

# INTERPRETING TORTS, EXPLAINING CONTRACTS

ALAN SCHWARTZ\*

Jules Coleman has written a rich book about corrective justice and its relation to current contract and tort law. In *Risks and Wrongs*,<sup>1</sup> he examines and interprets these bodies of law in an attempt to reveal their "point."<sup>2</sup> Contracts and torts are broad legal fields that are covered by an extensive body of scholarship. Thus, Coleman's goal can be realized only on a high level of abstraction. Despite the inevitable omissions that such a treatment requires—Coleman analyzes only one actual contracts case and very few tort cases—his account is useful and interesting.

The book synthesizes the central themes that have occupied judges and scholars in the fields of torts and contracts, illustrates in enlightening ways the relationships among these themes, clearly sets out and persuasively criticizes prior scholarly accounts, and makes new arguments about the nature of corrective justice. Part I of this article examines three particularly insightful contributions by Coleman; later parts, in contrast, raise questions about Coleman's interpretations and his economic analysis.

## I. COLEMAN'S CONTRIBUTION

Coleman begins with an accurate and helpful observation: A market system not only distributes economic goods but also facilitates cooperation among a heterogeneous citizenry.<sup>3</sup> For example, the question whether the state should respond to market failure with substantive regulation is commonly phrased as a choice between the inefficiencies of private allocation and the potential inefficiencies of state regulation. Coleman's analysis adds a new dimension. Even inefficient markets may facilitate coordinated behavior among heterogeneous strangers,

---

\* William K. Townsend Professor of Law, Yale Law School; Professor, Yale School of Organization and Management. John Langbein, Stephen Morse, Peter Shuck, and Harry Wellington made helpful comments on prior drafts.

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

2. *Id.* at 486.

3. *Id.* at 58-65.

Coleman explains; regulation may threaten these noneconomic "coordination" benefits. Thus, an argument for imposing regulation should show both that regulation will cure market failure and that the transfer of an economic function to the state will not adversely affect the social coordination networks that have evolved from the particular private ordering. Policymakers seldom address the latter concern.

Coleman also presents an effective resolution of the tension between rights-based and utilitarian views of contract law. Currently, these views do not conflict when a party has actually consented to a particular contract term. When contracts are incomplete, however, courts supply terms that govern the disputes at bar. These terms then become precedents—implied terms for future agreements. Parties are said to consent implicitly to contractual terms that constitute the background law in existence at the time the contract is made. A party to the lawsuit in which a new implied term is first fashioned, however, is bound by a provision to which he never consented. Such treatment arguably compromises, or at least does not advance, the party's autonomy. Coleman correctly recognizes that contracts are often incomplete and that courts must (rather than should) supply terms. He then questions whether the courts' performance of this task can be consistent with a commitment to party autonomy.

Coleman's solution is to stress the epistemic relevance of efficiency analysis.<sup>4</sup> This analysis recognizes that rational parties prefer efficient solutions to contracting problems because these solutions maximize their shared gains. When a uniquely efficient solution exists, rational parties want only it; when a set of efficient solutions exists, the parties commonly prefer any solution in the set to any outside it. Therefore, parties ordinarily prefer the state, acting through its courts or in commercial codes, to complete contracts with efficient default terms when transaction costs prevent the parties from creating such terms themselves. The presumption that actual parties would have chosen efficient default terms can be rebutted in particular cases; but without contrary evidence, the presumption should stand. Courts that supply efficient terms thus *prima facie* act consistently with a rights-based view of contract law. This point too

---

4. *Id.* at 267-277, 279.

seldom is made.<sup>5</sup>

Finally, Coleman's account of tort law makes numerous illuminating distinctions and clarifies several major points. For example, Coleman provides the most conceptually satisfying showing to date that strict liability is consistent with corrective justice.<sup>6</sup> Other views he expresses concerning the nature of rights and what constitutes wrongful invasion of these rights justifying compensation also enlighten much in tort theory. While these three contributions strike me as particularly helpful, I disagree with important aspects of Coleman's project. These disagreements likely reflect my distance from political philosophy rather than problems with the project itself. Law professors are among the book's addressees, however. Thus what follows, though critical in tone, is intended as a request for methodological clarification. Part II argues that Coleman's account of tort law is less persuasive than the competing economic account. Part III argues that Coleman's positive analyses of contracting behavior are connected too loosely to his interpretation of contract law. This gap may exist because recent economic contract theory suggests that Coleman does not explain contracting behavior well.

## II. INTERPRETING TORTS

### A. *The Nature of Coleman's Project*

Coleman's goal is to interpret tort law. He begins by referring to economic and corrective justice theories of the field and then asks: "Which is the better interpretation of our current tort practice?"<sup>7</sup> In a later chapter, he describes his goal as the development of an "interpretation" according to which "tort law has a point or purpose that . . . makes sense of it."<sup>8</sup> He makes similar statements throughout the book. Coleman's object is to "see . . . the practice [of torts] in its best light."<sup>9</sup>

Coleman's scope is narrower than these comments suggest.

---

5. Recent theory shows that contract defaults can induce future parties to reveal relevant information in the pre-contractual phase to increase the efficiency of their contracts. See Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 *YALE L.J.* 729 (1992). Such "information forcing" defaults may create a conflict between rights and efficiency-based views of contract law.

6. See COLEMAN, *supra* note 1, at 443-54.

7. *Id.* at 306.

8. *Id.* at 486.

9. *Id.*

He views a complete corrective justice interpretation of torts as requiring both a "substantive" and an "analytic" account of wrong and wrongdoing.<sup>10</sup> A substantive interpretation focuses on the questions of when a victim has been wronged and when an injurer has acted wrongfully; it recovers the norms or values that affect decisions in particular cases. An analytic interpretation specifies the relationships that exist in justice among the actors involved in an alleged tort. An analytic account thus tells whom a victim may sue; a substantive account tells when the victim can win. Coleman discusses substantive tort theories but does not develop his own; his only goal "is to get the analytic structure of corrective justice right" and thereby to develop "the best interpretation of our current tort practice."<sup>11</sup>

An analysis of a common law field can have two purposes: to explain the relevant rules or to justify and criticize the rules. A social scientific explanation will attempt to identify the features of common law litigation that should generate a particular set of legal outcomes. The explanation is refuted if the actual outcomes differ materially from those predicted. A legal explanation attempts to infer from case outcomes and judicial language the moral or political theory animating the courts; the analyst then uses the theory to predict results in later cases. Such an explanatory effort is refuted if the candidate normative theory can not explain later outcomes.<sup>12</sup> Coleman's project provides neither a social scientific nor a legal explanation of the rules it discusses.

