with his claim that, when deciding upon the structure of social institutions, ideal rational choosers consider cooperation, not competition, to be fundamental. They ask themselves: Which norms, institutions, or modes of interaction best enable us to cooperate rationally? This is not to say that they no longer face problems of defection or that rational choosers are willing to sacrifice their own benefits for the collective good. It means, rather, that they are searching for forms of cooperative interaction that meet the conditions of productive (Pareto), individual, and distributive rationality.

According to this view of the rational choosers' task, the market no longer sets the standard of rationality for other forms of social interaction. Coleman's rational choice liberalism regards markets, law, politics, and morality as institutional forms of cooperation, and assesses their rationality in light of a community's empirical circumstances and the institutions' assigned tasks.¹⁵ While markets still assume a large role in Coleman's liberal theory, he also recognizes the importance and value of other forms of social cooperation. In particular, he recognizes the importance of deliberative practices, through which people collectively articulate social values and establish a common identity.¹⁶ Such institutions as morality, law, and politics govern deliberative practices, and Coleman argues that it would radically distort those institutions to say that they serve or mimic the market. On the contrary, the political, legal, and moral realms "exist at least in part to resolve disputes for which markets are inappropriate and to articulate commitments markets are poorly suited to express."¹⁷

13. *Id.* at 61.

14. *Id.* at 66. Coleman does not, however, make it sufficiently clear that this commitment to cooperation, like the market paradigm's commitment to competition, is derivative, resting on the ideal agents' prior commitment to the three principles of rationality.

15. *Id.* at 62-67.

16. *Id.* at 65.

17. *Id.* at 65. Coleman does not explicitly argue for deliberative practices, and the institutions that shape them, as part of his rational choice liberalism. Presumably, he believes that just as rational cooperators would recognize the instrumental value of markets, they would endorse deliberative practices as rationally defensible forms of social cooperation. This argument should have been spelled out, however, because it is not obvious that rational cooperators as Coleman describes them would endorse such practices. One obstacle to their doing so is the fact that they seem capable of viewing problems of practical deliberation and decision-making only from a first-person singular point of view, even though it is only possible to appreciate the nature and value of these public deliberative practices from a first-person plural point of view. See generally Gerald J. Postema, *Public Practical Reason: An Archeology*, SOC. PHIL. & POL. (forthcoming 1995); Gerald J. Postema, *Public Practical Reason: Political Practice*, in *THEORY AND PRACTICE: NOMOS XXXVII* (Ian Shapiro & Judith De Cew eds., forthcoming 1994).

Thus, in Coleman's rational choice liberalism, legal institutions are justified to the extent that they serve the interests and needs of rational cooperators. In some cases, as in the law of contracts, law facilitates the small-scale, local coordination of interaction typical of market transactions. In some ways, then, rational choice liberalism vindicates economic theories of law. Yet even here Coleman introduces a major shift in emphasis. In his view, the aim of market protection is not to maximize efficiency or to ensure competition, but to promote a form of social cooperation. He further argues that other areas of the law, particularly constitutional law and tort law, are interpreted along revisionist economic analysis lines only at the price of seriously distorting the institutions. Constitutional law is better understood as an institutionalization of collective deliberative practices, and modern tort law as a formal implementation of corrective justice. While Coleman does not explicitly argue for the former claim, he spends nearly half of *Risks and Wrongs* defending the latter. Before I turn my attention to his account of tort law, however, I want to consider briefly Coleman's argument for the market as a rational form of social cooperation, which illustrates how he hopes to put the general framework of rational choice liberalism to work in normative political and legal theory.

B. *Markets in Liberal Political Culture*

The rational choice school defends the market either as the purest expression of rationality or as the best institutional means for achieving efficient allocation of goods. The market has also been justified on more explicitly liberal grounds as giving the fullest scope to individual choice in contexts of social interaction, thereby enhancing individual liberty. Although Coleman explicitly rejects the argument that markets embody perfectly rational interaction, he does not explicitly reject the other two arguments.¹⁸

Coleman chooses to defend the market as a form of cooperative social organization. Its most important feature, he argues, is that it enables people living in communities "whose values and population are dispersed" to interact for mutual advantage with only minimal agreement regarding matters of value.¹⁹ Successful cooperation in a market is possible without a common conception of the good life or even the value of the goods in question. In small, homogeneous communities, rational cooperators are not likely to find this feature of markets especially valuable. Large, geographically dispersed communities, on the other hand, are characterized by a diversity of traditions and values, so the minimal valuational demands of the market would appear especially attractive to members seeking rational forms of social cooperation.

18. RISKS AND WRONGS, *supra* note 4, at 67.

19. *Id.* at 68.

Coleman argues that under the latter set of historical social conditions, which are characteristic of "liberal political cultures," markets promote stability.²⁰ Members of such societies can engage in social intercourse civilly and to their mutual advantage without needing to articulate and resolve their disagreements. Such stability is important, Coleman maintains, because it is a prerequisite of political freedom.²¹ Individual freedom and "human autonomy" require a wide range of possible ways of life, and hence a society characterized by "value pluralism," as well as a stable framework of social institutions "within which individuals can construct and pursue their projects, plans, and goals."²² The market promotes stability in a way especially well suited to individual autonomy because it works its integrating magic without threatening "value pluralism" in the community. Thus, Coleman believes, the market's singular capacity to serve rational cooperators' need for stable forms of cooperation under modern conditions of pluralism recommends the market to liberals.

This argument is remarkable in several respects. It views the market as a social institution, as an institutionalized form of social interaction within the pale of moral and political assessment, and thus differs sharply from the assumption that the market is either an ideal construct or a "natural" form of human interaction outside the pale of morality.²³ Coleman's argument also recognizes that the value of a social institution is likely to vary with social conditions. It assumes that we can assess the value of the market only in certain social and cultural contexts. These are lessons not easily learned in the school of rational choice theory.

The above argument illustrates well how Coleman's rational choice liberalism approaches the task of justifying a given norm or institution. But the argument is incomplete as it stands and, I suspect, more limited in scope than Coleman acknowledges. He seems to argue that rational cooperators would accord markets a wide scope in liberal political cultures because markets promote stability and thus facilitate autonomy. That argument is incomplete, however, because Coleman never shows why rational cooperators would value autonomy. To do so he must show that all rational cooperators have an intrinsic or derivative interest in autonomy and that markets promote autonomy in a way that best serves their interests overall. In view of the wide range of interests rational cooperators are likely to have, and the different weights they are likely to give the interests they share, it would be difficult to make a convincing interest-based argument for autonomy.²⁴

20. *Id.* at 436.

21. *Id.*

22. *Id.* at 436, 439.

23. According to David Gauthier, the market represents a "morally free zone." DAVID GAUTHIER, *MORALS BY AGREEMENT* 13-14, 95-100 (1986).

24. For a discussion of the difficulties of interest-based arguments for liberty, see Ronald Dworkin, *What Is Equality? Part III: The Place of Liberty*, 73 *IOWA L. REV.* 1, 13-22 (1987).

Coleman also argues that in a society marked by a dispersion of values and population, markets promote stability by enabling members to interact without requiring prior agreement on substantive values. However, he underestimates the cultural resources necessary to deploy successfully the market. The market can promote stability and cooperative interaction only if a culture believes it appropriate that the public value and allocation of goods be determined by factors other than the intrinsic merit of the goods. The culture must regard the goods and associated relationships as properly disengaged from deeper moral and evaluative convictions in society. In other words, the market will be able to work its magic only in a culture that is "liberal" in its diversity of evaluative visions, in the geographical dispersion of its population, and in its response to that diversity and dispersion. The viability of markets presupposes a certain, characteristically liberal, collective response to pluralism.

Consider two salient features of the market as social institution. First, as the debate over surrogate mother contracts reveals, the market is not merely a mode of interaction, but is also an institutionalized form of social valuation. If a community decides that a good is properly traded on the market, it takes a stand concerning the public value of that good. It holds that the value of that good lies in its ability to satisfy individual preferences, and can be measured against that of other goods traded on the market. Two features of this form of valuation are of immediate interest: the value of the commodity lies wholly in its satisfaction of arbitrary individual preferences, rendering pointless any deliberative reflection on the reasons for so valuing the commodity; and the social valuation of the commodity is strictly a vector sum of individual valuations, leaving no room for common or collective valuation.²⁵

Second, like any social interaction, successful market interaction depends heavily on compliance with rules against the use of force and fraud, and, more deeply, on a climate of trust. Trust springs from and depends upon a variety of social conditions. In many historical communities, the climate of trust depended heavily on widely shared sets of moral values or religious convictions. A climate of trust may also rest on a much thinner basis, however, depending far less on reassurances of the other party's orthodoxy. The basis of trust in a community is both a condition and consequence of a collective response to moral heterogeneity and cultural diversity.

