ON THE DOMAIN OF MARKET RHETORIC

MARGARET JANE RADIN*

Jules Coleman's *Risks and Wrongs*[1] is a capacious book. Its breadth makes it easy for me to do what comes naturally to commentators—focus on my own interests. This essay will record some reflections on commodification and pragmatism that were prompted by Coleman's work.

What Coleman calls the market paradigm corresponds to what I call market rhetoric, which is the intellectual aspect of what I call universal commodification. Market rhetoric is the discourse of commodification. In market rhetoric we conceive of all human interactions as market trades between profit-maximizing individuals, and we conceive of all things persons value as fungible objects (commodities). My reflections here are directed at the issue of how to delineate the theoretical domain in which such market conceptions are appropriate.

In Part I of this essay, I explore what is left of the market paradigm—market rhetoric—at the end of Coleman's intellectual odyssey with it. Along the way, I note the pragmatist implications of Coleman's theory of corrective justice. In Part II, I consider commodification and the problem of compensation, in particular the problem of the domain of compensable harms. This problem causes trouble for Coleman in two areas. One is in his discussion of the scope of rights and the associated analysis of the role of property rules and liability rules. The other is in his discussion of "nonpecuniary" harms.

I.

What is the market paradigm, in Coleman's view? In his Introduction, Coleman makes two very similar[2] statements defining it. They are:

---

* Professor of Law, Stanford Law School.

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

2. In general, there is a great deal of repetition in this book. It is no doubt helpful for the reader of a long book. Still, when the wording changes slightly in each version, the argument develops the same problem that plagues judicial opinions that state their conclusions in five or six versions. Which one is "the" holding? For example, in the statements about the market paradigm I quote, does it matter that one of them refers to political, legal, and moral *institutions* and one of them to political, legal, and moral *norms*? In this essay I will simply choose the formulation that suits my purposes best.

> (1) In the market paradigm, legal, political and moral institutions are collective schemes of self-constraint and rational cooperation. They are to be understood as rational responses to the generic problem of market failure, and justified to the extent that they replicate the outcomes of competitive markets. Cooperation is a response to failed competition, inexplicable otherwise, and justified, moreover, only to the extent it mimics aspects of competition.[3]
> (2) In the market paradigm, law, politics and morality are understood as solutions to the generic problem of market failure, and are justified to the extent that they replicate the outcomes of perfect competition. When competition fails, collective or cooperative action is necessary. Political, legal and moral norms are collective goods representing schemes of cooperation, rational if and when markets fail. Cooperation cannot be understood other than as a response to failed competition.[4]

The two basic postulates of the market paradigm are "the principle of rationality" and "its ideal institutional embodiment," the perfectly competitive market.[5] "Rationality" for the individual means utility maximization,[6] or acting on the basis of one's self-interest,[7] and "rationality" for society means Pareto optimality.[8]

In my view, the market paradigm corresponds to universal commodification in rhetoric because it conceives of the person as a profit-maximizer, conceives of all realms of human activity as competitive markets, and conceives of all deviations from competitive markets as attributable to market failure.[9] The market paradigm is a form of foundationalism because in this paradigm market concepts *ground* thought about human activity and experience; explanations and prescriptions are to be *derived* from them. The market paradigm is general (universal) because it is supposed to ground *all* theorizing about law, politics, and morality. It covers the intellectual domain.

---

3. COLEMAN, *supra* note 1, at Introduction [v].
4. *Id.* at Introduction [vii].
5. *See id.* at 2.
6. *See id.* at 3.
7. *See id.* at Introduction [iv] ("To be rational is to act on the basis of one's self-interest.").
8. *See id.* at 4.
9. For elaboration of the concepts of commodification and universal commodification, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret Jane Radin, *Justice and the Market Domain*, *in* MARKETS AND JUSTICE: NOMOS XXXI (John W. Chapman & J. Roland Pennock eds., 1989); Margaret Jane Radin, *Market Rhetoric and Free Expression* (unpublished manuscript).

Coleman's odyssey with the market paradigm leads him to a non-reductionist position. According to Coleman, law, politics, and morality cannot be reduced to market rhetoric. Thus market rhetoric fails as a general foundational theory, be it for law, politics, or morality. But it seems that Coleman is still committed, albeit ambivalently, to the market paradigm as grounding one or more smaller theoretical domains, and that ambivalent commitment makes *Risks and Wrongs* a deeply ambivalent book. As I shall try to explain shortly, I believe Coleman's theoretical odyssey is not yet over.

Perhaps surprisingly, Coleman's main argument against accepting the market paradigm on its own foundational terms—his argument against universal commodification—is deconstructive. In the market paradigm, competition is basic. That is, in the dichotomy between competition and cooperation, the market paradigm privileges competition. In the market paradigm, as Coleman says, cooperation derives from competition and can only be understood as a response to failed competition. But Coleman shows that the hierarchy can be flipped.[10] Cooperation can be made the dominant concept. Competition is a derivative of cooperation, and can only be understood as depending upon cooperation.[11] This invertability destroys the market paradigm in its claim to be foundational, because the market paradigm's claim to foundational status depends upon

10. *See* COLEMAN, *supra* note 1, at 57.

11. "So we must assume that in order for competition to exist, at least some problems of cooperation—i.e., the establishment and maintenance of an enforceable property rights scheme—have been successfully resolved." *Id.* This deconstruction is a nifty move, one that has also been made by Professor Michelman. *See* Frank I. Michelman, *Ethics, Economics, and the Law of Property, in* ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV 30-31 (John W. Chapman & Roland Pennock eds., 1982).

