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Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis

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TRANSPARENCY AND DETERMINACY IN COMMON LAW ADJUDICATION: A PHILOSOPHICAL DEFENSE OF EXPLANATORY ECONOMIC ANALYSIS

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EXPLANATORY economic analysis of the common law has long been subject to deep philosophical skepticism for two reasons. First, common law decisions appear to be cast in the language of deontic morality, not the consequentialist language of efficiency. For this reason, philosophers have claimed that explanatory economic analysis cannot satisfy the transparency criterion, which holds that a legal theory's explanation must provide a plausible account of the relationship between the reasoning it claims judges actually use to decide cases and the express reasoning judges provide in their opinions. Philosophers have doubted that the economic analysis has a plausible account of why judges would use deontic moral terms to explain cases they decide using consequentialist economic reasoning, arguing instead that only a deontic moral account of judicial reasoning can be squared with the judicial use of deontic moral language. Second, the common law has a bilateral structure, in which a plaintiff's right to recover and a defendant's duty to compensate are treated as correlative. Philosophers have observed that this structure

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seems custom tailored to retrospective moral rights adjudication and ill suited to prospective efficient regulation.

Recently, two philosophers, Jules L. Coleman and Stephen A. Smith, have developed these ideas into a full-scale assault on the explanatory credentials of the economic analysis. I defend the economic analysis by arguing that the bilateral structure of the common law either constitutes a "second best" approach to providing incentives for efficient behavior, as economic analysts have maintained, or that it is the vestigial remnant of the common law's originally deontic conception. I also claim that the economic analysis satisfies the transparency criterion by arguing that terms with a deontic plain meaning have acquired a consequentialist contextual meaning within the common law. Although this "contextualist convergence" thesis is counterintuitive, I build on Coleman's semantic theory to explain how it is possible. To demonstrate that it is plausible as well, I argue that evolutionary forces would have naturally led to this result over the course of the common law's development. In particular, I claim that the substantial indeterminacy of deontic moral theory, and the superior determinacy of the economic analysis, explains why judges would be intuitively attracted to reasoning that is best reconstructed in economic terms, notwithstanding the superior normative force of deontic moral theory. Thus, the core of my defense of explanatory economic analysis is that its critics overlook the central theoretical and practical role determinacy plays in explanation and justification generally, and in the explanation of judicial reasoning in particular, where determinacy is prized, if not above all else, no less than any other virtue.

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INTRODUCTION

From its inception, the economic analysis of the common law has been embarrassed by an open secret: common law decisions are cast in the language of morality, not efficiency, and the bilateral structure of the common law, in which a plaintiff's right to recover and a defendant's duty to compensate are treated as correlative, seems custom-tailored to retrospective moral rights adjudication rather than prospective efficiency-based regulation. Recently, two philosophers have developed these apparent inconsistencies into a full-scale assault on the explanatory credentials of the economic analysis of the common law. In his recent book,[1] Professor Stephen Smith argues that because law is a self-reflective social practice, an explanation of its core features must provide an account of what Professor H.L.A. Hart called the internal point of view of the legal officials who participate in it.[2] According to their point of view, legal reasoning is transparent.[3] Smith uses the term "transparency" to describe the extent to which the express legal reasoning offered by legal officials describes the actual reasoning they use to make their decisions. Law is transparent only if the express legal reasoning accurately describes the actual legal reasoning.[4] Smith argues that a legal theory's explanation must either support the express legal reasoning judges offer by showing "why the legal concepts employed by a judge are an appropriate way of expressing in prac-

[1] Stephen A. Smith, Contract Theory (2004).

[2] Thus, to understand law, Smith notes:

> [I]t is necessary to understand legal actors' public or 'legal' explanations of what they are doing. . . . [T]he theorist is interested in how legal actors explain what they are doing when they are acting as legal actors. The relevant evidence of this understanding is found in judicial reports, parliamentary debates, and lawyers' arguments in courts—rather than, say, in judges or legislators' personal diaries or in psychological assessments of their motives.

Id. at 14.

[3] Smith uses the term "law's self-understanding" to refer to the understanding of the law that is widely shared by legal actors. Id. at 24. He defines "legal actors" as "those who participate officially in making and applying the law." Id. at 14. Smith then argues that one "aspect of law's self-understanding . . . is the claim that . . . legal reasoning[] is transparent." Id. at 24.

[4] Id. at 25 ("That law is understood, *from the inside*, as transparent is clear: lawmakers, and in particular judges, give reasons for acting as they do and those reasons are presented as their real reasons. . . . In broad terms, to *account for* law's claim to be transparent a legal theory of the common law must, *inter alia*, take account . . . of the reasons that judges give for their decisions.").

tice the broader concepts that the theorist argues underlie the law,"[5] or demonstrate "how legal officials could sincerely, even if erroneously, believe the law is transparent."[6] Smith calls this the "transparency criterion" for legal theories.[7]

Smith argues that the economic theory of contract law cannot satisfy the transparency criterion because the kind of explanation of legal reasoning it provides is fundamentally incompatible with the kind of reasoning used by judges in contract cases.[8] According to Smith, an explanatory legal theory is not acceptable unless its account of express judicial reasoning, "once translated into concrete concepts, could be accepted by a court, even if no court has yet done so."[9] Smith claims that the reasoning judges use in con-

[5] Id. at 27.

[6] Id. at 25.

[7] Smith considers weak, strong, and moderate versions of what it means to "take account of" legal reasons offered by judges and settles on the moderate version: "a good legal theory should explain the law in a way that shows how judges could sincerely, even if perhaps erroneously, believe that the reasons they give for deciding as they do are the real reasons." Id. at 28. The weak version holds that "*any* explanation of law's claim that legal reasoning is transparent is sufficient. . . . A good theory could reveal the claim to be a deliberate falsehood." Id. at 26. This weak version of the transparency criterion could be satisfied by a conspiracy theory about why legal officials deliberately deceive. But Smith rejects the weak version because "it is just not plausible to suppose that the vast corpus of legal reasoning, which was created by countless individuals over centuries, is all the result of a mass effort by judges to misrepresent what they are doing." Id. The strong version holds that

> a good theory must show law's self-understanding to be true. It must show, that is, that the arguments judges employ determine the actual results of cases. . . . What the strong version requires is that the theorist's explanation of the law, which explanation may, and normally will be, at a more abstract or theoretical level than the legal explanation, leads by logical steps to the court's reasoning.

Id. at 27. Smith rejects the strong version on the ground that its satisfaction is sufficient but not necessary to make the law's self-understanding intelligible: "A false statement or belief may be perfectly intelligible so long as a plausible explanation is given for holding the statement or belief." Id. The moderate version of the transparency criterion, in Smith's view, sets out the bare minimum necessary to make law's self-understanding intelligible. The defense of the economic analysis I will provide satisfies the strong as well as the moderate version of the transparency criterion. See infra Part III.

[8] See Smith, supra note 1, at 132–33 (distinguishing judges' occasional consideration of the effects of their decisions on commercial and contracting activities from their consistent invocation of the concepts of individual responsibility and remedial compensation). "That there is a difference in kind between efficiency-based explanations and legal explanations of the law seems indisputable." Id. at 133.

[9] Id. at 30. For example, while an analysis of duress in terms of unjust enrichment would be recognizably legal, even if no court had ever embraced such an analysis, an

tracts cases is cast in deontic moral terms. Yet economic analysis insists this reasoning should be analyzed using the consequentialist concept of efficiency.[10] Because Smith believes the concept of efficiency is "foreign" to deontic legal reasoning,[11] he concludes that the economic analysis is inconsistent with contract law's self-understanding. As Smith puts the point, "efficiency theories are inappropriately 'external' to contract law" and therefore "do not offer an adequate explanation of the law because they rely on concepts, language, and reasoning that are radically different from those employed by legal actors themselves."[12] As a result, the concept of efficiency cannot explain legal reasoning in contracts, and thus satisfy the transparency criterion, because judges would not recognize it as a concept they employ, or would employ, at any level of abstraction. Smith's favorite example is the language of contract remedies:

> From the legal perspective, remedies are viewed as just that—remedies, and they are presented as the means by which a wrong is remedied. From the efficiency perspective, by contrast, a remedial order is regarded as a signal to future contracting parties to behave appropriately. . . . There is virtually no point of contact, then, between the legal explanation and the efficiency-based explanation. . . . That there is a difference in kind between efficiency-based explanations and legal explanations of the law seems indisputable.[13]

Smith concludes that if economic analysis is to be defensible, it must provide an account of why law's self-understanding is incor-

analysis of duress in terms of the concept of male hegemony is "foreign to legal reasoning." Id. Thus, Smith claims that acceptable legal explanations must use concepts that a "judge *might* have used." Id. at 29.

