

TORT LAW AS A COMPARATIVE INSTITUTION: REPLY TO PERRY

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I. MODELS OF TORT LAW

Tort theorists have been led by similarities between tort law and other areas of the law to explain the duty to compensate tort victims in terms of principles that help make sense of other legal institutions. Some treat the duty to compensate as the product of a hypothetical bargain between an injurer and a victim, thus assimilating tort law to contract law.¹ Others see the duty to compensate as a sanction for misconduct, thus assimilating tort law to criminal law. The "contract" theorists adopt an economic model of tort law,² while the "criminal" law theorists view tort law primarily as a moral institution.³

The economic and the moral models both have a certain plausibility. That this is so reflects a tension in our intuitions about tort liability. The tension emerges in one class of cases in particular, the class in which the degree of the injurer's wrongdoing and the amount of the victim's loss diverge. The ques-

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1. In the Calabresi-Melamed framework, for example, liability rules provide compensation for an involuntary transfer of entitlements when high transaction costs make voluntary transfer according to property rules infeasible. Liability rules are thus used to compensate accident victims because transaction costs prohibit allocating the cost of accidents in advance by contractual agreement among drivers. Tort rules, which allocate the cost of accidents *ex post*, can be thought of as effectuating the contract the parties would have agreed to were transaction costs not prohibitive. See Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1108-10 (1972).

2. Richard Posner provides the best example of the former approach. See Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981) [hereinafter, Posner, *Corrective Justice*]; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); see also GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970).

3. Ernest Weinrib provides the best example of the latter approach. See Ernest Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989); Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987); Ernest Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987). This division in the literature between economic and moral theorists is, in effect, a division between utilitarian and fairness-based approaches. See Posner, *Corrective Justice*, *supra* note 2. Although all economic approaches are utilitarian, however, and most utilitarian approaches are economic, not all fairness-based approaches regard tort law as imposing moral sanctions.

tion in these cases is whether the duty to compensate should be tied to the degree of wrongdoing or to the amount of loss.

The economic model is implicitly committed to tying the duty to compensate to loss. The attention to loss is a by-product of the way in which economic analysis conceives the point of tort law, namely, to create incentives for efficient behavior. Tort law, according to this model, encourages efficiency by setting the price of an involuntary transfer *ex post* at the price that will ensure that only efficient transactions take place. That price is the amount of the victim's loss.⁴ On the moral model, by contrast, the duty to compensate is tied (via the notion of corrective justice) to wrongful conduct. The wrongfulness of an act is a function of the intention, broadly speaking, with which it is performed.⁵ Therefore the moral model ties the duty to compensate to the injurer's intentions. Liability rules, on this view, are a form of punishment, and there is a general principle that it is unfair to punish agents for unintended consequences.⁶

In its emphasis on loss, economic analysis captures a central feature of tort law. But it captures this feature at a price: It cannot explain the ways in which an injurer's state of mind is also an integral part of the institution. The moral model, on the other hand, has difficulty explaining why we require injurers to compensate for the full degree of loss in situations where the extent of the loss was neither intended nor foreseen. Thus,

4. Setting the *ex post* cost at an amount equal to the victim's loss will generate the desired result, because the injurer will only choose to engage in transactions in which her gain is greater than her liability. Any transaction in which the injurer's gain exceeds the victim's loss is an efficient one, and any transaction in which the victim's loss exceeds the injurer's gain is inefficient. If the injurer must compensate the victim for the full amount of the loss, then the injurer will only engage in efficient transactions. This analysis, however, assumes a probability of detection of 1. Where the probability of detection is less than 1, economic analysis provides that the cost to the injurer should be somewhat higher than the victim's loss. See JULES L. COLEMAN, *Crimes, Kickers and Transaction Structures*, in *MARKETS, MORALS, AND THE LAW* (1988).

5. Recklessness is arguably a species of intention, because the reckless actor is aware of the risk when she acts. Negligence, where the risk is not, even if knowable, known, is more tenuously connected with intention. Arguably negligent conduct is not intentional and therefore not "wrongful," in the full moral sense of the term. Consistent with distinguishing recklessness and negligence in this way is the fact that negligence is rarely a sufficient *mens rea* for criminal liability.

6. Moral theories of corrective justice are, by their own lights, insufficient to cover the range of cases in which liability is imposed in tort. There are thus two possible directions such theories can take. First, they can say corrective justice is a moral notion, but that not all cases in tort fall within the domain of corrective justice. Second, they can use the limited scope of the theory to argue for institutional reform.

while each of these models is able to explain certain elements of tort law, neither can explain the practice as a whole.

In *Risks and Wrongs*,⁷ Jules Coleman presents a solution to this problem—his “mixed conception” of corrective justice. The mixed conception attempts to explain why injurers must compensate for loss, without ignoring the role played by the concept of responsibility and the intentional states that are central to it. Coleman properly regards tort law as a hybrid institution of sorts, and this allows him to accommodate our conflicting intuitions in this area. But the hybrid is not simply a combination of the economic and the moral models, for Coleman rejects both. The mixed conception justifies the focus on loss for ethical reasons, rather than for the utilitarian reasons of economic analysis. And it rejects traditional moral justifications for focusing on states of mind, like the retributivist arguments the “criminal law” theorists have advanced.⁸

In this article, I consider a criticism of Coleman’s mixed conception made by Stephen Perry.⁹ Perry argues that because the duty to compensate arises for reasons that are independent of the nature of the injurer’s conduct, injurers are strictly liable, on the mixed conception, for all the (sufficiently proximate) outcomes of their voluntary acts. Perry proposes a modification of the mixed conception—the incorporation of a fault requirement. While agreeing with Perry on the nature of the problem, I wish to take issue with his proposed solution.

I argue that incorporating a fault requirement makes unavailable any plausible account of necessity cases. Necessity cases in tort are difficult to explain precisely because injurers are held liable for the losses they engender, despite the fact that they are *not* at fault. The treatment of necessity cases in tort is peculiar to that institution; a necessity justification is exonerating, for example, in criminal law, while liability is not avoided in

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

8. See Weinrib, *Law as a Kantian Idea of Reason*, *supra* note 3, at 499 (“The requirement of right that every act of wrongdoing be answered by an equal and opposite reaction has a . . . retributive aspect.”); see also Weinrib, *Right and Advantage in Private Law*, *supra* note 3; Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989); Ernest Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983).