Although Coleman does not declare himself a poststructuralist, in *Risks and Wrongs* he shows an affinity for deconstructive arguments. Aside from the crucial deconstruction of the competition/cooperation dichotomy, discussed in the text, he also deconstructs the torts/contracts dichotomy and the strict liability/fault liability dichotomy. *See generally* COLEMAN, *supra* note 1, at 291-99, 324, 328-33. Coleman relies on other dichotomies without any sign that he knows deconstruction is always possible. Because I am a pragmatist, and thus an impure poststructuralist at best, I think the choice of which dichotomies to accept and which to deconstruct is pragmatic. *See generally* Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987). Once we know that dichotomies are all subject to this move, some argument is needed for the pragmatic appropriateness, in context, of the ones on which we choose to rely. In this regard, I regret that Coleman takes for granted—rather than either defends or deconstructs—the public/private (or the politics/contracts) dichotomy.

the claim that competition is foundational.[12]

After this deconstruction, what, if anything, remains of the market paradigm? Coleman claims, I believe, that an "incremental market paradigm" is left.[13] In an incremental market paradigm, market rhetoric is used only in those realms where it seems plausible (or "not implausible").[14] Coleman claims, then, that in those realms where it seems plausible, we can still theoretically privilege perfect competition, we can still explain or justify cooperation or collective action only in terms of market failure, and we can still conceive of the individual as a self-interested utility-maximizer.[15]

In other words, according to Coleman, foundational market rhetoric is appropriate in one or more sub-domains, in particular the realm of exchange (contract law). His commitment to its appropriateness in the exchange domain is the implied underpinning that must enable his "rational" theory of contracts, because that theory apparently depends upon a foundation in market rhetoric and thus upon the privileging of competition. The question on which I focus is what method Coleman would use for singling out which sub-domains are appropriate (plausible) for treating market rhetoric as foundational.

Before addressing this question I should note that Coleman's strategy of creating sub-domains is theoretically vulnerable to the same kind of deconstructive critique that Coleman uses against the market paradigm. No analytical principle will contain the invertability of the competition/cooperation hierarchy at the general level at which Coleman so neatly deploys it.

---

12. Coleman writes:

> There is no basis for the proposition that rational cooperation is a response to market failure. This feature of the market paradigm, in many ways, the essence of it, has to be abandoned. Once we abandon that premise in the argument, it cannot be the case that the best interpretation of our legal and moral practices sees them in terms of the role they play in solving problems of market failure, nor can it be the case that the only justification available for such institutions is the role they play in rectifying market inefficiencies.

COLEMAN, *supra* note 1, at 58.

13. *Id.* at 91.

14. Coleman writes:

> It is ludicrous to believe that all of the law in liberal democracies is designed either to make markets possible or to rectify for their shortcomings. . . . On the other hand, it is not implausible to suppose that contract law is designed primarily to facilitate market exchange by providing *ex ante* safeguards against contract or market failure.

Id. at 69.

15. I believe Coleman claims this because he still is using the language of "grounding." But I believe his claim is ambivalent for reasons that will appear later in this essay.

Rather, the hierarchy's invertability permeates the field. Every sub-domain that presupposes a foundation in competition to enable cooperation must also presuppose a foundation in cooperation to enable competition. The "private" world of free competition leading to contract is permeated with the "public" world of cooperation leading to the appropriate policing of the contracting process.[16] As Coleman argues, markets and contracts are most needed in situations where they are hardest to achieve because the background cooperation necessary to support them is least available. In other words, background cooperation is necessary.

In its recognition of the relevance of social practices and other empirical circumstances, this last argument turns toward pragmatism. Coleman moves more explicitly toward pragmatism when he rests his theory on a mixture of "calculus and contexts."[17] Coleman argues pragmatically that court intervention to rearrange distributional outcomes is less needed when contracts are among business people who are repeat players,[18] in ongoing relationships with each other and comprising a reputational community. He implies that court intervention is more needed, and hence justifiable, when contracts are one-time deals between strangers, and not among business people. It is these "features of the context of contracting [that] may make the division problem [distribution of the gains from trade] more tractable than the mathematics suggests it ought to be."[19]

Of course, because Coleman has chosen to use the market paradigm for the field of contracts, he would put this in market rhetoric to say that court intervention is cost-effective, and hence efficient, and hence justifiable. So I come again to my main question: On what basis does Coleman choose market

16. Coleman criticizes scholars who claim that the "private" world of contracts is permeated with the "public" world of distributive fairness. *See* COLEMAN, *supra* note 1, at 158-59. He does this by assimilating "the division problem" (distribution of the gains from trade) to the "private" side of the dichotomy, arguing that the market paradigm can handle this problem entirely. Whatever the merits of this argument vis-à-vis those that Coleman criticizes, I think the exclusion of "distributive fairness" from the realm of contracting does not *analytically* get rid of the problem that cooperation may be as foundational as competition at lower than the ultimate level of generality. (It may be possible to get rid of this problem *pragmatically*, if treating competition as dominating a particular field turns out to be most useful in context.)

17. *See id.* at 239-41.

18. *See id.* at 240.

