

# JULES AND THE TORTIST

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## I. DEMANDS ON NORMATIVE LEGAL THEORY: SERVING TWO MASTERS?

Two aspects of legal theory may pull a normative legal theorist in different directions. On the one hand is the law—statutes and cases—all of the dense matter that his theory must comprehend. On the other hand are the constraints that his theory must satisfy if it is both to explain and justify—to delineate a practice that we may accept as part of our normative repertoire. The theorist must understand law from the standpoint of practitioners who ask not simply, “How may we carry on this practice in a way that is faithful to its inherent norms?” but rather, “How may we carry on this practice in a way that is faithful to norms that are both inherent in it and philosophically acceptable to us?”

One immediate response to this question might be that no legal theory can be both faithful to its own inherent norms and morally acceptable to us. Such an answer might be pragmatically alarming but need not cause theoretical disquiet. This question is at the core of all normative inquiry. Consider, for example, J.L. Mackie’s theory of ethics.<sup>1</sup> In Mackie’s initial discussion of the subjectivity of values, he inquires into the inherent norms of our existing moral practices, finding that these norms are sustainable only if a compatible ontological thesis—a thesis he rejects—about the objective status of values is also sustained. Again, the answer to the question “How may we carry on moral practice in a way that is faithful to norms that are both inherent in it and philosophically acceptable to us?” is “We cannot.” In the remainder of his book, Mackie invents a “successor practice.” Right and wrong cannot be found in objective values; thus they must instead be invented.

The legal theorist might encounter a problem similar to Mackie’s. He might, for example, conclude that the inherent norms of our legal practices can be sustained only on the assumption of an objective natural law. If he in turn perceives

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1. J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 15-49 (1977).

that no such natural law exists, he might choose (as Mackie did) to create a successor practice. Alternatively, the legal theorist might come to believe that the inherent norms of our legal practices depend not on an unsustainable metaphysics, but rather on an unsustainable ethics—that any plausible way of making sense of our legal practices reveals norms that cannot survive ethical reflection. Rather than confronting the need to invent a successor practice, the theorist will face the demand that the existing practice undergo significant modification to bring it into line with ethical understandings.

The legal theorist may seek to serve two masters, but he should establish their priority. The task of understanding existing law, sociologically significant and interesting as it may be, is not the primary concern. Rather, the primary concern is to ascertain how far that law may be understood in a way that is philosophically acceptable—that is, how far existing legal practice can be justified. If the verdict on this question is mixed—if the theorist finds only a partial fit between the norms inherent in the existing law and those norms that could withstand reflective examination—the urge to engage in legal reform will prevail. The legal theorist will seek an understanding of law that justifies as much as possible of his material (the actual statutes and cases). To remain consistent, the legal theorist will construct a normative framework both exemplified in this material and commanding our philosophical acceptance. For material that does not conform, he will supply an error theory that explains departures from acceptable norms and standards. Finally, the theorist will point to remedial measures that would accommodate future statutes and judgments within the framework that he has constructed and that reflective practitioners can accept.

Although these assertions may seem controversial, such controversy is not the focus of this article. My intention has been simply to indicate some features of my own understanding of legal theory, features that underlie the argument of this paper. I have so far focused on a view of legal theorizing that leaves open the question of what norms might gain our reflective acceptance. I will now introduce my own normative perspective—the perspective of rational contractarianism.

## II. RATIONAL CONTRACTARIANISM AS A NORMATIVE FRAMEWORK

From a rational contractarian perspective, law is a device for the regulation of interaction. The contractarian theorist seeks both to explain and to justify law by reference to what rational persons would agree to in order to make possible a society conceived, as Rawls described it, as “a cooperative venture for mutual advantage.”<sup>2</sup> The basic normative conception embodied in contractarian thought is individual rationality, which we may associate with three fundamental values: autonomy, efficiency, and fairness.<sup>3</sup> The basic terms of social agreement require assurance of autonomy in interaction through the establishment and maintenance of a structure of individual rights, and promotion and protection of voluntary contractual relationships consistent with those rights. In contract, individuals can make mutually advantageous exchanges that, to the extent that they are the product of informed, rational, and voluntary decisions, will be both efficient and fair, capturing all available gains from the exchange while assigning to each party the share of the gains that he deems relatively acceptable.

Rational contractarianism is a theoretical proposal. In advancing it I suggest that law be interpreted as embodying contractarian norms that seem suited to gain reflective acceptance. My work in moral theory might be read as an attempt to elicit that acceptance. If it is possible to understand legal practice in contractarian terms, then we shall have a justification both for accepting that understanding and for continuing to engage in the practice, as well as further support for the acceptability of contractarian norms. This analysis may seem circular, but it is not. As long as there is some reason, independent of the understanding of legal practice, for accepting contractarian norms, and some reason, independent of our reason for accepting contractarian norms, for finding them inherent in legal practice, then treating each as reinforcing the other is plausible.

The substantive concern of this paper is to examine critically some features of Jules Coleman’s exercise in connecting “the

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2. JOHN RAWLS, *A THEORY OF JUSTICE* 4 (1971).

3. This analysis suggests a relation to Coleman’s triad: autonomy, rationality, and efficiency. JULES L. COLEMAN, *RISKS AND WRONGS* 112 (forthcoming 1992) (manuscript dated July 1991, on file with author; pages cited to manuscript). But I see autonomy and efficiency, as well as fairness, not as alternatives to rationality, but as realized through its exercise.

principles of rational choice theory to contemporary liberal political, legal and moral theory."<sup>4</sup> I will focus on two issues: the relation of rationality to contractarianism and the relation of rational contractarianism to tort law.

### III. INDIVIDUAL RATIONALITY

Coleman claims that "[t]he full rational choice theory of human motivation and political justification . . . consists in principles of collective, individual and division rationality."<sup>5</sup> My view is sparser. I acknowledge only individual rationality.

Coleman defines individual rationality as follows: "A social state is individually rational for an agent [if and only if] it makes her no worse off than any other feasible option."<sup>6</sup> This definition prompts two concerns. First, the phrase "makes her no worse off" suggests that individual rationality is necessarily related to individual well-being. This conclusion imposes an unnecessary substantive constraint on what constitutes a rational pursuit or desire. Rational agents need not be egoistic. Perhaps no one concern will qualify an agent as rational, but an exclusive concern with her own well-being is certainly not necessary to qualify an agent as rational. I would prefer to replace "makes her no worse off" with "is no less well supported by her reasons for acting." This leaves open the question whether there are substantive constraints on what is rational for an agent to want or pursue; giving an account of an agent's reasons for acting will decide the matter.

