JULES COLEMAN AND CORRECTIVE JUSTICE IN TORT LAW: A CRITIQUE AND REFORMULATION

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In his book *Risks and Wrongs*[1] Jules Coleman explores whether contract and tort law are best understood as expressing economic analysis, rational choice political theory, or corrective justice. His arguments are both broad in scope and intricate in detail. These comments will focus primarily on his discussion of corrective justice and tort law.

Coleman's analysis of corrective justice is illuminating in its examination of the relationship between corrective justice and tort doctrine, the relationship of political theory to private morality, and the contrasting roles of contract, tort, and criminal law. He delineates several sets of useful distinctions, including those between the grounds for liability (why should the defendant pay?) and the grounds for recovery (why should the plaintiff recover?); between the grounds for liability-recovery and the mode of rectification (what institutional form should liability or compensation take?); between the analytic dimension of fault or strict liability (what do we mean by fault?) and the "normative" dimension (why do we impose liability on that basis?);[2] and between the syntax—or structure—of rights (what is true of rights analytically?) and the semantics—or content—of rights (in light of the normative theory, which claims are associated with particular rights?).[3] Coleman carefully explores the significance of Calabresi and Melamed's distinction between

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

2. I find this terminology confusing, however, and would suggest different terms—perhaps the "criterion" of fault or strict liability versus the "point" or "purpose" of such liability.

3. Some of Coleman's other distinctions are more obscure. For example, he suggests that the "epistemic" function of torts identifies which claims to repair are valid or justified, while the "normative" function of torts provides an instrument through which the claims it deems valid are enforced. *See* COLEMAN, *supra* note 1, at 502. This use of "normative" is strange, and the distinction generally seems to overlap the distinction between grounds and modes of recovery (or of liability).

property rules and liability rules,[4] concluding that these distinct rules are not different ways of protecting rights so much as means to specify the content of rights, through the determination of the conditions of their legitimate transfer.[5]

Most importantly, Coleman draws provocative distinctions among the three ways in which the justifiability of an injurer's conduct may be relevant to the victim's claim to repair.[6] I will devote much of this comment to critiquing these "justification categories" that Coleman uses both to express his conceptions of fault, negligence, and strict liability and to reveal his views on the scope and meaning of corrective justice. While there is some truth to the justification categories, I disagree with Coleman about the nature of fault and strict liability as well as the relevance of corrective justice theory to tort law.

The following section explores and critiques some primary features of Coleman's corrective justice theory. These features include his beliefs concerning the point of a corrective justice theory, how corrective justice relates to the justification categories, what this relationship tells us about the distinctive features of contract, tort, and criminal law, and the problem of "strict victim liability." Section II outlines my views concerning the nature of negligence and strict liability, the role of a "duty to compensate," and the overall significance of corrective justice. My conclusions deviate from those of Coleman in important respects. With respect to a "faulty" injurer, I conclude that the primary duty is to avoid faulty conduct, not to compensate for harm done. Therefore, numerous secondary duties (such as compensation for risk-creation, or injunctive liability) may be consistent with corrective justice. In Section III, I apply my perspective to several of the problems addressed by Coleman. With regard to the justification categories, one must ascertain which of three options society prefers—that the injurer not engage in tortious conduct, that the injurer engage in such conduct but pay for the harm he causes, or that the injurer engage in the conduct and not pay. Such an inquiry serves to clarify fault and strict liability. I conclude, *inter alia*, that strict liability comprises both cases of "conditional fault" (where the injurer

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

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

6. *See id.* at 396-98.

has a primary duty to provide advance assurance of his ability to pay) and "non-fault."

I. Coleman on Corrective Justice: An Exposition and Critique

A. *Corrective Justice: The "Mixed" Conception*

What is corrective justice? What should we expect of a theory of corrective justice with respect to its explanatory power, its political legitimacy, or its normative defense? Although Coleman has much to say concerning these questions, his discussion is, unfortunately, scattered throughout the book. His analysis would be much clearer if he were to explicate the requirements for an adequate theory of corrective justice at the outset and then demonstrate how various theories (such as those of Richard Epstein and George Fletcher, or the annulment or relational theories of corrective judgment) fail to meet such standards.

Coleman believes that a corrective justice theory should at least explain the structure of tort litigation, which involves case-by-case adjudication, payment of compensation by an injurer to a victim, and a retrospective rather than prospective focus.[7] He persuasively argues that in these respects, corrective justice provides a superior explanation of tort law than economic analysis does.[8] For example, imagine that a product manufacturer provides an inadequate warning, which the user never even reads. The manufacturer's tort has not caused any harm, because the victim's condition would have been no different had the manufacturer avoided the tortious act. Corrective justice would not permit liability. Nevertheless, economic analysis might justify liability, on the grounds that the manufacturer can better spread costs or reduce risk.[9]

Coleman also believes that a corrective justice theory should provide the injurer with a "reason for action" and should not

7. *See id.* at 390, 588*. The pages in the manuscript immediately following page 573 are not numbered. I have numbered these pages consecutively, with an asterisk, beginning with page 574*.

8. Economic analysis can only give a contingent explanation of why victims obtain compensation from injurers—namely, that such compensation is likely to encourage efficient private prosecution of tortfeasors. If criminal or civil enforcement by government were equally effective, however, economic analysis would support such action and could no longer justify damage awards to plaintiffs.

9. *See* Coleman, *supra* note 1, at 649-50.

simply establish general principles that others—such as the government as social insurer—could as easily satisfy. Moreover, he properly insists that corrective justice must recognize the right of the victim, as well as the duty of the injurer. This requirement distinguishes corrective justice from retributive justice, which focuses exclusively on the injurer's wrong.[10]

Coleman's new emphasis on reasons for action is intriguing. He believes that reasons for action help to explain how corrective justice differs from distributive justice, which simply requires that holdings be distributed a certain way. Distributive justice, therefore, indiscriminately provides *all* persons the same reason for action to ensure that the needs of the victim are satisfied.[11] Coleman also argues that reasons for action help to explain the deficiency of the "annulment" theory of corrective justice, which Coleman had previously endorsed.[12] Under that theory, the point of corrective justice is to eliminate or annul wrongful or unjust losses. Although the annulment

10. *See id.* at 351.

11. *See id.* at 511. I was puzzled, however, by his later argument explaining the relationship between corrective justice and distributive justice. Coleman worries that if the effect of corrective justice were to embed a distributively unjust distribution of holdings, we cannot say that this is a requirement of "justice." Arguably, there is no moral reason for sustaining injustice. *See id.* at 569-70. But why must "justice" or a "moral reason" be a singular constraint? Why must we collapse the question whether the defendant has a corrective justice reason for action, a distributive justice reason for action, or some other moral reason for action, into the single question whether the defendant has a "moral reason" for action? Perhaps corrective and distributive justice each give moral reasons for action that conflict.

Suppose that paying the plaintiff for negligent injury will force defendant below the just level of welfare. The state may now owe the defendant a duty of distributive justice to assure minimum welfare. But why cannot the defendant still owe the plaintiff a duty of corrective justice? The net effect might be that the state, in effect, pays the plaintiff, but what is wrong with that? Moreover, by his negligence the defendant might forfeit claims of distributive justice he would otherwise have. Consider a similar example. Prison inmates have a distributive justice right to minimum welfare, but that right might be to a lower level of welfare than is enjoyed by a person who has not committed crimes.

Finally, even if we were to conclude that the defendant has no duty to compensate the plaintiff when this would lower the defendant below the poverty line, such a result might simply reflect the resolution of a conflict between two duties, one in corrective justice and the other in distributive justice. Perhaps the plaintiff's corrective justice right to repair is overridden by the defendant's right to a minimum income. Or perhaps the defendant has a moral reason for repairing the loss, but that reason is overridden by the plaintiff's own moral obligation—grounded in distributive justice—to assure the defendant a minimum income. (The analysis does not change if we substitute "the state's moral reason" for "the plaintiff's moral reason," thereby recognizing Coleman's point that collective action problems warrant the state enforcing distributive justice duties.)

12. *See id.* at 505-06 (citing Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEG. STUD. 421 (1982)).

view specifies grounds for recovery and liability, it does not specify a particular mode of rectification. Coleman now believes that the annulment view is mistaken, in part because it does not give the injurer a reason for action. According to this view, if the government compensated the victim for the injurer's tort, corrective justice would be satisfied. The annulment view "requires the bringing about of a certain state of the world, but not that individual actors bring it about."[13]

I think Coleman is incorrect in viewing corrective justice theory as distinctive because it gives agent-specific "reasons for action." Distributive justice can also be agent-specific in this way. For example, a parent may have a particularized duty to treat his children fairly relative to one another. Coleman's underlying point is valid, however: Duties in corrective justice plausibly depend on the injurers' actions, not merely upon the state of the world.[14] By contrast, duties of distributive justice might be triggered by natural disasters unrelated to anyone's actions.

Coleman also reviews and rejects another conception of corrective justice—the "relational" view,[15] under which corrective justice merely creates a "framework" of rights and responsibilities such that the wrongdoer must rectify the wrong he imposes on another. Although this view provides the wrongdoer with reasons for action, it remains deficient because it grounds his duty in his wrong, not in his causation of loss. Accordingly, it only requires the injurer to repair the wrong; it fails to require him also to rectify the loss caused to the victim. For example,

13. *See id.* at 511.

14. Coleman later helpfully distinguishes the reasons for action we have because of the actions we undertake and the reasons we have because we are members of a particular community—for example, our duty as citizens in distributive justice, which we delegate to the state. *See id.* at 521. At other times, however, he seems to mistakenly claim that only agent-specific reasons for action constitute moral reasons. If morality is action-guiding and gives reasons for action, he argues, then the annulment view of corrective justice is deficient, because it requires only the bringing about of a state of the world—not that the injurer bring it about. *See id.* at 510. Coleman's argument is unpersuasive. The annulment view of corrective justice does provide moral reasons and (in that sense) reasons for action—it simply provides such reasons to an unspecified class of persons. Perhaps "reasons for action" is an unfortunate phrase, because it can suggest, not simply moral reasons that can guide actors, but moral reasons triggered by the actor's own actions and therefore specific to that actor. The latter is an unduly narrow sense of the phrase, given the justificatory work that Coleman would have it do.

15. Some of what Coleman says about the relational view is a bit mystifying. He suggests that under this view corrective justice has no purpose; it simply establishes a framework for rectification. But why isn't rectification of a wrong a purpose?

this relational concept of corrective justice might require the injurer to apologize or accept punishment; or it might impose a duty on a negligent actor who caused no harm.

One might bridge this gap, Coleman notes, by claiming that the loss is part of the injurer's wrongdoing and not simply an unfortunate consequence of such action.[16] But what justifies this claim? The answer is the "mixed" conception of corrective justice, which draws on both the annulment and relational views and which Coleman ultimately defends. Under the mixed conception, corrective justice imposes a duty to repair the wrongful losses for which the wrongdoers are "responsible," and such responsibility includes causal agency.[17] The duty to repair the wrong comes from the relational view, while the importance of wrongful losses comes from the annulment view. The wrong grounds the victim's claim that the losses are wrongful, and thus brings them within the ambit of corrective justice, while the injurer's agency in creating the losses grounds the duty to repair.

