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BOOK REVIEW

CORRECTIVE JUSTICE FOR MODERNS

RISKS AND WRONGS. By Jules Coleman.¹ New York: Cambridge University Press. 1992. Pp. xvii, 508. \$59.95.

Reviewed by George P. Fletcher²

Once when I was reading a Soviet commentary on criminal procedure, a friend noticed the cyrillic title and asked whether the Russian book was fiction or nonfiction. My initial tendency was to give the straight response, "Nonfiction, of course," but then I thought about what I was reading and began to laugh. Now if someone asked me whether Jules Coleman's *Risks and Wrongs* was fiction or nonfiction, I would want to give the straight reply. Thinking about the book, however, I hesitate. And I do not laugh.

It is becoming more and more difficult these days to distinguish fiction from nonfiction in legal studies. Some recent books are deliberately cast as fiction,³ others as tales told in the first person, impressionistic reflections beyond hope of validation.⁴ Still others strive to describe a fictional world of perfect market competition and zero transaction costs.⁵ These stories about farmers and ranchers in a state of perfect competition⁶ are thought, however, not to be fiction, but a new way of thinking rationally about the law.

I do not want to denigrate theoretical inquiries by suggesting that they are fictional. Yet the concept of "legal theory" has come to mean different things to different camps in the legal academy. The philosophically rigorous theory that Coleman plies has little in common with the loose and impressionistic claims that are appreciatively called "theory" by advocates of deconstruction and other fads. And his style diverges sharply from the normative ambitions of his mentor, Guido Calabresi, to rewrite tort law in the image of an economic "theory" of torts.⁷ Coleman's project occupies a curious middle ground between

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³ See, e.g., DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL* (1992); NORVAL MORRIS, *THE BROTHEL BOY AND OTHER PARABLES OF THE LAW* (1992).

⁴ See, e.g., ALAN M. DERSHOWITZ, *CHUTZPAH* (1991); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

⁵ See, e.g., STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

⁶ These are the famous characters described in the most influential non-legal article about law of the last half-century. See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 3-6 (1960).

⁷ See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 1-33 (1970); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-98 (1972).

those who seek to describe the reality of the legal system and those who seek reform by advocating some standard of efficiency or justice as the correct organizing principle of the law. In this 500 page book overflowing with elegant economic and philosophical arguments, Jules Coleman offers an account of American law that fluctuates between designing a model for an ideal system and accounting for the law as it is. As we begin to peel away at the thought experiments and hypothetical cases, we come to see that Coleman's analysis rarely engages actual legal rules and doctrines, and as a result his theory eludes validation or refutation.

I. MARKETS AND CONTRACT

Risks and Wrongs is divided into the proverbial three parts. The first offers a seemingly new rationale for the free market; the second, a hurried view of contract; and the third, an imaginative account of tort law and corrective justice. The initial section on the "market paradigm" demonstrates Coleman's mastery of the literature on rational choice and its unresolved problems, in particular the uncertainty of bargaining on the efficiency frontier and the instability of solutions to the prisoner's dilemma. The central message that emerges from this section is that markets are good, but not for the reasons ordinarily given. One school of thought, defended by Ronald Coase, favors markets when they happen to be efficient; if planned economies turn out to be more efficient we should opt for them.⁸ Another line of thought, associated with Friedrich Hayek, defends markets as an expression of the intrinsic value of freedom and private property; even if a planned economy were more efficient, we would not opt for it, for coerced transactions violate these fundamental principles.⁹ Coleman steers a middle course between these schools. He rejects the efficiency arguments by insisting that voluntary consent in the market is logically prior to and independent of efficiency. Coleman contends that the market has a value as "a *form* of cooperation" (p. 71); it is inappropriate, therefore, to interpret legal practices solely as a corrective for market inefficiencies (pp. 61-62).¹⁰

By taking actual consent seriously, Coleman boards a freedom train that could carry him as far as Hayek's libertarian economics. In the end, however, his defense of the market is instrumental rather than libertarian: trading, and the relations thereby engendered, Coleman claims, contribute to social stability (p. 67). Markets foster social stability by facilitating interaction among individuals without first

⁸ See Coase, *supra* note 6, at 16-18.

⁹ See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 88-100 (1944).

¹⁰ Coleman uses the label "rational choice liberalism" to describe his approach to the market (p. 70).

requiring a consensus on fundamental values, goods, or ends (pp. 62-63). The advocates of East-West trade during the cold war plausibly made a similar argument about the advantages of trading with the enemy.¹¹

Yet, there is an important difference between economic and social stability. Within any particular society, a planned economy offers much more stability than the risk-laden world of the market. The greatest difficulty that East Europeans face today, in their post-Communist lives, is adjusting to the risks of unemployment and the widening gap between the rich and the poor. Indeed, markets thrive on risk. In the stable days of the Bretton Woods fixed exchange rates, business people knew how many German marks or French francs a dollar would buy. Today the currency markets are an invitation to gamble. Closer to home, urban real estate markets have yielded and expunged small fortunes in the last two decades. The message is simple: if you cannot live with risk, you cannot survive in the marketplace. You can insure against some risks, but not against the radical shifts in market prices, interest rates, and exchange rates that have wiped out many moguls in the last decade. The claim that markets contribute to social stability eludes the data: it is a bit hard to figure out what would constitute empirical validation.

The premise driving Coleman's thoughts about markets as promoters of social stability may be the claim that iterative transactions generate the kind of trust necessary to solve the problem of the prisoner's dilemma. Repeat transactions tend to mitigate the problem of defection that renders the prisoner's dilemma a form of market breakdown. If this is the argument, however, it shows only that repeated interactions generate trust, not that competitive markets are *per se* desirable.

