FOREWORD: COLEMAN AND CORRECTIVE JUSTICE

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I. INTRODUCTION TO THE SYMPOSIUM

Jules Coleman's *Risks and Wrongs*[1] will undoubtedly spawn many articles like the ones that make up this Symposium. Coleman is not only a preeminent legal philosopher, but he has also written a book that operates on many levels and touches on vast domains of legal, political, and moral theory. Moreover, Coleman's methodology is quite complex, ranging from rational choice political theory in Part One, and the specific rational choice problem of rational bargaining in Part Two, to the interpretation of institutional practices associated with tort law in Part Three. How the three parts of his book and their respective methodologies relate to one another will certainly be itself a topic of the critical literature on *Risks and Wrongs*, as it was to some extent in the Symposium papers that follow and to a greater extent in the discussion that took place at the conference at which these papers were first presented.

The Symposium papers can best be grouped as follows. The largest number of papers deal with the foundational issues in *Risks and Wrongs*. Jean Hampton[2] questions the extent to which Coleman's underlying political theory rests on rational choice principles rather than Kantian moral ones. She believes that Coleman's arguments require that he be less Hobbesian and more Kantian than he appears to be.

David Gauthier[3] focuses both on Coleman's rational choice theory itself and on the relationship between Coleman's political theory in Part One and his discussion of contracting and corrective justice in Parts Two and Three. Specifically, Gauthier is interested in why Coleman does not work downward from his rational contractarian political theory to derive justified norms of contracting and harmful interactions but in-

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

2. Jean Hampton, *Rational Choice and the Law*, 15 HARV. J.L. & PUB. POL'Y 649 (1992).

3. David Gauthier, *Jules and the Tortist*, 15 HARV. J.L. & PUB. POL'Y 683 (1992).

stead switches to an interpretive methodology in addressing tort law.

Margaret Jane Radin[4] and Steven Walt[5] also deal with foundational issues in *Risks and Wrongs*. Radin questions Coleman's privileging of the market rhetoric of utility maximization, competition, and commodification over the rhetoric of cooperation. Like Hampton, Radin finds Kantian, cooperative strands within Coleman's account and within the practices he interprets that are in tension with the more dominant rational, utility-maximizing ones.

Walt, in contrast, questions Coleman's argument for the priority of cooperation to competition. According to Walt, Coleman seeks to establish that cooperation is analytically, causally, and research-strategically prior to competition. In fact, argues Walt, none of those priorities is sustainable.

The next group of papers consists of those by Alan Schwartz[6] and Christopher Wonnell.[7] These papers focus not on foundational issues *per se*, but on the connection between Coleman's foundational theory and legal practices such as contract and tort law. Thus, Schwartz expresses concern about Coleman's interpretive approach to legal practices; the approach neither predicts actual outcomes nor is straightforwardly justificatory.[8] Moreover, although Coleman's interpretations meet the first two criteria relevant to whether they "fit" the data to be interpreted, elegance and parsimony, they do not meet the third criterion of scope.

Wonnell deals with the application of Coleman's political theory to various issues within contract and tort law. He touches upon, among other things, the theory's bearing on precontractual and pre-tort entitlements, nondisclosure in contracting, and division of contractual surplus. He also questions the distinction Coleman draws between economic (contractual

4. Margaret Jane Radin, *Putting Market Rhetoric in Its Place*, 15 HARV J.L. & PUB. POL'Y 711 (1992).

5. Steven Walt, *On the Relation Between Competition and Cooperation*, 15 HARV. J.L. & PUB. POL'Y 733 (1992).

6. Alan Schwartz, *Interpreting Torts, Explaining Contracts*, 15 HARV. J.L. & PUB. POL'Y 747 (1992).

7. Christopher T. Wonnell, *The Primacy of Cooperation, Rational Bargaining, and an Economic Theory of Part of the Common Law*, 15 HARV. J.L. & PUB. POL'Y 771 (1992).

8. *See also* Larry Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 LAW & PHIL. 419, 427-31 (1987).

or products liability) and noneconomic (tort) realms within common law.

The final six papers deal more directly with Coleman's treatment of contracting and corrective justice or tort law. Randy Barnett[9] and Richard Craswell[10] are interested in what Coleman says about contracting. Barnett argues that the role of the hypothetical rational bargain in interpreting contractual obligations is different from the role Coleman posits. He also gives an alternative to Coleman's account of nondisclosure of information in bargaining.