19. *Id.* at 242.

rhetoric as the best rhetoric with which to conceive of the subdomain of contracts? On what basis does he reject it for torts—except for products liability?[20]

It is striking that Coleman demurs to this question. He professes that he does not need a theory to distinguish market failure from non-market phenomena.[21] To say that is to say that he does not need a theory to tell which realms are appropriately commodified and which are not.[22] According to Coleman, contract is appropriately commodified and tort is not (except, ambivalently, for products liability).[23] So why is no theory needed to tell us: Why contracts, why not torts? After all, Coleman does show us that we *could* think of all of torts on the market model, as one big response to market failures. He could show

20. Although I will not dwell on the point, Coleman needs more argumentation before assimilating products liability to his model of contracts. He says that the case for treating products liability on the contract model is that "product liability law merely fills in the blanks in contracts between parties who are already in a contracting relationship with one another: producers and consumers." *Id.* at 556. The picture of contracts that supports Coleman's market rhetoric model supposes that transactions are among business people who are repeat players. Consumer purchases of products are not always, and perhaps not very frequently, contracts among these people. What justifies the assimilation?

Perhaps the pragmatic difference between producer-consumer contracts and the picture of contracts that supports Coleman's contract model is what prompts Coleman to say that in products liability "we may be driven to supplement through torts the 'contract' between the parties," although the second half of this sentence, to the effect that these tort-rule supplements should mimic the outcome of rational bargaining, undercuts its import. *Id.* at 556. (I would say that in all contracts we are similarly driven to supplement the contract between the parties through the tort-like rules of unconscionability, fraud, and duress.) Perhaps the less-than-ideal fit of products liability with the picture that supports Coleman's contracts model also accounts for his ambivalence on the issue of "nonpecuniary losses." I will discuss this in Part II, *infra* at 726-29.

Although I will not dwell on this point either, once Coleman has assimilated products liability to his contracts model because it relates to a contract between the injurer and the victim, he should tell us why he does not do the same thing (or maybe he would do the same thing?) for workplace injuries, professional malpractice, and various business torts.

21. "While I think it is very important to have theory [sic] that distinguishes market from political failures . . ., I have no such theory, and do not want to pretend otherwise. Moreover, none of the argument in this book (I believe) depends on my having such a theory." *Id.* at 108 n.9.

22. As Coleman recognizes, "political and moral debate about the commodification of various resources and relationships for example are issues about the scope of markets, they are not issues that arise *within* markets." *Id.* at 67 n.26 (emphasis in original).

23. At one point, Coleman sets forth the commodified and non-commodified views this way: "In one view, non-market institutions are responses to market failure, justifiable only to the extent they mimic the outcome of the market. On the other hand, these institutions are genuine alternatives to the market that arise in part to articulate the underlying norms of a community through which a community's identity is forged." Coleman says "the same can be said of the relationship between torts and contracts." *Id.* at 311 n.4. He means that contract is to be treated in the commodified, market-failure view and tort in the non-commodified, community-identity-forging view.

us as well, although he does not, that we *could* think of contracts on a non-market model, as one big creation and reinforcement of promise-keeping norms.

Maybe Coleman does not need a theory because he is a pragmatist.[24] Maybe he thinks that conceiving of contracts as governed by one intellectual paradigm and torts by another just works: These different conceptions are most useful because they fit our circumstances. Does Coleman endorse a pragmatic philosophical methodology?

Although Coleman does not discuss his methodology in any systematic way, most frequently his procedure is to seek the "best interpretation"[25] or "best normative interpretation" of "our current practices," where what is "normative" about the interpretation is to give it the best fit with the values of political liberalism.[26] In summing up what he has said about torts and corrective justice, for example, Coleman notes that he has not given "a logical demonstration" that tort law implements corrective justice. Instead, he argues that "in the typical case in which a victim has a right to recover in corrective justice, his compensation and the liability of his injurer is [sic] *best understood* as the law's giving expression to the demands of corrective justice."[27] I think this is a pragmatist procedure.[28]

---

24. "Pragmatism is freedom from theory-guilt." Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990).

25. COLEMAN, *supra* note 1, at 321.

26. Although Coleman's manuscript did not make his methodology explicit, when I wrote this essay I felt safe in assuming that whatever it was, it was the same throughout the book. At the conference, however, Coleman said that he meant the book to be taken asymmetrically. In the part dealing with contracts, he wanted to do "top-down" theory: Given rational choice theory as an article of faith, he wanted to show that certain conceptions of contract law "fall out." In the part dealing with torts, he wanted to "identify inherent norms" by finding the best interpretation of our existing practice (but he did not seek to reach "reflective equilibrium" by attempting to apply those norms to criticize or reform our practice).

As the manuscript stood before the conference, it seemed to be a mixture of both methodologies throughout. (For example, the passage quoted in footnote 12, *supra*, shows the "best interpretation" methodology at work in the first part of the book on the market paradigm; his treatment of products liability in the third part of the book seems to revert ambivalently to "top-down" theory.) For this essay, I made the judgment that the "best interpretation" methodology predominated.

27. *Id.* at 649 (emphasis added).

28. Coleman says that in his interpretive procedure he follows the Dworkin of *Law's Empire*. *See* COLEMAN, *supra* note 1, at 312 n.5. I must note for the record that Dworkin vociferously states that he is not a pragmatist, and that pragmatism is something else (that I would call crass instrumentalism). *See* RONALD DWORKIN, LAW'S EMPIRE 151-75 (1986). Nevertheless, various pragmatists, including Richard Rorty and me, think that Dworkin's methodology is pragmatist. *See* Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990). What is pragmatist about it?