Justifications for legal rules are either external or internal. The external method uses a moral theory such as utilitarianism or neo-Kantian autonomy to assess legal rules. Those assessed favorably—efficient rules, for example—are justifiable; those that fail should be changed. Coleman's justificatory analyses are not external; he never asks whether tort law's structure is efficient, autonomy-enhancing, or consistent with any other external moral theory. His claim to interpret torts suggests instead that he is pursuing an internal justificatory project.

---

10. *Id.* at 473-4.

11. *Id.* at 391, 474, 481.

12. A single prediction's falsity is an insufficient reason to abandon a theory. A series of refutations can give such a reason, just as a series of corroborations of a theory's predictions gives grounds for believing that the theory is provisionally true. Criteria of theory acceptance are clearly discussed in Bruce J. Caldwell, *Clarifying Popper*, 29 J. ECON. LIT. 1 (1991).

The goal of the project is to identify the moral norms underlying tort practice. Both reformist and legitimating impulses can justify this task. Respecting the former, if the set of immanent norms is incoherent, the practice is arbitrary and should be changed. Also, anomalies—cases that cannot be justified under the norms—should be eliminated. Respecting the latter impulse, a showing that the norms underlying an important practice are morally attractive encourages persons to act in accordance with those norms. Coleman's torts project seems best understood as an internal justification, an "interpretation" of tort law's central structural features.<sup>13</sup>

### B. *Difficulties with Coleman's Interpretation*

Coleman argues that the norms immanent in tort practice also constitute the theory of corrective justice.<sup>14</sup> This argument supports his central interpretative claim, that tort law "is best understood as the law's giving expression to the demands of corrective justice."<sup>15</sup> The test of a good interpretative theory is its "fit": An interpretation succeeds if knowledgeable observers accept the way it organizes the interpretative material. Three criteria are relevant to the question of fit: elegance, parsimony, and scope. Coleman's interpretation is elegant; the book makes many subtle distinctions and important, but not obvious, clarifications. His account also is parsimonious. According to Coleman, an injurer is an actor who has caused another's loss. The injurer, and no one else, has an obligation in justice to compensate his victim if he has invaded the victim's rights (even justifiably) or caused the loss by behaving wrongfully. Coleman uses these few principles to account for a considerable body of tort law. Nevertheless, his interpretation is problematic with respect to the criterion of scope—the extent of the field for which it accounts.

Coleman actually interprets a subset of tort law, accident law, not tort law in general. For example, he believes that products liability cases are not explicable on corrective justice grounds, and he does not discuss dignitary and commercial torts, such as defamation, unfair competition, and wrongful discharge. Acci-

---

13. Coleman says of his analysis: "The theory is intended to be a normative interpretation of the practice of tort law." *Id.* at 311-12.

14. *See id.*

15. *Id.* at 520.

dent law does occupy a considerable part of tort law, however; thus, a persuasive interpretation of it would be an achievement. This article argues that Coleman's interpretation is questionable on the scope criterion within accident law itself.

Coleman's interpretive difficulty stems from his decision to develop an account of tort law's structure in relative isolation from its particular doctrines. This decision is questionable because the policies or values from which the doctrines flow commonly influence the law's structural features. For example, the substantive purposes that the courts believe a cause of action could serve likely influence the courts' answer to the question of whom a victim can sue. Thus, Coleman's decision to discuss structure independently of the courts' substantive values makes it difficult for him to show when a particular structural feature is the product of those values or the courts' commitment to corrective justice.

### 1. *Scope and inconsistent cases*

An interpretative common law theorist must provide an approach to the arguably anomalous case. A decision that fits uncomfortably within the reigning norms can be a true mistake or the beginning of healthy growth. Thus, internal critique must distinguish between these possibilities to satisfy its animating reformist and legitimating impulses. Distinguishing mistakes from healthy trends without a substantive theory of the field is difficult, however; Coleman attempts to avoid rather than meet this difficulty. Thus, he finds no mistakes: Tort cases, in Coleman's view, are either consistent with corrective justice or beyond his interpretative range. This strategy slights the reformist impulse that underlies many internal critiques. More seriously, it calls into question the scope of Coleman's interpretative claim.

Coleman's treatment of two "market share" cases illustrates the problem. In the first, *Sindell v. Abbot Laboratories*,<sup>16</sup> the court imposed liability on the manufacturers of a harmful drug according to the market share each firm controlled at the time the injured plaintiff purchased the drug: Firms that had large market shares paid larger portions of damages than firms that had small market shares. The court created market share liability

---

16. 607 P.2d 924 (Cal. 1980), cert. denied, 449 U.S. 912 (1980).

because the victim was able to prove that her harm was the consequence of using the drug over time but could not prove which firm produced the particular batches that injured her. *Sindell* is questionable on corrective justice grounds because at least some firms were required to pay damages even though they did not cause the plaintiff's harm. Coleman believes that this case may be reconcilable with corrective justice but that a later case, *Hymowitz v. Eli Lilly & Co.*,<sup>17</sup> cannot.<sup>18</sup> In *Hymowitz*, the defendant produced the drug but did not sell the units that injured plaintiff. According to Coleman, *Hymowitz* "is a justifiable departure from corrective justice";<sup>19</sup> that case and *Sindell* are best understood as pursuing a legitimate distributional goal, not as implementing corrective justice.<sup>20</sup>

This conclusion is plausible but troublesome for Coleman's interpretative theory. On one view, the market share cases suggest that the structure of accident law does not follow from corrective justice but rather is implied by the substantive values that the courts hold. Coleman identifies an injurer as the person or entity that caused the victim's harm. He then argues that in corrective justice and in accident law, only the injurer must compensate the victim.<sup>21</sup> The *Hymowitz* defendant did not cause the plaintiff's harm but was held liable for it. In response to this apparent anomaly, Coleman claims that courts justifiably dispense with corrective justice's causation requirement when it impedes the pursuit of important norms. But if courts routinely abandon the structure of tort law that corrective justice implies when it threatens to frustrate their values, then it is the values rather than the courts' commitment to corrective justice that best explains the law. Corrective justice could "account" for tort rules only by coincidence—only when corrective justice

---

17. 539 N.E.2d 1069 (N.Y. 1989).