9. See Stephen Perry, *The Mixed Conception of Corrective Justice*, 15 HARV. J.L. & PUB. POL’Y 917 (1992).

tort.¹⁰ It is important to focus on necessity cases, rather than dismissing them as aberrations, because in them the distinctive nature of tort law stands in relief. Necessity cases teach that a fault requirement is at home in the criminal law but not in tort. For this reason, I argue, Perry's suggestion adheres to a model of tort liability that brings the duty to pay compensation in tort too close to the criminal sanction.¹¹

In the latter part of the paper, I attempt to provide Coleman with a solution to the problem Perry presents. My proposed solution is intended to be in the spirit of much of Perry's work. It is also intended to preserve the sense in Coleman's work that duties in corrective justice are dictated neither by principles of efficiency, nor by general moral concerns. The account I present takes as its point of departure the idea, which Perry discusses throughout his writings, that tort law is a *comparative* institution.¹² It is this feature, I believe, that distinguishes the duty to compensate in tort most sharply from the duties imposed by the two legal institutions that flank it.

II. THE MIXED CONCEPTION

The mixed conception is so-named because it is a mix of Coleman's old view, "the annulment conception,"¹³ and another view of corrective justice, the "relational view."¹⁴ According to the annulment conception, corrective justice requires that "wrongful (or unjust) gains and losses be rectified, eliminated, or annulled."¹⁵ Injurers should be stripped of any wrongful gains and victims compensated for any wrongful losses. The conception derives its plausibility from the para-

10. See MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962).

11. I do not in fact regard conventional moral models as particularly well-suited to explain criminal law either. But if such models are plausible at all, it is surely because they help to explain the practice of moral condemnation that is implicit in punishment.

12. The account I offer here attempts to follow Perry's lead, but to carry the idea farther than Perry has carried it. See Stephen Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. (forthcoming 1992) (manuscript at 84, on file with author); Perry, *supra* note 9, at 936-38; Stephen Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381 (forthcoming 1992) (manuscript on file with author). Other writers have also referred to tort law as a comparative institution, but few have attempted to develop the insight in any depth. See, e.g., Richard Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

13. For a detailed defense of the annulment conception, see JULES L. COLEMAN, *Corrective Justice and Wrongful Gain*, in MARKETS, MORALS, AND THE LAW (1988).

14. See sources cited *supra* notes 3, 9.

15. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. (forthcoming 1992) (manuscript at 10, on file with author).

digm of certain kinds of intentional torts. For example, in the case in which the injurer converts the victim's chattel, corrective justice requires that the property be taken away from the injurer and returned to the victim. The injurer's wrongful gain and the victim's wrongful loss are both eliminated by the return of the chattel because the gain and the loss are both equal to the value of the chattel.

When the injurer's gain is not equal to the victim's loss, however, the view is problematic. Suppose the injurer's gain is less than her victim's loss. It would be unfair, according to the annulment thesis, to make the injurer compensate the victim for the full amount of the loss because that would impose a wrongful loss on the injurer with respect to any amount she is required to pay that exceeds the amount of her gain. But to allow her to pay the victim an amount equal only to her gain would also be unfair because this would undercompensate the victim.

One solution to this problem is to set up a public fund, a sort of social insurance scheme.¹⁶ The injurer could be required to pay into the fund in the amount of her gain, and the victim could be paid out of the fund to the full extent of his loss.¹⁷ To extend the thesis to other sorts of cases, both intentional and non-intentional torts, we need only suppose that an injurer gains when she commits a wrong. Thus the commission of a battery would be considered a "gain" of some sort to an injurer, and the failure to take due care likewise.¹⁸ An injurer

16. In his earlier writings, Coleman seems to have suggested that such a scheme would be compatible with, but was not required by, the annulment thesis. He held the view that corrective justice merely provides "the foundation of a claim that a person has suffered a compensable loss, or that he has secured an unjust gain," Coleman, *supra* note 13, at 187, and not the mode of rectification, namely "the manner in which unjust gains and losses are to be eliminated." *Id.* But I think this is false if one holds true to the annulment conception. Given that many cases will be ones in which gains and losses are not equivalent, a mode of rectification that provides for unequal amounts of payment and recovery is *mandatory*. The social insurance scheme, or some comparable system, is not only compatible with corrective justice on the annulment conception, it is mandated by it.

An alternative approach, which Coleman adopted at various points, is to say that corrective justice applies only to those cases in which gains and losses are equal. *See id.* Other principles must account for duties in other sorts of cases. But this solution makes corrective justice a principle too narrow to be interesting, as Coleman has since recognized. He now concedes that corrective justice should specify the mode, as well as the grounds, of liability and recovery. *See* COLEMAN, *supra* note 7, at 500.

17. As a practical matter, the fund might not be self-sustaining, and the difference might have to be made up from general tax coffers.

18. The annulment conception must thus make use of two principles borrowed from economic analysis. Where intentional torts are concerned, the fact that committing a battery unobstructed is worth something to someone intent on battering means that a

could be required to pay whether or not her conduct had resulted in a loss because the duty to pay would be tied to wrongdoing, rather than to loss. To put the point in terms of a distinction Coleman has viewed as fundamental throughout his work, the "grounds of liability" would be distinct from the "grounds of recovery."¹⁹ That is, we would assess whether an injurer should be held liable separately from whether a victim can recover.

This solution, however, reveals a deeper problem. The annulment conception holds that wrongful gains and losses ought to be annulled; it is apparently indifferent as to who annuls them. The injurer's duty to repair a loss thus does not appear to be stronger than anyone else's duty to repair it. As Coleman himself says, "the annulment view appears to hold that justice requires that a certain state of the world be brought about, not that anyone in particular has a special reason in justice for bringing it about."²⁰

The problem, as Coleman notes, is that this is precisely the way we think of *distributive* justice.²¹ The central characteristic of distributive justice is that it provides society as a whole with reasons for acting. We tend to think of corrective justice, by contrast, as giving *individuals* reasons for acting. Corrective justice imposes on an agent who has behaved in a certain way, in virtue of the fact that she has behaved in that way, a reason for doing something—a reason that is unique to her. The annulment thesis thus effaces this difference between distributive and corrective justice.