Let us see how Coleman applies this procedure to contracts. What purpose, he asks, does the institution of contracts serve in political liberalism? The answer is *social stability*. According to Coleman, the best interpretation of why contract law exists is that it is the best way to preserve social stability in circumstances where such stability would best be achieved by markets, but where (for the same reasons that make markets desirable) markets are difficult to create and sustain. Where people's bargains are not embedded in a pre-existing and stable social network, conditions of uncertainty result in these difficulties.

Coleman does not argue much for why social stability is to be understood as the liberal value contract law aims to serve.[29]

Primarily its non-skeptical internalism and its blurring of the distinction between the empirical and the normative (that is, the interplay of what Dworkin calls the dimensions of fit and substance). *See* DWORKIN, *supra*, at 257.

Of course, the procedure has a lot of problems, such as how to describe "our" current practices. Coleman's book does not directly address the problems, and I will largely leave them aside here. I will just mention that the worst problem for this procedure is an apparent conservatism: How can we ever criticize and reform the law, if the theory we use to explain and justify it is just the best interpretation of "our current practices"?

Coleman adverts to this problem in a footnote. *See* COLEMAN, *supra* note 1, at 439 n.1. The Dworkinian approach to the problem of entrenchment of the status quo is that Hercules (the ideal judge) can say that some decisions or practices are wrong in light of the general contour of the whole. *See* DWORKIN, *supra*, at 245-75. Coleman refers to this approach as "internal reform." Coleman says he tends to be an internal reformer. But as Dworkin's critics are fond of pointing out, I think with some justice, Hercules will have extreme difficulty explaining how to determine which parts of our existing institutions are mistakes. (This problem is not necessarily fatal to the pragmatic interpretive procedure, but still needs substantial philosophical attention.)

Coleman also says in the same footnote that "the interpretive enterprise may lead even the most optimistic internal reformer to reject a current practice as beyond repair, leaving only external reform a viable option." COLEMAN, *supra* note 1, at 440 n.1. How can the best account of "our current practices" tell us to reject those practices?

29. The following two passages state why stability is Coleman's chosen value:

> The decision to organize allocation decisions by markets is a political one that has more to do with a desire to finesse or to avoid articulating the nature and scope of fundamental disagreements that may lead to instability than it has to do with the efficiency properties of such arrangements.

COLEMAN, *supra* note 1, at 61.

> Rational cooperators, under certain empirical conditions, will choose or desire to make a variety of allocation decisions through markets. The conditions under which they do so include those cases in which there are fundamental disagreements about what counts as a good life or makes a life worth living, where the members of a community are diverse in their backgrounds and histories and where they are dispersed geographically. In such cases allocation decisions through public debate may create too much strain on the network of abstract bonds that connect members of the community with one another.

Id. at 67. Coleman also mentions Rawls's notion of overlapping consensus. *See id.* at 358 n.8; *see also* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 1-25 (1987). He could have been more explicit about the place of social stability in latter-day Rawlsian liberalism. Achieving overlapping consensus is important to

This choice is plausible, but might be contested. I am more interested, however, in how the pragmatic need for contracts in these empirical circumstances leads to the pragmatic need to conceive of them—and those who make them—in market rhetoric. What takes us from the need for institutional enforcement of commercial promise-keeping to the idea that the problem is best conceived in terms of the individual as a profit-maximizer involved in a prisoner's dilemma and always wanting to defect? Coleman says we "should" see matters this way,[30] but I cannot find any argument to explain why.

Coleman does need at least a pragmatic reason to consider contracts an appropriate domain for the market paradigm, even if he does not need a "theory." Maybe he thinks it is self-evident that the techniques of rational choice theory *work* the best, given the problem of stability and its social parameters as he has described them. Maybe he just *likes* rational choice theory! At any rate, if Coleman were unambivalently pursuing a pragmatist course of inquiry, he would want to compare the results for social stability of thinking about contracts in terms of market rhetoric versus some other conceptual paradigm. He would also want to consider whether in the contract domain a hard-and-fast commitment to market rhetoric (treating it as a "ground" and making no exceptions) works better than a more flexible commitment to market rhetoric (treating it as a presumptive framework, but making exceptions appropriate to the circumstances).

Now I turn to Coleman's torts theory. Applying his interpretive procedure, we should understand Coleman to ask: What purpose does the institution of tort law serve in political liberalism? Coleman does not tackle this question head on. He does say that he wants "to provide an interpretation of tort law that rejects the idea that the practice can be understood as a unified whole."[31] His goal, he says, is "to explain the sense in which both the underlying claims and the structure of tort law reflect moral principles and economic ambitions."[32]

What does Coleman mean by his claim that tort law is not a unified practice? Does he mean that tort law does not serve one

Rawlsian liberalism because it is a better basis for social stability than is a Hobbesian modus vivendi.

30. *See, e.g.*, COLEMAN, *supra* note 1, at 714.

31. *Id.* at 502.