[10] Id. at 133 ("The objection . . . is that legal arguments are essentially about individual rights and individual responsibility rather than about efficiency or any related concept.").

[11] Id. at 31 ("Efficiency-based explanations characteristically explain the law using concepts that are foreign to legal reasoning. . . . This difference is not merely one of terminology or of degree; it is a difference in kind. The legal explanation focuses on the rights and duties of the litigants, the efficiency explanation focuses on the incentives for future behavior of contracting parties generally. . . . [I]n the main areas of private law, this kind of efficiency-based reasoning is not employed by the courts.").

[12] Id. at 132–33.

[13] Id. at 133.

rect—an "explanation as to why legal reasoning appears largely unconcerned with efficiency."[14] But Smith rejects as implausible the only accounts he believes economic analysis could offer to explain why the expressly deontic legal reasoning of judges does not correspond to their actual, allegedly efficiency-based, reasons for deciding cases.[15]

In his recent book,[16] Professor Jules Coleman presents a remarkably similar, but far more extensive, critique of the explanatory economic analysis of tort law. He claims that the economic analysis of tort law cannot adequately account for the fact that judges use transparently deontic concepts to explain their reasoning in tort cases. His critique of the economic interpretation of the central concepts of tort law derives from his view that particular areas of law, such as tort law, should be conceived of as social practices. These social practices are individual systems of practical reasoning that are defined by the structure and content of their core concepts.[17] An explanation of these practices therefore requires an explanation of the conceptual structure and content embedded in them. For Coleman, the content of the core concepts in a legal practice is given by the inferential role they play in all the practices in which they figure.[18] Like Smith, Coleman takes explanations of social practices to require an account of the internal point of view

[14] Id. at 134.

[15] See infra notes 31–34 and accompanying text.

[16] Jules L. Coleman, The Practice of Principle (2001).

[17] Id. at 10 ("Tort law is (in part) a system of practical reasoning."). Coleman goes on to state that "[t]o provide a conceptual analysis of a social institution is to identify the central concepts that figure in it, and to explicate their content and their relationships with one another." Id. at 13. "The core of tort law is composed of structural and substantive elements." Id. at 15.

[18] Id. at 7. To illustrate, Coleman uses the example of the concept of a promise:

> Suppose, for example, I say to Smith, 'I promise to meet you for lunch today.' Understanding this as a *promise* means knowing that it warrants a variety of inferences—for example, that I predict I will show up for lunch; that I have a duty to show up; that Smith has a right that I show up; and so on. The content of the concept 'promise' is revealed in the range of inferences warranted by the belief that a promise has been made; and to grasp the concept of a promise is to be able to project the inferences it warrants.

Id. Coleman's inferentialist theory has its origins in fundamental work in the philosophy of language by W.V.O. Quine and Wilfrid Sellars, especially as their theories have been elaborated by Benjamin Zipursky in defending the bipolarity critique of the economic analysis of tort law. See Benjamin C. Zipursky, Pragmatic Conceptualism, 6 Legal Theory 457 (2000).

of participants in those practices. Thus, one of Coleman's central objections to the economic analysis of tort law is that it "reject[s] the self-understandings of the developers and participants in the practice."[19] He argues that tort liability is predicated on "an inference warranted by the acceptance of certain claims, many of which employ concepts such as harm, wrong, duty of care, but-for and proximate cause, and so on," yet the economic analysis, by reducing tort law's core concepts to efficiency, "assign[s] to the central concepts of tort law contents that bear no immediate relationship to the actual structure of inferences those concepts warrant in the practices of tort law."[20] Instead, the economic analysis "suggests a scheme of practical inference altogether different from the one actually in place[,] and . . . jettison[s] concepts that are in fact central to our legal practice."[21] According to Coleman, "the economists tell us that the process of reasoning in which participants in our tort institutions engage is a kind of ideological illusion."[22] More generally, the economic analysis cannot plausibly claim that the legal reasoning judges express in their opinions represents their actual reasoning because economic analysis provides a "forward-looking" account of tort law, and the structure of the practical reasoning in tort opinions provides a "backward-looking" account of tort law.[23] Coleman concludes that the economic analysis "clearly fails as a conceptual analysis of tort law."[24] Although Coleman never explicitly embraces the transparency criterion by name, the term cap-

[19] Coleman, supra note 16, at 27.

[20] Id. at 22.

[21] Id. at 23.

[22] Id. at 22. "What [participants] think they are doing and what they are 'really' doing come apart on the economic analysis, and their self-understanding is portrayed as a kind of ideological illusion." Id. at 25.

[23] Id. at 16–17.

[24] Id. at 23. Coleman here rejects the claim that economic analysis can provide a nonreductive conceptual analysis of tort law. Economic analysis cannot, in Coleman's view, provide a nonreductive conceptual analysis because it must explain all of tort law's core features using only the concept of efficiency. A nonreductive conceptual analysis will not reduce the core concepts of tort law to a single concept but instead will explain the various distinctive concepts of tort law and how they hang together to form a coherent whole that can be understood to embed a more general principle. In addition, Coleman later considers and rejects on different grounds the claim that economic analysis can provide a functionalist explanation that would take the form of a reductive conceptual analysis. See Coleman, supra note 16, at 25–27.

tures one of his central grounds for rejecting the economic analysis of tort law as an explanatory theory.

In addition, both Smith and Coleman reject the economic analysis on the ground that it cannot adequately account for the bilateral structure of common law adjudication. The bilateral structure of the common law consists, in the first instance, in the fact that it is a body of law developed by judges engaged in adjudication, and not a body of statutes or regulations promulgated by a governmental body for purposes of regulating future conduct. Moreover, the common law is committed to a particular kind of bilateral structure that recognizes only those rights of plaintiffs that are correlative to duties of defendants and vindicates these rights by requiring defendants to compensate their respective plaintiffs. The common law's bilateral structure—or bilateralism—therefore explains why plaintiffs are awarded judgments only against the particular defendants who harmed them, rather than against society as a whole, and why defendants are ordered to pay damages only to the plaintiffs they harmed, rather than to a general social pool.[25] Smith objects to the economic analysis of contract law because it treats bilateralism as an administratively convenient method of providing the penalties and rewards necessary to create optimal incentives for contracting parties. It cannot appeal to the more natural explanation that bilateralism is a necessary requirement of a moral theory that grounds a claim to compensation in the defendant's violation of a moral duty correlative to the plaintiff's moral right.[26] Smith then rejects the economic account of bilateralism on the ground that it is "inconsistent with what judges say and understand

[25] Id. at 16.

[26] Smith further explains:

> [F]rom an efficiency perspective, the link between the defendant and the plaintiff is merely one of administrative convenience. In principle, the goal of ensuring that contracting parties face the correct mix of penalties and rewards (so that they act efficiently) could be achieved by ordering defendants to pay damages to the state, and by allowing plaintiffs to collect compensation from the same source. The efficiency theories' explanation for why the law requires defendants to pay plaintiffs is that this is administratively cheaper than the alternatives. In a system in which plaintiffs are compensated by defendants, plaintiffs have incentives to bring forth the information that courts require to make remedial orders. In effect, the plaintiff is bribed to act as the equivalent of a public prosecutor.

Smith, supra note 1, at 397.

themselves to be doing."[27] His objection to the economic account of bilateralism therefore clearly relies on his transparency criterion.

Coleman has two central objections to the economic analysis of bilateralism.[28] The first is that the economic analysis of tort law's

[27] Id. at 398.