I have doubts about both the coherence and the necessity of this mixed conception, not to mention certain of its details.[18] First, the mixed conception is a strange and possibly incoherent graft of two different conceptions. Why does the injurer have a duty to repair the wrongful losses he occasions, and not simply a duty to repair his wrong? According to Coleman, the annulment view explains why the losses must be repaired—namely, because they are a consequence of the injurer's agency.[19] The relational view explains why the injurer in particular has a duty to repair—namely, because his wrongdoing changes the relationship between the parties.[20] But, the annulment view's supposed explanation that losses need repair be-

16. *See* COLEMAN, *supra* note 1, at 524-25.

17. *See id.* at 527.

18. Coleman says that corrective justice requires repair only of the "wrongful" losses that an injurer brings about, not of all losses. *See id.* at 525-26. But Coleman is not here referring to the sensible limitation of injurer losses to those arising from the wrong. Rather, he is troubled by an idiosyncratic causal objection: What if the defendant's wrongdoing fortuitously makes the plaintiff better off than he otherwise would have been? For example, a defendant taxi driver negligently injures the plaintiff. But for the injury, plaintiff would have caught his plane but then would have died in an ensuing plane crash. Coleman should not amend his general theory and require a vaguely defined "wrongful" loss simply to preempt this causal problem. The problem creates trouble for any legal rule that relies on cause-in-fact, in tort law, criminal law, or elsewhere.

19. *See id.* at 530.

20. *See id.* at 529.

cause the injurer caused them[21] fails to explain why the duty extends only to "wrongful" losses. And the relational view's supposed explanation that the injurer distinctly has the duty to repair because of his wrongdoing or wrong cannot explain why the duty is to repair the loss, or why his wrongdoing or wrong attaches to the "loss" he causes and makes it wrongful. Perhaps the assumption is that the injurer's wrong or wrongdoing somehow flows to the loss itself, making it wrongful. That assumption may be reasonable, but it follows from neither the annulment view nor the relational view. In short, we need an independent explanation of the new "mixed" conception, not two separately insufficient explanations.[22]

The mixed conception is unnecessary. For reasons that I will later explain, the relational view is sufficient—indeed, preferable to the mixed conception—to explain torts involving fault, as well as certain strict liability torts involving what I will call conditional fault. Moreover, neither the annulment, relational, nor mixed view seems to explain other cases of strict liability. Coleman apparently seeks a single (if complex) conception of corrective justice that can explain various aspects of tort law.[23] By insisting on artificial unity, however, he undermines his own effort to provide the best possible explanations of fault and strict liability.

Finally, I am surprised at an important conclusion that Coleman draws from his corrective justice analysis. He states that social insurance plans that fully compensate victims do not violate corrective justice. This conclusion, one of the aspects of his prior annulment view, had previously drawn significant criti-

21. The relevance of causal agency itself is mystifying, as Coleman concedes. *See id.* at 530 n.15. "It is through their actions that we come to understand individuals" and to understand ourselves. *Id.* This claim may be true, but why is "understanding" relevant to moral or legal responsibility? Moreover, although Coleman speaks of "actions," the causal agency he discusses justifies liability for losses—for the *effects* of a person's actions in the world. Why do we best understand a person through the effects of her actions, as opposed to her actions? Concerns about moral luck might suggest that actions are more relevant to "understanding" than their sometimes fortuitous effects.

22. Perhaps an independent explanation is possible. For example, perhaps the injurer's "wrong" includes the loss that he causes. This is one, albeit controversial, interpretation of retributive justice. As applied here, it might justify the relational view of corrective justice. Coleman notices this explanation, but believes it ultimately collapses into the mixed conception. *See id.* at 524-25. He admits, however, that he needs a separate theory of "wrong" and "wrongdoing" for purposes of even the mixed conception; thus, it is not clear why this explanation could not count as such a theory.

23. *See, e.g., id.* at 353.

cism.[24] Moreover, for such an important argument, Coleman's explanation here is frustratingly incomplete.[25]

B. *The Justification Categories: Fault, Necessity, and Legitimate Pricing*

One of Coleman's most important arguments concerns the three ways in which he claims that the justifiability of an actor's conduct can be relevant to the actor's duty to pay compensation. Before examining these "justification categories," however, we need to review how Coleman conceives of "wrongful" losses.

According to Coleman, corrective justice imposes a duty to correct only "wrongful" losses, which he defines as losses resulting from either the injurer's "wrongdoing" or the injurer's "wrong."[26] "Wrongdoing" is the unjustifiable or impermissible

24. Coleman concedes that the annulment view is deficient because it fails to give the injurer in particular a reason for action, and thus fails to explain why a government compensation plan would not satisfy corrective justice. Coleman now asserts, not that it would actually satisfy corrective justice, but that such a plan would extinguish rights of corrective justice that a plaintiff would otherwise have. I find this distinction elusive and in need of further explanation.

Furthermore, Coleman has suggested that in a community such as New Zealand, citizens would simply not have rights to corrective justice if a social insurance plan gave them adequate compensation for harms caused. Remarks of Jules Coleman, Conference on Risks and Wrongs, University of San Diego School of Law, Jan. 30-Feb. 1, 1992. But I think he is aware that such a conclusion depends on very controversial assumptions about how normative ideals like corrective justice arise from legal and conventional practices.

25. A New Zealand-type compensation plan would not violate corrective justice, according to Coleman, because the victim would have been compensated and thus would have no right to recover from the injurer. This inability to recover might be the result of the victim's forfeiture of the claim or consent to the scheme. *See* COLEMAN, *supra* note 1, at 666. That is the extent of Coleman's explanation.

Coleman also asserts that corrective justice permits the state to impose a loss on someone other than the responsible party—unless it has no "good reason" for doing so. *See id.* at 657. This argument is incomplete, however. Presumably general political morality imposes this minimal requirement that the state have a "good reason" for its acts. If Coleman is suggesting that corrective justice itself imposes a stronger requirement than political morality, he has not yet offered an argument.

More generally, I do not fully understand why Coleman worries about whether the state has any obligation to implement corrective justice. *See id.* at 576*. How could the concept of corrective justice itself entail that it "must" be enforced? Consider the analogous argument about retributive justice. If the state chooses not to punish a guilty defendant, the state does not violate retributive justice, it simply has declined to enforce the principle fully. Of course, political theory might require certain principles of justice as a condition of the state's legitimacy. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971); ROBERT W. NOZICK, ANARCHY, STATE AND UTOPIA (1974). But then the failure to implement, say, distributive justice would not be a violation of distributive justice. Rather, it would be an objectionable undermining of the state's legitimacy. Perhaps Coleman is making the latter type of argument.

26. COLEMAN, *supra* note 1, at 384-88.

harming of a legitimate interest. An interest may not be sufficiently protected to be denominated a right, but the harming of an interest may still trigger a duty of compensation in corrective justice. An example is an unfair business practice. Business has no "right" to succeed, only a legitimate interest.[27]

A "wrong" is an action that invades, or is contrary to, a right. Wrongs may be justifiable or not. If they are unjustifiable, they are violations of rights. If they are justifiable, they are infringements of rights. In necessity cases, the wrong is justifiable and thus merely an infringement. Therefore, when Hal, a diabetic with an emergency need for insulin, takes insulin belonging to Carla without her consent, he commits a justifiable wrong—a justifiable infringement of her property rights—and must provide her with compensation. Other necessity cases are similar in nature. For example, *Vincent v. Lake Erie*[28] involves a shipowner who reasonably uses another's dock during a storm to prevent greater harm to his own vessel. Nevertheless, the shipowner is required to compensate the dock owner for any harm caused to the dock.

Coleman's nomenclature is quite confusing. "Wrongful," "wrong," and "wrongdoing" are similar terms, yet Coleman gives them distinct definitions. It would be much clearer, and more expressive of corrective "justice," to speak of "unjust" losses rather than "wrongful" losses, of "unjustifiable harmings" rather than "wrongdoing," and of (either justified or unjustified) "invasions of rights" rather than "wrongs." I am also

27. This distinction between a right and an interest is controversial. It may rest on Coleman's view that rights protect interests in relatively uniform ways, without regard to the nature of the infringer's conduct. Thus, a "right" of autonomy—for example, of privacy—might protect the holder from even well-intentioned infringements, while an "interest" in emotional health is potentially sensitive to the nature of the infringer's conduct—that is, it might protect the holder only from malicious or reckless harm. Of course, this view of the nature of rights is also controversial: If one has an interest protected by law or morality, why not call it a right?

I will not explore the matter here, except to note an apparent inconsistency. Coleman claims that lack of agency defeats a duty of corrective justice (for example, a defendant who is pushed into the victim has no corrective justice duty). *See id.* at 547. But if rights are spheres of autonomy that can be infringed regardless of the nature of the injurer's conduct, why does it matter whether the injurer is an independent human agent? In the realm of self-defense, it is plausible to grant assaulted persons rights of defense against innocent attackers, including children or the insane, and perhaps even against non-agents. *See* NOZICK, *supra* note 25, at 34. To be sure, one might recognize rights of autonomy that justify self-defense against non-agents without taking the further step of recognizing corrective justice rights of repair against those non-agents. We have also seen, however, that one might have a right of repair against one who justifiably "infringes" one's rights, such as the right of autonomy.

28. Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

puzzled that these definitions of "wrongdoing" and "wrong" seem to presuppose that the injurer has actually caused a loss.[29] Yet elsewhere, Coleman draws a distinction between negligent driving cases in which "wrongdoing"—the negligent driving—causes a loss and other cases in which such "wrongdoing" does not.[30] Coleman, to be consistent with his own theory, should define "wrongdoing" and "wrong" more restrictively.[31]

Now we come to the crux of the matter. Coleman states that the justifiability of an injurer's conduct can affect a victim's claim to repair in three possible ways:[32]

> (1) Compensation is due only if the injurer acts with fault, in an unreasonable and unjustifiable manner;
> (2) Compensation is due even though the injurer's action is justifiable;
> (3) The injurer's conduct is justifiable only if the injurer pays compensation for the losses he causes. Rendering compensation serves to right what would otherwise be a "wrong," an invasion of a right.

In category (1), compensation is for wrongdoing.[33] If the injurer's conduct is justifiable, the victim has no claim for repair. In category (2), compensation is for a wrong, but it does not right the wrong. Rather, compensation is due if the injurer *infringes* the rights of others, albeit justifiably. In category (3),

29. First, recall that Coleman defines "wrongdoing" as an unjustifiable *harming* of the interests of others. Therefore, negligent driving would not be "wrongdoing" unless or until it harmed another. (Coleman does not argue that creation of a *risk* of injury to another constitutes a harm. And in his later discussion of the views of Richard Wright, he suggests that this concept might be problematic. *See* COLEMAN, *supra* note 1, at 664.)

Second, recall that Coleman defines a "wrong" as an actual *invasion* of a right, not action that threatens to invade a right. But Coleman could extend his theory to the latter and thus preserve the distinction between "wrong" and "loss." Otherwise, he may have difficulty justifying as permissible those necessity-driven actions that are reasonable in prospect but mistaken in retrospect. For example, suppose the shipowner in *Vincent* reasonably foresaw only a minuscule risk of very extensive damage to the dock. If very extensive damage—greater than the value of the ship—actually occurred, the original action of tying to the dock may still have been reasonable and justifiable.