The point can be made in terms of the familiar distinction between agent-neutral and agent-relative reasons for acting.²² Agent-neutral reasons are reasons that "can be given a general form which does not include an essential reference to the person who has it,"²³ that is, a reference to the person whose reason it is. The fact that some act would reduce the amount of

batterer is enriched when he commits a battery. Where negligence is concerned, someone who does not take reasonable care incurs a gain because she saves the cost of taking precautions. See Posner, *Corrective Justice*, *supra* note 2, at 198.

19. Coleman, *supra* note 13; COLEMAN, *supra* note 7, at 391.

20. COLEMAN, *supra* note 7, at 422.

21. See *id.*

22. See Perry, *Comment on Coleman*, *supra* note 12, at 390. The distinction is Derek Parfit's. See DEREK PARFIT, *REASONS AND PERSONS* 143 (1984); see also THOMAS NAGEL, *THE VIEW FROM NOWHERE* 152-53 (1986).

23. NAGEL, *supra* note 22, at 152.

suffering in the world is an agent-neutral reason for acting. By contrast, agent-relative reasons *do* refer to the person whose reason it is. The fact that acting in a certain way is in my interest is an agent-relative reason because the description under which the relevant consideration is a reason makes essential reference to *me*. One important difference between distributive and corrective justice, then, is that the former creates agent-neutral reasons for acting, whereas the reasons created by the latter are agent-relative. The problem with the annulment conception is that the reasons it provides are agent-neutral rather than agent-relative; it cannot, therefore, provide a satisfactory account of corrective justice. The relational view, by contrast, does capture the agent-relative character of corrective justice.

According to the relational view, the fact that the injurer is morally responsible for wronging the victim creates a duty in the injurer to repair the wrong. The duty arises out of the injurer-victim relationship. As Ernest Weinrib maintains, “[t]he bond between plaintiff and defendant is the fruition in the plaintiff of the potential for injury contained in the wrongfulness of the defendant’s action.”²⁴ That the injurer has wronged the victim thus creates agent-relative reasons for the injurer to act.²⁵

The relational view, however, meets the condition of providing agent-relative reasons at the cost of being unable to explain why the wrong can only be repaired if compensation is paid to the victim. If the point of compensation, on this view, is to repair the wrong in the injurer, it would seem to be a matter of indifference whether the money is paid to the victim or to someone else, or even whether the wrong is repaired through compensation or punishment.²⁶

But even if the relational view can cure this more radical defect, by showing that the wrong can only be repaired in the injurer if the victim is compensated, it shares with the annulment conception the inability to bridge wrongdoing and loss. The result is that like the annulment conception, the relational view

24. Weinrib, *Causation and Wrongdoing*, *supra* note 3, at 440.

25. See COLEMAN, *supra* note 7, at 427.

26. Weinrib denies this: “The process of rectification . . . mirrors the process of wrongful injury. Just as the connection of tortfeasor and victim is essential to the wrongfulness of the loss, so this connection is essential to the way that tort law annuls this wrongful loss.” Weinrib, *Causation and Wrongdoing*, *supra* note 3, at 434. It is not clear, however, why on the relational view this should be so.

cannot explain why it is fair to require an injurer to compensate her victim for the full amount of the loss in the case in which the injurer's wrongdoing (or gain) is less than the victim's loss. Similarly, it cannot explain why an injurer should not be required to pay more than a victim's loss where the wrongdoing is greater than the loss. As Coleman points out, the relational view holds that "it is the wrong, not the loss that must be annulled"²⁷ If the duty to repair stems from the wrong, the theory cannot explain why any loss on the victim's part in excess of the wrong should be the injurer's responsibility.

The annulment conception, like the economic account, captures the importance of loss to the notion of corrective justice, but it fails to capture its agent-relative character. The relational view captures the agent-relative nature of corrective justice, but it focuses on wrongdoing rather than loss. The mixed conception combines these theories to give expression to the idea that corrective justice provides an injurer with agent-relative reasons to repair a victim's loss. Coleman states the mixed conception thus: "Corrective justice imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions. . . . [T]he duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible."²⁸

The mixed conception rests on two criteria:²⁹ (1) agency, which requires that the victim's loss stem from an exercise of the injurer's causal powers; and (2) wrongful loss. A loss is wrongful when it is the result of either a wrong or wrongdoing. A wrong is any action contrary to a right, whether a permissible invasion—in which case it is an infringement—or an impermissible invasion—in which case it is a violation.³⁰ Wrongdoing is impermissible or unjustifiable conduct that results in harm, where harm is a setback to a legitimate interest.³¹ (Illegitimate interests, in this taxonomy, cannot be harmed.) I shall consider these conditions in reverse order.

27. COLEMAN, *supra* note 7, at 427.

28. *Id.* at 436.

29. I follow Perry's apt characterization of the mixed conception. See Perry, *supra* note 9, at 920-23.

30. See COLEMAN, *supra* note 7, at 382, 407; see also JUDITH THOMSON, *Self Defense and Rights*, in *RIGHTS, RESTITUTION, AND RISK* (1986) (to whom the distinction is attributed).

31. See COLEMAN, *supra* note 7, at 451-54.

III. THE WRONGFUL LOSS REQUIREMENT

The distinction between a wrong and wrongdoing implicit in the second requirement is meant to accommodate necessity cases. Coleman gives the example of Hal and Carla, who are both diabetics. Hal takes some of Carla's insulin when she is not home to give her permission, in order to prevent himself from slipping into a coma. It would seem Hal had a justification for taking Carla's property without her consent. The question is why Hal must compensate Carla if he had a valid justification. Put the other way around, if the duty to pay stems from the fact that Carla's right to exclude has been violated, how could Hal's conduct have been justified?

As noted above, wrongs encompass both violations and infringements of rights. Here, the argument goes, Carla's right has not been violated; it has merely been infringed. Hal's duty to compensate Carla stems from the fact that Hal's behavior is contrary to her right, the fact that it merely infringed her right (because he has a justification) notwithstanding.