The second concern is directly relevant to our present purposes. To what does the phrase "any other feasible option" refer? What options are feasible? Suppose first that the situation involves neither risk nor uncertainty, so that for each action available to an agent there is a determinate resulting social state. Then the feasible options are simply those social states that the agent can bring about by the actions available to her. An option is feasible if and only if the agent can select it.

Under conditions of risk (as risk is treated in rational choice theory), a determinate probability distribution over resulting social states exists for each action available to an agent. The feasible options are simply those probability distributions over

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4. COLEMAN, *supra* note 3, at iv.

5. *Id.* at 12.

6. *Id.* at 4.

social states that the agent correlates with the actions available to her. We should then complicate Coleman's definition to read "a probability distribution over social states is individually rational for an agent if and only if it is no less well supported by her reasons for acting than any other feasible distribution." What to say about conditions of uncertainty, in which the agent is unable to correlate each of her possible actions with a determinate probability distribution over resulting social states, is itself uncertain. Fortunately, such conditions do not bear directly on this discussion, at least at the definitional level.

Although the preceding interpretation of Coleman's definition seems reflectively acceptable, not everything Coleman suggests fits this interpretation. He claims, for example, that "[a] Pareto superior state is individually rational for all agents."<sup>7</sup> According to the interpretation of individual rationality offered above, however, this statement is false. The Prisoner's Dilemma<sup>8</sup> (PD) depends on just this falsity. In the PD, the outcome of mutual defection is individually rational for all agents, and is the *only* outcome that is individually rational for all agents.<sup>9</sup> Regardless of the other person's choice, the outcome that results from one's own defection is better supported by one's reasons for acting—or if you like, makes one better off—than any other option. So the only outcome that is individually rational for both agents is the outcome of mutual defection. This outcome, however, is Pareto-inferior to the outcome of mutual cooperation.

Coleman says that in a PD "[t]he exchange option is Pareto optimal and individually rational for both parties."<sup>10</sup> The exchange option is the outcome of mutual cooperation; thus he claims that the outcome of mutual cooperation is individually rational. In a true PD, however, it is not. If the other party ex-

7. *Id.* at 5.

8. See THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 214 n.4 (1980).

9. The dilemma in the PD arises from viewing all reasons for acting as directly outcome-based. This approach is, of course, the orthodox view. I think it is mistaken, and so I think that many situations that have the strategic and payoff structures that we associate with the PD do not constitute genuine dilemmas. Agents in these situations have sufficient reasons for cooperating and thus, given my definition of individual rationality, the Pareto-optimal outcome of mutual cooperation will be individually rational. Even on my view, however, some situations will be genuine PDs; the agents will have only directly outcome-based reasons for acting, given their reasonable beliefs about each other, and the outcome of mutual defection will be uniquely individually rational.

10. COLEMAN, *supra* note 3, at 94.

changes or cooperates, then one does better not to exchange, and so better to defect. Of course, Coleman recognizes this last point. So what has gone wrong here?

Chapter 5 of *Risks and Wrongs* begins to provide an answer. Coleman says "where  $U_i$  is individual  $i$ 's expected utility from participating in a contract, and  $D_i$  is  $i$ 's utility from disagreement,  $i$  is *individually rational* if  $U_i \geq D_i$ ."<sup>11</sup> Coleman here refers to individual rationality as a condition of *bargaining* outcomes; a bargaining outcome is individually rational if and only if it affords each agent at least her disagreement payoff. Coleman has conflated the condition of individual rationality in bargaining with the condition of individual rationality of choice.

In bargaining, an option is feasible if and only if agreement among the parties could accomplish it. What each can achieve by an individual party's independent choice is not relevant to bargaining feasibility. In treating a PD as a bargaining situation, it is natural to treat the outcome of mutual defection as the disagreement outcome, and the outcome of mutual exchange or cooperation will then satisfy the individual rationality condition on bargaining. Note, however, that the disagreement outcome is also individually rational for both parties (because  $D_i \geq D_i$ ).

I propose to talk about individual rationality in relation to individual choice: In the absence of risk and uncertainty, an outcome is individually rational for an agent if and only if it is feasible—that is, the outcome of one of her possible actions—and no less well supported by her reasons for acting than any other feasible option—that is, any other outcome of her possible actions. I must therefore treat some of what Coleman says about individual rationality as mistaken, insofar as it is related to choice.

#### IV. COLLECTIVE AND DIVISION RATIONALITY

Coleman introduces two other forms of rationality—collective and division (or concession)—into his account. Despite his assertion, neither of these is a form of rationality. Collective rationality, as Coleman defines it, is simply Pareto optimality.<sup>12</sup> A modified version of Coleman's definition seems more sensi-

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11. *Id.* at 133.

12. *See id.* at 3.

ble: A social state  $S$  is Pareto-optimal if and only if there is no alternative social state  $S'$  such that some person evaluates  $S'$  more favorably than  $S$ , and no person evaluates  $S$  more favorably than  $S'$ . A person evaluates a social state  $S$  more favorably than a state  $S'$  if and only if (were she in a position to choose between the states) her directly outcome-based reasons for acting would better support choosing  $S$  than choosing  $S'$ .<sup>13</sup> I shall treat  $S'$  as an alternative to  $S$  in a particular situation if and only if in that situation there are sets  $A$  and  $A'$  of possible actions, one for each person, such that  $S$  is the outcome of  $A$  and  $S'$  is the outcome of  $A'$ .<sup>14</sup>

The idea that a Pareto-optimal state is collectively rational has little appeal. Consider, for example, the PD outcome in which one agent acts cooperatively and the other defects. For a more concrete example, consider an interaction between a potential buyer and a putative vendor in which the buyer pays for some commodity and the vendor defects with the money. The outcome is wonderfully optimal, because every alternative is evaluated less favorably by the double-crossing vendor. Yet this transfer does not seem like an instance of collective rationality.

Suppose we modify Coleman's claim, so that instead of identifying collectively rational social states with those that are Pareto-optimal, we suppose that collectively rational social states are a subset of those that are Pareto-optimal. Which subset? Presumably, collectively rational social states are a subset of those social states that are evaluated at least as favorably by each person as some designated outcome—in a PD, for example, the outcome of mutual defection. Then suppose that we have a situation with a designated outcome that is not Pareto-optimal. At least one person must favor an alternative to the designated outcome that no person would disfavor. A set of possible actions available to the person—a set that would yield such an alternative—also exists. But, as the PD shows, such an alternative need not be individually rational for all persons. Doing what is necessary to bring it about may not be adequately

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13. If all reasons are directly outcome-based, as the orthodox view assumes, then  $S$  is more highly evaluated than  $S'$  if and only if one's reasons for acting better support choosing  $S$  than choosing  $S'$ . But if, as I believe, not all reasons are directly outcome-based, then  $S$  may be more highly evaluated than  $S'$  even though—taking all of one's reasons for acting into account—choosing  $S'$  may be better supported.