18. COLEMAN, *supra* note 1, at 535.

19. *Id.*

20. Coleman also uses the strategy of consigning apparent anomalies to other interpretative realms when discussing cases concerning the duty to warn. In these cases, the victims did not read inadequate warnings and would not have read good ones. Consequently, the firm's failure to warn adequately did not cause the victim's harm (on a necessary condition account of causation). A majority of courts nevertheless hold the firms liable. Coleman believes that courts justifiably dispense with the causation requirement in these cases. See COLEMAN, *supra* note 1, at 500-03. He accepts the view of some earlier commentators that courts do and should regard plaintiffs as private attorneys general, who are allowed to recover to encourage challenges to bad warnings. See Alan Schwartz, *Causation in Private Tort Law: A Comment on Kelman*, 63 CHI.-KENT L. REV. 639 (1987).

21. See COLEMAN, *supra* note 1, at 500-03.

implies the same results that the driving substantive theories imply. Therefore, a corrective justice account has no independent justificatory power.

On another view, the market share and similar cases suggest that Coleman's interpretative theory has an indeterminate scope. To see why, call a set of cases "ordinary" when those cases are consistent both with corrective justice and a particular substantive theory of torts. If judicial treatment of apparent anomalies such as the market share cases follows from the courts' substantive values, then what determines judicial treatment of ordinary cases? When does corrective justice rather than a particular substantive theory account for the outcome in any case? Coleman's failure to answer these questions suggests that his interpretation ranges across an indeterminate domain.

A substantive theory of a common law field apparently is necessary for the development of a "theory of mistakes," a set of criteria that permits the interpretative theorist to distinguish legal errors from normal development. Coleman does not present a substantive theory of torts and thus lacks a theory of mistakes. In its absence, his treatment of apparent anomalies suggests either that his interpretation has no scope, it accounts for no cases, or that its scope is indeterminate. The scope of a good interpretative theory is both broad and clear. Thus, the absence of a substantive theory creates a problem for Coleman. Comparing Coleman's account with its chief competitor, an economic theory that is both substantive and procedural, accentuates this difficulty.

## 2. *Scope and the economic interpretation*<sup>22</sup>

Coleman often contrasts his account of torts with an eco-

---

22. Andrei Marmor draws certain distinctions in connection with interpreting legal texts that are helpful here. See Andrei Marmor, *Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory*, 10 *LAW & PHIL.* 383 (1991). He reads Dworkin as claiming that "interpretation comprises the pre-interpretative, the interpretative, and the post-interpretative stages." *Id.* at 395. At the first stage, the interpreter identifies the practice or body of material he is to interpret—the "text." At the interpretative stage, the question of scope or fit first arises: Here "fit is basically a threshold requirement." *Id.* at 397. A proposed interpretation must fit enough of the practice to show that the analyst is interpreting the identified practice rather than inventing a new one. "The post-interpretive stage introduces another, more evaluative notion of fit. It involves the choice of that interpretation which is attributed the better, or actually, the best fit." *Id.* The analysis in Part IIB(1) above relates to the interpretative stage, arguing that Coleman's account does not clearly fit enough of the practice of accident law to constitute a plausible interpretation of that practice. The

conomic account. According to him, corrective justice best explains two defining features of tort law's structure. First, Coleman claims that an economic analysis of a torts problem is "forward-looking": The judge should determine what assignment of liability would create the best incentives for future actors to invest in safety. A corrective justice court, in contrast, would look backwards to impose liability for accidents on the parties who caused them. In Coleman's view, tort law embodies "an essentially *backward-looking* theory of liability and recovery."<sup>23</sup> Coleman addresses the second key structural feature of tort law by explaining, "In the economic analysis, victims and injurers are not connected to each other as such."<sup>24</sup> Rather, the set of defendants is a function of the economic goal at issue; the judge should impose liability on a person or entity solely because that imposition would produce more safety or more efficient compensation. Coleman contrasts this method with a "relational account" of corrective justice in which an injurer, and no one else, has a special reason to compensate the victim: The injurer alone wrongfully caused the victim's loss or caused the victim's wrongful loss.<sup>25</sup> Cases in tort law, Coleman claims, follow this view: "Tort law brings injurers and victims together in a way that best reflects their *relationship to each other*, rather than to the goals of tort law. . . . [o]nly corrective justice can reflect the relational structure of tort law."<sup>26</sup> Consequently, in torts, "the victim's connection to his injurer is fundamental and analytic, not tenuous or contingent [as it would be in economic analysis]."<sup>27</sup>

Coleman's first distinction between his corrective justice account and a law-and-economics account presupposes "a non-economic meaning" of terms such as "fault and causation."<sup>28</sup> If these terms are given "economic renderings," the contrast between forward-looking and backward-looking ways of deciding cases "evaporates." Consider the economic treatment of causa-

---

analysis in Part IIB(2) will relate to the post-interpretative stage, arguing that if Coleman's interpretation is plausible, it fits less of the practice than the economic account, and so is an inferior interpretation.

23. COLEMAN, *supra* note 1, at 508.

24. *Id.* at 520.

25. *Id.* at 515-16.

26. *Id.* He adds that the victim's "claim to compensation as a matter of justice is based on his claim about what the injurer *did* to him not on the fact that the injurer is better suited than him to reduce accident costs." *Id.*

27. *Id.* at 516.