Coleman's conception of the market as a system rooted in rational choice liberalism informs his study of contract law. According to Coleman, enforceable contracts facilitate markets, and markets realize the value of rational choice (p. 193). His survey of contract law, however, reveals his detachment from the law's texture as a complex of rules and principles. Only twice does he discuss specific doctrines: he presents a passing reference to the rule that contracts are binding upon mailing an acceptance (p. 138), and he includes an analysis of the incentives for full disclosure of information relevant to the bargain (pp. 148-63). From his previous discussion of bargaining theory at the efficiency frontier, however, he infers an important point about the nature of deal-making in contracts. Bargains should express the actual consent of the parties, not "rational" solutions dictated by eco-

¹¹ See, e.g., SAMUEL PISAR, *COEXISTENCE AND COMMERCE: GUIDELINES FOR TRANSACTIONS BETWEEN EAST AND WEST* 87-88 (1970).

conomic analysis (p. 182). Therefore, default rules — those used to fill in gaps in the bargain — should be derived not from an assessment of rational behavior that would apply to everyone, but from the “particular structure of the contracting parties’ relationship” (p. 182). What makes contracts binding is not the implication of abstract principles, but the particular commitments of the parties. Coleman’s argument about the value of markets informs his perspective of contract law. He values contracts for their role “in creating and sustaining markets” (p. 193), which in turn enables people to pursue their private visions of the good. The anti-statist message of encouraging people to solve their own problems is, according to Coleman, the “central message of this entire part of the book” (p. 180).

II. TORT LAW AND CORRECTIVE JUSTICE

Coleman reserves the brunt of his labors for tort law and corrective justice, for, as he writes in the Introduction, he “know[s] a lot more about torts than . . . about contracts” (p. 10). Therefore, his methodology in writing about torts is to “immerse[] [himself] in the practice itself and ask[] if it can be usefully organized in ways that reflect a commitment to one or more plausible principles” (p. 8). Here he offers a number of propositions that can be tested against the cases and the general understanding of the binding principles of tort law. Let us see how well Coleman’s account fares when measured against tort reality.

A. Coleman on the Law

1. *Strict Liability*. — Coleman sets up his discussion of tort law by distinguishing between fault and strict liability. One conventional sense of strict liability is that it is simply liability without fault. I have no problem with that negative definition. But Coleman then proceeds to define strict liability positively, as a regime that requires only that the defendant acted so as to have caused the plaintiff a compensable loss (p. 212). It is doubtful that this form of liability has ever existed in the common law, and it unquestionably has not existed since the early seventeenth century.¹² No court would hold me liable for stepping on a mine buried in the street and thus unforeseeably causing an explosion injuring the plaintiff. Yet this would be a case that satisfied Coleman’s criterion of an action causing compensable harm.

¹² The case often read in the casebooks is *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616), which holds that a specific traverse to a writ of trespass was improperly pled, for it did not allege that the shooting accident occurred “utterly without fault” on the part of the defendant. *Id.* at 284.

Strict liability today requires some conscious risk creation in addition to voluntary action. The standard cases of strict liability are (1) extra-hazardous activities, such as blasting and fumigating, now called abnormally dangerous activities, (2) airplane damage to persons and property on the ground, (3) damage caused in cases of private necessity, as exemplified by the classic decision in *Vincent v. Lake Erie Transportation Co.*,¹³ and (4) some cases of damage caused by the escape of contained substances, first acknowledged in *Rylands v. Fletcher*,¹⁴ so far as these cases are not covered by the principle of abnormally dangerous activities. For many years, lawyers and theorists described dispensing with the "fault requirement" in products liability cases as strict liability, by which they meant that if the product was objectively defective, the plaintiff did not have to prove any flaw or error in the production process. It is now recognized that the notion of defect is readily captured by the principle of unreasonable risk-taking and therefore closely resembles the principle of negligence.¹⁵

Apart from products liability, the categories of strict liability bear two elements in common in addition to those listed in Coleman's incomplete definition: first, the defendant must knowingly or consciously create a risk to the victim, and further, the risk must bear certain features of intensity and gravity. As to the latter requirement, there is little consensus about the features that signal some risks and not others as candidates for strict liability. I have argued previously that the common feature of these risks is that they are disproportionately directed toward the victim and therefore properly described as "nonreciprocal."¹⁶ This is not the place to rehearse that argument.¹⁷

¹³ 124 N.W. 221 (Minn. 1910). For a discussion of the case, see below at pp. 1670-71.

¹⁴ 1 L.R.-Ex. 265 (1865). The case is discussed further below at p. 1671.

¹⁵ See RESTATEMENT (SECOND) OF TORTS § 402A (1977) (referring to "defective condition unreasonably dangerous to the user or consumer"); WILLIAM M. LANDIS & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 283 (1987) (arguing that "much of what is called strict products liability really is negligence liability"). There is considerable debate in case law about the application of this standard. See, e.g., *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 453-57 (Cal. 1978) (discussing the various interpretations and applications of liability for product defects).

¹⁶ See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 546-49 (1972).

¹⁷ Coleman is an astute critic of the argument. See pp. 252-69 and his earlier article, *Justice and Reciprocity in Tort Theory*, 14 W. ONTARIO L. REV. 105, 105-07 (1975). The most telling point that Coleman makes is the following counter example. Suppose both P and D are drivers with bad brakes. D crashes into P while both are driving and subjecting each other to reciprocal risks. P recovers against a negligent D, because P's negligence does not contribute to the accident. Yet notions of reciprocity would suggest there should be no recovery. The critique is well-taken. The problem in the current state of tort law is that it fluctuates between (1) a purely ex post way of thinking, which insists that P's negligence be an actual cause, and (2) risk-analysis, which requires the court to look back to the time of the act and then forward,

The important point is that tort law does not recognize any form of strict liability in Coleman's sense of liability based on causation alone.

After this beginning, Coleman begins to slip and slide in his use of the term "strict liability." In addition to the negative definition of liability without fault and the positive definition of strict liability as triggered by acts that simply cause harm, Coleman claims that we can "define strict liability in torts as liability that is defeasible by *neither excuses nor justifications*" (p. 220). Let us leave to one side the problem of excuses.¹⁸ The claim that strict liability is not defeasible by justifications is correct for some justifications but not for others. For example, a defendant's claim that a risk was justified because reasonable under the circumstances does not defease or negate liability; this follows from the negative definition of strict liability. Coleman's claim is also true for the justification of private necessity, as typified in the *Vincent* holding.¹⁹ But it is certainly not true for the justifications of consent and self-defense. If I have explicitly consented to bear the risks of blasting in my neighborhood, I cannot complain when rocks go through my window.²⁰ Self-defense is an equally clear case of a justification that precludes liability, whether strict or based on fault. Suppose that the only available way to stop an advancing gang is to spray them with a poisoned substance ordinarily used in fumigation. Though fumigating can ground a claim for abnormally dangerous activities, fumigating to avert an attack would be justified as a matter of self-defense, and there would almost certainly be no liability for the consequences. In cases of self-defense, the defending party is never liable for injuring the aggressor with the minimal force necessary to stop the attack.²¹ Coleman's claim about justification and strict liability is simply not attentive to the details of the law.