Craswell is interested in the relationship between Coleman's rational bargaining theory and conventional economic analysis as they illuminate contract law. Craswell concludes that conventional economical analysis, properly understood, can fulfill the role that Coleman intends for rational bargaining theory in prescribing background and default rules.

Emily Sherwin,[11] Stephen Perry,[12] Ken Simons,[13] and Richard Arneson[14] focus on Coleman's description of corrective justice and its relation to tort law. Sherwin's approach to corrective justice is skeptical; she is not persuaded that corrective justice is in fact a form of justice at all.[15] She argues that calling "wrongful" the various acts of defendants that are supposed to give rise to the corrective justice obligation to compensate, relies on a conception of wrongfulness so denatured that it adds nothing to the mere fact of plaintiff's loss, a loss which by itself cannot give rise to any such obligation.

Perry, on the other hand, accepts the existence of corrective justice. He claims that Coleman's distinction between plaintiff-focused wrongs and defendant-focused wrongdoings should be

9. Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, The Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL'Y 783 (1992).

10. Richard Craswell, *Efficiency and Rational Bargaining in Contractual Settings*, 15 HARV. J.L. & PUB. POL'Y 805 (1992).

11. Emily Sherwin, *Why is Corrective Justice Just?*, 15 HARV. J.L. & PUB. POL'Y 839 (1992).

12. Stephen R. Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J.L. & PUB. POL'Y 917 (1992).

13. Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law*, 15 HARV. J.L. & PUB. POL'Y 849 (1992).

14. Richard Arneson, *Rational Contractarianism, Corrective Justice, and Tort Law*, 15 HARV. J.L. & PUB. POL'Y 889 (1992).

15. I have expressed similarly skeptical views in the past. *See* Larry Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1 (1987).

replaced with a conception of defendant-focused wrongdoing that includes both fault in the doer and fault in the doing.

Simons also is concerned with the role of wrongs and wrongdoings in corrective justice. He criticizes and reworks Coleman's tripartite division of tort cases into his own tripartite division, in which wrongfulness is conceptualized in terms of enjoinability, and strict liability is divided into realms of conditional fault and pure nonfault, with either strict injurer or strict victim liability.

Arneson's paper is quite wide-ranging; he begins with a discussion of rational contractarianism as a foundation for political and moral theory, and ends with some comments on consumer rationality. His principal target, however, is Coleman's theory of corrective justice and its relation to tort law, and he explores in some depth the nature of fault, corrective justice's relation to other justice concerns, strict liability and rights, and Coleman's interpretive approach to torts.

The Symposium papers are thus as wide-ranging as *Risks and Wrongs* itself. They cover everything from Coleman's foundational, rational-choice-based political theory, to its relationship to legal practices, to Coleman's own interpretation of those practices.

My entry in the lists of critiques of Coleman becomes relevant at this juncture, given that I, like Sherwin, Perry, Simons, and Arneson, am concerned with corrective justice.

II. Some Thoughts on Corrective Justice: Coleman and Beyond

I am going to offer an interpretation of Coleman's views on corrective justice. I will then argue that the most plausible version of corrective justice would limit its domain to intentional torts. Most of tort law will therefore lie outside the realm of corrective justice. Moreover, even within its restricted domain, corrective justice must mesh somehow with both distributive and retributive justice.

A. *Coleman on Corrective Justice*

Here is one interpretation of Coleman's views on corrective justice:

(1) At the highest level—the liberal political theory level—

rational contractors *might* choose to deal with the problems resulting from the exercise of human agency through a practice of corrective justice. Corrective justice is but one of several practices that the contractors might establish to deal with agency's effects on others' interests and rights. Its connection with top-level theory is thus not one of tight entailment but one of loose connection.

(2) Corrective justice has certain definitive features as a practice. It creates agent-relative reasons for defendants to compensate plaintiffs to whom they cause losses. But corrective justice may take varying shapes and may cover domains of varying sizes.[16]

(3) Coleman's work can be used normatively to criticize substantive legal rules and results *if* we have chosen corrective justice to govern a case or range of cases and *if* we have departed from what corrective justice requires in that case or range of cases.