Because of the above-mentioned features of markets as social institutions, markets will promote stability in a society marked by moral and evaluative pluralism only if the dominant culture inspires trust without substantive agreement of moral vision and permits the social valuation of market goods

25. I do not mean to say that all preferences expressed in market behavior are arbitrary. My point is that the market is indifferent to whether preferences are arbitrary or reflectively grounded, whether they are mere preferences or preferences based on evaluative judgments.

and relationships to be disengaged from deeper, common sources of evaluation. Where morally pluralistic communities determine the social value of such goods and relationships on a substantive, reflective, deliberative, or collective basis, the introduction of markets for such goods will more likely produce instability. Similarly, markets cannot function properly in a culture that has responded in a less than liberal manner to its diversity of moral and evaluative convictions. Thus, rather than saying that markets promote social stability in circumstances of diversity and moral pluralism, it is perhaps more accurate to say that the scope and importance of markets in a society reflect the extent to which liberal culture exists in a society.²⁶

Before concluding this discussion of Coleman's foundational political theory, I will briefly consider Coleman's attempt to locate tort law and corrective justice in rational choice liberalism. Coleman's argument that corrective justice and its implementation in tort law would be valuable to rational cooperators parallels his argument for the market.²⁷ Again, he rests his argument not on the intrinsic value of redressing wrongful losses, but on the instrumental value of the practice. Coleman claims that the practice sustains local conventions of behavior in a community, conventions that determine the expectations and actions of its members.²⁸ Thus, corrective justice and tort law promote cooperation and stability, which, as we have seen, are valued because they facilitate individual autonomy.²⁹

Coleman's argument for the value of corrective justice and tort law is not as persuasive as his argument for the market. Coleman points out specific features of the market that promote stability without threatening value pluralism, but there seem to be no such protections built into the local conventions sustained by corrective justice. Indeed, local conventions defining reasonable risk-taking may work against the diversity of life pursuits in some communities. Coleman may be correct that stability of expectations is a necessary element of autonomy, but it is certainly not sufficient, and its costs, measured in terms of restrictions on liberty, may be high. Without further argument, we cannot be sure that rational cooperators living in a heterogeneous society would choose such a form of stability-preserving cooperation.

Coleman suggests that, in addition to promoting stability, corrective justice requires individuals to assume responsibility for the consequences of their actions. Also, he notes that compensatory damage awards redistribute resources

26. This is, of course, not the only possible liberal response to heterogeneity and diversity. Liberals may prefer to give wider scope to truly democratic deliberative institutions. Yet, in view of the high personal and social costs of participation in those institutions, a reasonable husbanding of social and personal resources will continue to make markets attractive to liberals across a wide range of social interactions.

27. RISKS AND WRONGS, *supra* note 4, at 359-60, 437-38.

28. *Id.* at 358-59.

29. *Id.* at 437.

to victims, enhancing their ability to pursue their own plans and projects.³⁰ Coleman maintains that these features of corrective justice further underscore “the interplay between stability and autonomy at the heart of the overarching liberal political theory that informs all our private law practices.”³¹ This is a plausible claim to the extent that the above-mentioned features of corrective justice are likely to be attractive to liberals. The question, however, is whether this “interplay” is at the heart of Coleman’s rational choice political theory. To prove that it is, Coleman would have to show that all rational cooperators have an interest in autonomy as conceived by liberals, that their interest in autonomy is best served by the institutions of commutative justice, and that serving autonomy in this way best serves their interests overall. Until Coleman further establishes the truth of these three claims, and the parallel claims for the market, he will not have successfully grounded liberal political and legal theory in his revised rational choice theory.

III. TORT LAW: MORAL CORE AND MARKET PENUMBRA

A. *Interpreting Tort Practice*

Coleman seeks to develop a normative interpretation of modern tort law. His interpretation begins with the defeasible assumptions that tort practice provides its participants with genuine reasons for action; and that its norms define genuine responsibilities, rights, and duties. The interpretive task is to present an account of this normative dimension that can “withstand the test of rational reflection.”³² Success is measured by the degree to which the normative interpretation accounts for the important elements of tort practice, and by the degree to which its principles meet reflective critical approval.

Coleman takes a “top-down” approach to the interpretation of contract law. He derives its fundamental principles from more abstract theoretical principles of bargaining and rational choice and attempts to show that these principles best explain the standard practice of contract law. In contrast, his interpretive approach to tort law is better described as “middle-up.”³³ Coleman’s primary aim is to develop an intuitively compelling account of tort practice.³⁴ While he makes some effort to link his account to rational choice liberalism, he does not

30. *Id.* at 437-38. This argument is somewhat obscure, but Coleman introduces it in response to an initiative from economic theory of torts that proposes replacing conventional lump-sum damage awards with packages of specific-service contracts designed to meet victims’ accident-related needs. Coleman’s objection resembles anti-paternalist objections to in-kind social services.

31. *Id.* at 439. Strangely, while Coleman is unwilling to rest his argument for the market on its autonomy-serving virtues alone, *id.* at 67, he does not hesitate to do so when it comes to corrective justice practices, *id.* at 437.

32. *Id.* at 7.

33. *Id.* at 8-9.

34. *Id.* at 478-80 n.1.

attempt to derive principles of tort law from his political theory.³⁵ Indeed, he admits that if we were to approach this part of commutative justice from the lofty perspective of rational choice liberalism, we would “miss much that is important about the practice.”³⁶ This is not to say that rational choice liberalism cannot ultimately explain the rational appeal of corrective justice and its implementation in tort law, but rather that distinctive and rationally attractive features of tort practice would be obscured if we were to approach it “top-down.”

Coleman’s central thesis is that modern tort law gives legal expression to our informal social practice of corrective justice. Thus, his project has four phases: articulating the principles of corrective justice, demonstrating that they explain modern tort law, showing that the principles are rationally defensible, and proving that the legal institutionalization of these principles is legitimate.³⁷ While he pays some attention to the latter two tasks, Coleman devotes the bulk of Part III of *Risks and Wrongs* to the first two.

According to Coleman, no single principle, whether economic or moral, can adequately account for the widely divergent components of tort practice without distorting essential elements of the practice or dismissing large portions of the practice as mistakes. He thus proposes the hybrid theory that tort law serves two masters at once.³⁸ The “core” of tort law implements the moral concerns of corrective justice, while its “penumbra” serves the market. Coleman maintains that “the core of tort law is a certain practice of holding people liable for the wrongful losses their conduct has occasioned.”³⁹ This underlying practice structures tort litigation and supplies its basic goal. Coleman notes:

The structural feature is that in the typical case decisions about who should bear a loss are rendered within a framework restricted to victims and those individuals they identify as their injurers. . . . The substantive feature is that if a victim can show that her loss is wrongful in the appropriate sense, the burden of making good her loss falls to the individual responsible for it.⁴⁰

Standard rules concerning intentional and unintentional torts fall in the core, he believes, while no-fault schemes, enterprise liability doctrines, worker’s compensation, and much of product liability litigation fall in the penumbra of tort law. In the “penumbral” cases, “individuals are compensated for losses that are not wrongful,” or parties are required to repair losses even when they are

35. *Id.* at 359-60, 437-39.

36. *Id.* at 12.

37. For a discussion of the problems inherent in the fourth phase, see *id.* at 362, 490-91 n.1.

38. *Id.* at 303, 428 (describing tort law as a “mixture of markets and morals”).

39. *Id.* at 198.

40. *Id.*

not responsible for them in any ordinary sense.⁴¹ Principles of corrective justice govern the core, whereas the penumbral cases are unified under market principles.

It is tempting to conclude that this hybrid interpretation belies an incoherent practice, but Coleman strongly defends the overall coherence of tort practice. He believes that the two masters of tort law are markedly free of normative jealousy and ambition. Principles of corrective justice, as Coleman understands them, are not morally mandatory in the sense that a society would be guilty of injustice if it failed to give them formal legal expression.⁴² Moreover, if the practice of corrective justice and the market are regarded as alternative forms of social cooperation, then we might regard market-oriented approaches to modern tort law and corrective justice practices as simply alternate routes to the same ultimate goal of social stability.⁴³ According to Coleman, then, a market-oriented approach may be as morally legitimate as a corrective justice approach, and can legitimately supplement, or even supplant, corrective justice.

Essential to Coleman's interpretation of tort practice is his critique of economic theories of torts. However, he believes his critique calls for a revision, rather than a complete repudiation, of familiar theories espoused by Posner, Calabresi, and others.⁴⁴ Coleman argues that even in the penumbra of tort practice, where appeals to market principles are most plausible, economic theories misconstrue the principles at work. Because these theories are based on the market paradigm, which he criticizes in Part I of *Risks and Wrongs*, they wrongly assume that efficiency guides tort practice and that the goal of tort law is to mimic the perfectly competitive market. Against this view, Coleman argues that the aim in penumbral cases is and should be to safeguard market cooperation from failure rather than to correct for failures of competition. The hallmark of his revised market-oriented account of tort law is not efficiency, but enhancing coordination, cooperation, and social stability.

Coleman also believes that economic theories of tort law fail more fundamentally to explain the core of tort practice. He suggests that in their attempt to provide a single, comprehensive rationale for tort practice, economic theories seriously distort the practice. In particular, economic theories argue that the principle of efficiency defines "fault," shaping the reasonable person standard and the rule of negligence. Coleman argues that this is a mistake for

41. *Id.*

42. I call this the "practice-dependent" dimension of corrective justice. Coleman argues that whether corrective justice imposes moral duties and rights on a community depends upon that community's "prevailing legal and social practices." *Id.* at 199, 388-95, 401-05.

43. Coleman does not explicitly mention this point, but it seems that rational choice liberalism logically implies it.

44. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

the general reasons he advances in his critique of the market paradigm, but also because efficiency does not play the role economic theories assign to it.⁴⁵ Instead, he maintains that the standards defining the limits of reasonable risk taking are local conventions. The idea behind such conventions is not to reduce risks optimally, but to coordinate behavior rationally around a common understanding of reasonableness. Coleman states that “[s]uccessful conventions are efficient in the sense that they coordinate behavior, not necessarily in the sense that they optimally reduce or spread risk.”⁴⁶ He also suggests that economic theories illegitimately conclude from their definition of fault that the aim of fault liability is to discourage inefficient risk taking.⁴⁷

The force of these objections depends on the soundness of a more fundamental objection. Coleman argues that economic theories of tort practice cannot adequately account for the distinctive structure of tort law.⁴⁸ This structure is characterized by case-by-case adjudication, which occurs between victims and their alleged injurers, and is governed by a backward-looking principle of liability and recovery. The explanations that economic theories provide for these features are inadequate because economic theories do not recognize that the principles governing tort litigation are rooted in the relationship between the parties.⁴⁹ According to such theories, the victim and the injurer only contingently relate to each other and to the larger goals of tort practice. Economic theories offer no principled reason for such a relationship, relying entirely on tort law’s goal of reducing accident costs for justification.⁵⁰ Thus, Coleman insists that economic arguments for the structure of tort litigation are the wrong kind of arguments.