28. *Id.* at 517.

tion: The economic theory holds that an actor has caused a harm if imposing liability on that actor best advances the law's economic goals. Economic analysts since Calabresi have defined causation in this functionalist way.<sup>29</sup> Were courts to decide causation issues by identifying the cheapest cost avoiders, the courts then would be looking backward to ask whether the particular defendant caused the harm. Courts also would be looking forward, however, to ask whether the defendant was in the class of persons that should be held liable on economic grounds for the type of accident at issue. Coleman recognizes that no real distinction between backward and forward-looking approaches would exist if courts acted in this way. Once this point is conceded, an economic interpretation of this structural feature of tort law would fit the case data better than Coleman's corrective justice account.

Coleman could avoid this conclusion by demonstrating that courts actually answer the causation question in a nonfunctionalist way, but he takes a different approach. He argues that an analyst who "reconstructed in economic terms" such central tort concepts as causation would "remake" tort practice rather than explain it;<sup>30</sup> legal practice must be assumed to "have a content that is the object of explanation, a content that constrains what can count as an adequate explanation of it."<sup>31</sup> These statements, however, mistake the economic analyst's methodology. According to her, a judicial practice of deciding causation issues by searching for the cheapest cost avoiders would have epistemic relevance; the practice would constitute persuasive evidence that accident law rests on a functionalist view of causation. The economic theory would then account well for the first structural feature that Coleman identifies: Courts look backwards, although in a functionalist way, to ask whether the defendant caused the plaintiff's injury.

An economic approach also better accounts for Coleman's second structural aspect of tort law, concerning whom a victim may sue. Recall that an interpretative theory that accounts for a relatively large number of cases is, other things being equal,

---

29. See, e.g., Guido Calabresi, *Concerning Cause and the Law of Torts*, 43 U. Chi. L. Rev. 69 (1975); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEG. STUD. 10 (1983).

30. COLEMAN, *supra* note 1, at 518.

31. *Id.*

preferable to a theory that accounts for relatively few cases.<sup>32</sup> Assume there is a set {E} of defendants whom a victim could sue if the law pursued efficiency. Let there also be a set {C} of defendants whom a victim could sue if corrective justice shaped the legal structure. Next, suppose: 1) set {E} is larger than set {C}, and 2) set {C} is completely contained in set {E}; that is, a victim could sue everyone under efficiency theory that she could sue under corrective justice and more besides. On these assumptions, the economic theory would better account for the aspect of tort law's structure that determines whom a victim can sue; the economic account would illuminate more cases.

Victims actually can sue everyone under the economic theory whom they could sue under corrective justice and more. The category of additional defendants, as Coleman recognizes, includes those in the market share and warning cases. The tort law structure also follows directly from the substantive economic theory; courts believe that imposing liability in these cases will advance the economic goals of deterrence and efficient compensation. In addition, this judicial practice suggests that the economic theory, rather than corrective justice, also generates results in ordinary cases. Coleman responds to such arguments by claiming that "even if the current structure of tort litigation is consistent with economic analysis, it is better understood as embodying some conception of corrective justice."<sup>33</sup> This response is unsatisfactory. An interpretation of a legal practice, *ceteris paribus*, is the more persuasive the larger is the portion of the practice for which it accounts. Thus Coleman's account would be preferable to the economic account only if he identified interpretive criteria at least as important as the scope criterion, and showed that tort structure "is better understood" under these criteria than it is under the scope criterion. Coleman does not identify these other criteria.

In sum, Coleman's corrective justice account of tort law is problematic on the criterion of fit. Its domain is unclear, and may be very small, when his interpretation is considered in isolation. Also, Coleman intends his account to explain only tort

---

32. In justificatory analysis, an interpretative theory also should have some normative appeal. An economic theory that accounts for much of the law but is morally indefensible thus would constitute an unsatisfactory interpretation. Coleman disagrees with the economic account but does not argue that it is morally disqualified as a candidate for an interpretative theory.

33. COLEMAN, *supra* note 1, at 516.

law's structure; the competing economic account, however, explains more "structural cases" than corrective justice does.<sup>34</sup> Recognition of the source of Coleman's problem suggests that these concerns are provisional. Coleman lacks a substantive theory of torts; without such a theory, scope difficulties are inevitable. Perhaps a substantive theory will develop that, in connection with corrective justice, can account clearly for much of tort law. In the absence of such a theory, Coleman's elegant and parsimonious theory is unpersuasive as an internal critique.<sup>35</sup>

### C. *Can Interpreting Torts Illuminate Corrective Justice?*

In *Risks and Wrongs* Coleman develops a conception of corrective justice<sup>36</sup> as well as an interpretation of tort law. These projects could be independent, but Coleman's discussion of basic corrective justice and tort concepts together suggests that they are linked. Coleman creates the impression that the tort concepts help explain corrective justice. For example, he asserts: "The account [he has given] of the ways in which property and liability [legal] rules specify the content of rights gives us an understanding of the concept of a wrong" within corrective justice.<sup>37</sup> Coleman also occasionally specifies the content or demands of corrective justice by reference to current practice. Thus, he attempts to refute the economist's and strict liability theorist's views concerning rights by reference to existing compensation practices. As another illustration, Coleman argues that the standard of reasonable care in tort law is objective: A defendant is held liable if there is "fault in the doing."<sup>38</sup> He then says: "Our question, then, is whether corrective justice

---

34. I believe, but will not argue here, that an economic interpretation also is elegant and parsimonious. Respecting the latter, one principle—efficiency—accounts for much data.

35. An alternative justification for Coleman's account could be that it highlights a previously unappreciated aspect of the field. Coleman makes this claim in connection with his discussion of contracts, acknowledging that there are "other accounts of contracting and contract law that are at least as sweeping and considerably more detailed than" his account. He justifies his account as exposing clearly a feature—"the theory of rational bargaining"—that should play a role in any satisfactory interpretation of contracts. Coleman does not make a similar claim for his interpretation of torts.

36. Coleman's goal in the book is to present a "conception" of corrective justice "that is closer to the truth of the matter than" his prior efforts. COLEMAN, *supra* note 1, at 437.

37. *Id.* at 463.