14. This conclusion assumes the absence of risk or uncertainty. I shall ignore here the complications needed to accommodate them.

supported by some agent's reasons for acting. In what sense, then, could we take the alternative, even though favored by everyone over the designated outcome, to be rational?

One might suppose that the idea of collective rationality belongs in a context quite different from that of individual rationality. If social states are outcomes of social decisions, then collective rationality is relevant and individual rationality has no place. Nevertheless, ascriptions of rationality and irrationality are relevant to any agent whose behavior is explained in terms of motivating reasons, whether this agent is a human individual or a corporate or collective body. The standard in the definition of individual rationality that I have adapted from Coleman appropriately governs these ascriptions: A social state is individually rational for an agent if and only if it is no less supported by her reasons for acting than any other social state she can produce by an action available to her. I would simply remove 'individual' from this definition: A social state is rational for an agent, whether an individual or a collective or corporate body, if and only if it is no less supported by the agent's reasons for acting than any alternative social state that the agent can bring about. The agent is rational insofar as it acts to bring about those social states best supported by its reasons for acting. Whether the agent is an individual or a collective body is irrelevant.

Let us now return to the thesis of collective rationality—that is, to the thesis that a social state is rational only if it is Pareto-optimal.<sup>15</sup> We might understand this thesis as a claim about a collective body's reasons for acting—that these reasons must be taken from the reasons of its members, and in such a way that only Pareto-optimal states can be adequately supported. Although potentially appealing, this substantive thesis about the content of rationality in no way parallels the thesis of (individual) rationality, which, as I have insisted, abstracts from all substantive issues. Furthermore, this thesis has no application to interaction among individual agents.

## V. PARETO OPTIMALITY AND INDIVIDUAL RATIONALITY

Although I reject Coleman's distinction between collective and individual rationality, I nevertheless accept the view that

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15. I modify 'if and only if' to 'only if' in line with my earlier discussion.

Pareto optimality has some significance within the framework of individual rationality. Its significance relates to the idea that “rational cooperation is a solution to failed competition.”<sup>16</sup> Coleman proposes to abandon this idea; he thinks that “[i]t is just not possible to disentangle competition from cooperation in a way that enables us to conceive of competition as logically or normatively prior to cooperation.”<sup>17</sup> At one level his claim is correct. The idea that competition is prior to cooperation, however, is an unsuccessful attempt to capture a deeper truth—that unconstrained interaction is normatively prior to constrained interaction, and that rational cooperation is a constrained solution to problems arising from the absence of constraints.

I have already noted the rather unoriginal but key idea that there are contexts of interaction, exemplified as always by the PD, in which the only individually rational outcome or outcomes are not Pareto-optimal. In such situations, there are benefits available to the agents that they fail to obtain. For each individually rational outcome, there is an alternative that is not individually rational, but that some evaluate more highly, and all evaluate at least as highly. If we suppose that the outcome of unconstrained interaction among the agents will satisfy individual rationality, then some agents may have reason to invest some effort to introduce constraints that will lead to a Pareto-superior outcome. To be sure, any agent investing in constraints must expect that her increase in benefit from the constrained outcome will more than offset her cost. This will not always be the case, no doubt; not all interactions lead to sub-optimal individually rational outcomes in the absence of constraints, and not all such interactions can be constrained to yield outcomes that, considering the cost of the constraints, are Pareto-superior. Some interactions will give rise to PD-type problems, however, and appropriate constraints can alleviate some of these problems.

If unconstrained interaction yields a Pareto-optimal outcome, then any alternative outcome, although it may be better for some persons, must be worse for others. Of course, this fact does not strictly eliminate the possibility of introducing constraints. The expected benefits may outweigh the costs to those who would benefit from certain constraints. Conversely, the

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16. COLEMAN, *supra* note 3, at 33.

17. *Id.* at 57.

costs of resistance, for those who would avoid constraints, may exceed the expected losses.

We should therefore distinguish between two types of constraints: productive and redistributive. A productive constraint is one that yields (or at least is rationally expected to yield) an outcome Pareto-superior to the outcome of unconstrained interaction. A redistributive constraint is one that yields an outcome Pareto-incomparable with the outcome of unconstrained interaction. If we suppose that cooperation must be advantageous to each cooperator—or at least that each must expect it to be advantageous—then a redistributive constraint cannot be the basis of cooperation. Those who will benefit from it impose such a constraint on their unwilling fellows. On the other hand, cooperation results from the willing acceptance of productive constraints as affording benefits unobtainable in unconstrained interaction.

Thus, I want to reaffirm the possibility that “the best interpretation of our legal and moral practices sees them in terms of the role they play in solving problems,” not “of market failure,”<sup>18</sup> but of the failure of unconstrained interaction. One can interpret the market itself as constraining certain forms of interaction to eliminate the possibility of force and fraud, thereby yielding productive benefits. Not only legal and moral practices, but also political and economic practices, stand between us and a state of nature in which the absence of all constraints would indeed make life “poore, nasty, brutish, and short.”<sup>19</sup>

It is only fair to note here that in treating the market on par with other forms of constraint, I depart from the argument of my book *Morals by Agreement*.<sup>20</sup> I am in good company in expressing a changed view, because Coleman acknowledges significant changes from his own previous views in *Risks and Wrongs*. In recognizing that we should interpret the market as an institutional device for constraining interaction to afford mutual advantage, however, I also want to emphasize the role of constraints of all types in alleviating the failures of unconstrained interaction. This theme lies at the heart of rational contractarianism, because it enables us to explain and justify

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18. *Id.* at 58.

19. THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL* 82 (Michael Oakeshott ed., 1957) (1651).

20. DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986).

what might at first seem paradoxical in the contractarian position—the voluntary mutual acceptance of constraint.

Rational contractarianism expresses the simple truth that it is rational for agents who interact with others under conditions of scarcity and limited concern to invest some effort to establish institutions that will constrain their interaction in mutually advantageous ways. The deepest level of constraint, in my view, is found in rationality itself. It is natural to consider that reasons for acting are directly outcome-based, so that in any situation, an agent has the most reason to bring about the outcome that she evaluates most favorably. This fact ensures that situations that have the strategic and payoff structures that we associate with the PD are genuine dilemmas. The first step in alleviating the problem of unconstrained interaction is to recognize that this view of reasons for acting is inadequate, and that directly outcome-based reasons need supplementing reasons that reflect an agent's commitments and plans. I argue elsewhere that, given such an enriched view of reasons, cooperating voluntarily in many situations with PD strategic and payoff structures is rational.<sup>21</sup> I cannot pursue this argument here. For present purposes, I want to emphasize that rationality can provide only a necessary but insufficient constraint in alleviating PD-type problems in interaction. A correct view of reasons for acting in no way obviates the need for the institutional constraints of moral, political, legal, and economic systems.