30. *See id.* at 524.

31. Thus, "wrongdoing" might refer either to conduct that has the effect of unjustifiably harming legitimate interests, or to conduct that unjustifiably *risks* harming legitimate interests. "Wrong" might refer either to conduct that has the effect of invading a right, or to conduct that *risks* invading a right. (Which version one adopts depends in part on how one wishes to treat mistakes and accidents. *See supra* note 29.)

32. *See* COLEMAN, *supra* note 1, at 396-97.

33. Coleman's statement that category (1) encompasses "wrongs" must be mistaken, because this category is the only one in which compensation is available for "wrongdoing," that is, unjustifiable harming of interests. *See id.* at 396-97. Elsewhere, Coleman does state that wrongdoing is the basis for compensation in category (1). *See id.* at 560.

there is neither wrongdoing nor a wrong. Rather, compensation changes the moral character of the act from a wrong and makes the conduct justifiable.[34] Compensation respects rights by respecting the conditions of legitimate transfer inherent within them.[35]

Cases of negligent or non-negligent driving would fall within logical category (1), and cases of necessity would fall within category (2). Coleman uses the scenario of a person who orders a salad at a restaurant as a somewhat odd example of category (3). If the person fails to pay for the salad, he commits a wrong; but if he pays, his conduct is justifiable.[36]

According to Coleman, these categories map onto tort doctrine as follows: Category (1) includes intentional torts (other than cases of necessity), recklessness, and negligence; category (2) includes cases of necessity; and category (3) includes "typical" products liability claims.[37]

Coleman then reaches the important conclusion that corrective justice grounds liability in categories (1) and (2), but not in category (3). In category (3), economic (or rational choice) analysis provides the best explanation for liability. Indeed, economic analysis tries to convert all cases of liability into category (3), viewing all tort liability as simply setting prices for tortfeasors and, in effect, letting them determine whether to commit a tort. If all of tort law were best analyzed as within category (3), then tort doctrine could best be described as economics-based and thereby conceived as merely an extension of contract law. Tort law, however, also expresses corrective justice in categories (1) and (2). As a result, Coleman concludes, tort law is a mixture of markets and morals.[38]

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34. Coleman says that category (3) cases involve rights; hence the reference to "wrong" but not "wrongdoing." *See id.* at 561. But I wonder. Category (3) may also involve harmings of legitimate interests not protected by rights. Does the restaurant owner have a right to profit from your eating the salad or simply a legitimate interest? Similarly, when a product manufacturer compensates users for harms caused by defects, does the user have a right or only an interest in physical health and safety?

Coleman may speak of respect for "rights" rather than "interests" in category (3) because he presupposes a conception of rights conducive to economic analysis, namely, rights as streams of welfare. *See id.* at 560. Such a conception of rights may be acceptable, but it seems to obliterate the distinction between rights and legitimate interests. And if economic analysis can ignore the distinction, why is the distinction so important in categories (1) and (2)?

35. *See id.* at 388, 560.

36. *See id.* at 398. For my criticism of this example, see note 94 *infra*.

37. *See id.* at 717.

38. *See id.* at 560.

Category (3) is still a bit mystifying. To understand the meaning of this category, reviewing Coleman's comparison of contract, tort, and criminal law is helpful. In the broadest terms, criminal law imposes disabilities, limits liberty, and punishes moral wrongs. Meanwhile, contract law is enabling, for it enhances liberty and moves resources to more highly-valued uses. Then how would one interpret tort law?

According to one view, tort law is a set of permissions or prices that neither prohibits activity nor fully permits it (inasmuch as tort imposes liability).[39] To be sure, some economists may try to "price" all activity, including criminal conduct. But such an effort is flawed. Criminal conduct is not "optional." Civil law may impose a license fee for fishing, thereby issuing the message, "you're free either not to fish, or to fish and pay the established fee, at your option." When criminal law imposes a punishment, however, the message is not, "you're free either not to steal, or to steal and pay the price of criminal punishment, at your option."[40]

Category (3) therefore expresses the "permissions" view of tort law—that tort law sets out what people are free to do if they pay the appropriate price. Expressed differently, such a liability rule legitimates a forced transfer.[41] For simplicity, I will refer to the three categories as: (1) fault; (2) Necessity; and (3) legitimate pricing.

How are we to interpret these three categories? Category (1) is relatively clear. Category (2), however, is more problematic. First, the category appears incomplete. An examination of the manuscript indicates that Coleman would wish to include within this grouping not only many instances of justifiable necessity,[42] but also most traditional strict liability categories, in-

39. *See id.* at 69.

40. *See id.* at 71-73. Although I largely agree with this criticism of the economic view of crime, criminal conduct is indeed optional at least in one sense. Our commitment to individual liberty largely disapproves of the practice of preventive detention—incarceration for the purpose of preventing non-imminent crime. In that sense, potential criminals are free either not to steal, or to steal and pay the price. On the other hand, if a police officer sees a defendant about to commit a crime, we permit and encourage the officer to prevent the crime. The law of attempt is in part designed to accommodate these conflicting interests in individual liberty and social prevention of immoral conduct. By rejecting the "option" view, Coleman is merely suggesting that the criminal defendant has still committed a wrong if he commits a crime and pays the penalty.

41. *See id.* at 302.

42. Coleman, however, fails to emphasize that not all cases of "necessity" should fall within category (2). Category (2) should encompass only those necessity cases where the injurer distinctly benefits, or benefits at the expense of the victim. *See id.* at 414

cluding strict liability for dangerous animals and for ultrahazardous or abnormally dangerous activities.[43] These are cases in which the injurer's basic conduct is justifiable—it is permissible to keep a wild animal, to engage in blasting, or to store large quantities of water on one's property—but one must pay for any harm one causes.[44]

Including these traditional strict liability cases within category (2), however, creates a serious problem with Coleman's overall structure. Some of these cases might not be instances of justifiable infringements of rights, which Coleman suggests they must be to ground a category (2) corrective justice duty. Instead, they might be justifiable harmings of interests. For example, if I suffer a bite from a wild animal supervised with due care by its owner, I can nonetheless recover in strict liability. But what "right" has the animal's owner justifiably infringed? My right to bodily integrity? Yet what triggers the strict liability duty here is not the simple infringement of that right. If the infringement of bodily integrity did trigger a strict liability duty, then why could not one recover against a non-negligent

(including a brief mention of this problem). Other "necessity" cases would fit within category (1) and incur no liability because the actions were justifiable. Consider public necessity cases, in which an injurer benefits the general community. For example, after a fire starts, an injurer burns a victim's house to create a fire-break in order to save the city. Or more generally, consider cases where an injurer diverts a threat from one group of third parties to a smaller group of third parties. For example, in the Trolley Problem, the conductor should not be liable for damages incurred in "reasonably" turning the trolley. *See* Judith J. Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

43. But note his misleading characterization of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), as a negligence case. *See* COLEMAN, *supra* note 1, at 580. Coleman claims, alternatively, that "non-natural use" might mean "unreasonable or unjustifiable" use, and that "ultrahazardous activities" are faulty because no level of precaution will reduce their risks to a non-negligent level. Both claims are extremely doubtful. If "fault" and "negligence" have anything like their ordinary meaning, it is not improper, faulty, or negligent to engage in such activities. Notice, for example, that we would not enjoin their continuation. *See infra* text accompanying note 70-71.

A number of Coleman's characterizations of tort doctrine are misleading. *See* COLEMAN, *supra* note 1, at 323 (failing to distinguish carefully between burden of production and burden of persuasion), 324 (giving simplified and misleading description of res ipsa loquitur), 327 (failing to explain accurately defendant's ability to present evidence undermining the prima facie case), 371-72 (making vague and misleading characterization of proximate cause that fails to mention reigning foresight and directness tests).

44. In necessity cases, the injurer has committed a prima facie intentional tort but has a justification or necessity defense. In traditional strict liability cases, the injurer has not committed a prima facie tort. The difference is not significant, however. In either case, the injurer's conduct is justifiable or permissible. *But see* Larry Alexander, Coleman on Corrective Justice (Mar., 1991) (Presentation to Pacific Division of the American Philosophical Association; manuscript on file with author). Alexander suggests that in some traditional strict liability cases we may conclude, *ex post*, that the injurer's action was not socially desirable.

driver who causes similar, or greater, bodily injury? If, on the other hand, I have an interest—but not a right—in bodily integrity, Coleman cannot explain why I can recover despite the fact that the owner acted permissibly.[45]

In my view, traditional strict liability is justifiable, not because the injurer has infringed a right of the victim, but rather because specific principles of justice—including some principles that may depend on the nature of the injurer's conduct—warrant compensation. A variety of principles, including nonreciprocity of risk or benefit,[46] protection of legitimate expectations, or a Kantian requirement of internalizing externalities,[47] can justify liability for non-faulty conduct. Restricting corrective justice principles to invasions of "rights" neither explains tort law doctrine nor seems to be a desirable constraint on corrective justice.

Coleman has suggested—to my surprise—that he would place these traditional strict liability cases within category (3), not category (2), apparently because he wishes category (2) to remain coherent and parsimonious, and because a "rights-infringement"-private necessity approach satisfies that requirement.[48] This view of traditional strict liability renders his corrective justice theory a very incomplete account of traditional tort doctrine. More importantly, I believe Coleman must explain why a skeptic should defer to his particular, incompletely justified vision of coherence and parsimony, when other, more conventional visions of corrective justice justify a more pluralistic approach. For example, non-reciprocity of risk

45. One response is to identify a category of "rights" protected by traditional strict liability categories. But I cannot think of a plausible theory—whether Fletcher's nonreciprocal risk theory, a similar nonreciprocal benefit theory, or Epstein's causal theory—that explains how these traditional categories protect "rights" rather than "interests" in the sense that Coleman demands. In each case, the scope and strength of the right depends significantly on the nature of the injurer's conduct. *See supra* note 27. *But cf.* COLEMAN, *supra* note 1, at 414 (acknowledging that the "right" in necessity cases might be simply a right not to have the value of one's right reduced by others for their own benefit).

46. *See* George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

47. *See* COLEMAN, *supra* note 1, at 361.

48. Remarks of Jules Coleman, Conference on Risks and Wrongs, University of San Diego School of Law, Jan. 30-Feb. 1, 1992. One major reason that Coleman has offered for placing modern product liability cases within category (3) is that these cases typically involve a contractual relationship between the manufacturer and the consumer. In traditional strict liability cases, however, the injurer and victim are rarely contracting with one another. Thus, how much weight this "already-contracting" explanation should carry is unclear.

or benefit might justify the "dangerous animal" and "ultrahazardous activity" cases, while intentional appropriation of a private benefit might justify *Vincent* and similar cases. These corrective justice principles do not fit within a single conception of "rights-infringement," but they might be defensible corrective justice principles nonetheless. Coleman seems to believe that corrective justice has a deep normative structure that demands an extremely parsimonious architecture, but I would like to see a developed argument for this view.[49]

What legal cases are Coleman's category (3) designed to encompass? Coleman wants to place modern products liability cases in category (3) because he believes they essentially involve an attempt to complete a contract that cannot be fully articulated *ex ante*. In the products liability sphere, parties are already in a contractual relationship, and the only major unenunciated portion of the contract concerns the allocation of safety-related risks.[50] As a factual matter, however, this description of the product market is questionable.[51] Moreover, many modern products liability cases rely on a negligence-like theory akin to category (1). Only liability for manufacturing defects is truly strict.[52]

Let us consider the theoretical issue, however: Do products liability cases fit more comfortably within the "legitimate pricing" category than within the other two categories? The answer depends on which corrective justice principles we believe underlie strict liability generally. If corrective justice principles can only explain necessity cases, or only unjust enrichment or appropriation necessity cases, then both traditional strict liabil-

49. Perhaps Coleman is concerned that a corrective justice theory must have the following features: (1) The injurer's payment of compensation cannot right the wrong, and (2) such payment cannot make it morally optional whether the injurer engages in the activity or simply pays the price. But Coleman's rights-infringement category of strict liability cases does not accurately express this concern. In some cases, corrective justice might justify a right to repair even under circumstances when it is morally optional whether the injurer engages in the activity or pays the price.