Reminiscent of the distinction between the "grounds of liability" and the "grounds of recovery," Coleman's solution depends on the idea that "a victim's claim to repair for loss can be independent of the moral character of the injurer's conduct."³² Hal's conduct is justified by his necessitous state. Carla has a right to compensation because her right to exclude has been infringed. Carla's claim is thus "independent of whatever overall moral assessment of [Hal's] conduct we come to."³³

This solution to necessity cases, however, cannot be maintained. Its weakness is best revealed by considering the criticism Perry makes of the wrongful loss requirement and what is required to rebut that criticism. Perry's criticism is that it allows the following case.³⁴ Two individuals, *A* and *B*, both contribute causally to a harm suffered by *C*. Suppose that *A*'s action, and *A*'s alone, constitutes a wrong or wrongdoing. This would appear to be sufficient to make *C*'s loss wrongful. Because *A* bears the requisite agency-relation to *C*'s loss, *A* is responsible in corrective justice to repair that loss. The problem is that *B* also satisfies the agency condition. And because *C*'s loss is wrong-

32. *Id.* at 406.

33. *Id.* at 408.

34. See Perry, *supra* note 9, at 922-23.

ful, it would seem that *B* also has a duty in corrective justice to make good *C*'s loss. But this cannot be right, because *B* did no wrong. Corrective justice should not implicate *B*.

The problem, Perry points out, stems from the fact that Coleman posits an independent category of wrongful loss—independent, that is, of features of the injurer's conduct.³⁵ We have already noted that the separate category is required to explain necessity cases.³⁶ If the duty to compensate were too tightly tied to the nature of the injurer's conduct, it would not be possible for "an injurer's claim to repair for loss [to] be independent of the moral character of the injurer's conduct."³⁷ But, Perry in effect argues, in the effort to solve necessity cases, Coleman has distorted the account he gives of non-necessity cases.

Perry suggests that the wrongful loss requirement be changed to a fault requirement: An injurer's conduct must be faulty before she can have duties in corrective justice.³⁸ This modification would take care of Perry's counter-example because *A* alone was at fault. But the change exposes Perry to the difficulty with necessity cases that Coleman's independent category of wrongful loss was designed to overcome. It would seem that Hal should not have to compensate Carla, on Perry's view, because he was not at fault. Recognizing this, Perry presents a different account of necessity cases.

Perry thinks that "the crucial point seems to be that Hal *intentionally* took the insulin."³⁹ He says that "our intuition that compensation is owed seems to be clearly tied to the intentional nature of Hal's act."⁴⁰ His solution is that the deliberate nature of the act makes Hal's behavior "*fault-like*, if not exactly faulty."⁴¹ It is "fault-likeness," then, that grounds the duty to repair in these cases, according to Perry.

There are at least three problems with this solution. First, assuming that "fault-likeness" can be given a clear meaning,

35. See *id.* at 923, 925.

36. See *supra* text accompanying notes 32-34.

37. COLEMAN, *supra* note 7, at 406.

38. Perry, *supra* note 9, at 929; see also Perry, *The Moral Foundations of Tort Law*, *supra* note 12, at 69.

39. Perry, *supra* note 9, at 929.

40. *Id.*

41. *Id.*; see also Perry, *Comment on Coleman*, *supra* note 12, at 403. See generally Perry, *The Moral Foundations of Tort Law*, *supra* note 12, at 83-87.

the intuition that it is the intentional nature of the taking that justifies the duty to compensate seems problematic. Perry surely does not mean to say that *taking* the insulin intentionally is what is relevant. That would seem to imply that intentional conduct is *per se* fault-like, which would include most of human behavior. He must therefore mean that intentionally *taking the insulin of another without permission* is what is relevant. But it would seem to be the fact that Hal took the insulin without permission *simpliciter* that is relevant, rather than that he did so intentionally. Suppose Hal were a guest in Carla's house, and in a state of desperation, he used the first vial of insulin he saw, without pausing to determine its ownership. It seems he would still have a duty to compensate Carla, despite the fact that he was merely reckless or negligent with respect to ownership. At the very least, then the notion of fault-likeness will have to include reckless, and perhaps negligent, behavior.

Second, Perry's solution to necessity cases will make it difficult for him to give a suitable account of self-defense cases. According to Perry's solution, it would seem that the behavior of one who acts in self-defense is "fault-like," because it is intentional. And if the behavior is fault-like, the agent acting in self-defense should be held liable for injuries she inflicts. This would be a revisionary treatment of self-defense, to say the least.

Third, Hal's conduct is either justified or it is not. If justified, it is not anything *like* faulty. On the contrary, at least in this context, to say that conduct is justified means more than that the behavior in question is tolerated, but preferably not engaged in. If Hal were truly in a state of necessity, we would surely *prefer* that he take Carla's insulin than that he let himself slip quietly into a coma.⁴²

That conduct is justified should mean not only that there is no "fault in the doer,"⁴³ as Coleman puts it, or no character defect. It should also mean that there is no "fault in the doing,"⁴⁴ that is, that the *conduct* in question cannot be criticized.

42. To say that conduct is "justified" in ordinary language may not always mean that the conduct is preferred, but in the semi-technical sense employed in the legal context, that is the connotation.

43. COLEMAN, *supra* note 7, at 290-91.

44. *Id.*

That is what it means for an agent to have a justification, not simply that she does not have a bad character.

Perry supposes that justifications speak to fault-in-the-doer, and that a justified, but otherwise faulty, action remains a fault-in-the-doing.⁴⁵ He therefore thinks of necessity cases as ones in which there is no fault in the agent, but that fault remains *in the action*.⁴⁶ But surely it makes no sense to predicate a moral quality, such as fault, of actions, construed literally. Fault—whether “in the doing” or “in the doer”—is predicated of people.

Judgments about the ethical qualities of action are connected to the way we value different modes of life. They are a species of what Charles Taylor calls “strong evaluation,” namely, evaluation of qualities of human motivation.⁴⁷ We can distinguish between two kinds of strong evaluation: evaluation of an agent for more or less permanent features of her character and evaluation of an agent for immediate states of intention or motivation. A judgment of fault results in the ascription of fault-in-the-doer in the former case; fault-in-the-doing applies in the latter. To say something is a fault-in-the-doing but not a fault-in-the-doer, then, is simply to say that it is a fault in an agent that is not attributable to her character. It is to say that although the actor is at fault, we cannot use the quality of the action to make generalizations about *her*. To say that some otherwise faulty piece of behavior is justified, therefore, is to say that the agent is not at fault in *any* respect, neither “in the doing” nor “in the doer.”