32. *Id.* at 503.

main purpose in political liberalism? Coleman might mean simply that tort law is not best interpreted as a unified practice, because products liability claims should be thought of differently from the rest of torts. Then Coleman would view products liability claims as best interpreted under his contract model. This model would reflect "economic ambitions," with the methodology of reasoning being market rhetoric, and the grounding liberal value being social stability. In contrast, other kinds of tort claims would be best interpreted under his theory of corrective justice. This theory would reflect "moral principles," with the methodology of reasoning being a rhetoric of wrongs and rights, and the grounding liberal value being—I think—human agency (which I will get to in a moment). If this is not what Coleman means by saying that tort law is not a unified practice, perhaps he means instead that his corrective justice model itself harbors both moral principles and economic ambitions—that it has, so to speak, one foot in the market paradigm and one foot in the non-market discourse of rights and wrongs. I find this idea quite interesting, but I have not found anything in the text to suggest that Coleman means to be understood this way.[33]

At any rate, what, according to Coleman, is the liberal value that the non-economic, corrective justice portion of tort practice is best interpreted as serving? The answer, I think, is the value in political liberalism of expressing and preserving *human agency*.[34] Coleman argues that the salience of human agency and the personal point of view best explains the structural aspect of tort law that brings together in litigation the wrongdoer and her victim. It expresses the responsibility of injurers for their own acts that cause harm to other agents.

Assume I am right that Coleman views the expression and preservation of human agency as the liberal political point of

33. Coleman does argue for a "mixed" view of corrective justice. That "mixed" view is not a mixture of moral principle and economics, but a mixture of the "relational" view of corrective justice (in which a responsible agent must repair her wrongs and the wrongful losses stemming therefrom) and the "annulment" view of corrective justice (in which wrongful losses must be repaired). The "mixed view" is thus that "the duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible." *Id.* at 527.

34. I interpret this idea to be the gist of chapter 17, and especially as explaining the relevance for Coleman of Thomas Nagel's distinction between the personal and impersonal points of view. *See id.* at 402-04; *see also* THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).

the practice of tort law. Put this view together with Coleman's claim that achieving and preserving social stability is the liberal political point of the practice of contract law. Then Coleman's pragmatic procedure of looking for the best interpretation of existing practices has led him to find the Kantian liberal *Grundnorm* (agency) in our practice of torts and the Hobbesian liberal *Grundnorm* (stability) in our practice of contracts.[35]

I find it intuitively plausible that both the Kantian and the Hobbesian core liberal values would figure in good interpretations of our legal institutions. I find it intuitively implausible that the Kantian core value would pragmatically dominate the field in one practice and the Hobbesian core value would pragmatically dominate the field in another. I think it is unlikely that conceiving of one practice wholly in market rhetoric and the other practice wholly in non-market rhetoric would make pragmatic sense. I would rather expect to find these core liberal values inextricably intertwined in all our legal practices.[36] I do not see why torts is supposed to be best understood from an agent-relative point of view involving individuals and their rights, when contracts is supposed to be best understood wholly from the impersonal, agent-neutral point of view. Why not also recognize contracts as promoting agency and expressing the agent-relative point of view? Why not see this as the best interpretation of the structure of contract law, in which promise-breakers and those they have wronged are brought together in litigation?

Perhaps the most interesting pragmatist implications of Coleman's theory of torts lie in his view of corrective justice. According to Coleman, corrective justice is a default option. It only kicks in as a moral requirement if the state has not chosen to handle the problems corrective justice addresses in some other permissible way. Coleman says:

35. Hobbes's political theory is based on the necessity of escape from the war of all against all in the state of nature. *See, e.g.*, JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION (1986). Kant's ethical theory is based on the moral agency of rational beings possessing free will. *See, e.g.*, HENRY E. ALLISON, KANT'S THEORY OF FREEDOM (1990).

36. This would seem to support the second interpretation of what Coleman might mean by the non-unified nature of our torts practice; but I did not find textual evidence for that interpretation. *See* text accompanying *supra* note 33. Of course, that interpretation might undermine Coleman's theory of contracts, because these core values would be inextricably intertwined in our practice of contracts as well, and then the best interpretation of our practice of contracts could not be that it is grounded in market rhetoric.

> [W]hether or not corrective justice in fact imposes moral duties upon particular individuals is *conditional* upon the existence of other institutions for making good victims' claims to repair. The capacity within a particular community of corrective justice to impose the relevant *moral* duties depends on the existence of certain *legal* or *political* institutions.[37]

Whether or not corrective justice—and "restitutionary justice, and perhaps transactional justice generally," and maybe even other moral principles—"imposes *moral* reasons for acting will depend on prevailing legal and social practices."[38] For Coleman, in a jurisdiction where compensation of victims is taken care of by an appropriate social insurance plan (perhaps New Zealand is such a jurisdiction) corrective justice would not exist as a moral requirement.

Moreover, Coleman views the duties of corrective justice as conditional in another way too, conditional even in their force as a default option. The underlying social situation, the existing distribution, must be above some threshold of justice in order for corrective justice to have any force at all.

> In order for a scheme of rights to warrant protection under corrective justice, then, they [sic] must be sufficiently defensible in justice to warrant being sustained against individual infringements. Entitlements that fail to have this minimal property are not real rights, their infringement cannot give rise to a moral reason for acting.[39]

For Coleman, restitution of stolen property is apparently not required if the scheme of property distribution is unjust enough.[40]

There are difficulties, of course, in evaluating our current practice for satisfaction of this minimal justice condition when our evaluation depends upon the best interpretation of current practice.[41] Coleman does not go into these difficulties. He does argue from existing practice for the existence of the condition: "[T]here is at least some good reason for thinking that nearly everyone is committed to the existence of some such condition by which the 'real' entitlements are to be distinguished from

37. COLEMAN, *supra* note 1, at 667 (emphasis in original).

38. *Id.* at 658 (emphasis in original).