My argument here follows a pattern that Hobbes made familiar. His account of the natural condition of mankind as a war of every man against every man illustrates the costs of unconstrained interaction. Each person exercises his unlimited right of nature, consulting only his own subjective judgment of good and evil in deciding what to do. The first form of constraint that Hobbes introduces is found in rationality itself—the laws of nature that reason suggests as “convenient Articles of Peace, upon which men may be drawn to agreement.”<sup>22</sup> The laws of nature introduce mutual constraint by requiring each person to limit his right of nature, provided that others do the same. The laws of nature are insufficient to assure peace absent determinate specification and effective enforcement, however. These missing elements are found in the institution of the sovereign,

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21. *Id.* at 182-87.

22. HOBBS, *supra* note 19, at 84.

which Hobbes views as the outcome of the social contract. Hobbes insists that because no man's private reason "is right reason fit to be a rule of our moral actions, we have therefore set up over ourselves a sovereign governor, and agreed that his laws shall be unto us, whatsoever they be, in the place of right reason, to dictate to us what is really good."<sup>23</sup> Distinguishing between the rational and the reasonable is helpful. The outcome of rational agreement is reasonable for the parties to the agreement. The outcome is only rational, however, for those parties who have sufficient reason to conform to it. The sovereign's laws are reasonable; it is not necessarily rational to obey them.

#### VI. DIVIDING THE GAINS OF COOPERATION AND RATIONAL CHOICE

Before turning to the law, I must return to Coleman's account of rationality, and focus now on his introduction of "the principle of bargaining or division rationality."<sup>24</sup> Consider a situation in which the outcome of unconstrained interaction—the status quo—is severely sub-optimal, so that each agent may expect substantial gains from cooperation. Suppose further that all outcomes Pareto-superior to the status quo are equally enforceable. Then, given ideal information and transaction costs, individually rational agents may be expected to agree to cooperate so as to obtain an outcome on the contract curve—that is, an outcome that is both Pareto-optimal and Pareto-superior to the status quo. No assumption of collective rationality is needed to reach this conclusion; assuming individual rationality is sufficient.

As Coleman notes, however, "[e]ach rational individual has a preference for a particular division of the gains. Rational cooperation can succeed only when differences among those preferences are resolved and a particular outcome along the contract curve is chosen."<sup>25</sup> Does the need to choose among points on the contract curve involve a further dimension of rationality, one not already included in the supposition that a rational outcome must be no less supported by an agent's reasons for acting than any alternative she might bring about? Recent work in

23. 5 THOMAS HOBBS, ENGLISH WORKS 194 (Sir William Molesworth ed., 1841).

24. COLEMAN, *supra* note 3, at 15.

25. *Id.*

game theory suggests that no further dimension of rationality is needed.<sup>26</sup>

John F. Nash, the parent of modern bargaining theory, has offered two quite different approaches to the subject.<sup>27</sup> One is axiomatic: Think up some conditions that the bargaining outcome should satisfy, put them together, and see what conclusions one can draw. Nash presents a set of axioms that yield a unique solution to bargaining problems. One of them is simply a strong version of Coleman's condition of individual rationality on bargaining outcomes: The bargaining outcome must afford each person a payoff strictly greater than the status quo.<sup>28</sup> Given that each person can enforce the status quo by refusing to agree, it seems evident that she has no reason to agree unless she gains in relation to the status quo. This requirement is thus unproblematic in terms of the general view of rationality I am assuming.

A second axiom requires the outcome to be independent of the particular way in which payoffs are calibrated. Information about the agent's evaluation of possible outcomes determines the measure used to express her evaluation. The bargaining outcome should thus be the same, regardless of the possible measures selected. Rejecting this axiom would in effect change the assumed informational base of the bargaining problem.

The third axiom has proved most controversial. Labelled the "independence of irrelevant alternatives," it requires that the bargaining solution remain fixed under any restriction of the contract curve that includes the original solution.<sup>29</sup> In *Morals by Agreement* I reject this axiom,<sup>30</sup> as does Coleman. The axiom seems on its face to have nothing to do with rationality. The problem is that any alternative to the axiom also seems to have little to do with rationality, insofar as rationality is understood

26. Because I can claim no expertise on this matter, I shall simply try to explain my understanding of the work of Ariel Rubinstein and Ken Binmore. See Ken Binmore, *Bargaining and Morality: Social Contract II*, in RATIONALITY, JUSTICE AND CONTRACT: THEMES FROM 'MORALS BY AGREEMENT' (David Gauthier & Robert Sugden eds., forthcoming 1992). I draw heavily on this paper, which contains all quotations from Binmore *infra*.

27. See John Nash, *The Bargaining Problem*, 18 *ECONOMETRICA* 155 (1950); *Non-cooperative Games*, 54 *ANNALS OF MATHEMATICS* 286 (1951); and *Two-person Cooperative Games*, 21 *ECONOMETRICA* 128 (1953).

28. I note that Binmore says that "[s]trong individual rationality is an unfortunate way of expressing [this] very mild requirement . . . ." Binmore, *supra* note 26, at —.

29. See Nash, *The Bargaining Problem*, *supra* note 27.

30. GAUTHIER, *MORALS BY AGREEMENT*, *supra* note 20, at 113-56.

in terms of the support given an outcome by an agent's reasons for acting. So perhaps this third axiom, or whatever condition is put in its place, expresses the further distinct component of rationality that Coleman introduces; perhaps different proposed axioms express different theories of division rationality.

Nash's second approach involves, as Binmore says, "the analysis of a specific model of a negotiation process in which both bargainers are restricted to making simultaneous take-it-or-leave-it demands."<sup>31</sup> Here one treats the bargainers as acting on the basis of their evaluations of possible outcomes, and so as straightforwardly individually rational (given, as game theory orthodoxy posits, that all reasons for acting are directly outcome-based). This approach is enough (with a bit of mathematical hand-waving) to yield a determinate solution and approximates Nash's axiomatic solution. Thus, no further notion of rationality is necessary to resolve the bargaining problem.