Further complicating his use of the term "strict liability," Coleman refers to denying the plaintiff's recovery in fault cases as "strict victim liability" (p. 228). Let us accept for a moment the distortion of language implicit in calling no-recovery a case of liability. Even under Coleman's own definition of strict liability as a regime based on acts that cause harm, his use of the term in this context is puzzling: The

from the actor's vantage point, in its assessment whether risks are reasonable or nonreciprocal. The causation requirement expresses the first paradigm; risk analysis, the second.

¹⁸ The topic is taken up below at pp. 1664-65. See also Fletcher, *supra* note 16, at 551-56 (discussing excuses for nonreciprocal risks).

¹⁹ See *infra* pp. 1670-71 (discussing *Vincent*).

²⁰ Because it might validly be objected that my consent is irrelevant to the permissibility of blasting, it follows that my consent probably should be seen not as a justification but as an anticipatory waiver of my claim for compensation.

²¹ See, e.g., *Courvoisier v. Raymond*, 47 P. 284, 287 (Colo. 1896). Interesting questions arise concerning liability to bystanders injured by actions taken in self-defense. See RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 35 (5th ed. 1990).

plaintiff is purely passive; she has not caused herself harm. All Coleman means is that she must bear the loss if neither she nor the defendant is at fault. Is it also the case that if she is hit by lightning and has no insurance, she is also strictly liable for the harm? The way Coleman abuses his own conceptual apparatus, there is no way of knowing.

In sum, Coleman uses the term "strict liability" in at least four distinct ways: (1) liability without fault, (2) liability based on acts causing harm, (3) liability not subject to defeasance by an excuse or justification, and (4) the "liability" that follows denying recovery when there is no showing of the plaintiff's fault. This indifference to the proper and consistent use of concepts and terminology invites concern.

2. *Fault*. — If Coleman's analysis of strict liability is wanting, we might expect more from the presentation of negligence or fault liability. Negligence, after all, is a well-analyzed field of law. Coleman begins his account with a controversial claim, namely that negligence is not really liability for fault, because "[f]ailure to measure up to the standard of reasonable care, whether or not one is capable of doing so, suffices to render one's conduct negligent" (p. 219).

He concludes in the following sentence that "ascriptions of fault (negligence) are not normally defeasible by excuses" (p. 219). The only authority cited for this proposition is the venerable case of *Vaughan v. Menlove*,²² in which a defendant was held liable for a fire that resulted from his keeping a flammable hay rick on his land. The court had ruled against the defendant, and in his rule nisi for a new trial he alleged that he did not possess "the highest order of intelligence."²³ On the basis of this language incidental to the opinion, Coleman concludes that negligence is "not normally defeasible by excuses" (p. 219). This is a remarkable inference. In *Vaughan*, there is neither evidence nor serious consideration of the possibility that the defendant landowner should have been excused on grounds of incapacity. The only possible excuse considered in the case is good faith, the defendant's argument being that he had acted "bona fide to the best of his judgment" in maintaining the hay rick and in disregarding warnings that it was likely to ignite.²⁴ But good faith could not conceivably be considered acceptable as an excuse. If it were, there would be no liability at all for negligent risk-taking. The cases left over, namely those in which the defendant knows of the risk and acts in bad faith to impose the risk on another, would be readily classified as intentional torts.

In the end, there is neither serious content in, nor evidence for, Coleman's claim that negligence is not defeasible by excuses and that

²² 132 Eng. Rep. 490 (C.P. 1837).

²³ *Id.* at 492.

²⁴ *See id.*

it is not really liability for fault. He disregards the literature that considers the failure to "measure up to a standard of reasonable care" to be culpable and faultful,²⁵ and he fails entirely to consider mistake, duress, and insanity as excuses under the case law.²⁶ It is hard to speculate about the provenance of Coleman's error, but someone who holds Coleman's view might be led astray by the common fallacy that the only real form of fault is conscious fault, that is, knowing wrongdoing. This view confuses fault as a social judgment and fault as a state of mind. True, one can be liable in tort, as well as in criminal law, for inadvertent risk-taking.²⁷ Failing to meet a standard that one could reasonably meet is obviously faultful. Those who think that the only true fault is conscious and malicious wrongdoing confuse the actor's perception of her conduct with the community's judgment whether the conduct is unreasonable and therefore a proper basis for finding fault with the actor's inadvertent risk-taking.

3. *Plaintiff's Fault and Strict Liability.* — The most surprising lapse in Coleman's survey of tort law is his failure to distinguish between the defenses available in negligence and strict liability cases. According to Coleman, strict liability means: "[t]he injurer has to bear the victim's losses unless the loss is the victim's fault" (p. 227). This misstates the law under any of the four meanings Coleman gives to "strict liability."²⁸ As far as I know, there is no case to support this view (outside the field of products liability), and the Restatement's black letter rule runs squarely to the contrary.²⁹ Contributory negligence is not a defense in cases of strict liability based on abnormally dangerous activities.³⁰

Coleman's arguments favor symmetry over attention to the details of the law. In his section on the market paradigm, he takes obvious

²⁵ H.L.A. HART, *Negligence, Mens Rea and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY 136, 152-57 (1968).

²⁶ See *Smith v. Lampe*, 64 F.2d 201, 203 (6th Cir. 1933) (excusing mistake); *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198, 199-202 (N.Y. City Ct. 1941) (recognizing duress under gunpoint); *Breunig v. American Family Ins. Co.*, 173 N.W.2d 619, 625 (Wis. 1970) (suggesting that insane delusions will be disregarded only if defendant "had knowledge of her condition and the likelihood of a hallucination").

²⁷ See George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 415 (1971).

²⁸ There is no doubt that Coleman asserts this as a proposition of law: "Strict liability often allows the defendant the positive defense of victim negligence" (p. 227). This is not just a hypothetical principle; the use of the term "often" makes his statement appear to be a claim about the world.