39. *Id.* at 571.

40. Coleman probably has in mind, for example, that one would not be morally obligated to return a stolen or runaway slave. But the principle has broader implications.

41. Here again is the problem for the pragmatic procedure. *See supra* note 28.

the pretenders."[42]

Coleman thinks his default-option view of corrective justice is "odd-sounding."[43] To me it sounds like a species of pragmatist moral argument, and not very odd. Pragmatists recognize no state of nature in which moral principles simply pre-exist the practices that implement them. All moral principles depend upon practice. This dependency is complex, however, because ordinary moral reasoning, which is itself a practice, seems to commit us to an understanding that moral principles are separate enough from practice so that we can sometimes step back and use them to evaluate our practices.

Coleman's commitment to "real" entitlements, in which he puts "real" in scare quotation marks, captures the pragmatist's attitude. Coleman's default view of corrective justice, which he thinks applies to other moral principles too, seems to be the beginning of an interesting attempt to model the complex relationship between our legal and moral practices, on the one hand, and our practices of criticizing and evaluating them, on the other. I wonder how he perceives property (the moral principles of acquiring and respecting entitlements). Could property rights, or some of them, represent a default option that only takes effect if the state has not found some other way to handle the problems they address? Could property rights in individuals be "real" only if the overall distributional scheme is sufficiently just?

II.

Coleman raises, but does not try to solve, the problem of distinguishing between compensable and non-compensable losses.[44] This problem is linked in certain ways with the problem of finding the appropriate domain for commodification and market rhetoric, and with the complex issue of incommensurability.

Compensation raises the issue of incommensurability because we can see compensation for a harm as either commensurable or incommensurable with the harm. In one view,

42. COLEMAN, *supra* note 1, at 573.

43. *Id.* at 658.

44. "Defining the class of compensable losses is ultimately necessary to any account of liability and recovery for loss, but I confess that I have no account of the requisite sort, nor, for that matter does anyone else." *Id.* at 396 n.4.

compensation accomplishes, or should theoretically aim to accomplish, making the victim completely whole. Such a commodified view of compensation conceives of the harm to the injured victim as commensurable with money. Theoretically (in market rhetoric) the harm is simply a cost to the victim. When that cost is paid, we recognize the victim as indifferent between being harmed and getting the payment, and not being harmed. Coleman seems sometimes implicitly to adopt this commodified view of compensation. Sometimes this view seems to be what he means by "repair" of a wrong.

On the other hand, the non-commodified view of compensation does not assume commensurability between the harm and the payment. In this view, the payment is a way of bringing the wrongdoer to recognize that she has done wrong, and a way of making redress to the victim. Compensation accomplishes redress by showing the victim that her rights are taken seriously, and by affirming that some action is required to symbolize public respect for the existence of rights and the transgressor's fault with regard to disrespecting rights. Neither the harm to the victim nor the victim's right not to be harmed are treated as commensurate with money. Coleman also at times seems to adopt this non-commodified view of compensation. This view appears to be what he means by "rectifying wrongs done to rights."[45]

Coleman argues that the Calabresi-Melamed distinction between property rules and liability rules[46] should be understood not as specifying different remedies for invasions of rights, but rather as a way to specify part of the "content" (scope) of the right. An individual has a right with one kind of content if only her voluntary relinquishment of an entitlement will appropriately transfer it. She has a right with another kind of content if a non-voluntary transfer is legitimate whenever an appropriate third party ensures what it deems a suitable payment.[47]

Coleman is now in an awkward position for considering the problem of compensation. If all remedies or rights to redress are conceptually made a part of the underlying right, there is no role for a concept of compensation *for* harm, and no room

45. *See, e.g., id.* at 557-59.

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

47. *See* COLEMAN, *supra* note 1, at 553.

for debate about what counts as a compensable harm. For compensable harm to play a role, compensation must be separate from the right that is violated; compensation cannot be conceptually a part of the same right the infringement of which demands compensation in the first place. In other words, if the content of rights subsumes the issue of what can count as compensable harm, the general normative theory by which we specify the content of rights will subsume the debate about the domain of compensable harms. I do not think this move will prove strategically advantageous in the debate—as yet to be joined—about what harms are compensable.

In the strangest passage in his book, Coleman argues that liability rules must exist, because otherwise compensation could never be paid for transgressing against property rules.[48] Perhaps this conclusion would be unremarkable if the commodified view of compensation corresponded fully with the conception of compensation we do indeed accept. If compensation is viewed as commensurable with the "cost" of losing the property right, then it may seem that paying compensation results in the creation of a liability rule. In the non-commodified view of compensation, however, compensation could easily be understood as payment for transgression of a naked property rule—that is, a property rule not conjoined with a liability rule. In this view, by paying compensation we are not equating the loss of the property right with the dollar value, we are merely using the payment to "rectify the wrong done to rights."

Perhaps Coleman concludes that property rules are nugatory without liability rules (unless protected by criminal sanctions) because he leans implicitly toward the commodified view of compensation. Coleman's argument seems strange because it is at odds with traditional liberal thought about the sacredness of property rights in light of their connection with human autonomy and agency. In traditional liberal thought, that sacredness cannot be theoretically held hostage to the availability of payment of an extrinsically determined dollar value to an owner whose rights are invaded.[49]

48. *See id.* at 299-301; *cf. id.* at 554 n.10.