Still, one might object that Nash's specific negotiation model is entirely ad hoc. Why suppose that rational bargaining must conform to its demands? Moreover, what about the hand-waving and approximating over which I have glossed? Ariel Rubinstein introduced a negotiation model that addresses almost all of these objections by allowing the bargainers to make alternate proposals to each other until one is accepted.<sup>32</sup> Assume that the bargainers value time—that is, the value of any outcome varies inversely with the time it takes to agree. Let the time between proposals approach zero and a weighted Nash-solution drops out (the weights representing the different discount rates of the bargainers with respect to time).

The punch line, as Binmore puts it, is that this "limiting case of Rubinstein's game minimizes on the fictions that need to be promulgated to explain the behavior of those playing the bargaining game" and so provides "a minimalist defense of the Nash bargaining solution."<sup>33</sup> What is important for our purposes is that the argument proceeds with no need for a condition of "division rationality."<sup>34</sup>

The product of the Rubinstein model need not be the bar-

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31. Binmore, *supra* note 26, at —.

32. See Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 *ECONOMETRICA* 97 (1982).

33. Binmore, *supra* note 26, at —.

34. *Id.* at —.

gaining solution that I have long advocated—minimax relative concession. Nor must it conform to the demands of what Coleman calls “resistance theory.”<sup>35</sup> As Binmore notes, “interpretations of the Nash axioms in terms of the psychology of the players, or in terms of variants of Zeuthen’s obsolete principle, are not to be admitted.”<sup>36</sup> Rubinstein’s model defends the Nash solution.<sup>37</sup> Coleman and I, who admit to being primarily consumers rather than creators of bargaining theory, may not welcome the message, but given the orthodox assumption that the reasons relevant to the bargainers’ decisions are to be taken directly from their evaluation of outcomes, Rubinstein’s model is compelling. “And the multitude of all . . . that fight against Ariel . . . shall be as a dream of a night vision.”<sup>38</sup>

Rubinstein’s bargaining model reinforces my insistence on the normative priority of non-cooperative interaction. The model shows how rational agents reach cooperation from a non-cooperative starting point. To be sure, the account assumes that whatever cooperative solution it yields can be implemented; it therefore does not directly address the compliance problem. But it yields a rather different picture than that suggested by Coleman. Consider the beginning of his recapitulation in chapter 6, section 4:

(1) Rational contractors seek to create mutually advantageous, enforceable agreements. (2) Doing so requires that they satisfy three independent rationality conditions: joint, concession and individual rationality. (3) These rationality conditions correspond to three phases in the contract process and enable the parties to solve three problems of rational choice: (a) the pre-phase cooperation problem (joint rationality); (b) the negotiation-phase division problem (concession rationality); (c) the post-phase compliance problem (individual rationality).<sup>39</sup>

According to my view there is only one rationality condition to be satisfied: Each person, at each stage in the contract process, must see her choice as best supported by her reasons for acting. Before negotiation, each agent must of course find it

35. COLEMAN, *supra* note 3, at 128.

36. Binmore, *supra* note 26, at —.

37. The Nash solution coincides with the outcome of minimax relative concession—and, I expect, with the outcome of resistance theory—over a wide range of bargaining situations. I shall not try to explore the relationships here, however.

38. *Isaiah* 29:7.

39. COLEMAN, *supra* note 3, at 147-48.

worthwhile to incur transaction costs in the hope of reaching agreement; to this extent there is a "pre-phase cooperation problem." To resolve this problem, each agent must form some expectation about the willingness of others to contract with her, but this does not require her to invoke any independent standard of joint rationality. The negotiation phase, which in the Rubinstein model depends strictly on behavior that is individually rational, does indeed yield a Pareto-optimal outcome. In her decisions about offers and acceptances, however, each bargainer considers only her own payoffs. Finally, the post-phase compliance problem, however it is resolved institutionally, must be resolved conceptually in terms of individually rational behavior.<sup>40</sup>

## VII. CONTRACTARIANISM AND CONTRACT LAW

I do not wish to make conceptual issues paramount in this paper. Rather, I want to look at one of the institutional questions at the core of Coleman's inquiry. May a contractarian reasonably hope to recruit tort law to his cause, understanding it in terms of norms that would enable him to endorse it?

Coleman defends "a market theory of contracts": "[C]ontract law is plausibly seen as concerned to facilitate market exchange by providing . . . rational safeguards against contract failure."<sup>41</sup> These safeguards, in Coleman's view, relate primarily to epistemic rather than motivational problems, so that rational safeguards reduce uncertainty. His position is somewhat misleading, however, because he acknowledges that "uncertainty about compliance is greatest, and consequently, crafting safeguards against defection is most pressing."<sup>42</sup> Surely uncertainty about compliance arises because of the likelihood that compliance will be insufficiently motivated—that reasons for agreeing to a bargaining outcome may fail to extend to reasons for actually doing one's part in effecting that outcome.

From a contractarian point of view, the role of contract law is to enable individuals to replicate at the micro-level the macro-

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40. Note the distinction between the negotiation problem, which determines what is (what I have termed) reasonable, and the compliance problem, which settles what is rational.

41. COLEMAN, *supra* note 3, at 113-14.

42. *Id.* at 148.

level structure of their interpersonal relationships. In a *contractarian* society, social institutions and practices are justified by their role in enabling individuals to interact in ways that afford optimal mutual benefit. In a *contractual* society, particular social institutions enable individuals to achieve optimal mutual benefit by facilitating and insuring their contractual relationships. Thus, contract law is primarily facilitative. We should note, however, that the unrestricted reign of contract in micro-level interpersonal relationships may not yield the macro-level contractual objective of optimal mutual benefit. Although primarily facilitative, contract law also serves to delimit the scope of contract in social life. It is sometimes suggested that only some paternalistic, moral perspective that is alien to contractarian thought could justify any restriction on opportunities to contract. To the contrary, individuals may well want to limit their freedom to contract—they may not want the opportunity to accept indentured servitude or to commodify bodily organs. Persons may reasonably expect to be worse off if some areas of human life are fully open to contract, even if all particular contractual relationships are rationally undertaken. Thus, the contractarian need not embrace the view that the role of contract law is merely to facilitate markets.