²⁹ See RESTATEMENT (SECOND) OF TORTS §§ 519, 524 (1977). Although the Restatement does speak of a defense of contributory negligence, it is only allowed in cases when the plaintiff has knowingly and unreasonably subjected himself to a risk. See *id.* § 524(2). Such cases are best understood as variations on the notion of assumption of risk. See *id.* § 524 cmt. b.

³⁰ See W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 565 (5th ed. 1984).

pride in positing that cooperation is a response to failed competition (p. 42) and then following up with the elegant claim that competition is a response to failed cooperation (p. 61). In the context of tort law, the payoff of Coleman's analysis is the following alleged symmetry between fault and strict liability:

1. The principle of fault requires a showing of fault on the part of the defendant, in the absence of which there is strict liability on the plaintiff.
2. The principle of strict liability requires a showing of fault on the part of the plaintiff, in the absence of which there is strict liability on the defendant (pp. 227-28).

You see, one standard is simply the "mirror image[]" of the other (p. 229). This is a neat and elegant thesis, but deriving it requires us to pervert the language of liability and to accept a false proposition of law, namely the claim that strict liability is defeated by the plaintiff's negligence. Apart from this objection, the claim of symmetry fails to meet the test of reality. Even if the plaintiff proves the defendant's negligence according to the fault principle, the defendant can defeat liability, totally or partially,³¹ by proving the plaintiff's negligence. The reciprocal proposition does not hold. If, under Coleman's supposed rule of strict liability, the defendant establishes the plaintiff's negligence, the plaintiff cannot defeat her own "liability" by proving the defendant's negligence. The thesis that fault is simply the mirror image of strict liability fails to account for this obvious fact.

B. Coleman on Corrective Justice

Let us get beyond Coleman's claims about tort law and focus on what seems really to matter to him, the theory of corrective justice. This is the heart of Coleman's contribution in *Risks and Wrongs*. His central thesis is that corrective justice is a social practice that generates reasons for action. It provides wrongdoers with a reason, a duty, to repair wrongful losses. As he sums up his reflections: "Corrective justice imposes the duty to repair the wrongs one does" (p. 320). The notion of "wrong," as Coleman explicates it, is a combination of (1) wrongdoing as unjustified action, and (2) committing a wrong in the sense of justifiably infringing a right (p. 361). As we shall see, he designs the concept of corrective justice in order to suppress the distinction between fault-based and strict liability.

Before turning to Coleman's effort to apply his concept of corrective justice in tort law, two qualifications are in order. First, Coleman makes very modest claims for his principle of corrective justice. One

³¹ This depends on whether the jurisdiction applies the rule of comparative or contributory negligence. Coleman finds this distinction irrelevant to his account of tort law.

would think that any theory of justice would claim for itself that it is the "first virtue of social institutions, as truth is of systems of thought."³² The passion to do justice does not admit of trade offs against utilitarian criteria. Yet, Coleman balks at the traditional view that justice has priority over other values, such as efficiency.³³ There is no need, in his view, to challenge Calabresi's thesis that the "cheapest cost avoider" should bear the loss (pp. 388-90).³⁴ Although Coleman makes some telling points against the economic analysis of tort law,³⁵ he seems unwilling to take a strong stand in favor of justice and against the suppression of individual rights for the sake of efficiency and utility maximization.

Were it true that justice and utility were simply values to be traded off one against the other, the claims of justice would be vapid. The theorist of a mixed system of justice and utility needs a meta-theory to determine the optimal combination. Yet, the very language of "optimality," "proper mix," and "trade off" implies that the conflicting axes could be reduced to a single commensurable dimension. The claims of corrective justice would become merely "a feeling of justice" that could be assigned a weight and compared with other sources of pleasure and welfare. Consequently, the meta-theory would be utilitarian, efficiency-based. Coleman ventures no meta-theory. If he had tried, he might have recognized how much he had given up by failing to insist that the claims of justice should take priority over so-called "justifiable departures from corrective justice" (pp. 386-406).

Further, Coleman writes about something called corrective justice, but he seems to be indifferent to the Aristotelian tradition, without which the claims of corrective and distributive justice would hardly carry the prestige they do in our thinking about law. He never mentions Aristotle, and he does not seem to be at all concerned about whether he is departing from several key premises in the *Nicomachean Ethics*.³⁶ Aristotle maintained that wrongful acts create an imbalance in the equilibrium established under criteria of "the geometric[]" pro-

³² JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971).

³³ Coleman devotes a chapter to this problem (pp. 386-406). Unfortunately, his argument fails to explain why corrective justice is either important or interesting if it cannot demand "an absolute priority with respect to all other goals the state may legitimately pursue within a tort system" (p. 392).

³⁴ The curious aspect of this deference to Calabresi's views is that Coleman fails to give an example in which he thinks it is right for the cheapest cost avoider to bear the loss. For a general early exposition of Calabresi's view, see CALABRESI, cited above at note 7, at 135-73.

³⁵ To quote Coleman:

If many legal theorists bemoan the Critical Legal Studies movement's fixation on law's indeterminacy, they have only the economists of law and other rampant reconstructionists to blame. For it was economic analysis, first, not Critical Legal Studies that treated legal concepts as if they could be remade at will in the light of one's preferred normative theory (p. 383).

³⁶ ARISTOTLE, *ETHICA NICOMACHEA* (David Ross trans. 1925).

portion[ality]" of distributive justice.³⁷ The injurer causes a loss, and as a result a shift of resources occurs from the victim to the injurer.³⁸ Corrective justice represents an arithmetic ideal: the injurer should be required to give half of the imbalance as a payment to the victim. This payment restores the status quo ante: the just distributive equilibrium is reinstated by eliminating the loss to the victim and the corresponding gain to the injurer.³⁹ What is "corrected" according to this view is neither the wrong nor the loss, but the imbalance that has occurred in the distributive scheme.

Aristotle's principle of corrective justice works fine for takings, where the defendant's gain is equal to the plaintiff's loss. But in cases of risk-taking (which Aristotle did not consider), there is no reason to assume that the injurer's gain, either economic or psychic, is equal to the injury that happens to materialize. Ernest Weinrib seems to believe that the two are logically equivalent,⁴⁰ but this view cannot survive serious scrutiny.⁴¹ The problem we moderns face, therefore, is not Aristotle's problem of correcting disequilibrium and returning to the status quo ante of just distribution. The problem is not one of correcting the loss, but, as Oliver Wendell Holmes, Jr., wrote at the dawn of contemporary tort theory, imposing liability is a matter of shifting the loss from one party to the other.⁴² The loss is a sunk cost. It cannot be "corrected" and thus be made to disappear.