Perry’s solution thus assumes away, rather than solves, the problem. He simply posits fault—against the intuition that there is none—in order to ground a duty to compensate. It is the intuition that there is no fault in this case, however, that

45. See Perry, *supra* note 9, at 929-30. Coleman also takes this view. See COLEMAN, *supra* note 7, at 290-91.

46. Coleman says: “When an individual acts, we can distinguish two aspects of the situation that might be at fault. On the one hand, the *action* may be at fault; on the other, the *actor* may be at fault . . .” COLEMAN, *supra* note 7, at 290-91.

47. CHARLES TAYLOR, *What is Human Agency?*, in PHILOSOPHICAL PAPERS VOL. I, HUMAN AGENCY AND LANGUAGE (1985). Taylor contrasts strong evaluation with weak evaluation, which is concerned primarily with outcomes. An example of the latter is when if, trying to decide between having chocolate or vanilla ice cream, I evaluate the merits of each directly. I do not consider the worth of my preference for one versus the worth of my preference for the other. I simply consider the strength of my preference in each case, and thus engage in what is primarily a quantitative, rather than qualitative, analysis. See *id.* at 16.

generates the problem, and the intuition cannot be wished away.

The substitution of a fault requirement for Coleman's wrongful loss requirement is not a satisfactory solution to the problem with the mixed conception that Perry signals. Intuitively this should seem obvious if we take necessity cases seriously: The fact that there is a duty to compensate in necessity cases in tort determines that fault cannot be a condition of corrective justice, assuming corrective justice is understood to be the organizing principle of tort law.

In the next section I discuss Perry's treatment of the other element of the mixed conception, the agency requirement, and I explain why Perry's interpretation of this requirement is largely correct. After considering Perry's account in greater detail in Section Five, in Section Six I propose an alternative modification of Coleman's wrongful loss requirement, one that does not make fault a necessary condition of liability in corrective justice.

IV. THE AGENCY REQUIREMENT

Perry proposes that the agency requirement be understood not as a general causal condition, but rather in terms of what A.M. Honoré refers to as "outcome responsibility."⁴⁸ Outcome responsibility is quite a general conception of responsibility, the reach of which is much broader than is the reach of "responsibility" in ordinary language. Perry says:

There is, I wish to argue, a sense in which we are responsible for all the (sufficiently proximate) outcomes of our actions, regardless of whether we were at fault in bringing them about. This conception of responsibility, which Tony Honoré has called outcome-responsibility, involves an element of moral luck. We can be responsible in a non-culpable sense for outcomes that we [did] not intend or foresee because the fact of having made a difference in the world, through a voluntary exercise of volition, is itself of normative significance.⁴⁹

Outcome responsibility limits responsibility based on causation to the sufficiently proximate consequences of voluntary actions. "Sufficiently proximate" is most reasonably construed as a

48. See A.M. Honoré, *Responsibility and Luck*, 104 *LAW Q. REV.* 530 (1988).

49. Perry, *supra* note 9, at 935 (citation omitted).

foreseeability condition.⁵⁰ Thus I am (outcome) responsible for the effects I could have been expected to foresee, whether I foresaw them or not. I merely cause, but am not (outcome) responsible for, effects that are not reasonably foreseeable.

It is easy to see why outcome responsibility is preferable to a mere causal requirement. Suppose the second condition were a fault condition, as Perry suggests.⁵¹ If the first condition were a causal condition without more, an agent would be responsible for all the effects of her faulty behavior, no matter how unlikely and, depending on one's view of causation, no matter how remote in time. There is a need, then, for a causal condition that limits responsibility more sharply than does a simple causal requirement.⁵²

Could the agency requirement be even *more* restrictive than the notion of outcome responsibility? Coleman himself appears to regard the first condition as a full responsibility condition, that is, a condition that restricts the field *more*, rather than *less*, than outcome responsibility would. He indicates the intended equivalence of the "agency" requirement and "responsibility" by saying that "an individual has a duty to repair those wrongful losses that are his responsibility."⁵³ An injurer (D) is responsible for a victim's (P's) wrongful loss only if P's loss is D's fault.⁵⁴ The sentence "P's loss is D's fault" is true when: 1) D is at fault, 2) the aspect under which D's conduct is faulty is causally connected in the appropriate way to P's loss, and 3) P's loss is within the scope of the risk that makes D's conduct at fault.⁵⁵

Spelling out the theory of responsibility in this way effectively incorporates the fault requirement that Perry thinks is missing from the second condition—the wrongful loss require-

50. As Perry notes elsewhere, the legal analogue of "sufficiently proximate" is "proximate cause," and this has been primarily understood to cover consequences of voluntary actions that are reasonably foreseeable. See Perry, *The Moral Foundations of Tort Law*, *supra* note 12, at 81. I therefore believe that Perry misstates the argument when he says in the above-quoted passage that outcome responsibility includes consequences that an agent "could not intend or foresee," Perry, *supra* note 9, at 935, and I have altered the passage accordingly.

51. See *supra* text accompanying notes 38-41.

52. Of course causation, under any interpretation, is not simple. Here I have in mind roughly a "but for" test. The general point that the causal requirement should contain a "reasonably foreseeable" component, however, is sufficiently clear without having to specify the exact nature of the underlying account of causation.

53. COLEMAN, *supra* note 7, at 468.

54. See *id.*

55. See *id.* at 468-69.

ment—into the first condition—the agency requirement. The problem, as we saw above,⁵⁶ is that this will deprive Coleman of the solution he presents to necessity cases. Hal should not have to pay once again, on this conception of responsibility, not because his conduct is “fault-like,” as Perry suggests, but because he is now not *responsible*.