38. *Id.* at 453.

implicates a similar notion of fault or wrongdoing.”<sup>39</sup> The answer, according to Coleman, is yes; an injurer should be liable in justice for a rights infringement even though he did not act “in a blameworthy fashion.”<sup>40</sup> Finally, Coleman supports his mixed conception of corrective justice by pointing to cases such as *Vincent v. Lake Erie*,<sup>41</sup> which impose liability for actions that were not wrongful but invaded another’s property rights.<sup>42</sup>

These examples suggest that Coleman’s relational theory of corrective justice may, although inadvertently, be in part a product of his legal knowledge. In Coleman’s view, the injurer must compensate the victim because of the injurer’s special relationship to her; the injurer caused the victim’s loss. In tort law, the party who is legally at fault must compensate the injured party. Coleman uses the latter fact to support his claim that the law implements corrective justice. But Coleman was aware of this feature of tort litigation before he developed his conception of corrective justice. That conception thus could be the product of his knowledge of torts as well as moral philosophy.

The possibility that Coleman inferred backward from tort law as well as extrapolated forward to it in developing his theory raises the question whether elements of the practice of tort law can enrich the theory of corrective justice. Contrasting Coleman’s effort with recent interpretations of game theory illuminates the doubt underlying this question. Game theory rests on basic primitives, such as the concepts of “game form” and “strategy.” A large number of game theory models exist. The analyst thus can interpret the practice of game theory to better understand the actual content of the theory’s primitive concepts. For example, a player’s “strategy” may be shown, by analysis of game theory models, to comprise not only her plan of action but also her opponents’ beliefs, should the player deviate from her original plan.<sup>43</sup> The doubt here is whether an analyst can enrich his understanding of corrective justice by in-

---

39. *Id.* at 453-54.

40. *Id.*

41. 124 N.W. 221 (Minn. 1910).

42. COLEMAN, *supra* note 1, at 497-98.

43. See Ariel Rubenstein, *Comments on the Interpretation of Game Theory*, 59 *ECONOMETRICA* 909 (1991) (“An interpretation is a mapping which links a formal theory with everyday language.”).

interpreting legal cases in the same way that an analyst can learn about game theory by interpreting models.

Game theory models are created by self-avowed game theorists, whose goal is to apply and extend the theory. Judges, however, are not self-avowed practitioners of corrective justice (or of political philosophy). Thus, judicial practice could illuminate corrective justice only if it were demonstrated that the judges are attempting to apply and extend that theory. This cannot be inferred from the courts' use of such concepts as causation and harm that also are primitives in corrective justice theory. The legal system's institutional requirements and the precedents in particular fields shape judicial language and practice. Therefore, it is necessary to argue that an interpretation of tort practice can illuminate corrective justice theory.

Coleman's work is the second major interpretative effort in torts. The first, by Richard Posner, argued that the common law is best understood as reflecting the pursuit of efficiency.<sup>44</sup> Posner applied standard tools of price theory to legal rules: The fact that a rule is more efficient than other rules courts could have chosen counted as evidence that courts choose rules by the efficiency criterion.<sup>45</sup> Posner focused exclusively on torts and never worked backward from the existence of a legal rule to an explanation of what economists mean by the concepts of "market" or "efficiency." He accepted the economic definitions of these concepts.<sup>46</sup>

If generally accepted definitions of the primitive concepts that constitute the theory of corrective justice existed, Coleman could have worked as Posner did; his sole task, in this book, would have been to examine whether the structure of tort law reflected the generally accepted view of corrective justice. Instead, Coleman attempts to develop a new theory of corrective justice with knowledge of the legal results that the theory was created to explain, and then uses the theory to explain those results. The book's practice of pursuing these two goals jointly suggests that Coleman may have worked backward from the law to the theory of justice, as well as forward from the theory to the law. In any event, that strategy is difficult for a commen-

---

44. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 29 (1986).

45. Lawyer economists now view Posner's original interpretative claim as too broad; the law, that is, has too many inefficient rules.

46. POSNER, *supra* note 44, at 147.

tator who knows both fields well to escape completely. Without an argument that the law can illuminate the theory, Coleman's project thus raises a difficult question: Would someone who was attempting to develop an account of corrective justice in the context of interpreting property or criminal law develop a materially different philosophical theory?<sup>47</sup>

#### D. *Summary*

Coleman develops a theory of corrective justice and uses it to interpret modern tort law. His account is original, elegant, and parsimonious, but raises serious questions for scholars who work in law or law and economics rather than legal philosophy. Coleman's theory explains too little of tort law to help these scholars. Also, they might question the apparent methodological practice of developing an interpretative theory partly by reference to common law doctrines and using that theory to account for the same doctrines. Moreover, Coleman writes as if his readers know the answers to such questions as how much of a field an interpretation must explain to count as a good interpretation. This assumption is untrue of many of the legal and "social science" scholars who are among the book's addressees. These readers may be more puzzled than persuaded by Coleman's analysis.

### III. EXPLAINING CONTRACTS

Coleman's contracts chapters differ substantially from his torts chapters. Coleman claims to interpret contract law but actually spends little time with contract rules; the text discusses only one case.<sup>48</sup> Coleman's interests may justify this cursory treatment. Corrective justice concerns wrongful acts that invade individuals' rights, while contract law regulates consensual agreements between rights holders. Thus, corrective justice is irrelevant to much of the detail of contract law. Coleman, like many modern observers, also believes that contract law should facilitate private ordering. For example, doctrine should supply potential contracting parties with a set of default

---

47. Jerome Bickenbach raised a similar question in his review of Alan Wertheimer's book *COERCION* (1987), which also attempted to develop both a moral and legal theory of coercion in the same work. See Jerome Bickenbach, *Critical Notice*, 20 *CAN. J. PHIL.* 577, 585-86 (1990).

48. *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178 (1817).

rules that will govern contractual relationships in cases where contracts are incomplete. This view would devote much of the scholarship in contracts to understanding private contracting behavior; the analyst must be able to predict the desirable and undesirable outcomes of contractual situations to know how the law should help future contractors.