(4) The problem with (3) is that because of (1) (the optionality of corrective justice at the level of political theory) and (2) (the optionality of corrective justice's institutional form and domain), we need some criterion or criteria by which to tell if we have wrongly departed from corrective justice or have instead constricted its domain or altered its institutional form. The Hartian internal point of view of the officials will not tell us, because the officials will think in terms of what more localized practices (such as legal precedents) require or in terms of what is right *tout court*, not in terms of what corrective justice demands. That we have a practice of corrective justice with a certain institutional form and a certain domain of coverage is, according to Coleman, an interpretation of what we are doing, not a direct reading of the states of mind of legal officials. Coleman purports to be interpreting, *á la* Dworkin,[17] existing practices, which is different from reading off the conscious points of view of officials or other persons within the practices. We are looking for norms embedded in our practices that give those within the practice reasons for acting and that can be used to criticize particular decisions. But we have no criteria for distinguishing mistakes from changes, for distinguishing cases

16. *See* Stephen Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 385 (1992).

17. *See* RONALD DWORKIN, LAW'S EMPIRE 87-101 (1986).

outside the practice's domain from those within it but—according to the norms of the practice—erroneously decided. We need criteria for deciding which interpretation is "better," apart from what is morally correct in a non-practice-dependent sense or what is conventionalist in a strictly intentionalist sense.

(5) The problems to which (4) alludes can be illustrated by focusing on Coleman's difficulties in distinguishing cases covered by corrective justice and cases covered by other practices, such as the market. Coleman divides tort cases into three categories. In the first category, he places wrongdoings, that is, wrongful harmings and invasions of rights. In the second category, he places cases of rights infringements, such as the private necessity cases (Feinberg's backpacker;[18] *Vincent v. Lake Erie Transportation Co.*[19]). According to Coleman, these two classes of cases fall within the practice of corrective justice. The third class, private takings, involves no wrongdoings or wrongs and therefore falls outside of corrective justice. But how can cases within the second and third classes be distinguished? They cannot be distinguished by whether the plaintiff recovers from the defendant, nor by whether the defendant intentionally harmed the plaintiff. Moreover, how can cases within the third class be distinguished from cases that look as if they would fall within the first and second classes but that result in no liability? Consider cases of non-negligently driving and injuring someone or someone's property, or intentionally shooting someone based on a reasonable mistake regarding the necessity of self-defense. These are cases of no liability, but how are they distinguishable from those in Coleman's second class? Are they all mistakes? Are they part of a different practice?

B. *Another Perspective on Corrective Justice*

I, like Emily Sherwin, am skeptical about whether corrective justice is a distinct form of justice.[20] After reading Coleman, however, I am in the process of rethinking the matter. There may be room in the mansion of norms of justice for corrective

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

19. 124 N.W. 221 (Minn. 1910).

20. *See supra* note 15.

justice, but it is at most a small room, and quite possibly just a closet.

Corrective justice must be distinguished from retributive justice—giving the culpable the punishment they deserve—and from distributive justice. The correct conception of the latter (and the former) is, of course, controversial among utilitarians, welfare liberals, libertarians, and others. If distributive justice includes, however, an injunction against allowing undeserved losses where those can be shifted and converted into deserved losses, then the room left for corrective justice may be small indeed.

If there is to be room for corrective justice and its agent-relative reasons for acting, distributive justice must not require a rigid pattern of distribution. Theories of distributive justice that are strongly patterned create agent-neutral reasons for realizing such patterns, and there will be no room for corrective justice's agent-relative reasons to operate because of their potential pattern-disrupting effects. Corrective justice is consistent with the existence of agent-neutral reasons for setting up institutions for realizing corrective justice.[21] But corrective justice is inconsistent with the existence of agent-neutral reasons that govern the same transactions governed by corrective justice but that dictate different distributive results. Under corrective justice, a plaintiff must be able either to demand *or to waive* recovery from a defendant. Strongly patterned theories of distributive justice would preclude this option.