Although individuals may want to limit their freedom to contract, or to foreclose the possibility of unwelcome opportunities, we may reasonably assume such a voluntary limitation to be a rare exception. Contract itself provides a device that speaks directly to rationality and to the associated values of autonomy, efficiency, and fairness. At this point in my discussion, the bearing of contract on all but the last of these values should be evident. One might still question the fairness of contract, especially because, as I have insisted, contract should be understood strictly in terms of individual rationality. That is, a contractual outcome represents the voluntary agreement of presumptively rational agents.<sup>43</sup> We may identify the fairness of an agreement with its rational acceptability to all parties. To be sure, this treatment leaves open questions of the *background* fairness of the circumstances in which agents enter into an agreement. This problem, however, may be accommodated by

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43. One of the ways in which contract law delimits the scope of contract is, of course, by excluding agents whose rationality may not be presumed from entering into or binding themselves by contractual relationships.

constraining the circumstances in which ostensible agreements constitute enforceable contracts, where these constraints are justified in terms of the underlying contractarian framework. The framework—the social contract—itself avoids problems of background fairness insofar as it is formulated as a hypothetical *ex ante* agreement among “agents of construction” (to borrow Rawls’s phrase<sup>44</sup>) conceived as fully and equally rational representatives of the actual members of society, who seek to establish terms to govern all aspects of their interaction.

Assuming that concerns of background fairness are met, the attractiveness of contract is clear. Contract enables each individual to advance her own concerns in a maximally effective way, subject to the constraint that she may not and cannot require others to interact with her in ways that detract from their pursuit of their own concerns. That is, the right to contract frees agents to better themselves through interaction with their fellows, but only in ways that also better their fellows. Rawls’s conception of “a cooperative venture for mutual advantage”<sup>45</sup> captures the moral ideal of a contractarian society, and contract law translates that ideal into practice.

### VIII. CONTRACTARIANISM AND TORT LAW

If the objective of contract law is to facilitate mutual benefit, the objective of tort law is to regulate the imposition of unilateral cost. Just as rational persons seek institutional means to enter into productive agreements with one another, so too they seek institutional means to control impositions on one another that are unproductive for the recipient. One might suppose that the appropriate goal would be to prevent unilateral impositions rather than to regulate them. Rational persons, however, viewing their interactions *ex ante*, desire not to prevent themselves from all impositions of cost on their fellows, nor even to agree to compensate for all such impositions. Sometimes rational persons desire that the costs be left to lie where they have fallen.

Agreeing that “contract law is designed to facilitate efficient exchange among agents who are in a position to negotiate with one another,” Coleman suggests that a natural but inadequate

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44. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 520 (1980).

45. RAWLS, *supra* note 2, at 4.

interpretation of tort law would view it as “designed to facilitate efficient ‘forced transfer’ among individuals who are disabled by high transaction costs from negotiating with one another.”<sup>46</sup> According to this view, “[t]he difference between contract and torts is the difference between moving resources to their most highly valid uses voluntarily, by *ex ante* agreement, and moving resources to more highly valued uses involuntarily, by forced transfer.”<sup>47</sup> Compensation replaces consent. The first rejoinder to this view, which both Coleman and I reject, is one that Coleman does not develop: Compensation does not replace consent. Someone who is the victim of a forced transfer is compensated by being restored to her former, pre-transfer position. Robert Nozick distinguishes this as full compensation, and contrasts it with the fruits of consent—market compensation—in which the parties share the benefits of the transfer.<sup>48</sup>

If a theory of tort law that “emphasizes its role in substituting for efficient contractual exchange” is, however, for reasons that Coleman develops at length, inadequate, is a theory of tort law as corrective justice, a theory “that emphasizes its role in rectifying for wrong done,” superior?<sup>49</sup> I think not. The idea of “wrong done” identifies too limited an area and does not suggest how that area may be conceptually linked to those parts of tort law that it excludes, such that we may gain a unified understanding of the whole. Coleman himself seems to foreclose the possibility of a unified understanding: “[N]ot every claim to repair enforceable in tort law is one that is, could, or should be grounded in corrective justice. This has been a constant theme of this argument.”<sup>50</sup> Is there a way of understanding tort law that restores its conceptual and normative unity and that does justice to Coleman’s admission?

An agent frequently imposes costs on others without their consent and without affording them compensating benefits. Even more frequently, she *risks* imposing such costs on others. No normative considerations beyond those that each agent incorporates into her evaluation of outcomes are necessary to understand what the imposition of costs means in simple cases. I impose costs on you if I leave you in an outcome that you eval-

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46. COLEMAN, *supra* note 3, at 80.

47. *Id.* at 89.

48. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 57, 65 (1974).

49. COLEMAN, *supra* note 3, at 306.

50. *Id.* at 649.

uate less favorably than the outcome you would have expected in the absence of interaction between us. The outcome itself is not decisive. I impose costs on you if I push you into the river; I do not impose costs on you if, seeing you in the river, I leave you there. The outcome is the same—you end up in the river—but in the first case it is contrasted with your not being in the river in my absence, whereas in the second case my presence or absence has no effect.

To be sure, normative considerations that are already present in the situation may affect the determination of whether costs are imposed. Suppose you are in the river and I, the lifeguard, leave you there. This is a normatively structured situation; as a lifeguard, I have the responsibility to rescue you. My failure to do so, given that responsibility, imposes a cost on you.

When a cost is imposed, the first question to ask is whether the imposition is reasonable. This inquiry does not ask whether the imposition is rational; recall my distinction between the two. The contractarian settles the question of reasonableness by considering whether rational persons would have agreed *ex ante* to the imposition of such a cost. I shall begin by considering that well-known case, *Rylands v. Fletcher*,<sup>51</sup> which Coleman also discusses.<sup>52</sup> The Rylands, the defendants in the original suit, erected a reservoir for a textile mill. The water escaped from the reservoir, flooding Fletcher's adjacent coal mine. Fletcher then brought an action against the Rylands and was at first unsuccessful, but the Court of the Exchequer Chamber reversed the lower court's decision and the House of Lords affirmed. Lord Cairns, writing for the House of Lords, reasoned that because the Rylands' activity had involved a "non-natural" use of the land, "that which the Defendants were doing they were doing at their own peril."<sup>53</sup> The idea of a "non-natural" use of the land indicates that rational persons would not have agreed to the risks inherent in such a use. This absence of agreement reflects the particular characteristics of the area, in which mining was of more economic significance than tex-

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51. L.R. 3 H.L. 330 (1868).

52. For the discussion of this and subsequent tort cases I am indebted to Jamie Titus's unpublished study, *The Myth of Reciprocity*, itself a critical discussion of George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

53. Fletcher, *supra* note 52, at 545.

tiles.<sup>54</sup> Such an understanding is more plausible than Coleman's view that "building reservoirs above the ground in England constitutes a nonnatural use of the land" because "[r]ainfall . . . is adequate for all reasonable uses."<sup>55</sup> The Rylands's use was nonconforming in the area in which the reservoir was built; we need not suppose that reservoir construction anywhere in England involves an inherently faulty use of land. The cost of the escape of water from the reservoir imposed on Fletcher was unreasonable because the use was nonconforming.