Coleman's contracts chapters thus properly attempt to explain how actual agreements are made and enforced. Much of this discussion is unhelpful. Coleman does not examine contracting behavior within the usual framework, or with the standard vocabulary, and his game theory analyses do not clearly illuminate contracting behavior. Therefore, his positive explanations of contracting practice do not advance his account of contract law. The remainder of part three of this article develops this view. The view might be misplaced, however; Coleman's unusual positive analyses may assist his philosophical goals. If so, he should more clearly explain how.<sup>49</sup>

A. *Coleman's View of the Law of Contracts and of Contracting Behavior*

Coleman contends that "in liberal legal cultures, the best interpretation of contract law sees contractual norms in terms of the role they play in guarding against contract failure and in creating and sustaining markets."<sup>50</sup> When parties contract, they must resolve "three distinct but intertwined problems: (1) cooperation, (2) division [of the expected gains from trade], and (3) defection [default]."<sup>51</sup> These problems determine the roles that courts play: "[M]any cases or doctrines in contract law can be assessed as rational responses to problems of cooperation, division and defection. . . ."<sup>52</sup> Thus courts "mediate" between contracting parties when they respond to "failed cooperation"; "arbitrate" when responding to failed "division"; and enforce when responding to "defection."<sup>53</sup> While courts

---

49. The first part of the book thoughtfully defends the choice of liberal politics to give the market considerable scope. The contracts chapters argue that one aspect of private law helps implement this choice: Contract law facilitates private ordering. This claim is correct, but the length of Coleman's contracts analysis suggests that he may have had additional philosophical purposes in mind. Also, Coleman attempts to advance contract theory itself. Part 3 focuses on this effort.

50. COLEMAN, *supra* note 1, at 142 (May 1, 1992 draft).

51. *Id.* at 143 (May 1, 1992 draft).

52. *Id.* at 239.

53. *Id.* at 254-55.

can be active, they should not take control of the contracting process from the parties; “the central lesson of this entire section of the book” is that courts “should encourage litigants to solve their own problems when they are in the best position to safeguard against contract failure.”<sup>54</sup>

The parties fail to cooperate, in Coleman’s view, not when they fail to begin a venture but rather when they write an incomplete contract to govern that venture. Thus courts mediate when they “specify authoritatively the norms governing market transactions”; that is, courts mediate when they supply default rules.<sup>55</sup> Respecting the courts’ second role, Coleman offers no examples of what he refers to as arbitration, and I am unaware of any court explicitly dividing the gains from trade when parties to a contract have not agreed over the split. The courts’ enforcement role is well understood.

Most of the substance of the contract law chapters concerns mediation. Coleman begins these chapters with two positive claims: The parties’ cooperation, division, and defection “problems are captured in [that is, are illuminated by a model of] a type of game termed the *divisible prisoners’ dilemma*”; and “to spell out the [appropriate] default rule, we need a theory of rational bargaining.”<sup>56</sup> He spends considerable time defending these claims.

### B. *Contracts, Bargaining, and Game Theory.*

An abundant economic literature, beginning in the early 1980s, attempts to explain both bargaining and contracting behavior. Psychologists also have tested bargaining theory experimentally. Scholars in these disciplines would recognize little in Coleman’s work. Coleman’s vocabulary is partly responsible; he uses such novel terms as “divisible prisoners’ dilemma,” “concession rationality,” and “resistance theory.”<sup>57</sup> The more serious problem, however, is his method. Coleman’s analyses generate no results—that is, no predictions. For example, he never asserts that, in light of his theory, actual contracts should contain a particular set of terms {X} or that companies would

---

54. *Id.* at 286.

55. *Id.* at 265.

56. *Id.* at 119.

57. None of these terms appear in the indices of standard industrial organization and game theory texts.

be more likely to merge rather than contract in a set of situations {Y}. He also does not attempt to prove theorems about bargaining or contracting behavior. A standard bargaining theorem holds, for example, that the parties' options should they fail to agree will partly determine whether they will contract but, when certain likely conditions arise, will not affect their division of the potential gains from trade.<sup>58</sup> Coleman's bargaining treatment does not develop such theorems.

The book's contract law analysis therefore cannot be evaluated using traditional criteria; its positive conclusions are not reviewable for internal coherence—are the theorems proved?—or for external validity—do people behave as the analysis predicts? Rather, Coleman's arguments should be taken as signposts that tell where more conventional analyses should go. It is unlikely that scholarship will go where Coleman points.<sup>59</sup>

1. *The prisoners' dilemma, sequential play, and repeated games*
  - a. *The prisoners' dilemma and contracts*

Coleman views the "prisoners' dilemma" as explaining much contracting behavior. Economists who analyze contracts do not refer to this game for three reasons. First, the prisoners' di-

---

58. DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 556-62 (1990).

59. The following analysis relates modern economic analysis to contracting problems. It presupposes rational behavior on the part of the relevant actors, as does much of Coleman's argument. On the contrary, a well-known body of work by psychologists indicates that experimental subjects often make cognitive errors. The question of whether this evidence undermines the economic theory thus arises. No conclusive answer has been put forward, but there is reason to believe the economic theory can stand. The psychological experiments test individual behavior; economic experiments test market behavior. The economists ask whether the economic theory, which rests on the rationality assumption, predicts market outcomes. Economics usually predicts well. Vernon Smith, the country's leading experimental economist, says of this disjunction:

Why is it that human subjects in the laboratory frequently violate the canons of rational choice when tested as isolated individuals, but in the social context of exchange institutions serve up decisions that are consistent (as though by magic) with predictive models based on individual rationality? Experimental economists have no good answer to this question, although adaptive learning models . . . are suggestive . . . [A]n important part of the answer resides in the properties of exchange institutions and in how privately informed, but globally poorly informed, decision making is mediated by institutions . . . [P]erhaps the structures we observe have survived because of their merit in coaxing Pareto-efficient behavior out of agents who do not know what that means.