Coleman and Perry are surely correct that corrective justice cannot consist in annulling wrongful gain. Nor can it consist in annulling wrongful loss in a person-neutral way.[22] To the extent that corrective justice is a principle of justice distinct from distributive justice and retributive justice, it must consist in the annulling of loss caused by wrongdoing, and the reasons for action it creates must be agent-relative to the wrongdoer.[23] Corrective justice must give the wrongdoer a distinctive reason to annul the loss caused by the wrongdoing.[24]

I maintain for a variety of reasons that corrective justice at most covers intentional, knowing, or reckless violations of

21. *See* Perry, *supra* note 16, at 394 n.61, 395-96; Simons, *supra* note 13, at 853.
22. *See* Perry, *supra* note 12, at 921.
23. *See id.* at 920-22.
24. *See* COLEMAN, *supra* note 1, at 530.

norms of conduct. I agree with Simons that corrective justice covers enjoinable conduct,[25] although I disagree that enjoinable conduct goes beyond intentional, knowing, and reckless norm violation to include inadvertent negligence, and much less strict liability of any sort. (Of course, issuing an actual injunction may convert a potentially inadvertent norm violation into a knowing norm violation, but that is a different matter.)

Inadvertent negligence and strict liability of all varieties cannot be characterized as wrongs in the doer,[26] because by themselves they display no moral character flaw. Nor can they be characterized as wrongs in the doing in any way that is not far too broad (I expand on this point at great length in the Appendix[27]), or in many cases where there is no liability—such as a non-negligent auto accident which, of course, involves intentionally taking a risk of injuring; or an intentional battery based upon a reasonable but mistaken belief in the necessity for self-defense[28]—there is wrong in the doing in the same sense in which inadvertent negligence is a wrong in the doing.[29] And if wrong in the doing means merely that we later see a cost-effective way that the harm could have been averted, then wrongs in the doing may include almost everything we do. There is no sense of the objectively wrongful that can be helpful here.[30] Even acts that we now regard as not harmful may be harmful in fact and even contemporaneously known to be so—for example, by beings on other planets who with superior perception and knowledge can perceive the harmfulness of what we are now doing but cannot warn us.

I, like Coleman, would divide the realm of non-consensual interactions that cause loss into three parts.[31] The first two parts would cover cases of regrettable losses, losses that in hindsight we would wish to avoid. In one part we have those losses caused by culpable acts, the intentional and reckless torts. That is the part covered by corrective justice. In the second part we have all other cases of regrettable losses, in some of which we place liability on the actor who causes the loss,

25. *See* Simons, *supra* note 13, at 872-73.
26. *But see id.* at 877 n.88.
27. *See* Appendix.
28. *See* Simons, *supra* note 13, at 877 n.88.
29. *But see* COLEMAN, *supra* note 1, at 403, 408; Perry, *supra* note 12, at 936-37.
30. *But see* Perry, *supra* note 12, at 930; Simons, *supra* note 13, at 874 n.82; Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 371-72.
31. *See* COLEMAN, *supra* note 1, at 396-98.

while in others we do not. Our choices in this part regarding where to place liability are generated by distributive justice considerations, not corrective justice. In the third part we have non-regrettable losses, losses that even in hindsight we would incur again. This is Coleman's private taking part, and one that, as he acknowledges, is clearly outside the purview of corrective justice.[32]

If I am right so far, then almost all of tort law is outside the realm of corrective justice—not just *Vincent v. Lake Erie* and Feinberg's backpacker (justified invasions), but also ordinary strict liability and inadvertent negligence. *Most of tort law falls within distributive justice, not corrective justice.*

Even if corrective justice covers intentional torts, retributive justice and distributive justice may leave little room for it to operate. Retributive justice could warrant tort fines geared to the level of culpability. Distributive justice could warrant shifting undeserved losses from victims (or from the taxpayers who would otherwise provide relief to those victims) in order to convert those losses into deserved losses (for example, by paying for them out of a fund created by fines on intentional tortfeasors).

Still, in a two-person universe, where a defendant intentionally violates a norm that protects a plaintiff's interest (and thus defines a plaintiff's rights) and thereby harms the plaintiff, and the undeserved loss to the plaintiff exceeds the loss corresponding to the defendant's negative desert, corrective justice—because it is neither retributive justice nor distributive justice—may warrant imposing the loss on the defendant. And while large numbers of plaintiffs and defendants may potentially reduce the size of corrective justice's independent realm, they may not totally eliminate it.