The central problem of modern tort law, therefore, is, Who should be richer and who should be poorer? Put this way, the problem is one of distributive rather than corrective justice. As a matter of history and tradition, however, the distributive inquiry has focused on criteria of desert expressed in the transaction between the parties. It is, as it were, transaction-based distributive justice. Yet, this view is under serious attack today. One source of the attack is the Law and Economics movement, which, as Coleman bemoans (p. 380), has never seemed to grasp the idea that tort disputes occur between two parties and are to be resolved on transaction-based criteria of desert.

The other source of the attack on traditional tort thinking is the tendency of the courts to view tort litigation as an opportunity for regulating recurrent sources of risk. The regulatory frame of mind is, by its nature, prospective rather than retrospective. Proactive courts

³⁷ *Id.* at V.3.1131b.

³⁸ *See id.* at V.3.1132a.

³⁹ *See id.* at V.3.1132a-1132b.

⁴⁰ *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 997 (1988).

⁴¹ The reason is that, in cases of risk-taking, the psychic or material benefit of the risk-taking is constant, while the harm that materializes from the risk varies over a spectrum of possible outcomes.

⁴² *See* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 88-96 (Mark D. Howe ed. 1963) (1881).

today are inclined to sidestep the traditional requirement that the defendant's actions actually have caused the plaintiff's injuries.⁴³ The focus shifts, therefore, from the particular transaction that occurred in the past to the type of transaction that the dispute brings to the fore. As we moderns are inclined to think, even if the particular past action did not cause this particular plaintiff's injuries, actions of the same type could cause undesirable injuries to future plaintiffs and therefore the court should intervene in an effort to influence future behavior. The identities of the injurer and victim get lost in regulatory thinking about classes of people who act and suffer in similar ways. The parties become tokens of general types.

It is against this background that Coleman struggles to revive a commitment to corrective justice, as he defines it. His non-Aristotelian view stresses the duty to rectify the victim's loss as one value among many that "the state may legitimately pursue within a tort system" (p. 392). It is hard to know, however, precisely what he is addressing when he speaks of corrective justice. Corrective justice is not immanent in the tort system, as Weinrib claims.⁴⁴ Nor does it provide a bulwark against economic and regulatory reasoning in tort law. It is not an absolute demand of justice and morality. Apparently, corrective justice is a "social practice," which means, I think, that it is a convention (p. 433). Yet this conventional practice appears to be the creation of Coleman's imagination,⁴⁵ a blank slate upon which he displays his considerable analytic finesse. When the argument is laid out before us, however, we search in vain for core assertions and criteria for determining whether Coleman's theory is right or wrong.

C. Applying Corrective Justice to the Law

The payoff of Coleman's theory of corrective justice should come in explaining and illuminating tort law. Yet it is here that his explanatory efforts break down. Coleman's theory of corrective justice obfuscates and distorts the critical differences between fault and strict liability. One has a duty "in corrective justice,"⁴⁶ he claims, to repair

⁴³ See, e.g., *Sindell v. Abbott Lab.*, 607 P.2d 924, 936-38 (1980); see also *Canterbury v. Spence*, 464 F.2d 772, 790-91 (D.C. Cir. 1972) (suggesting an objective standard of causation to support liability for a defendant's failure to give adequate warning, entailing that a plaintiff need not actually prove that he would have acted differently had he received the proper warning).

⁴⁴ See Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 425-31 (1987); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 425 (1992).

⁴⁵ I have no basis for knowing whether people feel a duty to correct wrongfully caused losses or not. I should think that between themselves, friends would correct any loss that occurs when they are in possession of a friend's goods. As to strangers, particularly corporate strangers, there is probably no general sense of a duty to repair negligently caused damage.

⁴⁶ This locution, which runs through Coleman's analysis, strikes me as odd. It is almost as though "corrective justice" were something like a writ in the writ system. Much as one could formerly sue in trespass or in trover, one may now sue "in corrective justice" or "in efficiency."

the consequences of the wrongs that one commits. These wrongs can be either (1) cases of wrongdoing (unjustified actions), or (2) cases of committing wrongs (invading or infringing rights). The first category readily covers negligence and intentional torts. The second category picks up the remaining cases of faultless strict liability. Coleman needs the category of "wrongs" as well as "wrongdoing," for the standard cases of strict liability presuppose justified action and therefore are not instances of wrongdoing.

The recurrent challenge for Coleman is the classic conundrum of *Vincent v. Lake Erie Transportation Co.*⁴⁷ The defendant moored his ship to plaintiff's dock; an unexpectedly severe storm came up, making it unreasonable for defendant to set out to sea. The defendant kept his ship moored and replaced the cable securing it to the dock. Buffeted by the storm, the ship caused, in the jury's estimation, \$500 worth of damage. The Minnesota Supreme Court upheld the trial court's finding of liability, even though defendant's decision to keep the ship moored to the dock was reasonable and justified.⁴⁸ The court cited no precedents in favor of liability. Its reasoning and citations focused almost entirely on what would have happened had the dock owner unmoored the ship and let it suffer the dangers of the storm.⁴⁹ The inference seems to be that, because the dock owner would have been liable had he exercised his right to defend his property against an unwanted intruder, he was entitled to collect for any damage that resulted from the intrusion. His claim for damages becomes a surrogate for his right to defend his property against intruders.

Coleman addresses the case in no fewer than five distinct passages, and every time he seeks to make the same misconceived point. Keeping the ship moored at the dock, he argues, was an invasion of the dock owner's rights and "in that sense, a wrong" (p. 372). If it is a "wrong," apparently, it is covered by the principle of corrective justice; if it is not a "wrong," it is not covered. But why is it a wrong? According to Coleman, the defendant should have secured the consent of the dock owner (p. 302). This is akin to saying that the government's exercise of its power of eminent domain is a wrong: it should get the property owner's consent before it condemns the property.