Vernon L. Smith, *Rational Choice: The Contrast between Economics and Psychology*, 99 J. POL. ECON. 877, 894 (1991). Until contrary data appear, the economic models thus can be taken as plausible approximations of what actually happens.

lemma is a game of perfect information; each prisoner knows his payoff and his opponent's payoff for every action the game permits. Parties often do not know their opponent's payoffs in actual contracting situations. For example, the price a buyer will pay is partly a function of the value the buyer places on performance. The seller is commonly uninformed about the buyer's value.

Second, each party to the prisoners' dilemma has a dominant strategy, a particular action that is best for him regardless of what action the other party takes. In the prisoners' dilemma, of course, the dominant strategy is to confess. Parties to contracts seldom have dominant strategies. For example, the amount the buyer will invest to increase the value to her of the seller's performance is partly a function of the likelihood that the seller actually will perform; what the buyer will do depends on what she thinks the seller will do. Games of perfect information that have dominant strategies thus can explain little contracting behavior.

Third, and most important, the prisoners' dilemma is a "simultaneous move game." In such games, a player must take an action, confess or not confess, without knowing what action the other player has taken. Bargaining and contracting, in contrast, are sequential games. In bargaining, one party makes an offer; the other then decides whether to accept or make a counteroffer. In contracting, the parties also make alternating offers and seldom perform simultaneously. When play in a game is sequential, modeling interaction as a simultaneous move game is unhelpful: The model cannot explain the players' behavior.

These three reasons explain why the economic contracting literature makes no reference to the prisoners' dilemma. They also may explain why Coleman's contracts discussions are abstract. He does not connect his prisoners' dilemma analysis to commercial practice because such a connection probably does not exist.

#### b. *Contracts as sequential games*

Coleman's failure to recognize that contracts should be modeled as sequential games causes him to make what economists would consider mistakes. For example, he notes that "even in forms of state of nature contractarianism, the contract problem is solvable under complete information. . . . if cooper-

ation fails . . . , it fails because information is incomplete."<sup>60</sup> This claim misconceives the coordination problem that state-supplied contract law can solve. To see why, consider a simple two-period, perfect-information contracting game without legal enforcement. In this game, a party to a potential contract can make an investment in period one that produces output in period two; the other party would like to purchase the output. The investing or performing party is called  $p^i$  and the purchasing party is called  $p^p$ . The investment will cost  $c$  and produce a total second period output of  $r$ ;  $c$  will be completely wasted if the parties fail to deal. The investing party  $p^i$  functions in a competitive market, in which people like her receive a wage of  $w$  in their usual pursuits; hence, if the parties fail to transact,  $p^i$  earns at most  $w$  per period elsewhere. Also,  $r - (2w + c) \geq 0$ . This last assumption establishes that the investment is worth making.

Even though these parties may be perfectly informed, they still will not contract to produce the output  $r$ . To see why, suppose that at the inception of the first period  $p^p$  proposes a one period agreement, called  $a_1$ , which provides that  $p^i$  is to make the investment and be paid  $w$ , her market wage. If  $p^i$  accepts this contract and invests at a cost  $c_1$ ,  $p^p$  will propose another one period agreement  $a_2$ , at the inception of the second period, under which  $p^i$  agrees to produce output and again be paid  $w$ . Since  $p^i$ 's investment is by assumption worthless outside this relationship,  $p^i$  can do no better than  $w$  elsewhere and therefore she will accept agreement  $a_2$ . She would have rejected agreement  $a_1$  in period one, however, if she anticipated  $p^p$ 's strategy. This result occurs because  $p^i$  would earn  $2w - c$  if she performed under both agreements but she could earn the larger sum of  $2w$  by working in the market rather than agreeing to invest.

The parties would like to make the long term agreement,  $a_L$ , under which  $p^p$  would pay  $p^i$  the wage  $w$  in period one and the sum  $w + c$  in period two. This agreement would ensure  $p^i$  her maximum gain of  $2w$  if the promise to pay were enforceable, and would produce positive gains for  $p^p$ . In our assumed world, however, this agreement is unenforceable. Thus when performing parties such as  $p^i$  are not myopic (that is, they understand

---

60. COLEMAN, *supra* note 1, at 137.

that the paying party will engage in exploitative behavior if given a chance), the parties cannot solve the contracting problem even though they possess perfect information.

In game theory terms, an equilibrium in which the parties agree to make an investment like that discussed above is not "sub-game perfect." Sub-game perfection is a solution concept for games that requires each party to play optimally whenever she has a chance to move.<sup>61</sup> In my example, it would be suboptimal for the paying party  $p^i$  to pay anything more than the performing party's market wage  $w$  in period two, after the investment has been made. Consequently, making the investment initially would be suboptimal for the performing party. When the parties are relatively well-informed, the state is necessary for the resolution of sub-game perfection problems; it can enforce the long term agreement  $a_L$  that permits parties to make productive investments.<sup>62</sup>

### c. *Contracts and repeated games*

Coleman occasionally blurs the difference between contracts and repeated games. This distinction should be sharp: A contract and the punishment strategies that sustain equilibria in repeated games are substitutes. Punishment strategies are necessary because in a repeated game the players' agreement as to how to play is assumed to be legally unenforceable. The repeated game analyst thus asks how parties can solve their coordination problem without contract law.<sup>63</sup> The analysis of repeated games is important because many real world agreements are unenforceable, either because they are illegal or because the behavior upon which the agreement depends is unverifiable (that is, not provable to a third party at reasonable cost). The aphorism that a contract is not a repeated game

---

61. Equilibria that can exist only because a party will not act in its own best interests are considered unrealistic.

62. Libertarians who argue that the state's role should be limited to protecting property rights and enforcing contracts understand the coordination problem that is referred to above as sub-game perfection; they slight the constructive role the state can play in curing the imperfect information problem. Coleman understands the latter role but apparently underestimates the contractual coordination problems that would exist in the state of nature.

63. For an excellent though technical review of this issue, see DAVID PEARCE, REPEATED GAMES: COOPERATION AND RATIONALITY (Cowles Foundation Discussion Paper No. 983, Yale University 1991).

sums up this view. Contracting behavior therefore should not be analyzed as a one shot or as a repeated prisoners' dilemma.