This last objection recalls arguments frequently directed against utilitarian accounts of rights, justice, or the value of liberty. Objections of this sort have force only when intuition supports a noncontingent, principle-based account. The objection seems less persuasive in the case of tort practice. Coleman never makes it clear why it is important to account for the structural features of tort practice in terms of deep principles, and certain aspects of his approach suggest otherwise. For example, Coleman admits that the core of tort practice is in flux, and that in twenty-five years it may shift its focus dramatically, and perhaps even move away from corrective justice.⁵¹ An institution this fluid seems an unlikely candidate for the kind of principled objection Coleman

45. RISKS AND WRONGS, *supra* note 4, at 358-59.

46. *Id.* at 359.

47. *Id.* at 239-40.

48. *Id.* at 374-85 (arguing that liability is imposed “not to discourage inefficiency but to rectify wrongful losses”).

49. For example, Coleman notes that economic theories argue that the structure of tort law deters injurers and provides incentives to the victim to initiate litigation, and that any wider scope would incur unjustifiably high administrative costs. *See id.* at 377-80.

50. *Id.* at 380-81.

51. *Id.* at 198-99.

raises.⁵² Moreover, justifications of legal institutions are likely to give greater weight to considerations of expediency than are justifications of fundamental moral concerns like rights, liberty, or justice. Add to this the fact that Coleman's account of corrective justice concludes that changes in our formal practices and institutions may entirely obviate principles of corrective justice, and Coleman's objection to economic theories loses much of its force. I believe that the worry underlying his objection is valid, but if it is to mature into a decisive objection against a theoretical approach as powerful as economic analysis, the argument needs to be developed more fully.

B. *Coleman's Mixed Conception of Corrective Justice*

According to Coleman, the distinctive structure of tort practice—which focuses on the relationship between victim and injurer—is evidence of the normative orientation of its core. The aim of tort law is to do justice between the parties, i.e., to implement corrective justice. The focus of corrective justice is on interpersonal transactions rather than on the structure of public institutions. Compensation for loss, rights of recovery, and duties to repair are the coin of this realm, but the standard for the currency lies in a morally significant personal relationship between victim and injurer. These broad features of corrective justice orient Coleman's search for the moral foundations of the core of tort law.

Coleman articulates and defends what he terms a “mixed conception” of corrective justice—mixed because it integrates into a single theory insights from Weinrib's “relational conception”⁵³ and Coleman's previously held “annulment conception.”⁵⁴ According to the mixed conception, the aim of corrective justice is not to allocate risks or losses, as economic theories maintain; to rectify wrongs, as the relational conception argues; nor merely to compensate wrongful losses, as the annulment conception holds. Its aim is to impose the duty to compensate wrongful losses upon the parties responsible for them.⁵⁵ This conception starts with the idea that a special moral relationship is created between the parties when one person injures another. If the loss incurred is wrongful, and the injurer is responsible for that wrongful loss, then corrective justice imposes a duty on the injurer to repair the victim's loss.⁵⁶ The victim is not merely the de facto beneficiary of the duty; the duty is

52. One might also think that a theory that promises to explain both the current practice and the shift in the focus, as an economic theory might do, would be more powerful than Coleman's hybrid.

53. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 514-26 (1989); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 444-50 (1987).

54. For Coleman's most extensive defense of this conception, see Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 365-69 (1992).

55. RISKS AND WRONGS, *supra* note 4, at 324.

56. *Id.* at 326, 434.

actually owed to the victim.⁵⁷ Coleman's thesis is that injurers have a "duty [in corrective justice] . . . to repair only the wrongful losses for which they are responsible."⁵⁸ The "only" in this sentence is triply restrictive: the duty to repair extends (a) only to the loss imposed, not to the wrong done; (b) only to losses that are wrongful; and (c) only to wrongful losses for which the injurer is responsible.

While our moral response to a tort may be to seek corrective and retributive justice, these are actually separate responses. Retributive justice concerns the wrong, the wrongdoer's culpability, and the appropriate response of the public. Corrective justice focuses on the victim's loss and the claim to repair for that loss; it is not concerned with punishing, blaming, or exculpating the injurer, or with rectifying the wrong. Corrective justice also recognizes a moral difference between claims of need created by misfortune and claims of justice that arise from the wrongful actions of others. Corrective justice focuses exclusively on the latter, leaving the former to distributive justice or humanitarian concern. According to Coleman, the ambit of corrective justice is limited to the wrongful losses of victims. Moreover, corrective justice grounds the duty to repair loss in the fact that the injurer is responsible for the loss, not just that the injurer did something wrong.⁵⁹ Both the duty and the right are derived from the "responsibility relationship" created between the parties when the victim suffers a loss through the injurer's wrongful act or omission.

This sketch of corrective justice needs an account of what makes losses "wrongful" and an account of what makes some losses, but not others, the injurer's "responsibility." Coleman begins to sketch accounts of wrongful behavior and individual responsibility tailored to corrective justice, but he acknowledges that much work remains to be done.

1. *Wrongfulness and Necessity*

A "wrongful loss," according to Coleman, is the harmful product of *wrongdoing*, an unjustified setback of the victim's legitimate interests.⁶⁰ The victim's legitimate interests include, but are not limited to, her rights. Thus, a loss may be wrongful because it is a consequence of the injurer's violation of

57. *Id.* at 354-57. I take this to imply that the victim has a correlative *right* against the injurer for repair of the loss, although Coleman does not explicitly draw the inference.

58. Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 441 (1992). In *Risks and Wrongs*, the same sentence is used without the word "only." RISKS AND WRONGS, *supra* note 4, at 324. However, this discrepancy is not significant, since the argument of the surrounding pages clearly supports the restrictive reading.

59. *Id.* at 326. Coleman seems unable to talk of injurers acting wrongfully. But, if he is willing to refer to morally justified infringements of rights as "wrongs," and the losses they bring about as "wrongful," it is arbitrary to refuse to refer to such wrongs as ways of acting "wrongfully." I will do so even though it is not consistent with Coleman's usage.

60. *Id.* at 329-32.

the victim's rights. Some interests are legitimate, however, even though they are not afforded the protection of rights. If I owned a pizza parlor, for example, my interest in the success of my pizza parlor would be a legitimate interest. The legitimate actions of one person may set back the legitimate interests of another, as when a competitor makes a better pizza and drives me out of business; similarly, a person's own wrongdoing may set back his own legitimate interests. In neither of these cases would the losses be wrongful, according to Coleman. However, if a competitor drives me out of business by spreading false rumors about the sanitary conditions of my kitchen, then my legitimate interest is set back through another's wrongdoing and my resulting loss is wrongful. Similarly, if losses result from actions that unreasonably exposed victims to the risk of harm, the actions are unjustified and the losses are wrongful.

Coleman's account of wrongfulness of losses is not complete without an account of the rights and legitimate interests we possess. Coleman also needs to square his account of wrongful loss with the fact that corrective justice imposes duties to repair on some injurers even though their actions are fully justified. This is true, for example, in cases of necessity, where the injurer seizes or uses the victim's property without authorization in order to prevent more serious loss of life or property to the injurer or to some third party.⁶¹ In such cases, courts have held the injurer liable for the loss suffered by the victim even though the injurer's action was reasonable and justified. Like most lawyers and philosophers, Coleman accepts that these decisions are correct and consistent with corrective justice. Thus, he has only two options: place these cases outside the core of tort practice and the ambit of corrective justice; or incorporate them into his conception of corrective justice, making adjustments in his understanding of wrongful loss where necessary. He chooses the latter course.

If, according to the principles of corrective justice, an injurer acting with full justification nevertheless has a duty to compensate victims for any resulting losses, then it seems that we must abandon the idea that corrective justice is concerned only with redress of wrongful losses. Any attempt to charge the injurer with wrongdoing will be defeated by his justification on grounds of necessity. However, Coleman rejects this way of adjusting his theory; he proposes to recognize a category of "wrongs that are not always wrongs," that is, rights invasions which are "wrong" but do not count as full-fledged wrongdoings because they are justified.⁶² Some philosophers have said that, although the justification overrides whatever direct claim the right-bearer has on the forbearance of the injurer, the right retains its moral force. The

61. See, e.g., *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); see also RESTATEMENT (SECOND) OF TORTS § 197 (1965).

62. RISKS AND WRONGS, *supra* note 4, at 324.

injurer has a residual obligation to compensate the victim for having invaded the right.⁶³ In this way, the moral status of the right-bearer, or the moral importance of the interest protected by the right, is said to be acknowledged despite the invasion. Following these philosophers, Coleman refers to justified invasions of rights as rights "infringements," rather than rights violations. He claims that such infringements are "wrongs" insofar as the rights are invaded; but they are justified wrongs, and for that reason are "no one's fault."⁶⁴ Coleman locates the wrong in the injurer's failure to secure the victim's permission to use the victim's property. This failure invades the victim's rightful claim to exclusive control over the property.⁶⁵ Thus, the injurer's failure to secure the victim's permission is a wrong to the victim, even if justice would have required the victim to permit the use and the use is fully justified. This wrong grounds the injurer's duty to make good the victim's losses in corrective justice. Corrective justice, then, is still concerned only with the victim's wrongful losses, but it accepts that such losses may be the result of either "wrongdoings" or "wrongs."