50. *See* COLEMAN, *supra* note 1, at 716-17.

51. In many, if not most, products liability cases, the victim has not directly contracted with the injurer. Coleman's frequent references to "consumers" create the mistaken impression that the victims of product defects are invariably the buyers of the product. He ignores users and bystanders. Moreover, exculpatory clauses relating to safety risks were quite common until courts decided to invalidate them.

52. But perhaps Coleman means to include within category (3) cases that would otherwise be treated as negligence (category (1)). I would disagree with such treatment of negligence cases, which I view as situations in which the injurer has not acted permissibly, not as situations where he has acted permissibly but must pay the price of his activity. See discussion *infra* at notes 85-87.

ity and strict products liability must, by default, be "legitimate pricing" cases. A set of corrective justice principles could, however, justify both strict products liability and traditional strict liability.[53] For example, one conception of corrective justice requires that safety costs be passed on to the broader class of consumers who benefit from the use of the product.

Finally, does category (3) makes any sense at all as a general logical category (as opposed to an abstract explication of economic theory)? Can we give any *non*-economic meaning to the concept, "permissible if you pay the price, otherwise not permissible"? For reasons that I will offer later, I believe that we can. Indeed, I believe that certain corrective justice principles help explain cases within this category. Thus, although certain tort cases may only fit into category (3), it does not follow that torts must be a "mixture of markets and morals," as Coleman concludes.

C. *"Strict Victim Liability"*

Coleman believes that his corrective justice theory helps explain an aspect of fault liability that is otherwise quite puzzling—the phenomenon that he calls "strict victim liability."[54] Coleman emphasizes that a regime of fault liability not only imposes liability on faulty injurers but also leaves victims with the loss in instances where the injurer has acted without fault. Such a loss, he claims, amounts to "strict victim liability." Therefore, strict liability is at the core of fault liability. What is worse, injurers are strictly liable only if they cause harm, while victims can be strictly liable even when they do not cause their own

53. Coleman also presses the converse argument. "The principle of strict liability has an element of fault liability at its core," he says, because strict liability typically allows a contributory negligence defense. COLEMAN, *supra* note 1, at 341-42. This assertion is simply incorrect. Traditional strict liability is typically subject to an assumption of risk defense, but not a contributory negligence defense. With respect to strict products liability, the influential Restatement § 402A narrows the contributory negligence defense. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1966). Moreover, a fault standard also typically has a contributory or comparative negligence defense. Instead of insisting on this false symmetry, Coleman should ignore the question of plaintiff fault and concentrate on the still important main point: Fault liability—with or without a contributory or comparative negligence defense—imposes a kind of strict liability on victims, while injurer strict liability—with or without a contributory or comparative negligence defense—does not.

I do agree with Coleman that corrective justice theorists should look more closely at the relevance of the victim's conduct, whether contributory negligence, mitigation of damages, consent, or assumption of risk.

54. *See* COLEMAN, *supra* note 1, at 342.

harm![55] Therefore, strict liability—for the injurer—might be preferable to fault liability, because the injurer has at least produced the harm.

Although Coleman is hardly the first commentator to notice that fault liability leaves many losses on victims, he may be the first to emphasize that the victim often lacks causal agency.[56] Coleman rightly expects a theory of corrective justice to explain why fault is an acceptable general standard of liability despite its colorably unfair effect on victims.

Nevertheless, Coleman concludes that corrective justice does not require general injurer strict liability: Causation of loss alone is not morally relevant under the theory of corrective justice he defends. Rather, the loss must be "wrongful" in one of the relevant senses, either as an unjustifiable harming or as the infringement or violation of a right. Therefore, a victim has no corrective justice right to repair simply because the injurer has caused her harm—even if the victim has not caused her own harm. Coleman acknowledges that letting the loss remain with the victim[57] does not reflect the "natural" course of events but rather a decision of the tort system. Nevertheless, corrective justice does not justify "shifting" the loss to the defendant whenever he has caused the loss.[58]

Apart from the question whether corrective justice indeed "shifts" losses,[59] Coleman's argument is incomplete. Why can

55. *Id.* at 343.

56. This point should not be overstated, however. Sometimes even non-negligent victims causally contribute to their own harm. Consider the farmers in LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry., 232 U.S. 340 (1914). Even if they "reasonably" place the flax relatively far from the railroad tracks, their decision to do so causally increases the risk of self-harm, as compared to the option of not placing any flax on their property. If, by "cause," one means to include the victim's responsibility for omissions, the victim's prior decisions, and decisions about activity level, then it may actually be rare for a victim *not* to causally contribute to her harm. *See* Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CANADIAN J.L. & JURISPRUDENCE 147 (1988).

57. At times, Coleman's description of how losses "lie" with the victim is confusing. For example, he states, "It is not analytic within tort law that losses should lie initially on victims." COLEMAN, *supra* note 1, at 347 (emphasis omitted). What Coleman intends to say, I believe, is this: Analytically, the victim suffers the loss initially, because that is what it means to be a victim; but normatively, we often decide to *leave* the loss on the victim. In the quoted phrase, Coleman should say "remain" or "presumptively remain" instead of "lie initially."

58. *See id.* at 345.

59. *See id.* at 323, 327. It would be more accurate to say that the tort system gives victims a right to repair or compensation. Tort law does not merely "shift" losses, nor does it simply "allocate" sunk costs. *See id.* at 335. When injurers are required to pay for a loss, their duty is to compensate as fully as possible. Their duty is not to accept a "loss" of the same nature or severity as the loss suffered by the victim, or to suffer as

the unilateral causation of harm not constitute infringement of a right—the right to bodily security? Although this approach may be an unwise, unduly broad view of corrective justice, it falls within Coleman's corrective justice definition.[60] More generally, in attempting to explain why corrective justice permits the imposition of faultless losses on victims, Coleman relies on a structural feature of his corrective justice theory: The theory principally asks when a victim has a right to repair.[61] But why is that the only relevant question? Why is corrective justice not also concerned with the injurer's right to cause (even faultless) harm to victims? Even if nothing about the injurer's action or status gives the victim an affirmative corrective justice right to repair, perhaps nothing about the victim's action or status gives the injurer an affirmative right to cause harm. And the unanswered question is why the victim's right to recover for harm requires affirmative justification, while the injurer's right to cause harm apparently requires less, or even no, justification.

Coleman might respond that corrective justice is not concerned with this last question, even if some other moral theory is. Corrective justice is simply concerned with whether victims have any affirmative right to recover for losses. I do not understand, however, why it is necessary or desirable to restrict the concept of corrective justice in this way. Alternatively, even if corrective justice is definitionally unconcerned with this question, it is an issue central to the justifiability of tort law. Justifying tort law requires considering other moral principles

much loss as the victim would have suffered absent compensation. Similarly, we do not inquire into whether paying compensation hurts the injurer as much as it helps the victim.

Suppose a court had the magical power to cure a victim's injury by causing the same injury to the injurer. The court would (and should) not take such action if it could also impose the alternative remedy of having the injurer pay for the costs of completely curing the victim. This would be true even if the alternative remedy would not immediately cure the victim, so that the victim would be worse off under the alternative solution than under the magical solution. Why? In part because we want the injurer to rectify the loss as much as possible; we do not want to simply impose a new loss. The "necessity" here is not between "shifting" a loss and leaving it on the victim, but between rectifying a loss and leaving it on the victim. There is no need to "shift" the loss in the magical solution, no need to create a new loss on the injurer. The belief that one must create a new loss is like the analogously fallacious argument—which Coleman properly criticizes—that either the victim or the injurer must receive *criminal* punishment. *See id.* at 336.

60. Perhaps this definition of a "right" is unacceptable to Coleman, but again, it is not clear why. *See supra* note 27.

61. The answer is that a victim has a right of repair only for defined types of "wrongful" losses.

relevant to the question.[62]

But perhaps I misunderstand Coleman here. After all, to say that an injurer's corrective justice duty to repair extends only to repairing "wrongful" losses seems equivalent to saying that the injurer has a corrective justice privilege to impose "non-wrongful" losses. If Coleman believes that corrective justice creates privileges and does not simply impose duties, then he is simply asserting that corrective justice can justify permitting an injurer to impose losses so long as he is without fault and has not infringed a right. Still, little in Coleman's manuscript affirmatively justifies such a corrective justice privilege. One might argue, for example, that members of society reciprocally benefit from their ability to impose faultless losses on one another. Instead, Coleman virtually stipulates that corrective justice is only for "wrongdoing" or "wrong," and therefore does not explore the logically equivalent question whether corrective justice also affirmatively justifies a privilege to cause harm outside these categories.

II. Fault, Strict Liability, and Corrective Justice: A Different View

Let me briefly sketch a different view of fault, strict liability,

62. A partial explanation, perhaps, is the special role that Coleman assigns to excuses that defeat causal agency. Such excuses defeat a duty in corrective justice, even though they do not defeat "liability"—including strict victim "liability." *See* Coleman, *supra* note 1, at 365, 548. Thus, if the wind unforeseeably knocks an injurer into his victim, the injurer has no duty in corrective justice. Nevertheless, the victim has been injured through no causal agency of her own and is "liable" for her own loss. I think this argument simply restates the general question I posed, however: Why doesn't the injurer's affirmative right to cause harm, even without agency, require justification as much as the victim's affirmative right to recover for harm caused without agency?

Coleman says that corrective justice imposes loss upon an injurer not because it is wrongful, but because the loss is, in some appropriate sense, the injurer's responsibility. *See id.* at 548. Presumably corrective justice permits some range of conceptions of "responsibility" (so long as the conception includes causal agency). Again, however, this conception of "responsibility" needs both affirmative and negative justification. When a loss is neither the injurer's nor the victim's responsibility, corrective justice still must explain why the injurer has a privilege to cause the harm.

Another response is to deny that strict victim "liability" is really a form of liability requiring justification. After all, if a victim is harmed by an earthquake, she is "liable" for the loss in a trivial sense: She must suffer the loss unless the government or someone compensates her. If the government fails to compensate her, it has made a decision not to do so. And perhaps she is "liable" in no more significant sense when the injurer has faultlessly caused her loss.