Coleman is aware of the difficulty, and he attempts a solution: He claims that the underlying theory of responsibility will vary depending on the type of case.⁵⁷ The theory outlined above, he says, will not apply to rights-infringement cases (i.e. necessity cases) “if for no other reason [than] that in the rights infringement case there is no fault in the doing.”⁵⁸ But Coleman neither explains why the absence of fault in the doing should alter the nature of the underlying theory of responsibility nor presents any independent justification for the claim that the theory of responsibility should vary with the case.⁵⁹

Moreover, there are reasons why fault should be external to the concept of responsibility. Responsibility normally applies to both praiseworthy and blameworthy actions, a result we cannot reach if to say someone is responsible means that he is at fault. Second, if the fault requirement is part of the concept of responsibility, we will be forced to say that someone who is not at fault is simply not responsible for his actions. In some cases this would not be troublesome; we sometimes refer to agents acting in self-defense in this manner. In other cases, however, this is counterintuitive. It seems wrong, for example, to say that an agent who chooses between the lesser of two evils is not *responsible* for the outcome. If she chooses correctly she is to be praised for the result, and this depends on her being responsible for it. To say a certain outcome was chosen presupposes the chooser’s responsibility for that outcome.

Perry is right, then, to suggest that outcome responsibility is the most likely candidate for the second condition. It is clear that the weak causal condition includes too many cases in the scope of corrective justice, and that fault-based responsibility will either include too few or require that we make the unlikely

56. See *supra* text accompanying notes 38-47.

57. See COLEMAN, *supra* note 7, at 470.

58. *Id.* (emphasis in original).

59. He also does not attempt to indicate what the proper theory of responsibility is in such cases.

assumption that the underlying concept of responsibility varies with the case.

V. PERRY'S TWO STAGES

I now wish to explore Perry's account of corrective justice in greater detail. Perry's account also consists of two elements, or stages of inquiry. At the first stage, outcome responsibility serves to identify the relevant class of individuals about whom the question of fault can be raised. Only agents who are outcome responsible for a victim's loss are candidates for duties in corrective justice.

Although the first stage does not settle the question of liability, it is not entirely neutral from a normative perspective. The inquiry is thus a moral one because Perry thinks of loss itself as a morally significant category, and the first stage measures whether an agent has been responsible for a loss. "A person who is outcome-responsible for a loss has a normatively significant connection with it that is capable of affecting her subsequent reasons for action."⁶⁰ He says elsewhere that "[s]omeone who is outcome-responsible for having harmed another has a special responsibility with respect to the loss, because there is a sense in which it is *her* loss"⁶¹ It is because Perry regards loss itself as having normative significance that he gives responsibility the broad definition he does. Perry wishes the term "responsibility," with all of its normative connotations, to cover the full range of reasonably foreseeable losses.

The first stage thus establishes whether there is fault-in-the-doing. But fault-in-the-doer is apparently required for liability under Perry's scheme. Thus the inquiry at the second stage shifts to the doer.

The question at the second stage is this: Who from among the class of doers of faulty doings can be considered a faulty doer?⁶² This is a question of moral merit, although not, Perry is at pains to say, a general one, but one about the moral worth of the agent with respect to a particular outcome.⁶³ Furthermore, because the loss has already been incurred, the question is fun-

60. Perry, *supra* note 9, at 935.

61. Perry, *The Moral Foundations of Tort Law*, *supra* note 12, at 69.

62. *See id.* at 82.

63. *See id.* at 71.

damentally a comparative one: Who, from among the (outcome) responsible parties, most deserves to bear it? As Perry says:

The fault requirement is one aspect of a more general *comparative* inquiry: Who among the group comprised of the victim and those persons who are outcome-responsible for his loss should most appropriately suffer the interference with well-being that *either* the original loss *or* the payment of compensation necessarily entails?⁶⁴

This is, in essence, a problem of distribution.

Perry is surely right to say that the analysis of liability in tort must be a comparative one. In this sense, tort law is fundamentally distinct from criminal law, in which there is no comparative analysis. The question, in criminal law, is not who of several should bear the loss. The victim, after all, will not spend ten years in jail if the injurer does not. In tort, as Coleman notes, "losses always must fall on someone," whereas punishment "need not be imposed on anyone."⁶⁵ The inquiry in tort is necessarily comparative because it determines who, as between the injurer and victim, must bear a loss that has already been incurred.

Perry is wrong, however, to think that the inquiry at the second stage is one about moral *worth*. Indeed, it is the very fact that tort law is a comparative institution that enables it to impose liability without taking into account the moral worth of the agent. Although tort law evaluates an agent, this evaluation does not involve consideration of the worth of the agent as a whole. The question of tort liability, in other words, is still only one about fault in the doing. At the end of the first stage, in my view, we still have not completed our inquiry into the question whether there was fault-in-the-doing. It is the second stage that will establish that. The question whether there was fault-in-the-doer, by contrast, is never reached in tort.⁶⁶ This is consistent with the objection I raised above to Perry's treatment of neces-

64. Perry, *supra* note 9, at 936.

65. COLEMAN, *supra* note 7, at 296.

66. Arguably, criminal law is interested in fault in the doer as well as fault in the doing. Another way to understand the difference between tort and criminal law on this point is to notice that the standard of liability in tort—the reasonableness standard—is an objective one. The standard of liability in criminal law, by contrast, is necessarily subjective. Fault-in-the-doer would appear to involve subjective features that fault-in-the-doing would not.

sity cases.⁶⁷ Perry views necessity cases as ones in which there is fault-in-the-doing, but no fault-in-the-doer.⁶⁸ I deny that there is fault of any sort in such cases.

I agree with Perry that, at least in the context of tort law, the category of loss is normatively significant. But I believe Perry has not realized the full implications of this claim. Take a case in which the injurer is outcome-responsible, but not at fault, and in which the victim is neither at fault nor outcome-responsible for his own loss. If the analysis is comparative, it would seem that the injurer should bear the loss, because the fact that she has caused the loss has *some* normative significance. Under a comparative analysis, the weak presumption in favor of liability at the end of the first stage should be enough to warrant the imposition of liability in the case in which the victim is *not* outcome-responsible. After all, why should the victim bear the loss if he *lacks*, as it were, a normative relation to his loss that the injurer *has*?

This conclusion does not square with what Perry says about such cases, namely, that the victim must continue to bear the loss.⁶⁹ Perry presumably wants to resist the idea that the injurer should bear the loss in such cases, because in his framework it amounts to strict liability in all cases in which the injurer is outcome responsible. It would thus appear to render the fault requirement otiose.