2. Responsibility, Fault, and Excuses

Coleman constructs his conception of corrective justice on the notion of a "relationship of responsibility" between two individuals. This notion is complex and must be carefully explained. Note, first, that while the responsibility relationship is the source of the rights and duties assigned by corrective justice, it is a sufficient, but not necessary, element of tort liability.⁶⁶ While the domain of corrective justice is restricted to responsibility relationships, we may have strong moral or political reasons for extending tort liability beyond that domain. Corrective justice only gives us an answer to the question, "Who should bear the losses consequent upon the interactions between individuals?" when a responsibility relationship exists between two

63. See JOEL FEINBERG, *Voluntary Euthanasia and the Inalienable Right to Life*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 221 (1980); JUDITH J. THOMSON, *Rights and Compensation*, in RIGHTS, RESTITUTION, AND RISKS 66-77 (W. Parent ed., 1986).

64. Coleman is reluctant to say that either the injurer or the injurer's conduct is at fault in such cases. It is odd to speak of either the agent or the action as "faulty" when the agent acts with full justification. However, it is just as odd to speak of infringements of rights as non-wrongful wrongs, as Coleman does. RISKS AND WRONGS, *supra* note 4, at 300. I argue below that there are good reasons to refuse to find fault in necessity cases, but to acknowledge those reasons would be to acknowledge that there is no reason to regard the injurer's action as a wrong or even an invasion of a right. Thus, Coleman's reluctance to speak of fault here has its roots in a very different understanding of the moral dimensions of necessity cases than he officially adopts. As long as he remains loyal to his official account, I believe that he has no substantive reason for refusing to speak of the injurer's action as "faulty." To avoid what I regard as unnecessary complications in laying out Coleman's theory, I will not follow him in this hesitation to talk of rights infringements as "faulty."

65. *Id.* at 301-02.

66. *Id.* at 262-63.

parties.⁶⁷ If the parties are not in a responsibility relationship, then corrective justice is silent regarding those parties. However, the question of who should bear the losses remains. The best answer may be that the victim ought to bear them, or the injurer, or the cheapest cost-avoider, or members of a pool of at-fault agents, or the community at large. In Coleman's view, however, these answers draw on sources beyond the horizons of corrective justice.⁶⁸ Thus, it may be fair to say that Coleman's hybrid interpretation of modern tort practice is driven more by a basic feature of his theory of corrective justice than by recalcitrant recent developments in tort law.

Second, Coleman focuses nearly all his attention in *Risks and Wrongs* on the "responsibility" arising from the exercise of causal agency.⁶⁹ The "responsibility relationship" is a moral consequence of the causal effect one party has on the interests of another. Coleman's thesis is that a causal relation between two people alters their moral relationship and may even create a new moral relationship. This is true even of causal relations involving bodily movements that fail to meet minimal standards of human action, Coleman believes;⁷⁰ but it is especially true of causal relations brought about "through the exercise of [our] powers of autonomous agency."⁷¹

While Coleman makes a profoundly important point, we risk misunderstanding his theory if we fail to see that it only sets the stage for his account of responsibility. One such misunderstanding generates the objection that Coleman's thesis confuses the morally neutral notion of causal responsibility, which Coleman refers to as "responsibility as authorship," with a morally loaded notion of responsibility that suggests that the consequences of an agent's actions are "his fault."⁷² But Coleman does not confuse the two notions and, indeed, takes pains to distinguish them.⁷³ Rather, he advances here a substantive, and controversial, moral thesis. This thesis is interesting and deserves more extensive argument than Coleman gives it.⁷⁴

67. Note that the question is a normative inquiry into who ought to bear the losses, not a question about who is likely to do so, or who may impose those losses if those who ought to bear them refuse to do so.

68. *Id.* at 483 n.6.

69. *See id.* at 265, 326, 333-35, 345-47, 482 n.10, 482-83 n.4. Coleman admits, however, that "being connected to an event by the [causal] agency relationship may be only one of the many morally relevant ways of being responsible for it." *Id.* at 274, 335. Because he does not elaborate, we can only speculate about what he might have in mind. I suspect that he would account for causally troublesome cases of omissions within this wider notion of responsibility.

70. *Id.* at 468 n.9.

71. *Id.* at 482 n.10.

72. *See, e.g.,* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 681-82 (1992).

73. RISKS AND WRONGS, *supra* note 4, at 274-75.

74. He defends part of his thesis with the following remarks: "It is through the exercise of the powers of autonomous agency that individuals make their mark in the world. It is through their actions that we come to understand individuals, and, more importantly, it is through our actions that we come to our self-understandings." *Id.* at 482 n.10. For a more fully developed argument along these lines, see Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 496-507 (1992).

It is important to recognize that Coleman's notion of "responsibility" here is a very thin, abstract one, lying between responsibility as mere authorship and responsibility that licenses attributions of fault to either agent or action.⁷⁵ From the causal interaction alone we cannot infer anything about the specific nature of the moral relationship or the duties and responsibilities of the parties to the relationship. The content of the parties' duties and responsibilities is a function of the nature and extent of their involvement in the causal interaction, the kind of losses occasioned by it, the social context in which it took place, and other morally relevant considerations. Rather than offer a theory of responsibility relationships, Coleman builds his account of corrective justice on a subset of such relationships. He believes that causal interaction may be sufficient to generate a duty to apologize to or aid the party one injures, but that corrective justice does not necessarily require compensation even if the action is voluntary.⁷⁶ Corrective justice is put on alert when causal interaction between parties yields losses, but it is brought into play only when the victim's losses are the causal consequence of the injurer's faulty action.⁷⁷ In other words, corrective justice demands compensation only when the injurer's wrongful actions cause the victim's wrongful losses. Only this "thick" sort of responsibility generates the rights and duties of corrective justice. The degree of responsibility qualifies both the losses for which the victim can claim redress in the name of corrective justice, and the parties from whom the victim can claim that redress.⁷⁸

What is involved in this "thick" notion of responsibility? It begins with a causal interaction, or "thin" responsibility relationship, between the parties. Added to that, however, is the notion that the loss is the fault of the party responsible. Coleman insists that the kind of fault that activates corrective justice is fault in the action rather than fault in the agent.⁷⁹ If the fault is in the

75. For the distinction between fault in the agent and fault in the action, see *infra* Part IV.B.

76. RISKS AND WRONGS, *supra* note 4, at 468 n.9.

77. Unless non-causal responsibility is involved. See *infra* Part IV.A.4. Recall, I am using "fault" here where Coleman in his official version would not. See RISKS AND WRONGS, *supra* note 4, at 346-47.

78. Coleman's language sometimes suggests that the basis of the victim's right to redress is different from that of the injurer's duty to repair. For example, Coleman says that "losses are the concern of corrective justice if they are wrongful. . . . [T]he duty to repair those wrongful losses is grounded not in the fact that they are the result of wrongdoing, but in the fact that the losses are the injurer's responsibility, the result of his agency." *Id.* at 326. This has led some critics to believe that it is Coleman's view that corrective justice would impose a duty to repair on a person who made some causal contribution to the victim's wrongful loss, but whose action plays no part in the wrongfulness of the loss. See Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445, 446-47 (1992); Wright, *supra* note 70, at 681. The point of Coleman's distinction is not to introduce different grounds for the right and the duty, however, but to shift the ground of the duty from the doing of wrong, which is the "relational conception's" view, to the "responsibility relationship." It is the injurer's responsibility for the loss, and not the doing of the wrong, that brings corrective justice to bear. For a similar reading of Coleman's thesis, see Stephen R. Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J.L. & PUB. POL'Y 917, 922-23 (1992). Of course, Coleman believes that the exercise of causal agency alone is not sufficient to create a duty to repair, see RISKS AND WRONGS, *supra* note 4, at 468 n.9; the injurer's action must be faulty in the sense described below.

79. *Id.* at 217-19, 333-35.

agent, then the agent has some character defect that accounts for the wrongdoing and the wrongful loss; thus the agent is culpable and morally blameworthy. Culpability-defeating excuses are aimed at charges of fault in the agent.⁸⁰ One can argue that the agent is not properly blamed because her action did not issue from any defect of character or motivation, or because her action was not wrong. In contrast, when the fault is in the action, culpability-defeating excuses are not sufficient to defeat attribution of fault or the moral consequences that flow from it. An action is faulty when it fails to meet some relevant standard, even if the agent cannot be said to have failed.⁸¹ Corrective justice is not concerned with culpability, distributing blame, or righting wrongs. Instead, it imposes a duty to repair wrongful losses. Coleman argues that, for that purpose, the relevant fault is that of the agent's doing. Neither culpability-defeating excuses nor justifications can defeat an injurer's duty to repair a loss when the fault is in the action. Thus, corrective justice is legitimately concerned with infringements of rights, even though the agent's invasion of the right is fully justified. In such cases, the action falls short of the standard that mandates securing permission before invading the right.

Note, however, that not every excuse is ruled out by this focus on faulty acts, for faulty acts still require agents. Thus, agency-defeating excuses—claims that one's bodily movements did not meet minimal conditions for voluntary human action⁸²—are sufficient to defeat a claim of responsibility.⁸³ Human agency is necessary, if not sufficient, for there to be fault in the action.

The final component of Coleman's "thick" notion of responsibility concerns the causal connection between action and loss. For the loss to be the fault of the agent, the faulty action must be causally connected to the victim's loss "in the appropriate way," and the victim's loss must fall within the scope of the risks that render the conduct faulty.⁸⁴ Coleman here considers various rules typically discussed under the rubric of "proximate cause." He understands these rules to be conditions of responsibility rather than conditions of causation. Although he does not intend his discussion of these conditions to be exhaustive, it is clear that the scope of "thick" responsibility is much narrower than that of the "thin" responsibility on which he constructed his broader conception of corrective justice. His broader conception is clearly a fault theory of corrective justice. Thus, it can only account for strict liability cases either by relegating them to the "penumbra" of tort practice, or by reinterpreting them under a special theory of fault liability. Coleman favors the latter approach, arguing that dangerous animal and ultrahazardous materials

80. *Id.* at 217-18.

81. *Id.* at 217.