This response is insufficient, however. When an injurer causes harm to a victim, *he* has changed the state of the world. It is then a fair question—indeed it is the question with which corrective justice is centrally concerned—whether his unsettling of the *status quo ante* imposes any duty upon him.

and corrective justice—a view that better explains the nature of fault and strict liability doctrines. Although my perspective does not justify certain features of current tort practice as necessary, and in this respect may appear inferior to Coleman's view, I will argue that this difference does not detract from my approach. I will begin with an explanation of fault and strict liability and then explore certain objections, particularly the question whether my explanation can plausibly be considered a corrective justice theory.

An injurer is *at fault* if she has acted as she should not have acted in creating an unjustifiable risk of harm to her potential victims. Her *primary* duty is not to cause unjustifiable harm to her potential victims.[63] But we might implement that primary duty via a number of possible secondary rights in the victims: a right to enjoin her action; a right to recover compensatory damages if the loss occurs; a right to recover for the risk of harm, even before (or perhaps even after) the harm has materialized;[64] a right to obtain advance assurance—such as a bond, insurance, or other form of security—that the potential injurer can afford to pay any damage that she causes through her fault;[65] or additional rights.[66]

The term "fault" is designed to include negligence, recklessness, and unprivileged intentional torts. By contrast, when an injurer is *strictly liable* for a harm, she is liable even if she lacks "fault" in this sense. That is, it need not be the case that she acted as she should not have acted.

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63. Alternatively, the duty could require the injurer not to impose negligent *risk* on a victim. *See* COLEMAN, *supra* note 1, at 664. More conventionally, the primary duty is not to cause *harm* through one's faulty or negligent conduct. On this view, risks would not be negligent unless they created a risk of actual harm—even if the harm is simply the emotional harm of feeling endangered. This distinction makes a difference if recovery is allowed for true risk-creation—that is, if an injurer cannot obtain exculpation by proving that she did not cause harm or that harm did not occur, or if a victim cannot obtain full recovery upon proof that he did suffer harm.

64. *See* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990); Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113 (1990); *see also* COLEMAN, *supra* note 1, at 390-91, 664.

65. *See* Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); *cf.* COLEMAN, *supra* note 1, at 705 (exploring whether the product manufacturer or the consumer should have a duty to insure).

66. In theory, a victim might be entitled to recover for her own precaution costs when the injurer's faulty conduct has required her to take additional steps for her own protection. I do not suggest that this remedy will often be feasible. Note, however, the surprising judicial disapproval of the "seatbelt defense," a judicial attitude that indirectly achieves this result.

On this view, although tort law typically requires injurers to compensate victims for harm caused, this compensation duty is secondary. The primary duty is not to engage in faulty conduct.[67] The secondary duty of compensation does not arise from the loss itself but from the need to do something feasible to respect the primary right of the victim. Therefore, the occurrence of a loss need not be central to corrective justice![68]

But the occurrence of a loss may be more central insofar as corrective justice imposes *strict* injurer liability. Under such circumstances, the victim has a right, not to avoid the harm, but to be repaired once the harm occurs. We would not enjoin the harmful activity, even if it were possible. Nevertheless, compensation for *risk* remains a viable remedy in such situations,[69] as does advance assurance of one's ability to compensate.

In general, faulty conduct is conduct that should not occur because it unjustifiably risks causing harm. And, in general, we would enjoin faulty conduct if it were feasible.[70] By contrast, non-faulty conduct is justifiable—or at least permissible—conduct that we would not enjoin. Similarly, we would not permit a

67. *See* Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51, 94 (1991); *see also* COLEMAN, *supra* note 1, at 519-20. *But cf.* Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 328-31 (1990)(noting "compensatory justice" as one principal rationale for tort law).

68. One might wonder why, once a loss has occurred and the costs are "sunk," the primary duty of the injurer not to act in a faulty manner should trigger any secondary duty of compensation. The answer is simply that this may be the best option available to respect the victim's right. To the extent possible, we wish to make the world as it would have been if the injurer had not engaged in faulty conduct.

Significantly, this justification of a compensation duty might not require the same type and degree of compensation that tort law now requires. For example, hedonic damages (for the lost value of life) are usually considered difficult to justify under corrective justice theory when the deceased victim has no survivors: If the primary duty is a duty to compensate actual victims, but no victims have survived, then there is nothing to compensate. But if the primary duty is not to engage in faulty conduct endangering or harming the (now-deceased) victim, then compensation as a second-best solution is more justifiable. (The victim would have had a right to enjoin the faulty conduct if that remedy had been feasible; now we are doing the best we can.)

69. *See* Schroeder, *supra* note 64; Simons, *supra* note 64.

70. A further condition might be added, stating "and if it were sufficiently clear that the conduct is faulty." When it is not sufficiently clear, damage liability might be preferable. This approach permits the injurer herself to decide whether she should have acted differently. *See* Calabresi & Melamed, *supra* note 4 (giving a specifically economic interpretation).

This additional condition may be very important in practice. Enjoining "negligent" activities frequently would be highly intrusive and disruptive and—if the risks of error are significant—would threaten to prevent many socially desirable activities. Similarly, although my approach might appear to support the routine imposition of punitive damages for negligent conduct, this remedy risks overdeterring desirable activities if the standard of negligence is often applied inaccurately. Willingness to enjoin is not, then, a distinct criterion of fault, but instead a partial explication of the fault concept.

private party to interfere with the right to engage in the activity. Thus, the dock owner in *Vincent* has no right to exclude the shipowner. To be sure, the typical tort remedy is compensation for harm. But this choice of remedy merely reflects the episodic nature of most tortious activity and independent concerns about the costs of injunctive remedies. Corrective justice *theory* would tolerate—and perhaps even encourage—an injunctive remedy for torts of negligence or intent.[71]

Before proceeding, I would like to clarify some of the above statements. First, by the criterion "acted as she should not have acted," I mean to adopt the *ex ante* perspective of contemporary tort law. The question is not whether, *ex post*, the injurer caused harm, for faulty conduct might not result in harm and non-faulty conduct might result in harm. We generally want to permit or encourage non-faulty, reasonable actions because in the long run—to put the matter plainly—such behavior makes the world a better place.[72]

Second, any number of more specific criteria still deserve the appellation "fault." Therefore, fault could mean any of the following: economic inefficiency, conduct that does not maximize utility as judged by an objective theory of value,[73] violations of

71. Tort practice does occasionally allow injunctive relief for certain activities, such as continuing nuisances and invasions of privacy. *See* DANIEL B. DOBBS, REMEDIES §§ 5.7, 7.4 (1973).

72. One should distinguish a third, intermediate position—an *ex post* or hindsight test of whether a specified activity is unjustifiable or faulty in general, regardless of whether it is harmful in particular cases. Such a "fault in hindsight" test (for example, Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539 (N.J. 1982)) is stricter than a true "fault in foresight" test. Judith Thompson seems to encounter unnecessary difficulty by ignoring the possibility that an *ex ante* "ought" statement will remain true even if the risk eventuates in harm. *See* JUDITH J. THOMSON, RIGHTS, RESTITUTION AND RISK 173-191 (1986).

Larry Alexander has distinguished between strict liability in which, *ex post*, even knowing that the injurer caused harm, we believe the injurer acted permissibly (for example, *Vincent*) and strict liability in which, we believe, in retrospect, that the injurer should not have acted as he did. *See* Alexander, *supra* note 44. For my purposes, either category describes non-faulty conduct if, *ex ante*, the injurer's action was (or reasonably appeared to be) justifiable.

The meaning of "should not have acted" can be ambiguous, both as to what one should not have done, and as to the temporal dimension. *See* THOMSON, *supra*. I do not think the ambiguities are overwhelming, however. In retrospect, of course, it is often true that one should not have done something that was perfectly reasonable to do at the time. The *ex ante* approach simply asks what is reasonable at the time of the action. I do not mean to deny difficulties in deciding what is "reasonable," or how much weight to give to the particular subjective perspective of the actor. But these difficulties—such as deciding whether the fault need only be in the action (as Coleman argues) or also in the actor—are not unique to my approach.

73. *See* DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989).

customary or community norms, failure to treat interests of others as one would treat one's own, non-reciprocity, failure to honor legitimate expectations, or failure to acknowledge the victim's freedom of choice.

Third, I assume that a court, legislature, or other social decisionmaker ordinarily will determine fault. Private determinations of fault will not likely match the moral criteria of public institutions for a number of reasons, including incentives, natural self-interested orientation, and incomplete information. In some circumstances, however, a private determination of fault may more likely be "correct" than a social determination. In such cases, a general strict liability rule might be preferable to a judicially-defined fault rule,[74] because it forces injurers to internalize adverse public effects and thus to determine the continued worth of their undertakings.

My analysis undoubtedly prompts certain questions. First and most importantly, is my view a corrective justice view? Although definitions of corrective justice differ widely,[75] the following interpretation encompasses fairly common ground. Corrective justice should be distinct from retributive justice in providing a specific right or claim to the victim; otherwise, criminal law could also be seen as instantiating corrective justice. Corrective justice should be distinct from distributive justice in focusing on the relationship between the parties, not merely on the justice of the victim's holdings. Furthermore, corrective justice requires a "wrong" or "injustice" by the injurer that the injurer has a duty to correct. And that duty must

74. Whether a private determination is more likely to be "correct" depends crucially on the criterion of fault. An economic criterion of fault may often warrant such a strict liability rule. *See* Calabresi & Melamed, *supra* note 4; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); *see also* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEG. STUD. 357 (1984); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

Two other clarifications of my approach deserve only footnote mention. First, the general criterion is counterfactual and thus both hypothetical and comparative. Faulty action is worse than—what? Non-faulty action? No action? Negligence theory usually gives a clear answer by specifying the precautions that "should" have been taken. A non-negligent doctor would have conducted the operation without negligence. A non-negligent warning would have specified the risks. Intentional torts—other than those involving necessity or other defenses—implicitly satisfy this condition as well. Second, although the primary right is that the injurer not unjustifiably harm others, this is not to say that tort law's point is to *deter* injurers from so acting. A purely retrospective orientation is also consistent with my conception of the primary right. Even in situations where deterrence is unlikely, the victim might have a right to compensation because the injurer acted as he should not have.

75. Compare the variety of views cited in Simons, *supra* note 64, at 125-26 nn.45-53.

derive at least in part from the relationship of the parties or the way in which the injurer's conduct has affected that relationship. A theory of corrective justice can probably accommodate a variety of conceptions of "wrong" or "injustice."[76]

My view of fault and strict liability provides rights to the victim, as well as a duty to the injurer. A defined class of plaintiffs should have the right to an injunction, to damages for risk-exposure, and to enforcement of a bond requirement (as well as the right to recover damages if harm actually occurs). I concede, however, that my view may seem problematic insofar as it gives such rights to potentially different classes of plaintiffs. At the time of an injunction, perhaps all (though only) those foreseeably endangered have such a right.[77] Prior to the occurrence of any harm, endangered individuals have a right to damages for risk-creation, perhaps calculated according to the probabilistic risk of each individual's injury.[78] After a person has been injured, however, she alone has the right to damages.