[28] Coleman has two additional objections to the explanation of bilateralism provided by the economic analysis. The first objection appears to rely on a variant of the transparency criterion. Coleman argues that corrective justice provides the most natural and intuitive explanation of the bilateral character of adjudication in tort law because it holds that injurers who wrongfully harm victims have a moral duty to compensate only their victims and that such victims have a moral right to recover only against their injurers. Like Smith, he notes that the economic analysis of tort law must explain tort law's bilateral structure as an administratively convenient method of inducing both victims and injurers to take optimal precautions because the costs of searching for those in the best position to reduce the costs of future accidents is too high. Coleman, supra note 16, at 18–19. Coleman then criticizes the economic analysis because it "tells us . . . that the apparently transparent purpose of [tort law's bilateralism] . . . is not the real purpose; and that the real purpose, efficiency, has nothing at all [to] do with the fact that the injurer may have wrongfully harmed the victim." Id. at 21. Coleman's objection to the economic analysis of bilateralism, then, is that "it renders . . . obvious and intuitively transparent features of tort law mysterious and opaque." Id. This objection appears to rest on a version of the transparency criterion that is not premised on Smith's claim that explanations of social practices must take into account the internal point of view, but rather holds that the most intuitive or natural explanation of the structure of a social practice is preferable, and any counterintuitive explanation must be supported by an adequate account of why the practice would have a structure that appears to serve a different purpose than the one it actually serves.

Coleman's second objection holds that the economic analysis's search cost explanation of bilateralism leads to a counterintuitive result: he believes it implies that, absent search costs, victims would have a duty to seek out and sue the cheapest cost avoiders. Id. at 19–20. But this absurd result does not follow from the economic explanation of bilateralism. The requirement that victims sue their injurers, on this account, is justified by the high search costs of finding the cheapest cost avoider for the accident that caused the injury. If that party could be found at no cost once the injury occurs, then tort law itself would be unnecessary. At most, individuals would have an obligation to report their own injuries so that government could penalize the person who could have prevented the accident at least cost. Indeed, Coleman seems to appreciate this when he writes:

> The fact that the injurer harmed the victim only matters if that fact gives us some reason for believing that either the injurer or the victim is in a good position to reduce accidents of this sort in the future. What happened between the injurer and the victim provides no reason that justifies liability or recovery, both of which are justified by their impact on future agents. When search costs are low enough . . . the tort has no significance at all.

Id. at 20 n.9. In light of this logic, it is unclear why Coleman argues that the search costs argument leads to the absurd result that injurers would have a duty to sue cheapest cost avoiders if search costs were low. As Coleman himself acknowledges,

bilateralism implies that "in the absence of search, administrative, and other transaction costs, these structural features of tort law would be incomprehensible."[29] Coleman instead endorses the corrective justice explanation on the ground that it would still make sense of the bilateral character of tort law even if transaction costs were zero. Thus, Coleman's more fundamental objection to the economic explanation of bilateralism is that it is unprincipled or ad hoc.[30] By "unprincipled," Coleman means that the economic analysis fails as an explanation of why bilateralism is an essential, rather than contingent, feature of tort law. The corrective justice account holds that bilateralism is essential to tort law because the purpose of tort law is to promote corrective justice, and a bilateral structure is a necessary characteristic of any body of law that serves this purpose. According to the economic analysis of tort law, however, bilateralism is not an essential feature of tort law because a bilateral character is not a necessary feature of any body of law that serves the purpose of promoting efficiency. Indeed, if the purpose of tort law is to promote efficiency, there would be no reason for tort law to have a bilateral structure if search costs were not high. Thus, instead of explaining the essential character of tort law's bilateralism, the economic analysis insists bilateralism is a contingent, rather than necessary, feature of tort law.

Coleman's second objection is that the economic analysis, in his view, cannot account for the concept of duty in torts.[31] Tort law requires a defendant to compensate a plaintiff harmed by its negligence only if that defendant's negligence breached a duty the defendant owed to the plaintiff. But tort law holds that defendants do

low search costs would, according to the economic analysis, justify abandoning tort law entirely, rather than impose a duty to sue. There is nothing counterintuitive about that result.

[29] Id. at 21.

[30] Thus, Coleman claims:

> There is simply no principled reason, on the economic analysis, to limit the defendant or plaintiff classes to injurers and their respective victims. The classes of victims and injurers are identified entirely by backward-looking features (the harmful event); yet those best able to reduce the costs of accidents are identified by their relationship to the forward-looking goal of cost reduction.

Id. at 17. Similarly, Coleman claims that on the economic analysis, "the normative significance of the victim-injurer relationship depends on a range of search and other transactions costs, and is in this sense derivative or superficial." Id. at 17 n.6.

[31] Coleman, supra note 16, at 23.

not owe a duty to plaintiffs whom they could not have foreseen would be harmed by their negligent conduct. Thus, tort law does not require defendants to pay damages for the harm they cause to unforeseeable parties, even if that harm resulted from the breach of a duty the defendants owed to a foreseeable party. The economic analysis, however, requires that tort law provide optimal incentives for individuals to make efficient decisions with respect to levels of activity and precaution. The concept of duty in tort law undermines this goal because it allows individuals to make these decisions without taking into account their full expected costs. Hence, Coleman concludes that the economic analysis, in principle, cannot account for one of the central concepts in tort law. Because the concept of duty restricts the scope of correlative rights recognized in tort law, I treat this as another objection to the economic analysis of bilateralism.

In sum, the philosophical critiques claim that the economic analysis of contract and tort law neither satisfies the transparency criterion nor explains why bilateralism is an essential, rather than contingent, feature of these areas of the law. Together, these objections challenge economic analysts to defend the claim that they have provided a genuine explanation of the common law. Such a defense requires them first to clarify both their view of the reasoning judges actually use to decide common law cases and the meaning of the moral terms used in the express reasoning of those decisions. The deontic critique is based on two critical assumptions. The first is that the transparency of judicial decisions turns on the correspondence between actual judicial reasoning and the *plain* meaning of express judicial reasoning. The second is that the plain meaning of the moral terms used in the express reasoning of judicial decisions is given by a deontic moral theory. It is this second assumption that, combined with the bilateral structure of common law adjudication, grounds the deontic critique's claim that judges in fact use deontic reasoning to decide cases.[32] The deontic plain meaning assumption, however, is not beyond dispute. Economic analysts, like consequentialist moral theorists, could argue that the

[32] Deontic theorists claim that the rights and duties recognized by the common law serve in judicial opinions as constraints on consequentialist reasoning that cannot be grounded in a consequentialist moral theory.

plain meaning of moral terms is given by a consequentialist moral theory. If that were true, then the economic analysis would easily satisfy the transparency criterion because it would claim that judges are using consequentialist reasoning to decide cases that they explain using express terms that have a consequentialist plain meaning.[33] Then, the burden would be on deontic theorists to explain why they believe judges use deontic reasoning and how *their* theory satisfies the transparency criterion. The claim that moral terms have a consequentialist plain meaning, however, is arguably as difficult to defend as consequentialist moral theory itself. Any defense of the economic analysis that rests on it would be highly contestable. I will therefore accept for purposes of argument the deontic critique's premise that the plain meaning of moral terms used in the express reasoning of common law decisions is given by a deontic moral theory.