82. For example, muscle twitches, epileptic fits, or conduct under hypnotic trance.

83. *Id.* at 334-35.

84. *Id.* at 346-47.

cases are best understood as negligence cases, where the fault lies not in the manner of the action, but in the action itself.⁸⁵ In such cases, any manner of engaging in the actions in question is faulty. Coleman appears to treat the remaining strict liability cases as he did the necessity cases, as justified infringements of rights for which a duty to repair is imposed by corrective justice.⁸⁶

3. *Wrongful Conduct and Local Conventions*

Thus far we have considered the analytic structure of the account of wrongdoing on which Coleman's mixed conception depends. The moral substance of his theory derives from our views about what rights we have, which of our interests are legitimate and worthy of moral recognition, and the limits of reasonable risk-taking. Thus, corrective justice, in a way, depends on a substantive theory of wrongdoing, including, or presupposing, a theory of distributive justice. Yet Coleman insists that it would be a mistake simply to reduce corrective justice to distributive justice, or to regard the former merely as the servant of the latter.⁸⁷ Corrective justice, he argues, enjoys "moral independence" from distributive justice for two reasons. First, while the background distributive theory determines what conduct is wrongful, and may substantially affect the content of the rights and duties of corrective justice, it does not determine the point of corrective justice.⁸⁸ The point is to repair wrongful losses by imposing the duty to do so on those responsible for them. This may in fact sustain principles of right conduct, but the focus of corrective justice is on the loss suffered and the relationships of the victim and injurer to that loss. While the collateral benefits of corrective justice may be an important part of its appeal to rational cooperators, they clearly do not define the practice.

Second, the background distributive theory must be tailored to the distinctive focus of corrective justice. Corrective justice involves parties whose relationship arose from the causal interaction between them as they found each other, that is, as participants in a distribution of resources and entitlements and a structure of social interaction. In a sense, corrective justice is part of what Rawls calls "non-ideal" theory, not because it assumes that ideal rules have been violated, but because it has a moral job to do even when conditions fall short of the moral ideal.⁸⁹ As a form of justice, on the other hand, it purports

85. *Id.* at 367-69.

86. *Id.* at 371-72.

87. *Id.* at 304-05, 348-54.

88. *Id.* at 348.

89. This is one way of understanding Aristotle's puzzling claim that corrective justice starts from the assumption that the parties are "equal." See ARISTOTLE, *NICHOMACHEAN ETHICS* 125 (Terence Irwin trans., 1985). Coleman, however, does not claim Aristotle as an authority.

to define real moral rights and duties and to yield real moral reasons for action, so it cannot be entirely insensitive to the injustice of background conditions.⁹⁰ Thus, the background distributive theory must define the rights, legitimate interests, and limits of reasonable risk-taking with reference to actual living conditions.

Coleman does not develop this part of his theory in any detail, but guides our thoughts in two ways. First, he suggests that although the existing scheme of recognized rights and legitimate interests need not meet the demands of ideal theory, it must be sufficiently defensible on rational moral grounds to justify protecting it against invasion by individuals.⁹¹ We might regard the scheme as vulnerable to attempts to restructure society along lines that more closely approximate distributive justice, but believe that relations among individuals must be governed by the imperfect structure currently in place until this society-wide restructuring is accomplished.

Second, Coleman argues that the limits of reasonable risk-taking are defined not by "global," or universally applicable principles, but by informal local conventions.⁹² The norms of wrongdoing presupposed by corrective justice "will reflect conventions within the relevant community of individuals. . . . [regarding] reasonable risk taking activity and the conventional understandings by which those norms are to be interpreted."⁹³ Coleman defends his claim with the following argument. Corrective justice is justice between parties. This implies that corrective justice is not concerned merely with wrongs, but more specifically with wrongs done to others. He claims that: "In order for my duty to you to be a duty in corrective justice, it must be because I have *wronged you* in an appropriate sense."⁹⁴ This claim implies, in turn, that I "have invaded a norm regulating the affairs between us," and that invasion "imposes responsibilities on each of us to the other."⁹⁵ Thus, not only the duties to repair imposed on the injurer as a moral consequence of his wrong, but also the norms defining the wrongful conduct itself must be "directed" or "relational." Global principles, like principles of efficiency or distributive justice, fail to satisfy this condition; violating them is wrong, but the wrong is not necessarily a wrong to anyone.⁹⁶ Only informal conventions that arise from and reinforce the mutual expectations of the parties are properly considered "local." These conventions will be local in the sense that they arise from the interactions of individuals in a relatively circumscribed community, and will provide a framework of trust and mutual expectations to coordinate

90. RISKS AND WRONGS, *supra* note 4, at 350-51.

91. *Id.* at 352.

92. *Id.* at 357-59.

93. *Id.* at 358.

94. *Id.* at 356.

95. *Id.* at 356-57.

96. *Id.* at 355-57.

interpersonal affairs. Thus, Coleman concludes, local conventions are at the very core of corrective justice.

Coleman's thesis is compelling, but I have four concerns about his argument for the thesis. First, I see no reason why the norms of wrongdoing themselves must be "between the parties." This conclusion does not follow from the fact that corrective justice is concerned exclusively with justice between parties. Second, duties and rights of corrective justice might arise between parties with no other personal or direct moral relationship other than that which arose from their causal interaction. There may be no other shared norms of reasonable risk-taking between them. Their causal interaction creates a responsibility relationship between them and that is enough to establish the "directionality" of the moral duty in question. Third, social norms may coordinate social interaction and yet not be "local" in any sense that can give meaning to the idea of justice "between the parties." Finally, we have no guarantee that local norms, even local coordination norms, can fund the kind of moral "directionality" that Coleman expects of corrective justice. Why would the violation of a local coordination norm yield the conclusion that the violator has wronged a particular member of some local community? Do violations of fashion norms, for example, yield such "directional wrongs"?

C. *The Practice-Dependent Dimension of Corrective Justice*

Coleman argues that the core of tort practice implements corrective justice, but its penumbra departs substantially from the dictates of corrective justice.⁹⁷ To avoid the charge that his hybrid theory of tort practice is ad hoc and incoherent, Coleman argues that the demands of corrective justice are context-sensitive. Both the existence and the content of the duties and rights of corrective justice depend on the environment of social practices and institutions in which victims and injurers interact. Coleman's account of this practice-dependent dimension of corrective justice is essential to his defense of tort practice as a coherent mix of markets and morals.

Many different compensation schemes are possible. They include the "localized at-fault pool" schemes found in *Hymowitz*,⁹⁸ "cheapest cost-avoider" or "deepest pocket" principles, and comprehensive social insurance schemes like New Zealand's no-fault plan.⁹⁹ Coleman argues that to believe that such alternative compensation schemes conflict with corrective justice is to believe

97. Coleman locates most of modern products liability law in the penumbra. *See id.* at 407-29. He also locates such cases as *Sindell* and *Hymowitz* in the penumbra, on the grounds that they are best understood as efforts by the courts to implement a localized at-fault pool scheme to deal with serious injuries where it is especially difficult for the plaintiff to prove causation by any specific manufacturer. *Id.* at 397-406.

98. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989).

99. *See* D.R. Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 *MOD. L. REV.* 361 (1974).

that the rights and duties imposed by corrective justice compete with the political aims served by the alternative compensation schemes. He suggests that such a view is mistaken, for if a victim can recover fully under an alternative scheme, then the victim has no right to repair against the injurer under corrective justice, and the injurer has no corresponding duty.¹⁰⁰ Coleman states that "whether or not corrective justice in fact imposes moral duties on particular individuals is *conditional* upon the existence of other institutions for making good victims' claims to repair."¹⁰¹ He himself suggests that we might understand this conditionality by analogy to the discharge of a debtor's obligation by a third party.¹⁰² If my Dutch uncle pays off a debt of mine unbeknownst to me, I am no longer in debt. In that case, my duty is discharged and my creditor's right is satisfied. Unfortunately, this analogy invites irrelevant objections and obscures Coleman's point.¹⁰³

The analogy assumes that the debtor already has a duty, and the creditor a right, and the only question is from whom does the money come to satisfy that duty. However, Coleman believes that where alternative compensation schemes are functioning properly, the rights and duties of corrective justice simply do not arise.¹⁰⁴ How can this be? Recall that Coleman suggests that corrective justice is put on alert by the causal relationship among the injurer, the victim, and the victim's loss, but is called into action only under certain additional conditions. When those conditions are met, corrective justice links the injuring agent with the victim's losses by imposing on the injurer a duty to repair, and by granting the victim a right to recover against that person. The victim's moral claim to recover is part of the normative basis of the injurer's duty to make good the loss; so, too, is the responsibility relationship among victim, injurer, and loss. But they do not automatically yield the duty to repair. "The nature and scope of the duty depend on the practices in place," Coleman insists.¹⁰⁵ The reason that the duty to repair is practice dependent is that the morally appropriate response to that loss depends on, among other things, the best way to meet its claim under the circumstances. Those circumstances

100. RISKS AND WRONGS, *supra* note 4, at 402. This is true, he claims, as long as there is an adequate justification for the alternative scheme.

101. *Id.*

102. *Id.* at 327.

103. See, e.g., Richard Arneson, *Rational Contractarianism, Corrective Justice, and Tort Law*, 15 HARV. J.L. & PUB. POL'Y 889, 900-01 (1992); Wright, *supra* note 76. Arneson and Wright point out the disanalogy between third-party discharge of debts and a social insurance compensation scheme. The latter is coercive, while the former is not. Coleman's reply to this sort of objection, see RISKS AND WRONGS, *supra* note 4, at 389-90, only makes sense if we abandon this obligation-discharge model for the default-displacement model he outlines later. See *id.* at 402-03.