Consider a three-person universe governed by a distributive justice principle of equal shares (of whatever goods are up for distribution) except where gain or loss is deserved by some but not others. *A*, *B*, and *C* begin with shares of ten each. *A* acts culpably (at a level of culpability that merits a loss of two shares) and causes *B* to lose nine shares. If *A* and *C* were to share equally in *B*'s loss, they would each contribute three shares to *B*, with the result that *A*, *B*, and *C* would now each

32. *See id.* at 560.

have seven shares. But because *A*'s culpability warrants his having a loss of two shares relative to his innocent neighbors, *A* should be fined one and two-thirds shares, leaving *A* with five and two-thirds shares and *B* and *C* at seven and two-thirds. At this point, the demands of distributive justice and redistributive justice have been fully met. But because *A* culpably caused a social loss that exceeds the loss corresponding to his negative desert, there is room for corrective justice to operate and make *A* responsible for the entire loss. Corrective justice would leave *A* with one share and *B* and *C* with ten, and this would be consistent with distributive and retributive justice so long as they were not strongly patterned.

If one argues that corrective justice requires its own norms, and that it cannot be parasitic on norms generated by distributive justice, then I am not sure that corrective justice can be made plausible at all. In other words, if corrective justice must mean something other than wrongfully (for example, knowingly) violating distributive-justice-generated norms of conduct, I find it totally mysterious.

APPENDIX: THE SHRINKING CATEGORY OF WRONG IN THE DOING: NEGLIGENCE, STRICT LIABILITY, AND HINDSIGHT

Negligence, as it refers to conduct that is actionable in law both civilly and criminally, means roughly acting without adverting to the substantial and unjustifiable risks to others' interests created by so acting and to which a reasonable person would advert. Negligence is to be distinguished from recklessness, which requires consciousness at the time of acting of the substantial and unjustifiable risks created. Negligence is also to be distinguished from conduct that results in strict civil or criminal liability—that is, liability that attaches whenever the actor causes harm to certain interests regardless of whether the actor can be deemed to have taken a substantial and unjustifiable risk that such harm would occur.

I have elsewhere argued that the distinction between negligence and strict liability cannot be maintained because there is no non-arbitrary way to construct the notion of the "reasonable person" who would have adverted to the risk created by his proposed conduct.[33] Here, I want to argue against the distinction between negligence and strict liability on different, but ultimately related, grounds. I want to argue that there is no non-arbitrary way to assess the riskiness of conduct *ex post* that will produce a negligence or strict liability distinction among those defendants who failed to advert to the risk. There is no non-arbitrary way because, *ex post*, the risk of harm created by conduct is either one or zero, and neither risk will produce the needed distinction.

To illustrate my point, I offer some cases:

(1) Nellie, looking for some spices in a cabinet, takes out some rat poison and places it on a kitchen counter. She is so preoccupied with her cooking that she forgets she has left the poison there. Later, her three-year-old brother Oscar comes into the kitchen, thinks the poison is sugar, and eats it. He becomes very ill.

(2) Same case as (1), except Oscar slips while he is reaching for the rat poison, hurts himself, and begins crying. Nellie rushes into the kitchen, where she sees that Oscar had almost

33. *See* Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84 (1990).

eaten the poison. With a great sense of relief, she puts the poison back in the cabinet.

(3) The Wrinkled Prune Company sells its prunes both pitted and unpitted. Its pitted prunes are pitted by a state-of-the-art technological process. It is extremely rare for a prune pitted by this process to retain any of its pit, but occasionally this happens. There is no cost-justified technology or process design that will guarantee that no pits will remain. Wrinkled puts a notice on every box of its pitted prunes that warns consumers that some pits may remain.

Paula, a six-year-old, loves to eat prunes. She bites down on one of Wrinkled's prunes and breaks a tooth on a pit that had not been removed. A worker at Wrinkled could have inspected this particular box of prunes for less cost than Paula's dentist bill.

(4) This case is the same as (3), only Paula discovers the pit with her fingers before biting down and thereby avoids injury.

Analysis of the Cases

Traditionally, these four cases would be analyzed along the following lines. In case (1), Nellie was negligent, and her negligence resulted in injury to Oscar. In case (2), she was again negligent, but her negligence led to no harm. In case (3), in many jurisdictions, Wrinkled would be strictly liable to Paula because its product, pitted prunes, was defective and caused Paula's injury. Wrinkled is not negligent, however, because its process for pitting was cost-justified, even given the risks of an occasional incompletely pitted prune. In case (4), there is neither negligence nor strict liability.