According to the deontic critique, then, there are only two possible combinations of actual and express judicial reasoning, neither of which is compatible with explanatory economic analysis. The first is that judges are using deontic reasoning and their express reasoning has a deontic plain meaning. On this view, actual and express judicial reasoning converge on deontic reasoning. This is, of course, the deontic theory's position, and it explains how the deontic theory satisfies the transparency criterion—judges use deontic reasoning to decide common law cases and therefore use terms with deontic plain meaning to explain their reasoning. If the economic theory also embraced the view that actual and express judicial reasoning converge on deontic reasoning, it would satisfy the transparency criterion but then could not plausibly claim to account for the internal point of view of the common law. Its explanation instead would have to be concededly external, such as the explanation provided by the well-known theories of the efficient evolution of the common law. While I make no general attempt to defend these theories here, I do defend them against the particular criticisms leveled by Smith and Coleman, and I invoke them as col-

[33] Alternatively, one might avoid the philosophical critique of the economic analysis by marshaling cases to demonstrate that many, if not most, common law decisions make no reference to deontic moral rights at all and instead invoke consequentialist policy arguments directly. See Nathan Oman, Unity and Pluralism in Contract Law, 103 Mich. L. Rev. 1483, 1493–96 (2005) (reviewing Smith, supra note 1).

lateral support for my defense of an internalist version of the economic analysis of the common law.[34]

The second possibility is that judges use consequentialist reasoning but their express reasoning has a deontic plain meaning. On this view, the actual judicial reasoning and the plain meaning of express judicial reasoning in common law cases diverge. This is, of course, the position that deontic theorists ascribe to the economic analysis. Economic analysts must explain why it is reasonable to believe that judges would use deontic terminology to explain consequentialist reasoning. Both Smith and Coleman argue that the only way to explain such divergence between the actual and express reasoning of judges would be to claim that judges are either systematically deluded about their own reasoning or engaged in a vast conspiracy to misrepresent their actual reasoning. Because they reasonably reject these two claims as implausible, they reject this view on the ground that it cannot satisfy the transparency criterion.

The deontic critique, thus, presents a constructive dilemma: the economic analysis either constitutes an external explanation of the common law, and therefore fails to explain the legal point of view of the lawyers and judges who interpret and thereby create the common law, or it constitutes an internal explanation that fails to satisfy the transparency criterion. Recall, however, that the other premise of the deontic critique, and thus the premise of this dilemma, is that the transparency of judicial decisions is determined relative to the plain meaning of the moral terms used in express judicial reasoning. In this Article, I defend the economic analysis by rejecting this premise of the deontic critique. I argue instead that the express terms in common law decisions have a specialized meaning within the common law and that the transparency of a judicial decision therefore should be determined relative to the contextual, rather than plain, meaning of the judicial language. Like

[34] Both Smith and Coleman consider the efficient evolution theory of the common law as an example of an economic theory that purports to provide an external explanation. They reject the efficient evolution theory, in the first instance, because its claim that the common law is best understood as a consequentialist institution cannot, in their view, be reconciled with the fact that judges take themselves to be engaged in an essentially deontic activity. Coleman also argues that this external version of economic theory has yet to make good on its essential premise that the common law has in fact become more efficient over time. See infra Part VI.

the deontic theory of the common law, this view satisfies the transparency criterion because it asserts that actual and express judicial reasoning converge. Unlike the deontic view, however, the claimed convergence is between actual judicial reasoning and the contextual, rather than plain, meaning of express judicial reasoning.

My defense of explanatory economic analysis, then, begins by defending a "contextualist convergence" thesis—that there is a convergence between actual and express judicial reasoning in common law cases because common law judges are using moral terms with a specialized, consequentialist meaning to explain their consequentialist reasoning. Defense of the contextualist convergence thesis first requires a plausible account of how the terms of express judicial reasoning could have acquired a specialized, consequentialist meaning within the common law that is at odds with the plain meaning of those terms. Then it must explain how that could be true in light of the fact that most judges would not agree that they understand the moral language of the common law to have an exclusively consequentialist meaning. It must therefore provide a plausible account of why judges would use, but deny that they use, consequentialist reasoning. Again, the only available accounts seem to require the implausible claim that judges are either systematically deluded about the nature of their own reasoning or engaged in a conspiracy to misrepresent their reasoning. Finally, even if the contextualist convergence thesis succeeds, a complete defense of the economic analysis also requires an explanation for why the common law has a bilateral structure despite its consequentialist purpose. The economic analysis contends that the purpose of the common law is to provide efficiency-based prospective regulation. Yet the common law's bilateral structure is perfectly tailored to the purpose of deontic adjudication and only contingently suited to the purpose of efficiency-based prospective regulation.

To demonstrate that contextualist convergence is *possible*, I use Coleman's semantic theory to explain how the common law could have evolved specialized, consequentialist meanings for moral terms with a deontic plain meaning. To explain why contextualist convergence is *plausible*, I argue that the relative indeterminacy of deontic moral concepts would have proved fatal to their use in the judicial reasoning necessary to decide hard cases and that the evo-

lution of a consequentialist interpretation of moral terms within the common law would have been a natural development. To explain why judges would deny that the moral terms they use in their opinions have a consequentialist meaning, I argue that they either misunderstand or fail to appreciate how this consequentialist interpretation identifies the deeper principles and logic underlying the reasoning they understand themselves to be using and thus the language they use to express it. If judges fully appreciated the account that economic analysis offers of the deep structure of their reasoning, they would likely agree that it accurately explains their reasoning. If they insist, nonetheless, that the common law would regard reasoning cast in explicitly economic terms as impermissible or erroneous, then they are merely reporting on the acceptable linguistic conventions of the common law, not rejecting the explanation of their reasoning provided by the economic analysis. Linguistic conventions governing express reasoning have no bearing on the accuracy of theories claiming to provide a deep explanation of the reasoning expressed within those conventions. Thus, I reject Smith's claim that adequate explanations of legal reasoning must provide reasons for judicial decision that a judge might have used,[35] and so must be reasons that "once translated into concrete concepts, could be accepted by a court, even if no court has yet done so."[36] Instead, I argue that the best interpretation of express judicial reasoning can be provided by a theory that uses terminology that would not be permissible to use in a judicial opinion. It also may describe that reasoning in terms unfamiliar to judges, even though it accurately identifies the theoretical basis of their actual reasoning. Therefore, even if judges affirmatively reject theoretical interpretations purporting to identify the deep structure of their reasoning, that does not prove that such interpretations are necessarily inaccurate. Judges need not be dishonest or deluded in order to fail to appreciate that their reasoning is best interpreted in theoretical terms that are foreign to them and their practice.

Finally, I defend the economic analysis against the bilateralism critique in two ways. The first defends economic theory's traditional search cost explanation of bilateralism against Smith's and

[35] Smith, supra note 1, at 29.
[36] Id. at 30; see also supra note 9.

Coleman's objection that it both violates the transparency criterion and fails to account for the fact that bilateralism is an essential feature of the common law. The second argues that the economic analysis itself need not explain all features, or even all the constitutive features, of the common law in order to fit into a coherent and satisfactory overall explanation of the common law. Thus, I argue that the economic analysis explains the content of common law reasoning and coheres with an historical account of the origins and persistence of the bilateral structure of the common law.

Defending the economic analysis against the transparency and bilateralism objections requires an argument to demonstrate not only that the contextualist convergence thesis is semantically possible and intuitively plausible, but also that it is theoretically motivated. I therefore begin by motivating the contextualist convergence thesis in Part I, which argues that legal explanatory theories are subject not only to the transparency criterion but also to two additional criteria, which I call the "determinacy" and "normative force" criteria. The determinacy criterion is based on the proposition that reasons fully explain an outcome only if they determine it. The determinacy criterion therefore holds that, all else equal, a theory that provides more determinate explanations is more likely to be correct than one that provides less determinate explanations. All else equal, then, economic theories of the common law are more likely to be correct than deontic theories if they provide more determinate explanations of case outcomes. For purposes of the present argument, I presume that economic analysis in fact yields more determinate explanations of case outcomes than deontic theories. Thus, according to the determinacy criterion, the alleged superior determinacy of the economic analysis constitutes a comparative advantage over deontic theories. This is especially important to offset the perceived superiority of the deontic theory's more intuitive plain meaning interpretation of express judicial reasoning. The normative force criterion holds that an adequate explanation of a judicial decision must offer reasons that would justify the decision's outcome according to a credible normative theory, while explanations that do not must be rejected. Moreover, even more determinate theories can be rejected in favor of less determinate theories with superior normative credentials. I argue that while deontic theories can trace the normative force of their reasons di-

rectly to credible moral theories, the economic analysis need not make the unsustainable claim that the normative force of its reasons derive from the justificatory power of the principle of efficiency alone. Instead, it can claim its reasons justify outcomes because of the role the principle of efficiency plays in the overall set of institutions sanctioned by the normative political theory justifying political authority.