104. *Id.* at 493-94 n.7. Coleman sometimes says that these other practices "extinguish" the duties of corrective justice, but this also is misleading. It suggests that the rights and duties are standing rights and duties, but in fact they arise from the actions and interactions of people. According to Coleman, if those actions and interactions take place in social contexts in which other compensatory practices or institutions exist, then questions of corrective justice simply do not arise.

105. *Id.* at 403.

include the formal and informal practices for meeting that claim that are already in place in a community. If there is at least an informal practice of corrective justice already in place in the community, corrective justice can operate as a kind of default option.¹⁰⁶ Corrective justice will determine the nature and scope of the rights and duties of the parties, but alternative means of responding to morally important losses can displace or narrow the scope of corrective justice, if the community has sound reasons for responding in that way. In such cases, Coleman believes that even though a wrongful action of the injurer caused the victim's loss, the injurer has no duty to repair in corrective justice. Of course, the injurer may still justifiably be held liable for the victim's loss or have a moral duty to make good the loss. Similarly, the victim may still have a legal or moral right to recover. But the liability, duties, and rights will, in that case, have their sources in other moral principles or political aims.

This, then, is Coleman's explanation of how modern tort practice could serve two masters without dividing the house. His default-displacement model is intelligible and illuminating, and I think it could do the job of reconciling the two masters, if Coleman's statements about corrective justice are true. I am not yet convinced, however, that the model gives a true description of the moral claims of corrective justice. What feature of corrective justice's normative structure renders it practice-dependent? This question cannot be answered by external observers of the practice, say, by rational cooperators. Coleman himself notes that rational cooperators are not sensitive to the internal workings or goals of the practices they consider.¹⁰⁷ They can appreciate and assess the coordination-enabling and stability-enhancing properties of the practice, but they are not reliable guides to the intrinsic merits of various social cooperation schemes. The question I have just asked is internal to the practice; it is a question about the point of the practice.

Coleman's detailed analytical account of corrective justice does not directly address this question. Nevertheless, his theory is built around a view or intuition about the fundamental concern of corrective justice. This view is put in sharp relief in his discussion of the circumstances under which corrective justice loses its significance.¹⁰⁸ What he finds fundamentally important to corrective justice is that human losses suffered at the hands of others, especially those caused by the wrongful acts of others, must be redressed, and the victim made whole. Other aims—such as holding persons

106. *Id.* at 493-94 n.7.

107. *Id.* at 12.

108. Compare Hume's discussion of the circumstances of justice. DAVID HUME, *ENQUIRIES* 183-92 (L.A. Selby-Bigge ed., 2d ed. rev. 1975). Hume argues that in conditions of superabundance or radical scarcity of material resources, or where everyone is an unreconstructed egoist or uncompromising altruist, justice simply has no point. From this observation Rawls concludes that justice is best understood as "a cooperative enterprise for mutual advantage." JOHN RAWLS, *A THEORY OF JUSTICE* 126 (1971).

responsible for their actions, recognizing the autonomy of others, or giving moral meaning to interpersonal relationships—to the extent that they play any role in Coleman's account of corrective justice, are secondary and derivative. They do not survive satisfaction of the fundamental aim, the victim's being made whole. Once the loss is redressed, nothing remains for corrective justice to do. In this respect, Coleman's new mixed conception has not moved far from his earlier annulment conception.

However, if this accurately represents Coleman's view of what lies at the very heart of corrective justice, then he leaves us room to ask why fault plays such a large role in his mixed conception. I suspect that Coleman has misplaced the notion of fault in his account of corrective justice, giving it greater importance than it deserves, and more importance than he can ultimately defend in view of the basic orientation of his account. In the concluding part of this Review, I will suggest some reasons for this assessment.

IV. PUTTING FAULT IN ITS PLACE

Let us accept Coleman's thesis that causal interaction between parties producing a significant loss in well-being yields a special moral relationship among the injurer, victim, and the loss. While this thesis needs more argument than he provides, it is too large a topic to pursue here. Even if we accept this thesis, it is only the beginning of our account of corrective justice, for the "responsibility relationship" alone does not define the domain of corrective justice. Coleman insists that this domain is defined by the notion of fault in the action. This concept determines the focus of corrective justice, which, Coleman argues, is to impose the duty to compensate a wrongful loss upon the party responsible.¹⁰⁹

This narrowing of the focus of corrective justice is premature, in my view. Coleman is entitled to draw that conclusion only after serious reflection on the central normative principles of corrective justice. While fault may turn out to be the central notion of corrective justice, this may not be assumed, it must be shown. We have accepted that causal interaction between injurer and victim yields a morally significant relationship and that this defines the scope of corrective justice. We also know that corrective justice is a kind of commutative justice, concerned not with intimate personal relations, but with "external" transactions between individuals.¹¹⁰ Against this minimal background, we might initially suggest that corrective justice is concerned with the question of where the losses arising from such transactions should fall. Who must bear the losses and how they should be shared are questions of

109. RISKS AND WRONGS, *supra* note 4, at 324.

110. *See, e.g.*, AQUINAS, *supra* note 1, at 41.

justice. Because corrective justice arises from external transactions between individuals, it limits the scope of potential loss-bearers to the injurer and victim. Thus, the central substantive question for corrective justice is: What principles govern the allocation of the losses? We may find that the principle of fault is a necessary and important part of the answer, but it may figure only as one principle among others.

This does not yet offer a theory of corrective justice, but it suggests how to proceed in constructing such a theory. This approach has several attractive features. First, it provides us with a principled rather than ad hoc basis for determining the nature and scope of the injurer's responsibility, which is relevant to corrective justice. Second, it enables us to identify and explore the differences and continuities between corrective justice and other species of justice, distributive justice in particular. Third, it acknowledges that tort practice has more than one goal, but looks for a unifying theory behind those goals. We may be able to identify shared principles of corrective and distributive justice that might help unify the seemingly disparate parts of the practice.

These are, of course, only speculative hopes at this point. I cannot argue the more constructive aspects of this suggestion here. Instead, I argue that Coleman has misplaced the notion of fault in his own account, and suggest how his most important insights might be better accommodated by the view of corrective justice I have just described. I begin with a critical discussion of his analysis of necessity and propose an alternative account that fits better with our moral intuitions and with tort practice. In the concluding section, I argue that Coleman's notion of fault in the action is more plausibly regarded as a principle of allocation than a principle of fault, and that he should embrace the allocation framework suggested above as his theory of corrective justice.

A. *Faultless Necessity*

As discussed above, Coleman accepts that necessity cases are part of the core of tort practice. This forces him to explain why injurers acting with full justification nevertheless owe a duty in corrective justice to repair the losses they cause. A fair allocation model of corrective justice provides a simple explanation. One might argue, for example, that necessity justifies the temporary use of another's property to deflect an immediate and serious threat to life or property, but does not justify the permanent shift of self-protection costs to that other person. Fairness requires that the beneficiary bear those costs.¹¹¹

111. In cases involving self-defense, other considerations, such as the fact that the person on whom the loss is initially imposed is typically an unjust aggressor, may also be relevant. That fact might reasonably defeat any claim the "victim" might have to share the losses with the injurer. The moral question is more complex when the supposed aggressor is innocent, and I have no ready solution for the

A fault-oriented conception of corrective justice, on the other hand, needs more conceptual dexterity to accommodate necessity cases. Coleman holds that infringements of rights automatically trigger victims' rights to repair, regardless of the moral nature of the invasion.¹¹² Accordingly, the necessitous injurer wrongs the victim by using her property without securing her consent, giving the victim a right to compensation.¹¹³ This explanation of the place of necessity cases in corrective justice, I argue, is counterintuitive, inconsistent with a central feature of Coleman's conception of corrective justice, and inconsistent with tort practice. I offer an alternative explanation that has deep roots in the history of jurisprudence, is better grounded in substantive morality, and better fits standard tort doctrine.

1. *Infringement and the "Moral Residue"*

Coleman should have held firm to his basic intuition that, in necessity cases, there is neither wrongdoing nor fault in either the agent or the action. He was moved, however, by the thought that "settling on the justifiability of someone's conduct . . . does not preclude the existence in justice or morality of residual claims, including those to compensation."¹¹⁴ This observation leads him to regard the compensation required by corrective justice in such cases as the moral response to the infringement of a right. I do not reject the notion of a "moral residue," but I believe that the residual claims Coleman and others have in mind are not claims of corrective justice.

My argument begins with Hume's observation regarding the expressive dimension of moral action. "[T]he principal part of an injury," Hume said, "is the contempt and hatred, which [the action] shews in the person, that injures us; and without that, the mere harm gives us a less sensible uneasiness."¹¹⁵ Actions have natural consequences, and they also communicate messages of respect or contempt; sometimes those messages are of greater importance to the victim than the natural consequences of the actions. The actions may signal contempt because the agent denied the victim's claim to the agent's consideration, and thus denied the victim's moral status.

innocent aggressor problem. The law seems no more confident about these cases. In cases of self-defense or necessity in which third parties are either victims or beneficiaries, corrective justice on the model I have hinted at may have less trouble than traditional tort law. For tort law forces all such problems into a rigid bilateral mold, despite the fact that these cases have a multilateral character that corrective justice as I conceive it could easily recognize. There may be pragmatic or institutional reasons for the bilateral focus of tort practice, but, unlike Coleman, I do not see any deep or principled reasons for it. If these institutional constraints turn out to be unavoidable, we may be forced to accept that tort practice can only imperfectly implement our commitment to corrective justice.

112. RISKS AND WRONGS, *supra* note 4, at 300.

113. *Id.* at 301-02, 475-76 n.7.

114. *Id.* at 302.