Now what were the risks of harm in these cases? Because we are operating *ex post*, the answers are easy. In cases (1) and (3), the risk of harm was one. In cases (2) and (4), it was zero. The actual risks fail to distinguish negligence and strict liability. They distinguish only the cases of harm from the cases of no harm.

What if we add the condition that the risks of harm must be unjustifiable if conduct is to be deemed negligent? That still does not produce the outcomes of the traditional analysis. In case (3), given that the actual risk of harm to Paula was one, Wrinkled was "unjustified" in not having a worker inspect the box bound for Paula's house. Of course, it did not know that

particular box contained an incompletely pitted prune. But neither did Nellie know that she had left the rat poison out, at least in the sense that she was not adverting to that fact. Moreover, in case (2), the risk is zero, which can hardly be deemed an unjustifiable risk.

To make the traditional analysis work, we must delete the information about injury that we possess *ex post* in such a way as to produce risks in cases (1) and (2) that are between one and zero, equal to each other, and higher than the risks in cases (3) and (4) (which are also between one and zero and equal to each other). The problem is how to select which information about the actual cases to delete.

This is not a problem in cases of recklessness. There we let the actor's subjective estimate of the risk *ex ante* determine our characterization of his conduct. If he estimates the risk as high, so high that we would deem taking such a risk unjustifiable, then he is reckless whether the risk was one or zero (that is, whether the harm risked came to pass).

In cases (1) - (4), however, we cannot avail ourselves of the actor's *ex ante* subjective estimate of risk if we want to produce the traditional outcomes. Nellie undoubtedly believes her activity, which she would describe as "cooking," is only minimally risky, because she is unaware that it includes her leaving rat poison in a place accessible to Oscar. Wrinkled has an *ex ante* estimate of the risks of injury to Paula which equals the risks to any consumer of its pitted prunes chosen at random. By hypothesis, that risk is low and reasonable to impose. The risk is ascertained by abstracting from the details of all reported cases of incompletely-pitted prunes information that can serve as the basis for efficient actuarial categories. Thus, the percentage of prunes that are incompletely pitted and the total damage caused by incompletely pitted prunes will probably be the only information that is gathered, the more specific details being too expensive to gather or incapable of affecting Wrinkled's conduct even if gathered. (An example of the latter information would be information that consumers are more likely to bite down on a pit at breakfast, when they are less alert, than at lunch; here, unless the differential risk were sufficient to warrant a special "breakfast warning," Wrinkled must lump the risks together.)

The cases of Nellie and Wrinkled resist being distinguished

upon close analysis despite the traditional view that they are different. In all four cases, the actors have in a sense misgauged the risks. In cases (1) and (3), Nellie and Wrinkled have underestimated the risk—Nellie, because she views her act as "cooking" rather than as "cooking while leaving rat poison where Oscar will eat it"; Wrinkled, because it is not concerned with the risks in any individual case but only with the average risks in the aggregate. In both cases the actual risk of one could have been reduced to zero by cost-justified actions, but neither actor was aware of the factors that would justify those actions. Nellie was not aware that she had forgotten to put the rat poison back in the cabinet. Wrinkled was not aware that the box bound for Paula contained an incompletely pitted prune. So although Nellie and Wrinkled believed that their conduct was risky, but justifiably so under the descriptions "cooking" and "selling prunes pitted by a particular process," both were unaware that their conduct caused a risk of one under the descriptions "cooking (or selling prunes) under the circumstances that actually exist in these cases." Likewise, in cases (2) and (4), where no harm occurs, Nellie and Wrinkled have overestimated the risk in the particular circumstances.

To summarize the analysis thus far, the risk in every case is actually either one or zero. In each case there are general features on which the actor will focus to predict a risk of harm that lies somewhere between one and zero. The actor who predicts a risk that is unjustifiably high and then proceeds to act is reckless even if the harm risked does not eventuate (the actual risk is zero). The actor who predicts a low risk—a risk that it is justifiable to take—is not reckless if he acts. If his prediction is actuarially sound, yet harm eventuates (the actual risk is one), then any liability he faces is paradigmatic strict liability (for example, our case (3)). This is so even though in the particular case acting was not cost-justified. (Wrinkled was not cost-justified in selling the particular box of prunes to Paula in case (3), or was not cost-justified in failing to inspect that particular box.)