### B. *Bargaining, Contracting, and Imperfect Information*

Coleman spends considerable time examining what he calls a "theory of rational bargaining."<sup>64</sup> Such a discussion raises two questions: How does bargaining theory relate to the functioning of courts? How does bargaining theory relate to the parties' contracting behavior? Coleman does not address the first question and says little about the second.<sup>65</sup> Bargaining theory, however accomplished, has little relevance to contract law. Parties who contract in competitive markets do not bargain; they buy or sell at the market price and under the contract terms that the market generates. All theories of contract hold that courts should enforce these contracts. Sometimes the costs of writing a complete contract exceed the parties' gain. A third party decisionmaker can help by supplying a default rule. The extensive law-and-economics literature that develops default rules does not use bargaining theory, primarily because actual parties often fail to contract about risks. These parties commonly prefer the state to supply the efficient risk allocation. That allocation ordinarily will impose the relevant risk on one or the other party. For example, when the manufacturer is the cheapest cost avoider, it—rather than consumers—should bear the defective product risk. Bargaining theory has no role to play in such anal-

---

64. COLEMAN, *supra* note 1, at 59.

65. Coleman's discussion of bargaining theory cites lightly to modern economic work and is occasionally contrary to the conclusions that work reaches. He apparently believes that bargaining games always have multiple equilibria. Equilibria actually are unique when the parties are informed. For example, when the gains from bargaining are sufficiently large to make both parties to a bargain better off than their disagreement payoffs, and the parties' discount rates are equal, both theory and evidence hold that they will agree in the first period to divide the bargaining gains equally. See Ken Binmore et al., *An Outside Option Experiment*, Q.J. ECON. 753 (1989) (stating the theory and verifying it experimentally). Bargaining games have multiple equilibria when the parties are uninformed. Scholars recently have attempted to shrink the set of equilibria, learning much about how bargaining costs affect outcomes and about the magnitude and character of the gains that parties forego when engaging in strategic behavior (for example, the buyer pretends to have a low valuation so the seller will not insist on a high price). The multiple equilibria problem is still unsolved, however. More references to this literature would enhance Coleman's discussion. For readers who want to pursue the point, Coleman's bargaining theory resembles that of David Gauthier in *MORALS BY AGREEMENT* (1986). A helpful criticism of Gauthier and this genre of analysis by a leading game theorist is KEN BINMORE, *BARGAINING AND MORALITY* (University of Michigan Working Paper, 1991).

yses; that theory asks how people split pies, not how they allocate risks.

When the parties have market power, bargaining theory can illuminate how they agree to split the gains from trade. But when their agreement on a division is contractual, the court's role again is merely to enforce that contract. If the parties fail to agree on a split, the courts will not supply a "default split." The split determines the price; consequently, if parties disagree over the split, they will have made a "contract" without a price. The word contract is in quotes because courts view the absence of a price as strong evidence that the parties did not intend to contract; without such an intention, the courts do not enforce any other terms. In unusual cases, the parties are assumed to intend to contract even though the contract lacks a price. The legal default in such cases commonly is the prevailing market price;<sup>66</sup> in other words, the industry trading price at the time that performance is due. Judges do not use bargaining theory to fill in a price and thereby solve the parties' division problem.

Coleman presents an interpretation of contract law and claims that bargaining theory is relevant to it. Contract law and contract theory, however, implicitly reject this view. The courts do not solve problems of "failed division," and scholars do not use bargaining theory in their analyses.<sup>67</sup> Coleman thus should better explain how bargaining theory—either his version or the economists'—is relevant to what courts do.

### C. Summary

The contracts section of *Risks and Wrongs* devotes relatively little time to contract law. Coleman focuses primarily on how parties make and enforce agreements because he believes that the purpose of the law is to help parties achieve their contracting goals. In particular, he argues that the law should contain default rules that "approximate what the parties would have done themselves."<sup>68</sup> To this extent, Coleman's emphasis

---

66. See U.C.C. § 2-305 (1989).

67. Recent economic contract theory discusses bargaining problems in multi-period settings. The parties in these settings may bargain after the contract is made, when they observe the realization of relevant economic variables such as demand or costs. The parties' anticipation of possible later bargaining outcomes should influence the *ex ante* contract. This genre of model likely will come to illuminate legal contract theory. See Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEG. STUD. 271, 316-18 (1992).

68. Coleman concludes the contracts chapters by distinguishing a default rule "that

on contracting parties' behavior is sound, if conventional to law-and-economics scholars. His discussions of actual contracting practice, however, are too idiosyncratic and too flawed to aid contracts analysts. Perhaps Coleman's unusual positive analyses advance his philosophic goals. The book does not develop this link as yet.

#### IV. CONCLUSION

*Risks and Wrongs* presents novel and provocative ideas in the fields of tort and contract law. The book, however, is difficult for readers who engage in traditional legal scholarship or law and economics. The interpretative parts of Coleman's project, particularly the torts chapters, may puzzle such readers. Coleman does not explain clearly what his interpretative project attempts to achieve, and his corrective justice account of tort law is apparently too narrow to be the basis of further works by torts analysts. Also, recent economic theory suggests that the book's analysis of contracting behavior is mistaken and thus probably unhelpful to scholars attempting to relate actual practice to legal rules.

Advocating that a book as lengthy as Coleman's should have been longer is difficult. Nevertheless, disclosing and defending his methodological premises would have made Coleman's argument more lucid. This book has so much promise that he should do this soon.

---

replicates the particular structure of the parties' relationship" from one that is "fair or efficient as judged by some external criterion of fairness or efficiency." The distinction is sound with regard to fairness: Some substantive fairness theories would condemn many private contracts. The distinction seems confusing or incorrect with regard to efficiency, however. A contract term may advance the parties' interests but be inefficient because it imposes costs on third parties that exceed the contracting parties' gains. Such clauses are not legal defaults today, but rather are substantively unconscionable. Apart from these third party effects, it is difficult to see how a term could maximize the utility of the contracting parties but violate "a principle of efficiency desirable from a global . . . point of view." COLEMAN, *supra* note 1, at 248 (May 1, 1992 draft).