Does such a variation demonstrate that the victims' rights are not really founded in corrective justice? Or does it simply demonstrate that corrective justice rights constitute a diverse lot? I am not certain.[79]

Coleman has challenged my theory with a similar objection. He claims that by emphasizing the injurer's violation of the victim's rights, rather than the loss that the injurer caused the victim, my view fails to explain the sense in which corrective justice "corrects." Moreover, because an injunction is prospective, that remedy is unable to "correct" a past injustice. In re-

76. *See* Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143, 160 (1990). In my response to Schroeder, I treated corrective justice as encompassing any non-instrumental tort theory. *See* Simons, *supra* note 64, at 127-28. I now believe that this view treats corrective justice too skeptically.

A corrective justice theory might also fail to specify what counts as "harm." *See* Schroeder, *supra*, at 160.

77. Other traditional injunctive requirements, such as irreparable injury, are less worrisome in this context because they are more relevant to the practical advisability of injunctive relief than to its theoretical aptness as a corrective justice remedy.

78. *See* Schroeder, *supra* note 64; Simons, *supra* note 64.

79. Here is another way of stating the problem: When a plaintiff is actually injured and seeks compensation, I claim that we should conceptualize her right as a primary right that the injurer not act in a faulty manner. But individuals who will not in fact be harmed would also have the right to an injunction. Arguably, then, the primary right does not really ground the secondary duty to compensate. On the other hand, we should not forget the second-best nature of the compensatory remedy. Perhaps all of those foreseeably endangered have both a primary right to prevent the faulty conduct, theoretically secured by an injunction, and also a *conditional* right to compensation if they become actual victims.

sponse, I suggest a more conceptual, less remedial understanding of corrective justice. When an injurer acts tortiously and endangers a victim, the injurer violates the victim's rights. Whether that violation is remedied by an injunction, damages for risk-creation, or damages for actual harm is a secondary issue. The injurer's primary duty in corrective justice is to avoid violating the victim's rights; the injustice is the violation.

The term "corrective" might seem to require an after-the-fact remedy: Once the injustice occurs, the injurer's duty is to "correct" it. Such an interpretation is unduly narrow, however. Given the role corrective justice plays within moral and legal theories, we should only require that when the injurer's actions upset the relationship between the injurer and the victim, the injurer must act to restore the relationship.[80]

Another objection is as follows: With my emphasis on enjoinability, I seem to be arguing simply that negligence and fault are entitlements protected by a property rule, in the Calabresi-Melamed framework. If this is the case, what is to prevent the tortfeasor from buying out the parties entitled to the injunction and continuing to do what he should not do? Transaction costs may be a barrier, but they are not always insurmountable.

This objection misunderstands my argument. Fault is not analytically identical to conduct protected by a property rule. Some conduct may be sufficiently faulty that its victims should also be protected by an inalienability rule. Moreover, although my criterion of fault maps onto enjoinability, I need not accept the economic reasons that Calabresi and Melamed provide for that equivalence, including facilitating efficient use of resources and overcoming obstacles to consensual transactions. Further, the tortfeasor's occasional ability to buy out the injunction does not demonstrate that the underlying conduct was not faulty.[81]

A final objection is this: Does my view fail to explain enough

80. Imagine, for example, that we could predict tortious conduct. Then a victim might have a right to enjoin an injurer from drunken driving. This remedy need not be based on the injurer's prior conduct: It might instead be based on the injurer's expected violation of the victim's rights. The injurer's liability to an injunction does not correct a past injustice, but it does restore a relationship that the injurer's tortious action would otherwise disrupt.

81. Such an ability might demonstrate the absence of fault, however, if the underlying definition of fault is inefficiency and if the injurer accurately weighs the precaution and liability-buyout costs. But I do not assume such a definition of fault.

of tort law? In particular, one might object that my view does not explain the necessity of the structure of tort law, especially its typical requirement that defendants compensate plaintiffs for tortious harm. I confess that I do view the compensatory structure of tort law as contingent—that is, as a second-best response once a loss has actually occurred. Even after a loss has occurred, compensation for risk-exposure may also satisfy corrective justice. Unlike proponents of the economic view, however, I believe that victims do have rights against injurers and are not simply useful enforcers of efficiency or other social objectives.[82]

III. Comparison to Coleman

To determine how my alternative account of corrective justice, fault, and strict liability compares with Coleman's views, it is necessary to examine several issues, including the justification categories, victim strict liability, and whether my conception of corrective justice is relational, annulment, or "mixed." Moreover, I will confront some practical implications of corrective justice, including whether corrective justice permits liability for risk-creation, and whether corrective justice permits a social insurance plan that fully compensates plaintiffs without imposing costs on defendants.

82. Here is another objection: Can this view of "fault" explain negligence, especially its "objective" test? Can it explain why negligence requires "fault in the doing, not the doer," in Coleman's phrase? Coleman, *supra* note 1, at 332.

I think it can. First, Coleman may understate the extent to which even the objective test reflects the personal fault of the actor. He neglects to mention a standard argument suggesting that the objective test is consistent with personal culpability and with the moral principle "ought implies can"—namely, that the objective test does partially excuse children, those with physical disabilities, and the elderly, and only fails to recognize excuses when either the costs of evaluating the excuse or the risks of fraud are too high.

But I find this standard argument overstated. We are also simply less worried about liability tracking personal culpability in tort law than in criminal law.

Yet, if it is not true that the actor should have done better, and only true that the *action* should have been better, is this sense of fault too attenuated? Why not say the *result* should have been better and hence justify strict liability?

Note that this problem underlies the liability of insane persons for most of their torts. We recognize the oddness of saying that their actions should have been better when clearly they could not do better. Such an approach seems like strict liability.

One possible response to the problem is to argue that even the tortious conduct of insane persons involves "fault" in an important sense. The law needs to define *ex ante* the types of conduct that are impermissible, whether the law is concerned to deter the conduct or to characterize it as wrong. The message may be, "If you were personally culpable and you did *that*, you would really be at fault."

A. *Critiquing and Reconstructing the Justification Categories*

Under my approach, how do we interpret Coleman's three categories of (1) fault, (2) necessity, and (3) legitimate pricing?

Coleman's category (1) closely parallels mine. He emphasizes that "wrongdoing" occurs, and that a "wrongful" loss results, even if there is compensation. I emphasize that the "wrongdoing" is conduct that we wish had not occurred. Unlike Coleman, however, I emphasize that the primary duty is not to act in such a "wrongful" or faulty way, while the duty to compensate is secondary.

Coleman's category (2) clearly does not implicate fault. Here, Coleman and I are in partial agreement. We both believe that society prefers—or at least does not disfavor—the necessity-driven action of taking the insulin, damaging the dock, or stealing the food, as well as the strict liability activities of blasting, storing large quantities of water, or keeping wild animals.[83] But my approach differs from Coleman's. He emphasizes that category (2) involves only violations of rights—for example, the property rights of the owner of the insulin, the dock, or the food. Consequently, category (2) still requires the repair of a "wrong"—the infringement of a right. My approach, however, emphasizes that corrective justice requires compensation on the basis of any number of specific principles of justice, such as imposing a non-reciprocal risk or obtaining a non-reciprocal benefit, that are not necessarily based on violations of "rights."[84]

Coleman's third category—legitimate pricing—is the least clear. According to Coleman, certain conduct is wrong unless one pays an appropriate price. Once one has paid, however, the behavior is no longer wrong. Coleman also seems to believe that only economic analysis can explain this category. I disa-

83. But recall some uncertainty exists about how Coleman would treat the latter non-necessity cases.

84. Put differently, Coleman describes a very narrow category of "rights"—as opposed to "interests"—that corrective justice protects. I would be content to allow corrective justice to extend either to certain ways of harming others' "interests"—rather than "rights"—or to violations of a broader category of "rights" protected by corrective justice. For example, when your ultrahazardous blasting imposes a non-reciprocal risk on me by causing me bodily harm, or allows you to obtain a non-reciprocal benefit, we could say either that corrective justice should rectify for the nonreciprocal risk (or benefit) that harmed my interests, or that I have a "right" protected by corrective justice not to be subjected to a non-reciprocal risk (or benefit).

gree with such a proposition. Category (3) can be a more general logical category, and does not require an economic interpretation. Category (3) can largely be reinterpreted as a category of "conditional fault"—conduct that is wrong if one does not provide assurance of payment, but acceptable when one provides such assurance. Before we reach that conclusion, however, let me set forth what one might call "preference menus" between alternative choices available to potential injurers. These menus clarify the different senses of fault operating in categories (1), (2), and (3), and in my reconstructed categories (2)* and (3)*, introduced below.

1. Category (1):

In category (1), the question is whether society has any preference between the following three alternative choices available to potential injurers:

(a) Do not act negligently (or with reckless or intentional fault);
(b) Act negligently but pay for the harm you cause;
(c) Act negligently but do not pay for the harm you cause.

The answer is yes. Within category (1), society prefers (a) to (b) (and *a fortiori* to (c)). To be sure, tort law attempts to assure full compensation and make *victims* as indifferent as possible between the consequences of the injurer choosing (a) or choosing (b). We would like *injurers* to choose (a), however.

Some economists adopt the tenets of category (3) in approaching this problem.[85] Such a choice transforms most cases of fault, as well as strict liability, into cases of legitimate pricing. According to this view, (a) is not necessarily socially preferable to (b) and, arguably, that choice should be left entirely to the injurer.[86] Coleman and I both reject this "optional" view of

85. *See, e.g.*, Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519 (1978), cited by Coleman, *supra* note 1, at 71.

86. Even an economic view might sometimes prefer (a) to (b), however. Perhaps the court has better information about what is inefficient conduct, and it "prices" the negligent activity to induce injurers to act as the court independently believes they should. This latter view, however, is closer to (1) than to (3), because it seems to identify faulty conduct in need of "correction." Even if an injurer compensates after the fact, it would have been better if she had not engaged in the faulty conduct.

Alternatively, one view argues that what rational injurers actually do is, by definition, efficient, non-negligent, and "non-faulty." If a court accepted this view of fault, then the court need only assess whether the injurer was rational, not whether he was negligent. On this view, the apparent choice between (a) and (b) is incoherent, in the sense that a rational person will always "choose' (a). If a rational injurer took a precaution

fault liability for essentially the same reason that we would reject such a view of criminal liability.[87]

2. Category (2):

In category (2), are we indifferent between the analogous choices?

(a) Do not engage in the "tortious" activity or action for which strict liability will be imposed when harm occurs (for example, do not appropriate another's insulin, food, or dock; and do not set off explosives);[88]
(b) Engage in the activity but pay for the harm you cause;
(c) Engage in the activity but do not pay for the harm you cause.

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under these circumstances, the precaution must have been efficient, and the injurer was not negligent. If the actual injurer did not take such a precaution, the precaution must have been inefficient, and the injurer was negligent. If the actual injurer was rational and failed to take a precaution, she was non-negligent. If she was not rational, however, he might have been negligent. In no case, however, would a rational injurer choose to act negligently and then pay for the harm she causes (option (b)).

87. *See* discussion *supra* at notes 39-40. Even from a non-economic and "non-optional" perspective, an injurer's precaution costs may exceed his expected liability, and under such circumstances the injurer may prefer (b) to (a). In that case, if a court rules that the injurer is negligent, the injurer might simply pay off the liability instead of taking precautions. *See, e.g.*, Stone v. Bolton, [1950] 1 K.B. 201 (Eng. C.A.), *rev'd*, 1951 A.C. 850. If this result is troubling, then again the response is twofold: (1) The problem is simply practical, and does not affect the *social* determination of what really is "fault" or a "worse" state of the world, and (2) we can sometimes address the practical problem by employing an injunction or even making the right to the injunction inalienable.