The shipowner's action in *Vincent* is fully justified. He does not need the consent of the dock owner and the latter cannot exercise self-defense against him. What kind of right does the dock owner have if he cannot use defensive force to protect it? The key to the case is not the absence of consent, but the inroad made by the emergency situation on the plaintiff's property rights. The plaintiff is

⁴⁷ 124 N.W. 221 (Minn. 1910).

⁴⁸ See *id.* at 222.

⁴⁹ See *id.*

forced, under the circumstances, to keep his dock open to someone who finds himself there when the storm comes up. Because his rights are compromised in the interests of another person, tort law makes up for what he loses under the law of property.

There is no wrong in any coherent sense in *Vincent*. Coleman's twisting and bending the case to fit his theory causes him problems elsewhere. What, for example, should he say now about *Rylands v. Fletcher*,⁵⁰ the famous case in which the defendant's reservoir broke through abandoned mine shafts, flooding plaintiff's neighboring mines? The House of Lords explicitly affirmed liability in the absence of any negligence for which the defendant could be held accountable.⁵¹ The critical factor for the Lords was that building a reservoir in that district was a nonnatural use of land.⁵² A decent degree of respect for the judges' opinions would require us to conclude that this is a case of liability without fault, a paradigm of strict liability. It cannot be squeezed into Coleman's analysis of wrongs, at least not in the way that he analyzes wrongs in *Vincent*. In *Rylands*, the waters break through suddenly. There is no opportunity to ask the plaintiff for his consent to the flooding of his mines. Therefore, if this is a wrong, it must be so for reasons other than defendant's failure to secure plaintiff's consent.

Confronted with the decision in *Rylands*, Coleman might move in any one of three plausible directions: (1) he could ignore the case and claim it is not an instance of corrective justice; (2) he could modify his theory of wrongs; or (3) he could give up his view that corrective justice presupposes either wrongdoing or committing a wrong. Instead of these options, Coleman pushes the case into the category of wrongdoing, contrary to the explicit opinions of the judges: "Rainfall in the United Kingdom is adequate for all reasonable uses . . . simply building a reservoir creates unnecessary, and therefore unreasonable risks. Thus, a nonnatural use is a faulty use. Such an account brings *Rylands* under the principle of fault liability" (p. 368).

This argument, weak enough as it is, leads to even greater problems. An alternative holding for *Rylands* might be that storing water is an ultrahazardous activity, thus rendering the holding an instance of the Restatement's rule of strict liability for ultrahazardous (now called abnormally dangerous) activities.⁵³ Addressing this alternative theory, Coleman says that "[u]ltrahazardous activities are inherently faulty. Someone is at fault merely for engaging in such activities The negligence is not in the manner of doing, but in the very doing itself" (pp. 368-69).

⁵⁰ 1 L.R.-Ex. 265 (1865).

⁵¹ See *id.* at 287.

⁵² See *id.* at 280.

⁵³ See RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977).

Thus a classic case of strict liability, in which the court explicitly held that the defendant was not negligent, turns out to be a case of "negligence . . . in the very doing itself." This faulty reasoning recalls Coleman's earlier attempts to obfuscate the difference between fault and strict liability. There is supposedly no difference between the two: one is the mirror image of the other. This false claim of symmetry haunts Coleman's entire treatment of tort law and corrective justice. Reflections on the foundations of tort law should begin with the search for an adequate account of the roles of fault and strict liability in the broader debate about justice or efficiency as the basic rationale of liability.

III. TOWARD A BETTER THEORY OF FAULT AND STRICT LIABILITY

As anyone who has pondered the mysteries of tort law realizes, either the standard of fault or of strict liability could conquer the entire field of torts. There is no apparent reason why the fault standard of *Brown v. Kendall*⁵⁴ fails to control the cases of abnormally dangerous activities, the "taking" situation illustrated by *Vincent*, and the aggressive use of land typified by *Rylands*. Conversely, there is no obvious reason why the standard of strict liability fails to displace fault liability in those areas, such as cases of automotive injuries to pedestrians, where it still holds sway. The economists fail to agree on which standard to promote on efficiency grounds.⁵⁵ We are left, therefore, with a puzzle about why both standards persist and whether, in principle, we should support one or the other.

In formulating an approach to this conundrum, I borrow a refrain from Calabresi⁵⁶ which Coleman discusses (pp. 74-76), though ultimately rejects. The claim is that tort law occupies a middle position between criminal and contract law. Criminal law strictly prohibits actions, contract law generates bargained-for permissions to act, and tort law permits actions, but only at the price of paying damages for resulting injuries. The basic insight is correct. Blackstone captured the same point by labeling torts "private wrongs."⁵⁷ The notion of "wrongs" expresses the common denominator between torts and crimes, and the adjective "private" locates tort law within the private law of obligations, which includes various species of contract as well as unjust enrichment.

⁵⁴ 60 Mass. (6 Cush.) 292 (1850). For a discussion of the case, see below at p. 1674.

⁵⁵ Compare SHAVELL, *supra* note 5, at 23-25 (arguing that only strict liability accounts for activity levels and thereby produces the most appropriate level of care) with George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1534-39 (1987) (discussing economic problems produced by strict liability).

⁵⁶ See Guido Calabresi, *Torts — The Law of the Mixed Society*, 56 TEX. L. REV. 519, 521 (1978).

⁵⁷ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *1 (1768).

It is a mistake, however, to think that the difference between criminal and tort law consists in the distinction between prohibitions and permissions with a price.⁵⁸ Criminal law could also be conceptualized as a set of norms permitting actions, provided the offender is willing to pay the penalty. The claim that the defendant pays money in tort and risks a jail term for committing many crimes hardly pinpoints a conceptual distinction. If there is a difference between crimes and torts, the difference must be sought elsewhere.

The starting place for understanding the difference between the two types of "wrongs" — public and private — is to consider the place of the victim in the analysis of liability. The distinctive feature of criminal liability is that, in principle, the victim's contributory fault is irrelevant to liability.⁵⁹ If the victim is mugged while jogging at night in Manhattan's Central Park, the defendant can hardly defend himself by claiming that "she assumed the risk." It is legally irrelevant in a burglary case that the homeowner may have left a window unlocked on the day of the crime. The irrelevance of the victim's fault cuts across the criminal law. The pickpocket cannot defend himself on the ground that the victim should have kept a closer eye on his wallet. Even in cases of criminal negligence, the defendant cannot defend on the basis of the victim's contributory fault. The role of the victim in precipitating crimes has engaged the interest of sociologists, but the phenomenon has no bearing on the proper analysis of criminal liability. The question is: why?