Part II lays out Coleman's theory of how content is assigned to concepts in social practices. It then argues that he provides a seriously incomplete account of how tort law determines the content of duties it recognizes and vindicates as a matter of corrective justice. Part III argues that Coleman's corrective justice account of tort law could use a "semantic vertical integration" strategy to allow the economic analysis to determine the content of duties in tort law, despite Coleman's claim to the contrary. Part IV argues that Coleman's semantic theory suggests an explanation of the development of meaning in the common law that makes the contextualist convergence thesis plausible. I argue that the lack of determinacy in deontic common law doctrine naturally could have led the meaning of common law terms to undergo radical semantic evolution, which explains why judges would express their consequentialist reasoning in terms with a deontic plain meaning. Part V uses this radical semantic evolution account to defend the economic analysis against the claim that it can account neither for bilateralism generally nor for the concept of duty in tort law in particular. Part VI argues that the classic model of the efficient evolution of the common law provides collateral support for the radical semantic evolution explanation of the contextualist convergence thesis. It also explains how this thesis avoids the objections Coleman and Smith make to the efficient evolution model as a free-standing explanation of tort law.

I. THE DETERMINACY AND NORMATIVE FORCE CRITERIA FOR LEGAL EXPLANATIONS

At the outset, I observed that the economic analysis of the common law has been embarrassed since its inception by the obvious and forceful objections to its explanatory credentials. In truth, economic analysts rarely take notice of the tension between their explanations and the common law's internal point of view, let alone

think about it long enough to feel embarrassed. The same, however, could be said of deontic theorists: deontic theories have long been embarrassed by the gap between their explanations of judicial reasoning and the outcomes of adjudication. In truth, however, deontic theorists rarely take notice of the indeterminacy of their legal explanations, let alone think about it long enough to feel embarrassed by their own claim to have explained judicial decisions with concepts that fall far short of determining outcomes. Thus, if deontic theories appear to have a leg up on economic theories of the common law because they enjoy a more natural fit with its language and structure, economic theories appear to have the edge on deontic theories because their explanations of judicial decisions systematically yield more determinate results, at least in principle.[37]

The transparency criterion tells us that to be plausible, an explanatory legal theory must yield an account of express judicial reasoning according to which a reasonable judge could honestly believe that her express reasoning explains the outcome of the case it purports to explain. I maintain that reasons fully explain an outcome only if they determine the outcome and that the closer an explanation's reasons come to determining the outcome they are supposed to explain, the closer that explanation comes to providing a full explanation.[38] I conclude that explanatory legal theories must

[37] Throughout my analysis, I presume that, on average, the principle of efficiency leads to more determinate results, on any plausible scale of determinacy, than deontic moral principles. I will often add the proviso that the efficiency principle has superior determinacy "at least in principle." I mean here to distinguish between what we know about what the principle of efficiency requires and what we know about how to satisfy that requirement given our limited empirical knowledge. If we know what a theory requires but do not know how to satisfy that requirement given our limited empirical knowledge, the theory is determinate in principle only—not in result. But if we do not even know what state of the world would satisfy the theory's requirements even if we were omniscient as to empirical facts, that theory is indeterminate in principle. Elsewhere, I have provided some argument for the claimed superior determinacy of the principle of efficiency. See generally Jody S. Kraus, Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency in Contract Theory, *in* Political and Legal Philosophy 385 (Enrique Villanueva ed., 2002); Jody S. Kraus, Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy, 11 Phil. Issues 420 (2001) [hereinafter Kraus, Reconciling]. It is by no means an uncontroversial claim, and if it is to play the central role it has in the present defense of the economic analysis, much more needs to be done to clarify and defend it. That task, however, is not undertaken here.

[38] The philosophical debate over legal determinacy animates much of twentieth-century analytic jurisprudence. The main poles of the debate are staked out by Pro-

be evaluated according to "the determinacy criterion": all else equal, legal theories that offer more determinate explanations of adjudicative outcomes are better than ones that provide less determinate explanations. In fact, the transparency criterion incorporates the determinacy criterion because transparency requires the most plausible account of express judicial reasoning. The plausibility of an account of express judicial reasoning turns, in part, on how likely judges are to have intended that account's interpretation of their reasoning. Since express judicial reasoning unquestionably claims to explain the reasoning judges use to decide the outcomes of cases, one interpretation is better than another if, all else equal, it is more determinate. In other words, all else equal, the more determinate an explanation, the more likely it is to be correct. Choosing an alternative interpretation under these circumstances would be perverse—a deliberate flouting of the principle of charity widely recognized as governing the process of interpretation.[39]

fessors Hart and Dworkin in their classic debate over the existence of judicial discretion. Hart famously argued that while law determines outcomes in "easy" cases that fall within the semantic core of the concepts used in legal reasoning, law does not determine the outcomes of cases falling within the "penumbra" of those concepts. See Jules L. Coleman & Brian Leiter, Determinacy, Objectivity, and Authority, 142 U. Pa. L. Rev. 549, 564 (1993). Hart maintained that, in penumbral cases, judges must exercise discretion that necessarily relies on nonlegal sources. Id. Dworkin rejected Hart's claim, maintaining that, even in "hard" cases, the law provides a right answer which determines the result. Id. at 565. For Hart and Dworkin, the question of legal determinacy was answered by a theory of law. Hart's theory of law was positivism, which entailed the existence of some legal indeterminacy. Dworkin's theory of law was rights theory (and, later, interpretivism), which entailed right answers, and thus legal determinacy, in every case. It is not clear, however, that Dworkin's interpretivism, either in Dworkin's view or in fact, entails the right answer theory.

[39] See Willard Van Orman Quine, Word and Object 59 (1960) ("The common sense behind the maxim is that one's interlocutor's silliness, beyond a certain point, is less likely than bad translation . . . ."); see also Donald Davidson, Inquiries into Truth and Interpretation 125–39 (1984). Davidson notes that interpretation should proceed by

> assigning truth conditions to alien sentences that make native speakers right when plausibly possible, according, of course, to our own view of what is right. What justifies the procedure is the fact that disagreement and agreement alike are intelligible only against a background of massive agreement. Applied to language, this principle reads: the more sentences we conspire to accept or reject (whether or not through a medium of interpretation), the better we understand the rest, whether or not we agree about them.

Id. at 137. Davidson also claims that "[c]harity in interpreting the words and thoughts of others is unavoidable . . . just as we must maximize agreement, or risk not making

More broadly, the determinacy criterion for interpretations of express judicial reasoning is implied by the self-evident purpose of the practice of providing express judicial reasoning in cases: the justification of the threatened use of political coercion implicit in every judicial order. Express judicial reasoning does a better job of discharging its burden of justifying the use of political coercion if, all else equal, it actually determines the outcome of the case it purports to explain. To the extent express judicial reasoning leaves the outcome indeterminate, the litigants can legitimately complain that the state coercion used to enforce the court's judgment on them has not yet been justified. Indeterminate explanations fail to explain fully why one litigant prevailed and the other lost, yet the demand to justify the exercise of coercion requires that precisely this choice be justified by reasons that explain it.

The claim that indeterminacy of legal reasons detracts from the force of their justification for the exercise of political coercion has been subject to debate. Professors Jules Coleman and Brian Leiter have assessed the related thesis that legal reasons are necessarily indeterminate and that therefore legal reasons are inadequate "as (full) justifications of the outcomes they are offered to support."[40] Coleman and Leiter never directly ask the question of whether, all else equal, a more determinate explanation for an adjudicative outcome provides a better justification than a less determinate explanation. But much of what they say provides support for the view that indeterminacy dilutes justification. In the course of their analysis, Coleman and Leiter argue that "[i]n order to be justified, judicial decisions must be warranted by the available set of legal reasons."[41] They ask:

> Is it enough to say that the coercion argument requires only warrant by dint of legal reasons and not uniqueness (determinacy)? Consider the situation of the losing litigant, say, the plain-

sense of what the alien is talking about, so we must maximize the self-consistency we attribute to him, on pain of not understanding him." Id. at 27 (emphasis omitted). See also Ronald Dworkin, Law's Empire 53 (1986) ("Understanding another person's conversation requires using devices and presumptions, like the so-called principle of charity, that have the effect in normal circumstances of making of what he says the best performance of communication it can be.").