What if the actor incorrectly underestimates the actuarial risk?[34] This may occur when an act has a general feature or features that lend themselves to determining the actuarial risk, but the actor is either unaware of those features or is aware of

34. Here I continue a discussion begun in Alexander, *supra* note 15, at 17-21.

the features but not of the actuarial risk associated with them. These are the cases of inadvertent negligence, such as Nellie's leaving the rat poison within Oscar's reach (cases (1) and (2)). In these cases we must ask why the actor is ignorant of the important features or the risk associated with them. And in doing so we repeat the preceding analysis, only this time we replace risk of harm with risk of ignorance (of features or risks).[35] The risk of ignorance may be either reckless, or it may be cost-justified. (For example, Nellie may be employing an efficient level of advertence that in cases (1) and (2) just happened to result in inadvertence to risk.) Or the actor could be ignorant of the risk of ignorance, in which case the analysis repeats again. Ultimately, we end up with either a reckless actor or a strictly liable one. Inadvertent negligence breaks down into one of those two categories; it is not a third category.

True risks—one or zero—do not distinguish within the class of human-caused accidents, because the risk is always one in those cases. The focus must therefore be on *ex ante* subjective estimates of the risk. The subjective estimates may show the action to be *ex ante* cost-justified (strict liability) because the action is a particular instance of a general class whose actuarial risk of harm is low relative to its benefits and the costs of refining the actuarial estimates. The subjective estimates may show the action to be reckless. Or the subjective estimates may, were they correct, show the action to be *ex ante* cost-justified, but they may be incorrect subjective estimates. In the latter case our focus must switch to the subjective estimate of risks associated with features of acts, the subjective estimates regarding the degree of confidence warranted in the subjective estimates of risks associated with features of acts, the subjective estimates of the benefits of using different actuarial categories, or the subjective estimates of the likelihood of not adverting to a feature whose associated risk is known. The subjective estimates of those subjective estimates may either reveal reasonable behavior, and hence strict liability, or reveal recklessness.

In short, every case of inadvertent negligence—Nellie in cases (1) and (2)—is at bottom a case of recklessness or a case of strict liability. And every case of strict liability—Wrinkled in

35. Mark Grady has made a similar point in several articles. *See, e.g.*, Mark Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988).

case (3)—can be viewed as a case of inadvertent negligence if we ignore subjective estimates of risk and focus on the particulars that make the true risk one.

To the extent that tort law is concerned with deterring culpable behavior and requiring culpable actors to pay for the damage caused by their acts, both inadvertent negligence and strict liability are outside its purview. To the extent that tort law is concerned with placing the costs of interactions on those—injurers or injureds, third-party insurers or first-party insurers—who possess actuarial information about risks, providing (cost-justified) incentives to obtain actuarial information, or effecting distributional patterns and reducing transaction costs (including litigation costs), cases of both inadvertent negligence and strict liability are within its purview, although the distinction between them is wholly chimerical and irrelevant. This is why, from an economist's view, when strategic concerns relative to the costs and likelihood of proving negligence in court are put to one side, the choice between a negligence rule and a strict liability rule is inconsequential: They would lead to exactly the same conduct.

Ultimately, everything comes down to what to do about non-actuarial risks. When we lack information, we cannot act on the information we lack, nor can we assess the value of obtaining that information. (We must have the information in order to assess the value of obtaining it.) Ignorance cannot be assigned an actuarial value. Except for reckless, knowing, or intentional harm causing, all harm-causing results from ignorance of true risk. An actor who acts in the face of his own estimate of unjustifiably high risks has acted unjustifiably and can be dealt with in the same manner as are knowing and intentional injurers. But an actor whose ignorance leads him to assess a risk as sufficiently low to make taking it justifiable is an actor whose liability, if any, is strict. And when the strict liability attaches to ignorance that, *at the level it occurs*, cannot be actuarialized, the case for liability and internalizing costs rather than socializing them cannot rest on attaching the proper incentives to rational calculation.