49. For Kant, for example, it is morally required to enter into a juridical state in order to protect property rights, because property rights are necessary to persons' autonomy; persons must control objects in order fully to constitute themselves as persons. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 52-3, 64-5 (John Ladd trans., 1965) (1797). For Locke, property rights are acquired by labor in a state of

The question of what to do about "nonpecuniary" harms also raises the commodification issue in an interesting way. Here too there is a commodified and a non-commodified way of looking at the issue. In the commodified view, "nonpecuniary" harms are not qualitatively different from "pecuniary" harms; they are all costs commensurate with money. "Nonpecuniary" harms are in principle reducible to a dollar value, although what makes them "nonpecuniary" is that they have not been so reduced prior to the injury. In the non-commodified view, "nonpecuniary" harms are not commensurate with money. Hence the term "nonpecuniary costs," which Coleman occasionally uses, is an oxymoron under the non-commodified approach. To conceive of these harms as "costs" is to conceive of them in the market rhetoric of the commodified view.

In the commodified view of compensation for pain and suffering, the award would theoretically pay the victim the dollar value to her of undergoing the pain and suffering. In the non-commodified view of compensation for pain and suffering, the award would show the victim and society that the pain and suffering—incommensurable with money—was unjustly inflicted, and would show the injurer and society that such unjust inflictions will not go unredressed.

In the non-economic, corrective justice view of tort law, manufacturers should be liable for "nonpecuniary" losses that they cause just as they are liable for "pecuniary" losses that they cause. A standard economic view these days,[50] on the other hand, is that pain and suffering and other "nonpecuniary" losses should not give rise to a duty to compensate. The view rests on the argument that if the victim would not have insured against the loss as part of a rational bargain with the manufacturer, it is inefficient (and hence, in this view, unjustified) for tort law to insure her against the loss.

This standard economic view, which Coleman adopts, involves an optimal insurance contract. The view is perhaps not completely commodified, in that conceiving of the harms to persons as bearing an implicit dollar value is not necessary in

---

nature and must limit the extent of the state's power. *See* JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT (1773). Neither Kantian nor Lockean liberalism could countenance the idea that an individual's property rights are fungible with an extrinsically determined dollar amount.

50. The view owes much to Professor Schwartz. *See* Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 408 (1988).

order to observe whether or not people insure against them.[51] An alternative economic perspective that Coleman does not discuss involves achieving optimal precautions instead of an optimal insurance contract.[52] In this view consumers are willing to pay to avoid "nonpecuniary" harms like pain and suffering, even if they do not insure themselves against them. The implicit contract between manufacturer and consumer should thus offer, at the appropriate price, compensation for such harms. This view is perhaps more completely commodified than the one Coleman adopts, because it is likely committed to the commensurability, in dollar value, of the harm and the compensation for it.[53]

Coleman recognizes that the economic view he adopts is incompatible with his corrective justice view on the issue of "nonpecuniary" harms.[54] Because he is committed to treating the products liability portion of tort law under his contracts model, and because he is committed to this economic approach as part of his contracts model, he is committed to denying compensation for pain and suffering and other "nonpecuniary costs." But Coleman is evidently uncomfortable with this result. He feels "torn in two directions."[55] He is attracted to the market paradigm view for products liability law in general, but he is attracted to the corrective justice view when it comes to compensation for pain and suffering.

At one point Coleman suggests mediating his dilemma by refusing compensation for "nonpecuniary" losses, but imposing fines on manufacturers "*equal to the nonpecuniary costs* caused by

51. Indeed, Professor Schwartz considers what injured consumers might purchase as substitutes for the "nonpecuniary" capabilities they no longer enjoy, but the argument stops short of equating the substitutes to the lost capabilities in dollar value. *See id.* at 364, 410.

52. I am indebted to Professor Craswell for his discussion of alternative economic views. *See* Richard Craswell, *Efficiency and Rational Bargaining in Contractual Settings*, 15 HARV. J.L. & PUB. POL'Y 805 (1992).

53. The issue of degrees of commodification is murky and discussing it would lead me afield here. I can say in general that I see complete commodification as committed, in the social context of markets, to (1) objectification of things people value, (2) fungibility of things people value, (3) commensurability of things people value (reducibility to a common metric, like "utility"), and (4) money as the common metric of commensurability. Economic views that do not use Kaldor-Hicks efficiency or inter-personal comparison of utilities are perhaps committed to the first three indicia of commodification, but not the fourth. For my attempt to disentangle various senses of incomplete commodification, see Radin, *Market Rhetoric and Free Expression*, *supra* note 9.

54. *See* COLEMAN, *supra* note 1, at 711 n.7, 718.