[40] Coleman & Leiter, supra note 38, at 561.

[41] Id. at 588.

> tiff in a suit. Is it enough that a decision for the defendant is warranted by the class of legal reasons even in the case in which a decision in favor of the losing litigant could have also been warranted by the class of legal reasons? Surely, the plaintiff will feel that the power of the state has been unjustly imposed against him.[42]

In support of such a plaintiff's complaint, they elaborate a version of the interpretive argument I presented above, but on behalf of the stronger claim that justification requires legal determinacy, rather than my more modest claim that determinacy enhances the justificatory power of legal explanations. Their argument explains why

> the best interpretation of the [legal] practice will reflect a commitment to legal determinacy. The plaintiff says, in effect, "to justify a decision against me it is not enough that the defendant has as good a case; the case on his side has to be better than mine." Coercion can be justified only to support the best case, not a case that is merely good enough. A plausible way of understanding the notion of a correct answer is in precisely this way: the correct answer is the better one. Thus, litigants may have a working conception of the practice that commits them to the view that there are correct answers to legal disputes; otherwise, the exercise of coercion against them lacks justification. This is one kind of reason a theorist might have for trying to understand adjudication as being committed to determinate outcomes.[43]

This argument, however, may seek to prove too much. Perhaps there are inherent limits to reason, such as the problems of incommensurability or conceptual vagueness, that make it implausible to require determinacy for justification in all cases. My claim here, though, is not that the best interpretation of the practice of providing express judicial reasoning requires a commitment to determinate outcomes, but that it requires a commitment to the view that "the correct answer is the better one" and that the better answer is,

[42] Id. at 589.
[43] Id. at 589–90.

all else equal, the more determinate answer.[44] The more determinate answer is better, all else equal, because it leaves less of the grounds of a decision unexplained by the reasons that justify it. The demand for a justification of a judicial outcome is a demand to provide reasons that explain why that outcome was reached. To the extent that justifying reasons eliminate certain inconsistent outcomes, or eliminate certain inconsistent reasons for an outcome, they justify any outcome not thereby eliminated. But to the extent that the available justifying reasons fail to determine an outcome, they also fail to justify it. The gap between the reasons explaining a decision and the outcome reached in that decision can be bridged only by nonjustifying reasons or unreasoned decisionmaking, neither of which can fully justify an outcome. An outcome can be fully justified only by a set of justifying reasons that determine it. In short, full justification requires justifying reasons all the way down.[45]

Despite Coleman and Leiter's appreciation of the interpretive argument for linking justification to determinacy, they argue that

> [p]olitical coercion is unjustified when it is employed to enforce an *unjustifiable* decision, not when it is used to enforce a justifiable (if not uniquely so) decision. The problem with coercion is its use to enforce outcomes that are not justified; it is not that coercion is being employed to enforce justified outcomes that happen not to be uniquely warranted. Coercion requires warrant, not uniqueness. Uniqueness, we shall argue, is not a requirement of legitimate authority.[46]

Thus, Coleman and Leiter maintain that the coercive enforcement of a judgment can be justified even though not uniquely warranted

[44] I have since sketched an argument, building on Gerald Gaus's theory of political legitimacy, that justification does indeed require determinacy, even if it is determinacy that results from an arbitrary decision procedure itself justified by determinate reasons. See Jody S. Kraus, Legal Determinacy and Legal Justification, 48 Wm. & Mary L. Rev. (forthcoming Apr. 2007).

[45] I am reminded of a Sidney Harris cartoon in which a scientist/mathematician in a lab coat is standing at a chalk board next to another scientist/mathematician, also dressed in a lab coat. The first says, "I think you should be more explicit here in step two," while pointing to a spot that says ". . . then a miracle occurs" in the middle of a long and complex mathematical proof written on the chalk board by his colleague. See Sidney Harris, Chalk Up Another One: The Best of Sidney Harris 1 (1992).

[46] Coleman & Leiter, supra note 38, at 588–89.

by reason. They are not concerned here with the inherent limitations of reason, however. Instead, they have in mind the case in which two outcomes are equally warranted.[47] In that case, they claim that:

> Provided that the operative political theory of the state is that decisions based on reasoned judgment are better than no decision at all, that it is better to have authorized decisions than no decision, the judgment against the plaintiff can be justified. In the end, a decision for either the plaintiff or the defendant will be arbitrary, but it does not necessarily follow that the decision will be utterly unreasoned or unreasonable. Thus, the objection that deciding against the plaintiff is unjust rings hollow.[48]

But there is an air of paradox in the view that an arbitrary judgment is nonetheless reasoned and reasonable. "Reasoned" and "arbitrary" appear to be opposites.[49] When the available reasons for deciding a case either way are equal, we may be able to speak loosely of a reasoned decision in favor of one party over the other, but it is false that the decision can be *based on* any of those reasons.[50] That those reasons equally support a decision in favor of either litigant demonstrates that neither decision can be supported by *those* reasons alone. There may indeed be a good reason to make an arbitrary decision in such cases. For example, a theory justifying political authority may support a system for the final adjudication of all disputes, even in the absence of reasons favoring one

[47] In their view, two inconsistent outcomes can be warranted at the same time because the reasons each meet a warrant "threshold." But they concede that "[i]f both outcomes are warranted, then only the argument that is given greater support by the class of legal reasons is justifiably enforceable. The real dilemma occurs when both outcomes are equally warranted." Id. at 589 n.77.

[48] Id. at 592.

[49] The Oxford English Dictionary has several definitions of the word arbitrary, including "[d]erived from mere opinion or preference; not based on the nature of things; *hence*, capricious, uncertain, varying," and "[u]nrestrained in the exercise of will; of uncontrolled power or authority, absolute; *hence*, despotic, tyrannical." 1 Oxford English Dictionary 602 (2d ed. 1989).

[50] Or, as Coleman and Leiter put it, we should say that the decision lacks a "conclusory" reason. Coleman & Leiter, supra note 38, at 591. Conclusory reasons are just reasons that outweigh the balance of competing reasons. If a decision lacks a conclusory reason, then by hypothesis the balance of reasons does not favor any decision. That reasons equally favor either decision does not mean that either decision is warranted by reason. It means that neither is warranted by reason.

party over the other, in order to insure the peaceful resolution of disputes between its citizens. But this is not a reason to decide the case in favor of a particular party. It is a reason to decide in favor of one party or the other, in spite of the absence of a reason for favoring either party, by using a random, and in that sense arbitrary, procedure. This reason would justify coercive enforcement of the outcome of the arbitrary decision procedure. And in that sense, the outcome would be "reasonable" because it is still determined by reason, but the reason that explains, determines, and thereby justifies the outcome is not a reason for favoring either party. Instead, it is the (normative political) justifying reason for resolving disputes arbitrarily if they cannot be determined by the balance of reasons favoring either party.

Thus, Coleman and Leiter have identified a case in which an adjudicative outcome is fully justified, even though a decision in favor of either party is equally warranted. The justification of that outcome, though, is provided by the reason for adjudicating disputes that cannot be decided on the basis of reasons favoring one party over the other. The reasons favoring a decision in either party's favor cancel each other out and leave the justification of an adjudicative outcome to an entirely independent reason, one which justifies the use of an arbitrary procedure and thereby determines the outcome. Thus, the justification for the outcome in Coleman and Leiter's equal warrant case is provided by a reason that in fact determines the outcome. Coleman and Leiter have not identified a case in which an outcome is fully justified by reasons that fail to determine it.[51]

However, as I have explained above, I concede that theoretical limitations on the nature of reason might make it impossible to explain some outcomes by providing justifying reasons that determine them. While explanations that fail to determine an outcome can, in my view, justify that outcome, their justificatory force is diminished compared to a full justification. The idea that the force of a justification of an adjudicative outcome increases with the determinacy of the justifying reasons that explain it underwrites the determinacy criterion's preference for more determinate over less de-

[51] Indeed, there is a good argument that all justification requires determinacy. See Kraus, supra note 44.

terminate explanations. Thus, given that the self-evident purpose of express judicial reasoning is to explain and justify adjudicative outcomes, the interpretation of that reasoning that yields a more determinate explanation, all else equal, should be preferred to interpretations that yield less determinate explanations.