The answer I submit is that criminal aggression is an act of dominance.⁶⁰ The violation of the victim's rights subordinates the victim to the criminal's will. Though victims expose themselves to risks, they are treated by the criminal law as autonomous agents, insulated against the aggression of others: she moves in the world with as much freedom as she enjoys behind locked doors; he is entitled to walk in the park when he wants or to leave his windows open at night; she is entitled to wear skimpy clothes without having to fear that she will be faulted for precipitating rape. This is what it means to be a free person, and the criminal law protects this freedom by not censuring those who expose themselves, perhaps with less than due care, to risks of criminal aggression. The blame is properly placed

⁵⁸ Coleman expresses reservation about viewing torts as a legal system that sets prices rather than one that requires compensation for committing wrongs (p. 76).

⁵⁹ There are some arguable exceptions. The original understanding of provocation was that the victim contributed to the occurrence of the killing. Cases of justified self-defense could be understood as victim-precipitated homicides. For notes on the interaction between victim and perpetrator in the structure of homicide, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 350–55 (1978).

⁶⁰ For my recently formulated views on counteracting dominance as the rationale for defining crimes and prescribing punishment, see George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993).

on the mugger, thief, and rapist, regardless of the victim's role in the interaction leading to the crime.

What, one might ask, would be an alternative conception of the interaction between injurer and victim? Consider the facts of *Brown v. Kendall*.⁶¹ Defendant swings a stick in an effort to break up a fight between dogs. Plaintiff stands by. The dogs move around, defendant and plaintiff move with them. Eventually the stick hits plaintiff in the eye. We could focus narrowly on this interaction and see it just as an act of aggression and dominance. Defendant's swing injures the passive plaintiff; the stick encroaches upon his freedom. But we could also see the interaction as a collective failure of the parties to prevent the injury. The alternative paradigm of "failed collaboration" holds the injurer and victim jointly responsible for the minimization of harm. When the stick makes contact with the eye, either the bearer of the eye or the bearer of the stick might be seen as the causally dominant party.

There are two ways, then, to conceptualize the routine injury of A hitting B. According to the paradigm of dominance, A asserts himself by hitting a passive B and thus subjects B to his will. According to the paradigm of failed collaboration, it takes two for a hit to occur: both A and B contribute to the harm by failing collectively to avert the harmful contact. The critical difference is whether we perceive the victim as a responsible participant in the genesis of his own injury. That perception, in turn, depends on whether we see the two parties as engaged in a collaborative effort to minimize the harm latent in their interactions.

The striking feature of contract jurisprudence — at least from the perspective of criminal law — is that the victim of a contract breach bears a duty to mitigate damages. If the seller does not deliver, the buyer must go into the market and try to cover herself by buying from another source.⁶² Thus, if the market price at the time of the breach is the same as the price stipulated in the contract, there are no damages. This elementary doctrine of contract law expresses a distinctive way of conceptualizing the relationship between injurer and victim. They are engaged in a collaborative scheme for their mutual welfare, and the breakdown of the scheme imposes burdens on the victim to minimize his losses. The victim of a contract breach bears no resemblance, then, to the victim of a mugging in Central Park. The duty to mitigate damages is characteristic of the paradigm of failed collaboration.

The way to understand the pivotal 1850 case of *Brown v. Kendall*, the case of the defendant's stick hitting the plaintiff's eye, is to think

⁶¹ 60 Mass. (6 Cush.) 292 (1850).

⁶² See U.C.C. § 2-712 (1978).

of Chief Justice Shaw's opinion as recasting the writ of trespass to fit the paradigm of failed collaboration. The traditional conception of trespass, as understood by the trial court, exacted a limited inquiry into whether the defendant swung the stick and directly caused the injury. If the impact was direct, the plaintiff's own causal contribution to the injury was irrelevant. All that mattered was that the defendant directly encroached upon the plaintiff's physical autonomy.⁶³ The principle was that, if the defendant dominated the body of the plaintiff by direct causation, justice required compensation of the resulting injuries.

The conventional reading of *Brown v. Kendall* emphasizes the case's shift from the strict liability of trespass to the fault standard of due care, with the burden on the plaintiff to prove the defendant's fault.⁶⁴ More significantly, however, the case reshapes the law of aggressive injuries by making the plaintiff's contributory negligence a complete defense, thus signaling a paradigmatic shift from trespassory dominance to a private law standard of failed collaboration. As the contract obligee must mitigate damages, the tort plaintiff must henceforth mitigate the risk of injury by exercising due care on her own part. If she fails to exercise due care, the occurrence of harm is attributed to her failing: she collects nothing.

Yet, the basic principle of criminal law — the wrong of dominating another's physical well-being — survives and flourishes in the law of torts. This principle accounts for the complex of intentional torts, which is almost as indifferent to the victim's behavior as is the criminal law. The primary difference between the two is that assumption of risk serves as a defense of varying impact in tort cases, while in criminal cases of violent aggression, the victim's knowing — perhaps even voluntary — exposure to the risk is no defense. The same principle informs the pockets of strict liability in which we dispense with both the fault requirement and the relevance of the victim's contributory fault. In cases of abnormally dangerous activities, the defendant — when blasting, crop-dusting, fumigating, or flying an airplane overhead — directs a disproportionately great risk toward the plaintiff. The dominance of the plaintiff by the defendant's risk is expressed in the law's refusal to intervene prior to the realization of damages. The activity is, after all, socially beneficial; it cannot be enjoined as a nuisance, and the plaintiff may not interpose defensive

⁶³ Of course, the defendant might have excused himself on the ground that the injury occurred "utterly without fault." See *supra* note 12. By 1850 this excuse had expanded to the point that the trial court instructed the jury that the "defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care." *Brown*, 60 Mass. (6 Cush.) at 297.

⁶⁴ See, e.g., Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 367 (1951).

force to protect his physical space. The subordinated plaintiff can do nothing except wait until she is injured.