Perry might reply that the second stage alone should be comparative. But if he treats the first stage as normative, on what grounds can he claim that the second stage is comparative if the first is not? Indeed, in the next section I shall argue that the account is ultimately improved by treating both stages as comparative.

VI. TORT LAW AS A COMPARATIVE INSTITUTION

The central defining feature of tort law is that it allocates a cost that has already been incurred among parties who have had varying degrees of involvement in creating it. Fault can be thought of as simply a further degree of involvement than contributing causally to a foreseeable outcome; it is not an essen-

67. See *supra* text accompanying notes 43-47.

68. See *id.*

69. See Perry, *The Moral Foundations of Tort Law*, *supra* note 12, at 72.

tial part of the institution. Unlike criminal law, the injurer need not be in any particular psychological state for it to be fair to impose liability on her. She must only fare worse, I argue, than the victim in a comparative analysis.

A comparative approach provides a middle way between a system of strict liability, on the one hand, and a fault-based system on the other. It avoids a fault system because it can impose liability on the grounds of outcome responsibility alone. The way in which it avoids a system of strict liability is more complicated.

The comparative analysis would not impose strict liability because there are two situations in which the injurer's outcome responsibility would not subject her to liability. First, the victim may be both outcome-responsible and at fault. In this case, the weak normative preference for imposing the cost on an outcome-responsible injurer who is not at fault would be overcome by the victim's fault. Outcome responsibility, we can say, is subordinate to fault. Second, the injurer and victim may both be outcome-responsible, but neither may be at fault. In that case, one might suppose, responsibility would cancel out, and the injurer and victim could split the costs.⁷⁰ Alternatively, one could adopt the rule that the victim's outcome responsibility weighed more heavily than the injurer's, and thus in the case in which they were both outcome-responsible, the loss would lie where it fell.

If we follow the idea that tort law is a comparative institution to its logical conclusion, then, we achieve the following result. The injurer is strictly liable for the reasonably foreseeable effects of her voluntary conduct except (1) when her victim is at fault; or (2) when the loss is the reasonably foreseeable result of the victim's conduct.

Fault is therefore relevant only in the situation where the victim and the injurer are both outcome-responsible. In this case, whoever is at fault must bear the loss. If both the injurer and the victim are at fault, as in the situation where both are outcome-responsible and neither is at fault, a policy decision must be made. Either they should split (or apportion) the costs, or the loss should lie where it fell. The considerations that might

70. If outcome responsibility can be measured in degrees, where both parties are outcome-responsible and neither is at fault, the costs could be apportioned according to degree of involvement instead of split evenly.

be brought to bear to decide between these alternatives fall outside the realm of corrective justice, and thus they do not concern us here.

Coleman makes reference to, but does not pursue extensively, the idea of establishing liability on the basis of a general comparative analysis. He says "if the fact that one person's conduct causes the harm is a morally relevant feature of the situation, then, other things being equal, the loss should fall on injurers when it must fall strictly on someone."⁷¹ Coleman argues that against the background of this assumption (that is, if we affirm the antecedent of his conditional), strict liability is preferable to fault, precisely because a fault standard holds victims liable under circumstances in which they have not contributed causally to their own injury, but in which the injurer has.⁷² A fault system is, in effect, strict victim liability. Strict injurer liability would be preferable to strict victim liability on this assumption, because, as Coleman explains, "under strict injurer liability, faultless injurers are liable only if they *cause* harm, whereas under fault liability, faultless victims can be held liable whether or not they cause harm."⁷³ Coleman ultimately, however, appears to reject the idea that causation has normative significance.⁷⁴

My analysis would result in roughly the following series of conditionals: (1) If the injurer is at fault, then she is liable unless the victim is at fault (assuming both are outcome-responsible). In the latter case, they should either split (or apportion) the costs, or let the loss lie where it falls. (2) If the injurer is not at fault, and the victim is not outcome-responsible, then, if the injurer is outcome-responsible, she is liable. If the victim is outcome-responsible also, then either they should split the costs, or let the loss lie where it falls. If we omit the case in which agents are at fault but *not* outcome-responsible (which is not an interesting one for our purposes, because outcome responsibility is a necessary condition for liability), there are nine possible cases. We can summarize them with the following matrix.

71. COLEMAN, *supra* note 7, at 301.

72. *See id.*

73. *Id.* at 302.

74. *See id.* at 377-79.

INJURER

| | | <u>No Involvement</u> | <u>Outcome Responsible</u> | <u>Fault</u> ⁷⁵ |
|----------------------------|----------------------------|-----------------------|--------------------------------------|--------------------------------------|
| | | (1) | (2) | (3) |
| V I C T I M | <u>No Involvement</u> | Let loss lie | Injurer liable | Injurer liable |
| | <u>Outcome Responsible</u> | (4) Let loss lie | (5) Split costs (or let loss lie) | (6) Injurer liable |
| | <u>Fault</u> | (7) Let loss lie | (8) Let loss lie | (9) Split costs (or let loss lie) |

In the three boxes that lie on the diagonal, (1), (5), and (9), policy decisions must be made. When there are no normative preferences from the standpoint of corrective justice, there are various possibilities. In cases where the injurer is at least outcome-responsible, the injurer and the victim can split (or apportion, depending on the degree of involvement) the costs. This option should not be available in box (1), however, because the injurer bears no responsibility at all; the agency condition has not been satisfied. Unlike fault, outcome responsibility is a necessary condition for burdening an agent with the duty to compensate, at least where the duty is to be justified by corrective justice.

There is a ready solution to necessity cases on the account I have presented. In necessity cases, the injurer is outcome-responsible but not at fault. The victim is neither outcome-responsible nor at fault. This would place the case in box (2) of our matrix, which seems right. As between Hal and Carla, because Hal bears a normatively significant relation to the loss that Carla lacks, it is preferable that he rather than she be burdened with the loss. In the case in which Carla is outcome-responsible for the loss as well (box (5)), as she would be if she left the insulin lying on a table in a public library and Hal took it in a necessitous state, their responsibilities would cancel out, and Hal would not be required to compensate Carla. Alternatively, they could split the costs.