Of course, all else is rarely equal. The other major criterion for choosing among competing interpretations of judicial reasoning that purports to justify adjudicative outcomes is the normative force of the justifying reasons each interpretation produces. Even if an interpretation of express judicial reasoning yielded justifying reasons that perfectly determined the outcome it purported to justify, the normative force criterion holds that it should be rejected if the kinds of reasons it attributes to judges cannot plausibly be regarded as having the normative force necessary to justify an outcome. Under the normative force criterion, even an interpretation that yields a less determinate outcome might be preferable to an interpretation that yields a more determinate, yet less normatively credible, justification of the same outcome. Because the transparency requirement ultimately requires an interpretation of express judicial reasoning that yields the most plausible overall account of the practice of providing express judicial reasons, it will prefer, following the principle of charity, the interpretation that makes such reasoning the best that it can be. That, in turn, argues in favor of the interpretation that achieves the optimal satisfaction of both the determinacy and normative force of express judicial reasoning. When these two criteria argue in favor of opposing interpretations, one criterion has to be traded off against the other. Interpretations that meet a threshold level of determinacy and normative force are better than ones that excel on one criterion but utterly fail on the other. When more than one interpretation meets both thresholds, comparisons over incommensurables are unavoidable. When no interpretation satisfies both thresholds, express judicial statements cannot be taken seriously as credible justifications, and some other account of the practice of express judicial reasoning is necessary.

As between deontic and economic theories, deontic theories satisfy the normative force criterion more easily than economic theories. Most moral philosophers have concluded that deontic moral theory is more defensible than consequentialism. Even moral philosophers who defend consequentialism almost uniformly reject the principle of

efficiency as a free-standing moral principle.[52] But economic theories need not seek to establish the normative force of the principle of efficiency as a free-standing moral principle. Instead, they can argue that the theory justifying political coercion permits the pursuit of efficiency within individual institutions, provided other principles operate at a different level of society to constitute a morally acceptable political arrangement.[53] Much more needs to be said about how the principle

[52] Among non-philosophers, Professors Louis Kaplow and Steven Shavell stand virtually alone in supporting a pure principle of welfare maximization as the sole normative basis for making social decisions. Yet even they expressly reject wealth maximization and efficiency as a free-standing moral principle. See Louis Kaplow & Steven Shavell, Fairness versus Welfare 5, 35–37 (2002). For the seminal debate over the normative foundations of efficiency analysis, see Richard Posner, The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, 8 Hofstra L. Rev. 487 (1980); see also Jules L. Coleman, Efficiency, Utility, and Wealth Maximization, 8 Hofstra L. Rev. 509 (1980); Ronald Dworkin, Is Wealth a Value?, 9 J. Legal Stud. 191 (1980) [hereinafter Dworkin, Is Wealth a Value?]; Ronald Dworkin, Why Efficiency?, 8 Hofstra L. Rev. 563 (1980); Anthony Kronman, Wealth Maximization as a Normative Principle, 9 J. Legal Stud. 227 (1980). For a brief overview of that debate, see Kraus, Reconciling, supra note 37, at 428–31. After that debate, even Richard Posner abandoned the moral defense of efficiency. See Richard Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 191 (1980).

[53] This point also bears on why Coleman and Smith reject the claim that the economic analysis of contract and tort can qualify as a Dworkinian constructive interpretation: it cannot satisfy the value criterion. To constitute a constructive interpretation, economic analysis must argue that viewing contract and tort as aiming toward efficiency is necessary to reveal them in their best moral light. This in turn requires an "argument for the moral attractiveness of efficiency as the exclusive or paramount aim of tort law, and indeed requires an argument that the exclusive aim of efficiency is more attractive morally than [alternative available theories such as] corrective justice." Coleman, supra note 16, at 31. Since the first extensive debate over the foundations of economic analysis twenty-five years ago, it has been clear that efficiency, as an exclusive criterion for social change, is indefensible as a moral principle. So, if it is necessary to defend the principle of efficiency as a moral principle to make out the credentials of economic analysis as a constructive interpretation, clearly economic analysis will fail to qualify. Two points bear mentioning, however. First, as Coleman notes, the question here is not whether the principle of efficiency can be defended as a moral principle *tout court*, but whether it can be used to reveal contract and tort in their best moral light possible, subject to the criterion of fit. This is a relative, not absolute, inquiry. More importantly, however, while Dworkin's view makes moral value relevant to the interpretation of law generally, it is not clear that the moral value of any particular area of law can be assessed independently of its overall role in the legal system. Thus, while the principle of efficiency may not cast a particular institution in its best moral light if considered in isolation, when understood as a component of the overall legal system, interpreting an institution as devoted exclusively to promoting efficiency not only may be morally defensible, but also may cast that institution in its best moral light as a contributing member to the moral value of the legal system as a

of efficiency can be integrated into an overall set of institutions that satisfy the demands of the correct principles of justice.[54] But for now, it should suffice to note that the reasons of efficiency cannot be disqualified as plausible justifying reasons merely because the principle of efficiency does not qualify as a free-standing moral principle. The normative force criterion therefore cannot be invoked as a ground for dismissing the economic interpretation of express judicial reasoning as necessarily inferior to the deontic interpretation. At most, the normative credentials of efficiency-based reasoning stand in greater need of clarification than the normative credentials of deontic reasoning.

II. EXPLANATION AND SEMANTIC THEORY

The defense of the economic analysis of the common law I offer builds on the theory of semantic content and legal explanation that Jules Coleman develops in *The Practice of Principle*. Coleman's semantic theory begins by arguing that the semantic content of concepts is given not just by the role they play in one practice, but collectively by the roles they play in all practices in which they figure.[55] Coleman thus rejects "semantic atomism," the view that "any

whole. For this reason, efficiency cannot be automatically disqualified from satisfying the Dworkinian value component of a constructive interpretation. Note, however, that a complete defense of explanatory economic analysis requires a full response to Dworkin's own argument that wealth-maximization and other notions of efficiency are not values at all, even as components of a broader moral system. See generally Dworkin, Is Wealth a Value?, supra note 52. That defense is beyond the scope of the present argument.

[54] See, e.g., Kevin Kordana & David Tabachnick, Rawls & Contract Law, 73 Geo. Wash. L. Rev. 598 (2005) (arguing that Rawls's theory of justice cannot, a priori, rule out any particular normative principles in contract law because their acceptability under the principles of justice turns on their conformity with the first principle of justice and a global assessment of the net effect of all institutions on the least well-off, not a particularized inquiry into the isolated effects of contract law).

[55] As Coleman explains:

> The content of the concept [of] "promise" as it figures in, say, our legal practices is not given simply by the inferences that concept warrants in legal contexts. Rather, its content depends on all of the practices that involve promising. This is true in general: the meaning of a concept in any one practice influences its proper meaning in all the others.

Coleman, supra note 16, at 8. As Zipursky put the point:

> On the sort of pragmatism I am considering, to understand the concepts and principles within an area of the law is to grasp from within the practices of the law the pattern of verbal and practical inferences that constitute the relevant area of the law. Accordingly, to explain some area of the law is, in part, to dis-

single semantic element has a determinate meaning independent of at least some of the other elements of the semantic system (that is, the language, conceptual scheme, or belief set of which the element is a part)."[56] Instead, he embraces "semantic holism," the view that "[t]he inferential roles our concepts play reveal the holistic (or semi-holistic) web of relations in which they stand to one another, and it is this web that determines a concept's content."[57] While the content of concepts is given by the inferential role they play in social practices, the resulting inferences warranted by the use of a concept in a practice are grounded not in the participants' knowledge of rules of logic, but rather in their "grasp" of the concept. When we grasp a concept, we understand the inferences it warrants in a particular practice, but "[w]hat we know, in the first instance, is not a set of rules, but simply *how* to engage in a variety of practices in which [the concept figures]. This kind of 'knowing how' is not necessarily reducible to 'knowing that.'"[58]

Coleman pairs his semantic theory with his distinctive theory of the explanation of social practices. According to Coleman, a complete explanation of a social practice seeks not only to identify the inferential roles played by its core concepts, but also to bring the core conceptual structure and content of a practice, if possible, under a unifying principle.[59] By doing so, an explanation demonstrates how a principle is "embodied" by a practice.[60] Explanation by em-

> play the concepts and principles the grasping of which constitutes understanding the law, and to do so in such a way as to make that form of understanding available. A criterion for a successful explanation will be the capacity to see how the verbal and practical inferences within the pattern "go on." To understand a legal provision is to grasp the pattern of inferences that underlies how the law has been used and to be able to recognize a variety of scenarios in which the provision would or would not be exemplified.