88. One might object that defining the activity here is problematic and casts doubt on the distinction between negligence (category (1)) and strict liability (category (2)). For example, if one chooses the activity of driving, one might drive negligently. Then, so the objection goes, negligence liability for harm caused while driving is just a type of strict liability.

But this objection is invalid. Fault liability is not for driving as such, but for faulty driving. What the driver should not have done is drive negligently.

The problem persists in a narrower form, however, when the injurer's negligence is inadvertent. Then he has not made a conscious choice to depart from the due care standard, but has simply been inattentive or forgetful. *See* Mark F. Grady, *Why are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 Nw. U.L. REV. 293 (1988); Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL'Y 84 (1990). Alexander likens inadvertent negligence to strict liability in the following sense: Only in retrospect is it true that one "should not" have engaged in the conduct. Alexander, *supra*, at 98-100.

In response, I believe that there is a meaningful sense in which even the inadvertently negligent injurer has acted *ex ante* as he should not have. But strict liability's judgment that the injurer "should not have" acted as he did is a purely *ex post* judgment. In retrospect, it would have been better had the dynamite company foregone setting off explosives on that particular day in that particular manner. *Ex ante*, however, it is generally socially desirable that companies dynamite in that manner, given the foreseeable risks and benefits. By contrast, it is not *ex ante* socially desirable that drivers be inattentive or forgetful.

In this situation, society does not prefer (a) to (b). In fact, we may prefer (b), reflecting an unwillingness to enjoin the activity and enforce (a). At the very least, we are content to leave this decision to the injurer, and either choice is ordinarily morally acceptable.[89]

Moreover, depending on the context, we may even prefer (c) to (a)! For example, if Hal cannot afford to pay for the insulin, we might still prefer that he take the insulin rather than respect Carla's property rights, given the harm he would otherwise suffer and the imminent necessity.[90] But if a fireworks company cannot afford to pay for the harm that it causes, we would probably prefer that it not engage in the activity at all—and thereby prefer (a) to (c). Conceptually, this last subcategory within category (2) consists of a primary duty not to engage in certain activity unless one pays for the harm. That duty might be implemented through any of several secondary duties, including putting up a bond, carrying insurance, or otherwise guaranteeing payment as a condition for engaging in the conduct.[91]

3. Category (3):

We now turn to category (3), the "pricing" or "legitimation of transfer" category. The choices, once again, are:

(a) Do not engage in the defined activity or action;
(b) Engage in the activity but pay for the harm you cause;
(c) Engage in the activity but do not pay for the harm you cause.

89. Exceptions may exist—for example, where an injurer has a duty to others (or to himself) to choose (b) rather than (a). Thus, the shipowner in Ploof v. Putnam, 71 A. 188 (Vt. 1908), had a duty to his family to try to save them at the expense of the dock. But I believe that these exceptions affect the rights of those third parties against an injurer, not the actual victim's corrective justice right against the injurer.

90. Even in cases where we prefer (c) to (a), (c) sometimes—as in this insulin example—involves an invasion of a victim's rights, or a "wrong" in Coleman's vocabulary. Notwithstanding that (c) is an invasion of the victim's rights, while (a) is not, we may prefer (c) for a variety of reasons. On a utilitarian calculus, (c) might be preferable. Alternatively, (c) might recognize a right of autonomy or welfare in the injurer (to be able to sail or retain his health) that overrides the victim's rights.

91. *Cf.* Keeton, *supra* note 65. A final variation: If the injurer, the shipowner in *Vincent*, told the victim, the dock owner, that the injurer could not afford to pay for damage to the dock, would that give the victim the right to exclude the injurer without suffering liability for any ensuing damages? Notwithstanding *Ploof* I think the victim might have a right to exclude, but only if the injurer breached the secondary duty to give advance assurance. Thus, if there is a category of boaters who are too impecunious to give advance assurance, but whom we wish to allow on the seas despite the risks of harm they pose, such boaters might not owe a secondary duty to give advance assurance. As a result, a victim might not have a right to exclude them.

According to Coleman, a "wrong" occurs if one chooses (c), but that "wrong" is "righted" if one chooses (b).[92] So (b) is definitely preferred to (c). Whether (b) is preferred to (a) is less clear. Consider Coleman's examples. Is the world a better place if I eat and pay for my salad, as opposed to not eating the salad?[93] This odd question is difficult to answer, though the "victim"—the restaurant owner—undoubtedly prefers another sale.[94] More clearly, because this is more clearly a tort example, society prefers to have the product manufacturer engage in manufacturing and pay for harms from occasional manufacturing flaws than to have the manufacturer cease operating.

Applying Coleman's conception of "wrong" to this category is difficult. In category (1), the "wrong" consists of acting negligently, and it remains a "wrong" whether or not one pays for the harm. In category (2), the "wrong," right-invasion, or injustice consists of engaging and taking another's property or security interest, perhaps via a particular type of activity—for example, activity that poses a non-reciprocal risk or is unusually risky. Again, according to Coleman, the action remains a right-invasion or "wrong" whether or not one pays for the harm—whether one chooses (b) or (c). Now, in category (3), Coleman says that the "wrong" consists only in engaging without paying, but that "wrong" is "righted" if one pays. As a result, no wrong occurs under (b), unlike the outcome in the other two cases. Yet his theory cannot explain the sense in which engaging but not paying is a "wrongdoing" or "wrong." By definition, those terms apply only to categories (1) and (2).

Perhaps this is precisely Coleman's point, however. Category (3) does not involve a "wrong" in any *corrective justice* sense. By default, only a non-corrective justice—perhaps economic—theory can explain the sense in which payment "rights" what would otherwise be a "wrong."

92. *See* COLEMAN, *supra* note 1, at 396-97.

93. *See id.* at 398.

94. This observation, however, reveals the awkwardness of the example, which might better be viewed as a breach of contract than a tort. Note that it is difficult to conceptualize the salad example as involving a choice between not engaging (a) and engaging but paying for the "harm" one does (b). Note also that we might reconsider the salad example under several scenarios: The customer eats with the intention of paying (only later to discover that he forgot his wallet), the customer eats with the intention of not paying, or the customer eats with no intention about the matter. Taking the food with the intention of not paying does seem tortious. But is that wrong righted if the customer changes his mind and chooses to pay? These complexities suggest that the apparently simple example confuses matters more than it clarifies them.

In contrast, I adopt an alternative view. I believe that for some cases falling within category (3), corrective justice can explain a right to repair. For example, one might plausibly conclude that corrective justice imposes a duty upon a manufacturer to give advance assurance that it can compensate for the harms it causes. Such an obligation would be a condition of engaging in business.[95]

As a result, I believe that categories (2) and (3) can be reconstructed into two new categories:

> (2)* *Strict liability/Conditional fault:*[96] According to this category, the primary duty is not to engage in activity unless you pay. The secondary duties involve various ways of assuring payment, either in advance or *ex post*. The breach of a secondary duty, such as a failure to pay in advance, may theoretically entitle the plaintiff to an injunction against the activity itself.
>
> (3)* *Strict liability/Non-fault*: This category comprises all other cases of strict liability. Here, there is neither fault nor conditional fault. Even if the injurer cannot afford to pay *ex post*, or cannot afford to give *ex ante* assurances, it is better that he act and cause uncompensated harm than that he not act.

The last category is likely to include some emergency private necessity cases, especially when life is in danger. It is, of course, preferable that the injurer pay. In that sense, a "wrong" occurs if payment is not made. The wrong is not as serious as in my reconstructed category (2)*, however. The injurer's duties are reduced, because we would not require advance assurance of payment as a condition of the injurer engaging in the activity.

This reconstruction helps answer a question that I earlier left open: Can Coleman's category (3) be given a non-economic interpretation? Yes, in part. Category (3) need not be limited to the purely economic concept of "pricing" an activity and having the injurer then decide whether to act. It can also express the broader concept of "conduct that is wrong if you do not pay, but not wrong if you do." To that extent, category (3) can easily be reformulated as reconstructed category (2)*. And, category (2)* defines the "wrong" in general rather than merely

95. Similarly, if one knew that a person might not pay for his meal, one might legitimately require some advance assurance, such as taking his credit card, before he was served.

96. I borrow the term from Judge (then Professor) Robert E. Keeton. *See* Keeton, *supra* note 65.

economic terms.[97]

Therefore, unlike Coleman, I would recognize a corrective justice duty to correct the "wrong" of conditional fault in many strict liability cases (2*). Coleman would only recognize a "wrong" in these cases where a right was infringed; otherwise, he believes that only a non-corrective justice theory can explain recovery. I also believe that corrective justice can support strict liability in "non-fault" cases (3*). Here, the argument is not that a "wrong" (in my sense) has occurred (either fault or conditional fault), but that justice demands recompense for some specific reason—for example, the injurer's appropriation of a private benefit at the expense of the victim.

B. *What Conception of Corrective Justice Do I Endorse?*

It is appropriate to ask whether my conception of corrective justice is the annulment, relational, or mixed conception (using Coleman's terminology). The answer is: in part relational, and in part annulment (if that is a coherent category). I believe that a unitary conception of corrective justice is neither possible nor desirable.

My view of fault is relational; the wrong must be repaired. Indeed, Coleman could endorse this view of fault (category (1)) as well. But he seems to insist on a single conception of corrective justice encompassing (1) and (2), and this view forces him to adopt an unduly complex "mixed" conception.

My view of strict liability is also sometimes relational. Occasionally—specifically, in reconstructed category (2)*, or conditional fault—the wrong consists only of not providing compensation, or assurance of compensation, when that is possible. I further assume that other, more specific reasons for cor-

97. Can category (3) also include cases of category (3)*? I do not think so. No wrong is done when Hal takes Carla's insulin out of necessity, because we would not want him to act otherwise. Moreover, Hal would not be required to pay if he could not afford to pay. If he actually does pay, is his payment the righting of a "wrong" (as (3) requires)? Not in my sense of a wrong, which entails one doing what one should not have done; for it is neither the case that Hal should not have taken the insulin, nor that he should have given advance assurance of payment.

Curiously, then, I reach the opposite conclusion from Coleman about many such private necessity cases. Coleman sees them as "wrongs" in the sense of infringements of "rights." As a result, corrective justice imposes a duty to repair. I think corrective justice imposes a duty, but not because of any "wrong" in my sense of what the actor should not have done.

rective justice, such as non-reciprocal benefit, are necessary for liability in this category.

At other times—specifically, in reconstructed category (3)*, or non-fault—no wrong occurs at all, and an injurer's duty is at most to pay if she can. In this last strict liability category, the absence of a "wrong" in my sense—that is, fault or conditional fault—may mean that such a corrective justice duty is not relational. And given that this category regards repairing the actual loss as the only, and therefore primary, duty, perhaps this category more closely resembles an annulment conception of corrective justice. But I also tend to agree with Coleman's view that the annulment conception itself is really just a metaphor.[98] Losses are never really annulled; they are simply repaired to the extent feasible. Given my doubts about the mixed conception of corrective justice, I would prefer simply to say that category (3)* exemplifies the injurer's corrective justice obligation to repair harm, if possible. Again, that general obligation could express any of a number of more specific corrective justice reasons (such as private appropriation of a benefit in an emergency).