According to my understanding of fault in the doing versus

75. The heading "fault" presupposes outcome responsibility.

fault in the doer,⁷⁶ the resolution of necessity cases can be explained by saying that Hal's behavior does not even amount to fault in the doing. The duty to pay compensation must, then, be a pre-moral duty of sorts. Hal's conduct is not faulty, but he must compensate Carla simply because he causally contributed to a reasonably foreseeable loss which it would be unfair to impose on anyone else. Cases where excuses and justifications are invoked, according to this model, are ones in which a weak normative duty requires that the injurer pay compensation. They are not cases, however, in which a moral duty (in the strict sense) obtains, in that there is no fault in the doing.

One advantage my modification of the wrongful loss requirement has over Perry's is that it explains why courts do not treat self-defense in the same way that they treat necessity cases. Suppose Sam hits Carole and claims he was acting in self-defense. A claim of self-defense is valid only when the person invoking the defense can reasonably claim that his attacker was in the wrong.⁷⁷ This would place the case in box (8) of the matrix, because Carole (the victim in this case) is *at fault*, and this predominates over the fact that Sam (the injurer) is outcome-responsible for injuring Carole. If Carole is at fault, and Sam is not at fault, although both Sam and Carole are outcome-responsible, Sam is not liable for Carole's injuries.

Notice that in the case in which Carole (still "victim") herself has a justification for having initiated the attack (say, for example, that Sam is breaking into Carole's home, where the general duty to retreat does not apply),⁷⁸ then Sam cannot claim self-defense when he responds to Carole's attack.⁷⁹ In that case, Carole is not at fault, and thus Sam cannot claim that his behavior is excused. Sam ("injurer") is now at fault and Carole is not. The case would fall into box (6) because the injurer is now truly at fault and the victim is merely outcome-responsible.

By contrast, we cannot reach this result on Perry's account. This is because Perry labels the behavior of an agent acting

76. See *supra* text accompanying notes 43-47.

77. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 19 (5th ed. 1984).

78. See *id.*

79. Tort law is for the most part in accord with the criminal law on this point. See MODEL PENAL CODE, § 3.04(2)(a)(ii). The MPC provides, however, for an exception when "the actor believes that such force is necessary to protect himself against death or serious bodily harm." § 3.04(2)(a)(ii)(3).

under a claim of necessity “fault-like” in order to bring the agent’s conduct within the ambit of corrective justice. The label attaches because the behavior is intentional. But by this logic, an agent acting in self-defense is liable in corrective justice as well.

One addition to my account is needed to cover the range of cases we have been discussing. Consider, again, the hypothetical Perry used to criticize Coleman’s theory.⁸⁰ According to a comparative analysis, it might appear to be the case that *B* is liable, although not at fault. *B* is outcome-responsible for *C*’s loss, and as between *B* and *C*, the comparative analysis would appear to require that *B* should bear the loss. There is a solution, however: The relevant comparison is not between *B* and *C*, but between *B* and *A*. *A* is both outcome-responsible and at fault. *A*’s fault, then, should predominate over *B*’s outcome responsibility. This case underscores the way in which fault overwhelms the weak ethical duty to compensate victims on the basis of mere outcome responsibility. In the absence of fault, the comparative analysis has normative preferences that it does not have where one of the parties in question is at fault. Were *B* acting alone, the comparative analysis would dictate liability. But *A*’s fault, in the case in which they act together, relieves *B* of liability if *B* is not at fault.

Where does the comparative approach leave us with respect to Coleman’s two conditions? I agree with Perry that the first condition, the agency requirement, should be understood along the lines of outcome responsibility. The account of responsibility Coleman offers is unacceptable, I have argued, because of the problem posed by necessity cases. The second condition, wrongful loss, should be modified. It should not, however, be changed to a fault requirement, as Perry suggests. Rather, the notion of “wrongful loss” should be understood as a comparative concept. A loss is “wrongful” when there exists, from among the outcome-responsible agents, at least one agent whose conduct implicates her *more* than the victim is implicated on the basis of his conduct. This proposal does not ignore the role fault plays in many of our judgments of culpability. But it does posit that fault is neither a necessary nor a sufficient con-

80. Perry, *supra* note 9, at 922-23. See also *supra* text accompanying notes 34-41.

dition for liability.⁸¹

VII. CONCLUSION

I have argued that the central problem with Perry's account is that it makes fault a necessary condition of liability in tort, and that this move precludes a satisfactory account of necessity cases. I have therefore argued that Coleman should resist the invitation to meet Perry's criticism by introducing a fault condition into the wrongful loss requirement. Coleman's incorporation of a fault condition into his account of responsibility is problematic for the same reason. I have argued that his attempt to work around this difficulty does not resolve the problem.

In place of Perry's suggestion, I have proposed a modification of the wrongful loss requirement which I believe satisfactorily meets the difficulty that Perry signals: It explains necessity cases without eliminating the role fault plays in other kinds of cases, thus permitting fault to be the prevailing consideration in cases in which more than one agent is outcome-responsible but not all are at fault. The mistaken assumption behind Perry's suggestion is that if outcome responsibility grounds a duty to compensate in some cases—such as necessity cases—it must do so in all cases. I have tried to show that because of the comparative nature of tort law, this assumption is unwarranted.

Tort law is not, for the most part, primarily a moral institution, as is criminal law, although where fault is relevant to liability tort law employs moral norms. Nor is tort law primarily an economic institution, although by imposing the loss on the party with the greatest degree of involvement it happens to create incentives for efficient behavior. Tort law appears to start from different premises altogether, premises that are neither fundamentally psychological nor consequentialist. It is concerned with distributing losses on the basis of degrees of involvement, not because "degree of involvement" serves as a proxy for something else, such as culpability or cheapest cost

81. My suggestion is intended to supplement, not to replace, Coleman's wrongful loss requirement. The comparative analysis would apply to wrongs—rights invasions, whether permissible or impermissible—and wrongdoings—impermissible setbacks to legitimate interests. See *supra* text accompanying notes 29-31. In other words, the comparative analysis does not apply to illegitimate interests, such as a thief's interest in stolen goods, or to permissible setbacks to legitimate interests, such as revenue loss because of business competition.

avoider. Involvement in bringing about a loss, where certain types of protected interests are concerned, is normatively significant in its own right. A system of liability can therefore flow directly from it.