55. *Id.* at 716.

their products."[56] He is not satisfied with this suggestion, however, because it seems easier simply to compensate the victims. In the end, Coleman almost abandons his commodified model:

> Corrective justice holds that nonpecuniary costs, even those which are not insured against, can be wrongful; and when they are, the duty to annul them falls to the product manufacturer. The theory of rational bargaining appears to claim that such losses ought not be compensated because the victim would not require the producer to insure against them. *If the theory of rational bargaining leads to a result incompatible with the constraints imposed by corrective justice, it cannot be the correct way of thinking about product liability law.*[57]

This statement is remarkable in the context of Coleman's overall project of cabining off products liability law as an appropriate bailiwick for market rhetoric. Does he mean to imply here that the best interpretation of our compensation for pain and suffering is that these harms give rise to duties of corrective justice? Or does he mean to give primacy to the constraints imposed by corrective justice on grounds other than his usual interpretive procedure? Either way, this move might well take back Coleman's commitment to conceive of products liability law in market rhetoric. At minimum it carves out a *sub*-sub-domain (compensation for pain and suffering) for the rhetoric of rights and wrongs, within a sub-domain (products liability) of market rhetoric, within the general domain (torts) of the rhetoric of rights and wrongs. This ad hoc creation of smaller domains strongly suggests that Coleman cannot pragmatically defend any commitment to one rhetoric in either contract or tort as sufficiently dominant to be treated as "grounding" that field.

In any event, Coleman concludes by trying to draw back from this brink.[58] He concedes that the rational contract between the manufacturer and the consumer excludes "nonpecuniary" losses. The rational contract would thus preclude recovery for such losses when the manufacturer has not breached the con-

56. *Id.* at 715 (emphasis in original). Note that this suggestion forthrightly assumes commensurability. The suggestion is perhaps in principle related to the alternative economic view mentioned in the text (based on optimal precautions), because the fines would function to deter conduct that did not take enough precautions against harm. (Of course the amount of fine it would take to deter $x worth of harm to a consumer need not be equal to $x.)

57. *Id.* at 718 (emphasis added).

58. *See id.* at 718-20.

tract by imposing a level of risk that exceeds the level for which the consumer implicitly bargained. Coleman argues, however, that if the manufacturer does impose risk exceeding the level bargained for, corrective justice then kicks in. At that point the victim "is entitled to rectification of both his pecuniary and non-pecuniary losses."[59] Why? "The losses are wrongful because they are the result of conduct invasive of [the victim's] right to be exposed to a probability of harm not greater than [the one for which she impliedly bargained]."[60]

Thus, Coleman thinks (pragmatically compromising, perhaps) that even if some "nonpecuniary" losses in his model are uncompensated, some important portion can be brought theoretically under a duty to compensate. But I do not think this argument can do that trick for him. When we conceive of the transaction between the manufacturer and the consumer in market rhetoric, as Coleman insists, so that what transpires between them must be understood as merely a contract, the manufacturer's imposition of a level of risk greater than the level for which the consumer impliedly bargained is merely breach of contract. Coleman does not want to say that breach of contract gives rise to a duty in corrective justice because that would give up his commodified conception of contracts. Thus the argument will not work unless he can find some way of using market rhetoric to make the appropriate damages for breach of contract cover resulting "nonpecuniary" harms. This is exactly what the optimal-insurance economic view denies him.

A more promising line of argument, although one that would not support Coleman's commitment to market rhetoric, would question the basis of the economic view he adopts. If it is empirically true that consumers do not insure themselves against "nonpecuniary" losses, the best interpretation of the reason may be that they do not conceive of matters like pain and suffering in commodified terms. Perhaps the reason consumers fail to insure, if they do fail, is not that insuring is "irrational," but rather that persons simply do not conceive of themselves as profit-maximizers when it comes to their own pain and suffering. They simply do not conceive of their own pain and suffering as commensurable either with money or with other commodities that the money might buy.

59. *Id.* at 720.
60. *Id.*

If we accept this interpretation, the economic argument is trying to have it both ways. The argument relies on the non-commodified conceptions held by consumers to construct a commodified view that denies them compensation for harms that are very real to them, but simply not reducible to money or things that money can buy. In effect the economic view denies the reality of the harm because it is not commensurable with money or other goods and therefore cannot be cognizable in a view of the world in which all harms are reducible to money or substitutable goods.

This conclusion returns us to the problem of how to conceive of compensation and in particular how compensation relates to what can count as a compensable harm. If we hold a completely commodified view of compensation, then the act of paying compensation declares that the harm for which we are compensating is commensurable with money. We might then specify that we do not want to compensate for harms to interests that we do not—or should not—conceive of as commodities, because doing so would improperly reduce them to commodities.[61]

Maybe so. If we are committed to pragmatic inquiry, we would have to look and see whether compensation would indeed reduce harms like pain and suffering to commodities. Part of our inquiry would be to observe to what extent we accept the commodified view of compensation. If we do not accept the commodified view of compensation to any great extent, then the practice of paying compensation is not in danger of making us conceive of the harms to persons for which compensation is paid as commodities. If we do accept the commodified view of compensation to a great extent, then we are more likely to be commodifying the harms for which compensation is paid as well.

We should also remember that a commodified view of compensation may be part of a commodified world view, universal commodification or the general market paradigm. If we admit that non-commodified conceptions of ourselves and our practices do prevail in at least some areas, that world view is not monolithic. In particular the view is not monolithic to the ex-

61. If the economic view discussed in the text is the right-wing view of why we should abolish compensation for pain and suffering, then this is the left-wing view. *See, e.g.*, Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 803 (1990).

tent that we are committed to moral principles of personhood that preclude commodification in some areas, and these commitments to principle are also part of our practice. Then universal commodification or the general market paradigm does not prevail, and our problem is simply the pragmatic one of how to put market rhetoric in its place. Even if the commodified conception of compensation is dominant, then, it can be morally evaluated. In doing so we might find that we should best interpret and structure the practice of compensation for pain and suffering using non-commodified conceptions of both the compensation and the harm for which the compensation is due.