C. *"Strict Victim Liability"*

Why can injurers ordinarily cause faultless harm to victims? In my view, torts involving fault express a primary right that the faulty conduct not occur, while torts involving strict liability express a primary right either of assurance of compensation—conditional fault—or of compensation for the harm or the risk—non-fault. Can my theory explain the current tort system, under which strict liability is limited and fault principles therefore often permit faultless harm to victims?

Reconceiving the primary duty as a duty that the faulty conduct not occur does not resolve the problem. The question remains: If an injurer's primary duty is merely to avoid faulty conduct, why does he have a privilege to inflict harm through his non-faulty conduct? The problem similarly persists for secondary rights and duties, including but not limited to compensation. For example, if the victim has a right that the injurer not create faulty *risk* of harm, why does the injurer have the privilege to impose *non*-faulty risks?

98. *See* COLEMAN, *supra* note 1, at 528 n.14.

A partial answer is that the criterion of "fault" in category (1) may be an all-things-considered judgment of what "should have been," a judgment about both the justifiability of the injurer's conduct and the fairness of allowing the injurer to impose "non-faulty" harms on victims. For example, a utilitarian approach should consider all the welfare costs and benefits in deciding both to define "fault" and whether to permit liability for "non-faulty" behavior. Even if such an approach were supplemented to include an injurer's duty to protect some of the victim's property rights,[99] the "fault" criterion might still affirmatively support the injurer's privilege to impose non-faulty harms outside the "fault" categories. In any event, an affirmative corrective justice justification of this negative aspect of "fault" liability is necessary.[100] Coleman might not really disagree with this approach. Still, by defining corrective justice as a "wrongful" loss due to "wrongdoing" or a "wrong," and by claiming that a theory of corrective justice is consistent with many different conceptions of those quoted terms, Coleman fails to emphasize that corrective justice must give an account of these conceptions that also explains why injurers may impose "non-wrongful" harms.

D. *Practical Differences Between My View, Coleman's Corrective Justice View, and Other Views of Torts*

Rendering existing tort doctrine more intelligible and justifiable is a virtue in itself. But there are other, more practical implications of my views. Corrective justice theory serves as the major alternative to economic explanations of tort law. If I have presented a defensible corrective justice theory, then what that theory permits, requires, and forbids should be of interest. Let me suggest two significant differences between my views of corrective justice and those of Professor Coleman.

One important difference concerns tort liability for risk-creation alone, apart from the injurer's actual causation of harm.

99. *Cf.* LeRoy Fibre Co. v. Chicago, Milwaukee, & St. Paul Ry., 232 U.S. 340 (1914).

100. Of course, the same question can be put differently: Would it be consistent with corrective justice to impose strict liability in *all* instances of causing harm? Or can a principle of corrective justice justify giving injurers the privilege to cause some faultless harms without paying compensation? It may be that corrective justice affirmatively justifies only a duty not to act in a faulty way, and not a general or presumptive privilege to cause faultless harm. Even so, corrective justice sufficiently justifies that privilege if it can affirmatively justify, not only a limited duty not to cause harm in certain specified strict liability categories, but also a privilege to cause harm outside those categories.

Together with Christopher Schroeder, I have argued that risk-creation liability is consistent with corrective justice.[101] Courts have increasingly, though hesitatingly, embraced such liability. Schroeder and I suggest that they should not be deterred by a misplaced concern that liability for risk-creation is a radical departure from traditional corrective justice principles, properly understood.

Coleman disagrees that corrective justice is consistent with such liability for risk-creation. He provides an extended and thoughtful analysis of two cases—*Sindell*[102] and *Hymowitz* (a recent case of the New York Court of Appeals)[103]—that provide different solutions to the DES causation problem. *Sindell* holds that manufacturers of DES may be liable according to their local market share even though the victim cannot identify which manufacturer actually caused the harm. Any defendant is permitted to escape liability, however, by demonstrating that it did not market the specific drug that the victim's mother ingested. *Hymowitz*, by contrast, extends the principle by examining the national market share of a defendant, and by not permitting the defendant to escape liability through a demonstration of no-causation.

Coleman concludes that *Sindell* and *Hymowitz* are not simply second-best attempts to apply corrective justice in a situation where direct proof of causation is unavailable.[104] Rather, the cases effectively create limited "at fault" pools, in which accident costs are not allocated the way that individualized corrective justice would require. Indeed, Coleman believes that *Sindell*

101. Specifically, I agree with Schroeder that imposing liability on injurers for the tortious risks they create, while using those risk liability payments to pay full damages to victims who suffer actual injury, would be consistent with corrective justice. I also believe that the symmetrical system, in which injurers pay only for the tortious risks they create while victims only recover for risk-exposure, would be consistent with corrective justice. *See* Simons, *supra* note 64, at 122-25. Schroeder is more agnostic on the latter point. Schroeder, *supra* note 64, at 158-60.

Indeed, Schroeder argues that his proposed system of liability for risk-creation would better serve corrective justice principles than the current system because it is often a matter of luck whether an injurer's negligence causes harm. While the current system makes liability turn on that morally arbitrary causal linkage, his proposal would render that linkage legally irrelevant. I am less certain about this comparative claim. Retributive or other fairness principles, rather than corrective justice principles, may explain why moral luck seems arbitrary here.

102. Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980).

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

104. Coleman does interpret *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), as such a second-best corrective justice approach. *See* COLEMAN, *supra* note 1, at 660.

is an uneasy compromise between corrective justice and such an "at fault" pool, because it permits defendant exculpation. *Hymowitz* is closer to the "fault pool" concept in forbidding exculpation.

Contrary to Coleman, I believe that *Sindell* and even *Hymowitz* can be viewed as implementing corrective justice for two separate reasons. First, the relevant harm for corrective justice purposes could be the creation of the risk of injury, not the injury itself.[105] Second, the relevant harm may be an actual injury, but a "national market-no exculpation" approach may best approximate that harm, given the factual uncertainties.[106] Moreover, I disagree with Coleman's assertion that *Sindell* and *Hymowitz* give the victim a right of recovery merely because she is a desirable private prosecutor.[107] Rather, these cases provide the victim with a corrective justice right to avoid subjection to tortious risk or to recover damages for actual harm in a manner that best approximates actual causation.[108]

A second potential difference between my approach and that of Coleman concerns the relevance of a social insurance scheme that fully compensates tortiously injured plaintiffs. Coleman believes that such a scheme defeats any corrective jus-

105. Coleman notes this possibility but points out that this explanation is incomplete. Why is liability for risk-creation limited to instances where causation is uncertain? Why is it not the general rule in tort law? *See* COLEMAN, *supra* note 1, at 664. In response, consider the following. Liability for risk-creation, while theoretically appropriate and consistent with corrective justice, is quite expensive and impractical in most circumstances. Moreover, another remedy consistent with corrective justice is normally available, namely, the standard approach of compensating for harm actually caused. However, the market share theory—especially the *Hymowitz* variation—is more straightforward than many "risk-creation" remedies. Although the market share theory is still much more costly than the traditional remedy, the unavailability of that traditional remedy ultimately justifies it.

106. Similarly, a national market approach might appropriately ignore evidence from the *plaintiff* identifying a particular manufacturer of DES as the cause. For this would remedy the following problem under the *Sindell* approach:

> Some manufacturers . . . may have marketed their product under a brand name rather than generically and kept more complete customer records, making it relatively easy for plaintiffs to trace pills to their origin. . . . [T]hese defendants may be exposed to double liability: to knowing plaintiffs who can trace specific injuries to them and to unknowing plaintiffs for their general percentage of the market.

Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 676 (1981).

107. *See* COLEMAN, *supra* note 1, at 669.

108. In market-share cases, courts continue to require that plaintiffs specifically demonstrate that someone's DES caused them harm. *See, e.g., Sindell*, 607 P.2d at 936-37. The "private prosecutor" rationale does not fully explain this requirement.

tice rights that plaintiffs might otherwise have.[109] I question this conclusion, however. When the plaintiff has a primary right that defendant not engage in a tortious activity, a social insurance scheme at most extinguishes the secondary duty to pay compensation. Such a scheme might not extinguish a secondary duty to suffer the penalty of an injunction, initiated by the plaintiff or other endangered victims.[110] Even if the loss has occurred and full social compensation has been effected, the victim might have a secondary corrective justice right against the tortfeasor, such as a right that the injurer pay a fine to the government. Such a right safeguards the primary right—that the tortfeasor not act tortiously—in a way that social compensation of the victim does not. Specifically, such a right ensures that the tortfeasor's disrespect of the primary right will carry a consequence. If Coleman's belief that social insurance extinguishes corrective justice claims is correct, however, then he is committed to a most surprising result. Not only may the tortfeasor treat the choice between (a) and (b)—between not acting tortiously, and acting tortiously but paying—as "optional," but he may treat the second option as "preferred."[111]

IV. Conclusion

A final, and most general, criticism of Coleman's analysis of corrective justice is that he does not give an independent normative defense of corrective justice. Is corrective justice a desirable principle of justice? Should we care whether tort law expresses corrective justice?[112]

I believe that Coleman is on solid ground when he insists that an interpretive theory is valuable in its own right.[113] Cole-

109. *See* discussion at *supra* notes 24-25.

110. Although in the text I discuss a primary right that an injurer not act tortiously (category (1)), a social insurance scheme might also fail to satisfy the corrective justice claims of victims in categories (2)* or (3)*.

111. My reason for endorsing this secondary right that the tortfeasor pay a government fine is not that this remedy is necessary to deter the tortfeasor. Even if imposing the regulatory fine against the tortfeasor will not change his behavior, corrective justice may require some mechanism for respecting the plaintiff's primary right that the injurer not act tortiously.

112. One could level the same criticism against Ernest Weinrib's powerful account of corrective justice. Weinrib asserts, controversially, both that corrective justice is the best interpretation of tort practice, and that tort practice might be socially unwise and better replaced by a combination of regulation and social insurance. *See* Ernest Weinrib, *The Special Morality of Tort Law*, 34 McGill L.J. 404, 412 (1989).

113. *See* Coleman, *supra* note 1, at 306, 312.

man does consider the acceptability of the corrective justice theory within political theory.[114] He often points out the normative as well as interpretive advantages of his corrective justice theory as compared to certain economic theories or other corrective justice theories. Moreover, he is attempting to defend a theory both specific enough to explain some substantive and structural features of tort practice, and general enough to permit a variety of particular conceptions of wrong, wrongfulness, and harm. Although I disagree about many of the features of his explanation, I agree that the project is worthwhile.

It is easy to criticize, especially when the topic is as controversial as corrective justice. In my relentless efforts to understand and dismantle Coleman's arguments, I do not mean to downplay their sophistication and imaginativeness.

It is also dangerous to offer one's own tentative views in a forum such as this one. I have done so mainly to illustrate different ways of understanding negligence, strict liability, and the relevance of justifiability to corrective justice. My primary duty is to offer a helpful critique of Coleman's views. Any duty to present my own views in an intelligible fashion is distinctly secondary.

114. *See id.* at 576*.