Note that the issue here is not whether the Rylands were negligent or responsible for negligent behavior. If the Rylands erected the reservoir at their own risk, then however well constructed it might have been, they would have been liable for costs incurred had water escaped from it. Nor is the issue whether the Rylands's behavior was inefficient. In building at their own peril, the Rylands in effect were required to internalize the costs of their activity; had they recognized this, they might or might not have deemed it worthwhile to proceed, either assuming the risk or shifting it by insuring against it. No doubt it would be impossible to obtain an *ex ante* rational agreement to the imposition of risks negligently or inefficiently. The absence of negligence or inefficiency, however, does not ensure that imposition of the risk will be judged acceptable, given the different ways in which persons consider themselves related to it. In a mining community, the introduction of activities risky to mining will not be acceptable.

*Rylands v. Fletcher* might have been decided differently had textiles rather than mining been the prevailing activity in the community. In such a case, the Rylands's reservoir would have been part of a "natural use" of the land, and Fletcher's coal mine would have been an intrusion. In a community dominated by textile mills, it would not be rational for persons to agree to bear the costs were someone to dig a coal mine and then have it flooded by water escaping from one of their many reservoirs. Here, barring negligence on the part of the reservoir owners, Fletcher would have been acting at his own peril.<sup>56</sup> We might

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54. Fletcher reasons in a somewhat similar way, but in support of the claim that the rationale for liability was "nonreciprocal risk-taking." *Id.* at 545, 547. This claim seems quite implausible. See *supra* note 9.

55. COLEMAN, *supra* note 3, at 448.

56. What would Fletcher (the legal theorist, not the mine owner) say about this case?

seek to understand *Rylands v. Fletcher* as an exercise in corrective justice, compensating for a wrongful loss, even though negligence was not at issue. Thus it may fit Coleman's theoretical framework. But consider another classic case, *Vincent v. Lake Erie Transp. Co.*<sup>57</sup> The plaintiff was the owner of a dock to which the defendant's boat was moored. The defendant refused to remove its boat because of an impending storm, although its right to mooring had expired and the plaintiff had refused to renew the right. As a result, the boat weathered the storm but caused \$500 in damage to the dock. Vincent sued, and the court held that the defendant's behavior was "justified and reasonable" but ruled that it "prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property" and awarded damages.<sup>58</sup> Coleman represents this decision as corrective justice, the plaintiff having suffered wrongful damages. It seems more natural, however, to view the decision simply as determining a reasonable allocation of costs in the context of fully justifiable behavior.

This case is instructive in several ways. It illustrates the relevance of tort law to contexts in which the failure to contract does not reflect high transaction costs. It shows that courts need not seek to simulate *ex post* what the parties would have agreed to *ex ante*, for although Vincent was awarded damages, and so full compensation, Lake Erie retained the full net benefit of keeping its ship moored to the wharf. In judging Lake Erie's conduct prudent and reasonable, the court in effect ruled that Lake Erie was entitled to keep its ship moored to the wharf without contracting to do so and thus without paying market compensation for the mooring. The matter was removed from the realm of contract.

On the other hand, the court's action shows that liability does not depend on unreasonable behavior. Lake Erie behaved reasonably, and the court did not suggest that compensating Vincent was a necessary condition of its reasonableness. Never-

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He discusses a reservoir built in textile country, but the coal mine appears to vanish, so that he considers the reciprocal risk of flooding that adjacent reservoir owners might face. Fletcher, *supra* note 52, at 546. But let us bring back the mine; then the legal theorist's paradigm would surely require him to treat the Rylands's imposition of risk on the miner as equally non-reciprocal, whether mining or textiles was predominant in the community, and so he would hold the Rylands liable. It seems to me that in textile country, Fletcher's theory, like Fletcher's mine, is in danger of subsiding.

57. 124 N.W. 221 (Minn. 1910).

58. *Id.* at 222.

theless Vincent was owed compensation: It would have been unreasonable for Lake Erie to have reaped the gross benefit of its action, rather than internalizing all costs and so gaining only the net benefit. From the contractarian perspective, the court's ruling reflects the idea that rational persons would agree *ex ante* to the imposition of costs, even on an unwilling party, to avoid a significant peril, but that the party benefitting from the avoidance of the peril should internalize such costs. Lake Erie's liability does not then reflect the workings of corrective justice, but rather the principle that in benefitting from interaction no agent should worsen the situation of another. This tenet is one of the determining principles of contractarian reasonableness.

A third case, *Smith v. Lampe*,<sup>59</sup> provides further insight. The defendant noticed a tugboat heading toward shore in dense fog and honked his horn as warning. The captain of the boat, mistaking Lampe's honking for a navigational signal, steered towards the sound and ran the boat aground. Here, the appellate court did not find the defendant liable. In honking his horn, Lampe acted in ignorance, but not in blameworthy ignorance, because the costs of acquainting himself with navigational signalling would have outweighed any reasonable expectation of benefit. He intended his action to warn the tugboat. Nonetheless, the outcome was unfortunate. The benefits that may be expected to accrue from good-faith endeavors of assistance in situations of the type in which Lampe acted make it mutually desirable that such endeavors be encouraged. Because those who offer such assistance are not seeking personal benefit, to expect them to accept responsibility for costs that they could not reasonably have foreseen would discourage their actions. From a contractarian perspective, letting costs lie where they fall—which conforms to the court's decision—is reasonable.

Note further that even if Lampe had thought that his honking might mislead the tugboat captain, and so recognized that it was not without risk, he would presumably incur no liability in honking so long as he reasonably believed that the chances of equivalent harm befalling the tugboat would be greater if he did not honk his horn.

It might be argued that letting costs lie where they fall violates the principle that no agent should worsen the situation of

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59. 64 F.2d. 201 (6th Cir. 1933).

another. This is not the contractarian principle to which I have appealed, however. The principle on which I rely forbids an agent from bettering his situation through interaction that worsens the situation of another. In effect, it forbids an agent from adding to or creating gains by displacing costs.

None of the cases that I have discussed involves negligence on the part of the defendant. In all three, the defendant might have foreseen the risk of harm to the plaintiff, and indeed in *Vincent v. Lake Erie* the defendant might have expected the risk to materialize. In *Rylands v. Fletcher* the defendant acted at his own peril, while in *Vincent v. Lake Erie* the defendant acted reasonably and prudently; but in both cases the defendant incurred liability when the risks materialized as costs to the plaintiff. In *Smith v. Lampe*, the defendant also acted reasonably, but unlike Vincent, Lampe did not incur liability when the risks materialized as costs. These summary remarks might indicate that the cases do not reveal a coherent or unified pattern of adjudication. Yet abstracting such a pattern in my analysis has posed no difficulty.