This is precisely the subordinated position of the dock owner victim in *Vincent*. He may not exercise defensive force to protect his property. He may not do anything except wait until the dock is damaged. He has no option but to receive compensation after the deed. In all of these cases, the guiding principle of justice is that, if the injurer dominates another by the imposition of a risk that is beneficial for society as a whole, the injurer must make whole those who suffer resulting injuries.

The best way to illustrate the radical difference between the two approaches to tort liability is to imagine that the dock owner could have mitigated his damages by attaching old tires to the dock. Suppose that a one time investment of \$50 would lower the projected damage to the dock, even in very serious storms, to \$100. The dock owner fails to take this precaution. When \$500 worth of damage accrues, should he be able to collect the full amount or should his contributory fault (risking \$400 of damage to save \$50) block his claim for damages?⁶⁵ If the case were considered under the criteria of failed collaboration, his contributory negligence would preclude recovery. But resolving the case in this way would not be faithful to the rationale and spirit of the *Vincent* opinion. The plaintiff recovers because he is subject to the ship owner's right to use the dock to save his ship. His right to recover the full amount of the damages is the only way to vindicate his position as owner of the dock.⁶⁶ The law deprives the plaintiff of his right to defend his property and thus subordinates his interests to those of the ship owner. His right to recover the full amount of the damage is the only way to restore his position as the owner of the dock. Thus, in keeping with the rationale for imposing liability on those who dominate the interests of others, the ship owner should pay the full loss, regardless of the dock owner's failure to take collaborative measures to reduce the loss.⁶⁷ The same

⁶⁵ A plausible alternative might be to grant the dock owner \$100 in damages, the amount that would have accrued had he taken due care to protect the dock. But the doctrine of contributory negligence precludes recovery altogether; the prediction that the damage would have been \$100 in the case of due care would probably be regarded as speculative.

⁶⁶ This position comes close to the view, expressed by Coleman and rejected in the text at p. 1670, that *Vincent* awards compensation to correct a wrong to the dock owner. Yet the damages awarded in *Vincent* should be understood not as a sanction for a wrong done, but rather as a surrogate for the ownership rights surrendered in the emergency situation. Although dominance is normally a wrong to the person subordinated, the dominance generated in this case is a consequence not of wrongful aggression, but of the law's forcing the dock owner passively to suffer the harm.

⁶⁷ Contrary to popular readings of the case, the contractual relationship between the parties is irrelevant. If the dock owner had refused to deal with the ship owner, the latter would nonetheless be entitled to moor the vessel under the doctrine of necessity. That is the teaching of *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

reasoning explains why contributory negligence is irrelevant in cases of abnormally dangerous activities and in the cases following *Rylands v. Fletcher*.

This, then, is the proper understanding of tort law as the middle position between criminal and contract law. The cases of strict liability reflect the influence of criminal law. The influence begins early in the law of torts under the writ of trespass and carries forward in the various situations in which we perceive the defendant's action as aggression that dominates the interests of a plaintiff insulated by her rights. In contrast, the influence of private law thinking breaks through in the collaborative principle underlying the law of negligence. By entering into certain spheres of risk-taking, plaintiff and defendant both come under duties to act with a view to the costs and benefits of their actions. They become a unit, acting under an implicit obligation to optimize the consequences of their actions.⁶⁸

The problem that remains unanswered is when each of these two approaches to tort liability should prevail. When should we think in the victim-protective style of criminal law and when in the collaborative paradigm of contract law? Alas, this sketch is but the beginning of an adequate theory. We can draw some guidance from the phrase used above: when the plaintiff "enters into certain spheres" of risk. Consider the tripartite liability relations of airplane owners and operators. As to passengers in the airplane as well as passengers and owners of other planes sharing the airways, the owners and operators are liable under the rule of negligence. As to persons and property owners on the ground, the owners and operators of airplanes who put them at risk fall under the rule of strict liability. These rules make good sense. Passengers enter into the sphere of risk by voluntarily contracting for passage. Those who fly the neighboring airplanes also enter into the sphere by imposing reciprocal risks on the defendant.⁶⁹ The homeowner in the path of the flight, however, does nothing to subject herself to the risk of airplanes crashing into her living room.

The following objection lies at the ready: just as pedestrians enter into the sphere of risk by walking near the highway (and thus are protected only by the rule of negligence), so homeowners enter into the community of risk defined by airplane overflights if they buy their homes with full knowledge of the overflights (or if they refuse to move

⁶⁸ Admittedly, this argument does not explain the asymmetry of plaintiff's and defendant's fault. Plaintiff's fault conclusively bars recovery; defendant's fault does not conclusively ground recovery. This asymmetry is less striking in cases adopting the rule of comparative negligence.

⁶⁹ I have made this argument in a previous work. See Fletcher, *supra* note 16, at 548. Although that earlier article stresses the unity of fault and strict liability under the paradigm of nonreciprocal risk-taking and here I elicit the difference between the two, I do not mean to depart from the basic contours of my earlier argument. I offer instead "another view of the cathedral."

once they learn of them). Admittedly, the distinction between pedestrians relative to cars and homeowners relative to airplanes lies at the foundation of current legal practice. The distinction bears some intuitive plausibility based on the likelihood of an accident. But the border between the two paradigms is open to dispute, and it would not be shocking if car accidents with pedestrians were treated like airplane-caused ground damage or vice versa. The principle remains sound even though there may be debate at the fringes of its application.

What makes this tentative theory of fault and strict liability more plausible than Coleman's effort to reduce the two standards of liability to mirror images of each other? First, recognizing and explicating the difference gives a more faithful account of the law's self-understanding. Judges and practitioners argue on the assumption that accepting or rejecting the fault standard matters in litigation. Further, there are important political and moral issues at stake in working out the criteria for displacing the way we think about criminal law with a private law standard of collaboration that implies a shared duty to find the optimal level of harmful activities. Where strict liability holds sway, we witness the application of a principle of justice: if you dominate another by subjecting her to risks when she has no right of self-defense, you must pay for the consequences. Where fault liability rules the case, there is more room for an interpretation of the case that comports with an economic rationale of resource conservation. The parties are bound to act together to minimize the costs of their interaction. Admittedly, these conflicting political and moral criteria require further explication. We can be confident, however, that more is at stake in legal theory than elegance and symmetry. The life of the law is not simple logic, for all too often there are multiple logics, multiple paradigms, at work in legal disputes.