115. DAVID HUME, A TREATISE OF HUMAN NATURE 349 (L.A. Selby-Bigge ed., 2d ed. rev. 1978).

With this in mind, let us consider the role of the "moral residue." Where an important right or interest has been invaded, the public message may be contempt. This message may be sent even when the action is justified, in which case the message would be false. For just that reason, however, it may be incumbent upon the agent to take appropriate steps to counter that message. This action may be taken with sincere expressions of regret, reinforced by efforts to compensate the losses suffered by the victim. In this context, compensation for the loss plays an instrumental role: it is the means by which the good faith of the injurer is effectively communicated. The point is not to undo the harm, but to counter the message of contempt otherwise communicated to the victim.

If an action infringes upon an important interest or expectation of a family member, lover, or friend, the moral residue has a further function. Compensation is one of many ways to express commitment to the other party and the relationship when that commitment is brought into question. It is important because it expresses the agent's commitment, not only to the relationship but also to the other person, by directly addressing his or her well-being.

These are the most important functions of the moral residue, but it is clear that they are not functions of corrective justice. Corrective justice concerns the "external" interactions of individuals, focusing on the harm, not the heart. The previously considered reasons for compensating harm would apply equally in cases where a person infringes on the rights or interests of another to avoid a public disaster. Thus, it would be important for the agent to counter the false message of contempt when the actions are justified by the prevention of significant public harms. Standard tort doctrine does not require this, however, and we would not expect such a requirement from corrective justice.

Similarly, if corrective justice were concerned with moral residue, we would expect that an injurer's duty to compensate could not be discharged by others, or supplanted by formal institutional devices to redress losses. Residual compensation addresses a distinctly interpersonal moral problem. Such compensation concerns the message the agent's action communicated to the victim about the agent's regard for the victim's moral status. This is not the task for a surrogate. Thus, it is unlikely that corrective justice is concerned with the moral residue of rights-invading actions, and one important motivation for following the "rights infringement" line in necessity cases evaporates.

2. *On the Right to Refuse Access*

Coleman's theory that the wrong done by the necessity-driven injurer is her failure to secure the victim's permission does not fit with standard

necessity doctrine in American tort law. The clear message of *Ploof v. Putnam*¹¹⁶ is that under conditions of necessity, the owner whose property stands to be taken has no right to refuse access. In other words, the owner who refuses to permit access to her property in an emergency violates a duty to the party in need. Coleman reads *Ploof* differently, however. He suggests that its thesis is that the owner fully retains his right to refuse access, but wrongly exercises that right in doing so, and may be held liable for any resulting harm.¹¹⁷

There is nothing incoherent in the suggestion that there are rights it would be wrong to exercise. In law, however, the notion is typically restricted to the exercise of rights out of malicious or other seriously objectionable motives. Coleman's hesitant language in discussing *Ploof*¹¹⁸ suggests that even he finds his reading something of a stretch. The analogies on which *Ploof* drew involved cases in which mere trespass on the land of another was recognized as justified under conditions of necessity, and no right to compensation for the trespass was recognized.¹¹⁹ A right to compensation, it seems, can be justified only if there is damage, and it is for the loss suffered due to that damage that compensation must be paid. This suggests strongly that the legal tradition in which *Ploof* was working did not regard the intrusion on the owner's land to be an infringement of the owner's right to exclude. Indeed, in these mere trespass cases, it recognized no invasion at all. The owner's right to exclude played no important role.

Also, Coleman's solution to the puzzle of whether an injurer has a duty to compensate the victim of a justified action seems inconsistent with the main thrust of his conception of corrective justice. Coleman rejects the relational conception of corrective justice on the ground that it fails to connect the actual focus of compensation on the victim's loss with the expressed aim of corrective justice according to the relational conception, to rectify the wrong done.¹²⁰ There is a similar failed connection in Coleman's explanation of the "wrong" involved in standard necessity cases. He believes that the wrong lies in the injurer's invasion of the owner's right to exclude. While the agent's use of the property is justified, the failure to secure consent constitutes a wrong.¹²¹ The injurer is still only bound to compensate the loss occasioned by

116. 71 A. 188, 189 (Vt. 1908).

117. RISKS AND WRONGS, *supra* note 4, at 301-02.

118. *See id.* at 301.

119. *See Ploof v. Putnam*, 71 A. at 189.

120. RISKS AND WRONGS, *supra* note 4, at 314-15.

121. *See id.* at 301-02. I am not sure that this accurately states Coleman's view. Perhaps both the use and the failure to secure permission from the owner are justified. But then why single out the right to exclude as the locus of the invasion of the right? If, on the other hand, the failure to secure permission is not justified, then we might conclude, contrary to Coleman's hypothesis and the doctrinal tradition, that there is a genuine fault-bearing wrong done by using without permission. In any case, my argument is that as long as the locus of the wrong is the failure to secure permission, compensation for the damage simply does not connect to the wrong done.

the use of the property; the injurer is not required to compensate the owner's loss of opportunity to refuse another use of the property.¹²² It is not clear what form of compensation would be appropriate for the latter invasion, but there is no reason to assume that it would be accomplished by compensating losses consequent upon using the property.

3. *A Grotian Approach to Compensation in Cases of Necessity*

Coleman considers and rejects an alternative solution to the necessity conundrum,¹²³ according to which necessity justifies the agent's use of the property and temporarily suspends the owner's right to refuse access. The owner's right to compensation for any damage remains despite the agent's necessity, and the agent's duty to compensate flows from that right. The language of the Calabresi-Melamed "property rule/liability rule" distinction allows a more precise statement of this solution.¹²⁴ In ordinary circumstances, an owner's interest in property is protected by a conjunction of a property rule, which imposes a duty on others to refrain from using the property without the owner's consent, and a liability rule, which imposes on unauthorized users a duty to compensate the owner for any resulting damages. In circumstances of necessity, the property rule is temporarily suspended relative to the party in necessity, but the liability rule remains in place.

Necessity conceived in this way is sometimes said to provide a conditional justification,¹²⁵ but this can be misleading. Theorists over the centuries, from Samuel Pufendorf¹²⁶ to Robert Keeton,¹²⁷ have understood conditional justification in terms of the intentions of the agent acting in circumstances of necessity. The action is justified if the agent intends to compensate any losses resulting from the use of another's property. On the other hand, the above-mentioned theory does not consider the agent's intentions. It is better to regard the necessity as justifying a temporary suspension of the owner's right to refuse access to the property regardless of the injurer's intent, and creating a

122. According to the German doctrine of *Aufopferungsanspruch*, or "a claim based on sacrifice," the dock owner's right to compensation in *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910), arises from the fact that the plaintiff was forced to sacrifice his ordinary right to expel an intruder because the ship that docked without permission was in imminent danger. See George P. Fletcher, *The Search for Synthesis in Tort Theory*, 2 *LAW & PHIL.* 63, 87 (1983). This doctrine also locates the source of the right in the wrong place. Compensation focuses on damage or harm done, not on the loss of the right.

123. RISKS AND WRONGS, *supra* note 4, at 295-96, 302. Coleman's discussion of this alternative is illuminating, but he assumes that it would only be attractive to economic or utilitarian theorists. This is a mistake. A theory embracing this alternative would not have to adopt efficiency or utility maximization as its normative goal, nor would it have to deny, as economic theories do, that one important interest protected by rights is an individual's interest in control over his or her life.

124. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1106-10 (1972).

125. See RISKS AND WRONGS, *supra* note 4, at 291.

126. See 2 SAMUEL PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* 302 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688).

127. See Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 *HARV. L. REV.* 401 (1959).

right temporarily to impose the costs of the agent's actions on the owner. Thus, no wrong is done and no right is violated by the agent's use of the property. If the injurer later fails to assume those costs, a wrong is committed. Feinberg put it well when he said, "[o]ne owes compensation here for the same reason one must repay a debt or return what one has borrowed."¹²⁸ Like paying off a debt, compensating losses caused by one's actions in circumstances of necessity respects the owner's right, but is not required in response to the infringement of that right. Unlike incurring a debt, however, incurring the duty to compensate in circumstances of necessity involves no voluntary temporary transfer of property by the owner.

The solution that Coleman rejects is sounder than his infringement solution, and is consistent with standard tort doctrine. However, the choice between this solution and Coleman's ultimately turns on the substantive question of which best fits with our justification of the institution of private property. I will attempt to show how my proposal fits more comfortably into such a theory.

There are two different kinds of restrictions on rules: exceptions and limitations.¹²⁹ The distinction turns on the relation between the restriction and the rule's underlying justification. A restriction is an exception to a rule if it is the outcome of a conflict between the principle served by the rule and some other principle threatened by compliance. In contrast, a restriction is a limitation on a rule if it is a direct consequence of the rule's underlying justification.¹³⁰ Limitations express the boundaries of the scope of a rule as determined by its underlying rationale.

Coleman's infringement approach treats circumstances of necessity as an exception to the rules defining the rights of ownership. He believes that his theory expresses our intuitive sense that "there is a conflict of claims that needs to be accommodated . . ."¹³¹ He states that "necessity morally justifies the appropriation—thus giving rise to the injurer's claim—and the

128. FEINBERG, *supra* note 61, at 230. However, in the next sentence Feinberg says, "[i]f the other had no right that was infringed in the first place, one could hardly have the duty to compensate him." *Id.* This, of course, is inconsistent with the view expressed in the passage quoted above, for when one repays a debt one is not compensating a right infringed, but rather taking steps to respect the right of the creditor.

129. See JEREMY BENTHAM, *OF LAWS IN GENERAL* 147-48 (H.L.A. Hart ed., 1970); see also Gerald J. Postema, *The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication*, 11 GA. L. REV. 1393, 1411-14 (1977).

130. I have also phrased this distinction between exceptions and limitations as follows:

Exceptions to the rule arise when the primary reasons for the rule are overridden in the circumstances by countervailing reasons. In such a case, there may still be reasons to follow the rule, but they are overridden in the circumstances. . . . *Limitations*, in contrast, define the scope of the reasons on which the rule rests for its justification. Where there is a rule-plus-limitation—e.g. 'no one, save the owner of the property, may freely make use of it'—the reasons justifying the qualified rule do not extend to an unqualified version of the rule. Thus, considerations justifying a limitation do not conflict with the rationale behind a rule They conflict only with the unqualified rule.

GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 343 (1986).

131. RISKS AND WRONGS, *supra* note 4, at 298.

property right of the victim justifies the claim to repair.”¹³² This assumes that justice gives an owner the right to refuse anyone access to the property regardless of the circumstances. This right is qualified by “morality” in cases of necessity. The justice-based argument emerges again, however, as a justification of a “residual” duty to compensate for infringement of the right.

A long tradition, extending at least as far back as Grotius, takes a different and more plausible view of the moral status of property rights in circumstances of necessity. Grotius believed that each individual’s fundamental claim to the resources necessary for life in the state of nature creates a right to use the material resources of nature. That right incorporates the right to refuse access to others only to the extent that consuming the fruits of nature makes them unavailable to others. Grotius argued that the institution of private property is justified because it better enables individuals to fulfill their needs, the same needs that justify their limited right to extract goods from the commons in the state of nature. The original right to use generates both the institution of property and its limitations. Grotius believed that in modern society the institution of property must recognize the right of necessity in order to protect the original right to use.¹³³ The right of necessity justifies one’s use of things owned by others without their consent, but the owner’s property right is not destroyed, only limited to a right to be compensated for the use of the thing. Grotius is very clear about the moral grounds of this right of necessity: “The reason . . . is not, as some allege, that the owner of a thing is bound by the rule of love to give to him who lacks; it is, rather, that all things seem to have been distributed to individual owners with a benign reservation in favour of the primitive right.”¹³⁴ Thus, it is not charity, a general duty of mutual aid, or any other independent principle that grounds the right of necessity. Instead, the right is grounded in the justification of the institution of property itself. The right of necessity is a limitation expressing the natural boundaries of the general justification of property rights.

The Grotian approach looks to the underlying justification for property rights in order to determine the scope of the normal bundle of ownership rights. This underlying justification may best be served by a structure of rights, powers, immunities, and disabilities, and their Hohfeldian correlatives that is sensitive to the circumstances of the owner and other potential users of the property. When individuals find themselves in circumstances of great need, the justification for a fully exclusive property right meets its natural limit. In such cases, the right to refuse access is suspended. The owner’s claim is not completely extinguished, however, as the owner has a right to compensation for the use.

132. *Id.* at 298.

133. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* 193-94 (F.W. Kelsey trans., 1964) (1625); see also STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME* 46 (1991).

134. GROTIUS, *supra* note 131, at 193.

There is no fundamental clash between justice and morality in the Grotian approach, but it does recognize the clash between the *prima facie* interests of the owner and those of the party facing necessity. It represents this clash not as a conflict between rights of property and some other moral value, but as a conflict between competing but commensurable “pre-property” interests. The conflict between the owner and the agent in need is resolved within the institution of property by consulting the institution’s fundamental justification. Moral weight is given to both interests: one party’s need yields a temporary right to use, without express permission, the property of another, but compensation for the use is still required.

Coleman might object to this approach on the ground that it puts necessity cases beyond the pale of corrective justice. But we are forced to this conclusion only if we accept Coleman’s assumption that the core of corrective justice is concerned only with redressing wrongful losses. If we adopt the view that corrective justice is concerned with the fair allocation of losses produced by causal interaction between individuals, then necessity cases still fall within the ambit of corrective justice. If my proposal for dealing with necessity cases is the more plausible one, we have reason to reconsider Coleman’s thesis that the domain of corrective justice is defined by wrongful loss.

4. *Injurers, Victims, and Strict Liability*

Any conception of corrective justice that places fault at its center faces the problem of explaining the strict liability elements of modern tort practice. Coleman’s response to these elements is complex. First, Coleman argues that some cases fall beyond the pale of corrective justice and are best explained on “market” rather than “moral” principles. He treats products liability law in this manner.¹³⁵ He also treats what he calls “strict victim liability” in this way, claiming that corrective justice is silent where there is no wrongful loss.¹³⁶ Second, Coleman treats the more standard kinds of strict liability as falling within the core of corrective justice and requiring a finding of fault. He divides these cases into two camps: those, like *Rylands v. Fletcher*¹³⁷ and ultrahazardous activities cases,¹³⁸ which involve inherent negligence;¹³⁹ and the remainder, which he treats much as he did the necessity cases, as involving infringements which give rise to rights to repair despite being justified.¹⁴⁰

135. RISKS AND WRONGS, *supra* note 4, at 407-29.

136. *Id.* at 227-33. With “strict victim liability” Coleman refers to the fact that, under a fault liability system, the victim is liable for all losses suffered as a result of the causal interaction between injurer and victim unless the victim can prove fault on the part of the injurer.

137. *Rylands v. Fletcher*, 159 Eng. Rep. 737 (Exch. 1865).

138. *E.g.*, *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969).

139. RISKS AND WRONGS, *supra* note 4, at 367-69. This is negligence “not in the manner of doing, but in the very doing itself.” *Id.* at 369.

140. *Id.* at 371-72. Coleman doesn’t make clear which cases he thinks can best be explained in these

Coleman's manner of dealing with strict liability gives us further reason to question his view that wrongful loss defines the scope of corrective justice. Let us accept that products liability is different, and plausibly treated on some basis other than corrective justice, and focus on the other three forms of strict liability. First, if my alternative analysis of necessity cases is preferred to Coleman's, then he is forced to treat these cases as falling beyond the pale of corrective justice or, as I argue, face further pressure to modify his view of the centrality of fault to corrective justice. Second, Coleman's treatment of strict victim liability is not entirely satisfying. If strict victim liability is an inevitable consequence of a fault system of tort liability, and if corrective justice is silent where there is no fault, then this inevitable part of the core of tort practice is left unexplained and unjustified. Coleman may be able to extend market principles to account for this large part of tort practice, but he does not offer such an argument. At this point, Coleman's restriction of corrective justice to imposing duties for wrongful losses on those responsible for them seems arbitrary. In such cases, the question of how the losses ought to be allocated requires a principled answer. It would be a mistake, I think, to see strict victim liability cases as analogous to cases in which fellow citizens suffer losses as the result of a natural disaster. Finally, Coleman's treatment of *Rylands* as involving inherent negligence strains credibility, and the credibility it has turns on the plausibility of Coleman's notion of fault in the action.

B. *Fault in the Action and Fair Allocation of Losses*

There may still be a reason for Coleman to insist on the centrality of fault in corrective justice if he believes there is a morally important difference between principles of liability in the law of negligence and intentional torts, and the principles animating strict liability and necessity, and that the difference lies in the notion of fault. This thought would be compelling if he could argue that the basic justification for imposing tort liability is moral culpability, but Coleman clearly and correctly rejects any such "retributive" account of corrective justice.¹⁴¹ One of his reasons for doing so is that the standards of wrongful action in corrective justice and for liability in torts are objective; they do not recognize culpability-defeating excuses.

Nevertheless, Coleman argues that the notion of fault in the action operates both in corrective justice and in torts. I am not convinced this is an intelligible concept. Insofar as there is a notion of fault at work, it is a notion of fault in the agent, and thus one of culpability. I doubt we can make sense of fault in an action if it is not based on fault in the agent. My argument is simple: there are no actions without agents, and thus we speak of faulty actions only

terms.

141. *Id.* at 220-24, 234-36.

derivatively. Actions may be good or bad, right or wrong, justified or unjustified, but only agents bear responsibility for them and they alone are bearers of fault. Coleman suggests that an action can be faulty by virtue of violating some standard. Strictly speaking, however, actions do not violate standards, they only conform or fail to conform to them. Agents violate standards.

We must not confuse the questionable distinction between fault in the agent and fault in the action with the legitimate and important distinction between an agent's having a fault and an agent's being at fault.¹⁴² A person may be at fault in certain circumstances but have no defect of character; the action may have been "out of character." This is a very important distinction, but it is not Coleman's distinction. While the action may have been out of character, and all would agree that the agent has no defect of character, the agent may still be blameworthy. The ordinary notion of culpability applies. According to Coleman's distinction, however, no one is to blame if there is no fault in the agent.

With the notion of fault in the action, Coleman has isolated an important moral idea, but he has not articulated it adequately. The idea, I think, is that in those cases in which someone injures another in violation of an "objective" standard of liability, we think it fair that the agent bear some or all of the resulting losses. This suggests that fairness in the allocation of such losses does not depend on a noncomparative assessment of desert, because the injurer may not deserve to bear the losses any more than the victim does. Instead, it suggests that the fair allocation of such losses depends on a comparative assessment of the parties' respective contributions to the creation of the losses. If this idea is correct, it suggests that the noncomparative conceptual structure of the notion of fault may distort the moral intuition at work.

If something like the theory articulated above helps explain our willingness to adopt an "objective" standard of liability, then there may be a notion of fair assumption or allocation of losses that unifies negligence, necessity, and strict liability. To explore this suggestion we do not have to abandon Coleman's conception of corrective justice—indeed, we could not begin the inquiry without the basic structure of his conception—but we do need to resist for the time being his thesis that the ambit of corrective justice is defined by wrongful losses and the notion of fault. Ultimately, we may find that the best account of the principles of fair allocation or assumption of losses gives a large role to fault. However, any such account must also make way for principles at work in the core of tort practice that are not plausibly reduced to dimensions of fault liability.

What exactly are these principles? Do they have a coherent moral focus? How do they relate to principles of distributive justice? Are they rationally

142. See JOEL FEINBERG, *DOING AND DESERVING* 188-94 (1970).

defensible? These are the large and important questions we must now address. The great value of Coleman's work is that it, more than any previous work in the field, enables us to see clearly the importance of these questions and provides us with the conceptual equipment we need to answer them.