This analysis might be pursued more systematically by considering the relationships among: (1) imposing costs unilaterally without compensation; (2) imposing costs unilaterally with compensation; and (3) refraining from imposing costs unilaterally.<sup>60</sup> If in a particular situation (1) is preferable to (2) and (3), then the situation is not actionable. Option (2) is preferable to (1) and (1) to (3) in a case of necessity, such as *Vincent v. Lake Erie*, which is actionable but without imputing fault. If (2) is preferable to (3) and (3) to (1), then we have what Kenneth Simons refers to as "legitimate pricing."<sup>61</sup> If option (3) is preferable to (1) and (1) to (2) in a case such as *Smith v. Lampe*, the action fails because the imposition of cost was unintended and contrary to reasonable expectation. Option (3) is preferable to (2) and (2) to (1) in typical cases of negligence, which are actionable and impute fault to the defendant. Different theories of legal reasoning would lead to different orderings of preferences and classifications of particular situations in which unilateral costs are imposed. A contractarian might be more sensitive

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60. I was led to add this paragraph to my original paper after reading and discussing Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 HARV. J.L. & PUB. POL'Y 849 (1992), in particular sec. IV.A in which he reformulates Coleman's "justification matrix."

61. *Id.* at 856-64.

to the distributive consequences of choosing between (1) and (2) than a narrowly economic or straightforwardly utilitarian theorist would be.

#### IX. CONCLUSION

A contractarian theory answers questions about liability for costs incurred—whether reasonably or unreasonably or whether through negligent activity or prudent activity—by appealing to *ex ante* rational agreement. If some parts of tort law simulate the effects of contract in situations in which high transaction costs prevent actual contract, then this approach does not constitute evidence for a market-simulation theory of tort law. Rather, it supports a contractarian view, by claiming that rational persons would agree that in certain contexts in which actual agreement among individuals is precluded, resources should be moved to their most highly valued uses without worsening any individual's situation in consequence. The argument that tort law simulates the effects of contract may be misleading, because this situation typically involves full rather than market compensation. The constraint that no one's situation be worsened is quite different from the contractual requirement that each person see his situation acceptably bettered.

Nonetheless, a contractarian theorist must recognize that not all actual judgments of liability can be rationalized in contractarian terms. In recent years, many railroad fan groups have encountered problems in organizing excursions because of the insurance requirements of the railroads over which their excursions would run—requirements that reflect current trends in treating corporations as having “deep pocket” liability for individual injuries. Because railroad fan excursions are strictly voluntary activities, and because holding the operators liable for injuries however caused is a deterrent to such excursions, it seems reasonable that those who wish to participate in such excursions should be deemed willing to waive liability for injuries incurred except through the negligence of the operators. This area of concern may seem trivial, but it reflects a more general problem in the direction of recent legal decisions, assessed against a contractarian standard. Perhaps the contractarian theorist is increasingly called upon to become a legal reformer!

If my evaluation is correct, tort law concerns non-contract-

tual, non-agreed-upon interaction. Implicit in my argument is the view that a theory of tort law should and indeed must reflect a more general normative theory of interaction. Coleman, I think, wants to hold that one of the concerns central to much of tort law is the repair of wrongful loss, where the idea of wrongful loss is itself left open for definition by substantive accounts of wrong and wrongfulness. I, on the contrary, would propose to build a substantive account of such matters as “wrong” into the structure of a theory of tort law, because I see such an account as present in the underlying normative theory of interaction. It is neither useful nor possible to develop a more abstract theory of interaction that leaves open fundamental substantive questions, and to use that theory in the construction of more particular normative theories. Therefore, I start from a contractarian perspective and apply it to particular domains and issues.

Such a perspective will be descriptively inadequate to enable us to understand legal practices in societies whose values and norms cannot usefully be understood in contractarian terms. But a theory of tort, or of a system corresponding to tort, in a society whose legal practices rest, say, in a supposedly literal reading of some alleged revelation, need have nothing to say to us, insofar as we are concerned with understanding and justifying our own legal practices. I return then to my initial emphasis on the endeavor to answer the question, “How may we carry on this practice in a way that is faithful to norms that are both inherent in it and philosophically acceptable to us?” If this is what the normative legal theorist asks, and if there is an answer other than “We cannot,” that answer must be found in an account that appeals to values and norms that he and we can reflectively endorse—an account that in my view can only be contractarian.

Some persons reject a contractarian understanding because they mistakenly suppose that the macro-level framework must constrain the micro-analysis of interaction in such a way that the only legitimate forms of behavior must be either contractual or contract-simulating in contexts in which transaction costs prevent contract. Let me reiterate again that the social contract—the macro-level framework—should be understood as delimiting the sphere appropriate to contract and contractual simulation in particular interactions. Thus, as contractari-

ans we are not required or even urged to view tort law as concerned simply with moving resources to the uses that a market would most highly value. The social contract addresses distributive as well as allocative problems; each agent has an interest in the distribution of social goods that is not strictly derived from an interest in allocative efficiency.

In discussing particular cases I referred to George Fletcher's paper "Fairness and Utility in Tort Theory."<sup>62</sup> Fletcher contrasts two "paradigms of liability": reciprocity and reasonableness. But reasonableness, for Fletcher, is strictly utilitarian. "The test for justifying risks became a straightforward utilitarian comparison of the benefits and costs of the defendant's risk-creating activity."<sup>63</sup> Fletcher rightly inveighs against this approach, insisting that "an individual . . . cannot fairly be expected to suffer . . . deprivations in the name of a utilitarian calculus,"<sup>64</sup> but fails to realize that the alternative to utilitarianism in the law is not to scrap the paradigm of reasonableness, but to understand this paradigm correctly in contractarian terms. The reasonable agreement of rational persons will not express a simple social-utility-maximizing or wealth-maximizing view of legitimate social interaction.

Somewhat similarly, Coleman sees rational contractarianism as focused on the market paradigm and thus part of the economic understanding of law intended to promote and simulate market interaction. This analysis is not entirely false, just as it is not entirely false that the reasonable agreement of rational persons will not ignore wealth-maximizing or utilitarian considerations. But because the deeper contractarian concern is with social arrangements that are reasonable from the (*ex ante*) perspective of each person, the market paradigm—and utilitarianism—play only a secondary, derivative role in contractarian arguments. Neither Fletcher's emphasis on reciprocity and its absence, nor Coleman's emphasis on wrongful loss and its rectification, is needed to distance ourselves from narrowly economic and utilitarian accounts in developing normative legal theory within a contractarian framework.

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62. Fletcher, *supra* note 52.

63. *Id.* at 563.

64. *Id.* at 568.