Zipursky, supra note 18, at 473.

[56] Coleman, supra note 16, at 7.

[57] Id.

[58] Id. at 8.

[59] If the inferential roles of concepts in a practice can be brought together under a general principle, the principle can then be said to be "embodied in the practice and, at the same time, to explain it." Id. (emphasis omitted).

[60] It bears emphasis that Coleman does not insist that every practice is susceptible to explanation by embodiment: "the method employed here . . . is committed only to identifying what principles, *if any*, reveal the actual structure and content of the practical inference in the law." Id. at 10 n.13 (emphasis added). His point is only that "in certain kinds of practices, the inferential roles of concepts may be seen to hang to-

bodiment renders a practice deeply intelligible by revealing a fundamental coherence among its constituent components.[61] Applying his own metatheory to the problem of explaining tort law, Coleman claims that the principle of corrective justice explains tort law by virtue of its embodiment in tort law. By conceiving of tort law as a social practice devoted to securing corrective justice, this explanation renders the core features of tort law coherent and thus intelligible.[62]

For Coleman, then, a semantic theory determines the content of the constitutive concepts of a practice by identifying their inferential role in all practices in which they figure. If possible, an explanation of a practice will go beyond this semantic task to unify the conceptual content and structure of the practice under a single principle. But Coleman's corrective justice explanation of tort law yields a semantics that fails to determine the full content of some of the key concepts of tort law. Coleman readily admits, for example, that the corrective justice account of tort law leaves the conception of duty that tort law enforces "largely unspecified."[63]

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gether in a way that reflects a general principle" and that when they do, "that principle is the best way to make sense of the role [they] play in [the] practice." Id. at 8.

[61] Id. ("[T]he principle identifies certain elements of the practice as normatively significant and tells us what that significance is. . . . [U]nderstanding [a core concept of a practice] in light of that principle is the best way to make sense of the role [it] plays in [the] practice."); id. at 21 ("[T]he corrective justice account of tort law seeks to show how the structural components of tort law are independently intelligible and mutually coherent in the light of a familiar and widely accepted principle of justice . . . .").

[62] Coleman explains:

> Litigants bring evidence in support of some set of assertions (for example, that the defendant acted negligently, that the defendant had a duty to forbear from imposing certain risks on the plaintiff, that the plaintiff was injured, and so on) from which certain practical inferences are thought to follow (either that the defendant should be held liable to the plaintiff or not). Corrective justice enables us to understand why this kind of evidence is introduced, and why other evidence—for example, evidence of the relative capacity of the litigants to reduce accidents at various costs—is not; and it displays how the inference to a judgment of liability (or freedom from liability) is warranted.

Coleman, supra note 16, at 10.

[63] Id. at 34. Coleman recognizes that the corrective justice explanation of tort law is plausible only if there is reason to believe that there is a robust set of first-order duties on which the principle of corrective justice could operate. Since Coleman concedes that these duties cannot be generated or derived from the principle of corrective justice itself, he must provide an independent reason to accept that there are first-order duties, the violation of which, according to the corrective justice account, it is the purpose of tort law to rectify. Coleman claims that paradigmatic instances of first-

Coleman argues, however, that while the principle of corrective justice does not determine the content of the first-order duties on which it operates, it nonetheless "imposes constraints on the kinds of interests that can be protected by tort law, and on the conditions of agency and responsibility that tort law requires for liability."[64] The first constraint it imposes is that the holdings restored by corrective justice must not constitute an extreme departure from those required by the correct principle of distributive justice. The second is that the content of first-order duties must make sense under a plausible theory of responsibility. Thus, for reasons I will return to shortly, Coleman claims that tort law could not be explained by the principle of corrective justice if judges in tort cases determined whether the plaintiff or defendant had a duty by assigning the duty to the party who was the cheapest cost-avoider or risk-spreader.[65] These considerations suffice, Coleman argues, "to make the theory a complete account of what it purports to explain."[66]

But how can the corrective justice theory constitute a complete account of tort law's reasoning when it fails to determine the outcomes that the reasoning purports to explain and justify? Coleman's claim seems to be that the corrective justice theory merely purports to explain the structure and content of reasoning in tort law and not necessarily all of the reasoning used to reach decisions in tort cases. If the reasoning of tort law, on the corrective justice account, happens to fall short of determining outcomes in tort cases, so much the worse for tort law, not the theory of corrective justice. Apparently, this just shows that the reasoning of tort law does not explain tort case outcomes, not that the corrective justice account of tort law does not explain the reasoning in tort law.

Coleman further explains:

> Whether or not the corrective justice account owes us a theory of first-order duties, one might suppose that we still need such a theory—that is, one from which the duties enforced by tort law might be systematically derived—before we can claim to have

order duties, such as the duty not to commit assault and battery, are sufficient to establish the existence of the widespread and important set of first-order duties presupposed by the corrective justice explanation of tort. Id.

[64] Id. at 33.

[65] Id. at 34.

[66] Id.

> provided an adequate account of our tort institutions and practices.[67]

So, Coleman denies that the corrective justice theory is inadequate because it fails to determine the content of duty in tort law, even though he concedes that the principle of corrective justice cannot by itself explain tort law and thus must be supplemented with a different theory to serve that purpose. Apparently, Coleman's position is that the corrective justice theory's conceptual analysis of the reasoning used in tort cases provides a "deep" explanation of tort law by showing that this reasoning embeds the principle of corrective justice, even though the theory utterly fails, and indeed does not even purport, to explain and justify the outcomes of tort cases. The claim is that a theory can explain tort law by explaining the structure and content of reasoning in tort cases, but that explaining the structure and content of reasoning in tort cases does not require an explanation of the reasoning judges use to determine the outcome in tort cases.

Even for a philosopher, this distinction rests the explanatory adequacy of the corrective justice account of tort law on a vanishingly thin reed. First, such reasoning flies in the face of the transparency criterion. On this version of the corrective justice theory, judges offer express accounts of their reasoning in torts cases that purport to explain and thereby justify their decisions, even though they know that these express reasons fall short of explaining how they decided the outcome. Yet the transparency criterion requires that explanatory legal theories provide a plausible account of express judicial reasoning and therefore shifts the burden to the corrective justice theory to explain why judges would regularly claim to have fully explained their decisions by providing explanations they know to be inadequate. Presumably, corrective justice theorists would regard collective delusion and conspiracy theories as no more plausible when advanced on behalf of their theory than when advanced on behalf of the economic theory. Second, if the corrective justice theory leaves the central concepts of tort law largely indeterminate, then the determinacy criterion holds that, all else equal, the corrective justice theory is less likely to be correct than an alternative theory, such as the economic analysis, that yields an

[67] Id.

interpretation of the reasoning used and expressed in tort decisions that is less indeterminate.

Fortunately, Coleman goes on to provide a theory of how the content of duties is determined in tort law, though he maintains that this theory is not part of the corrective justice account of tort law. In fact, Coleman doubts that any *general and systematic* theory of the content of duties is possible.[68] Instead, he argues:

> [M]uch of the content of first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. These generate conventions that give rise to expectations among individuals regarding the kind and level of care they—we—can reasonably demand of one another. The content of these duties is then *further* specified in the practice of tort law itself—in the process of litigation, in the development of case law, in the writing of restatements, and the like. . . . [T]here is no reason to *suppose* that [first-order duties] must be derivable from some theory, nor that providing such a theory is a condition for an adequate explanation of our tort practices.[69]

So, Coleman does not reject the demand that an explanatory theory provide an account of how first-order duties are determined in the process of deciding which litigant will win in each tort case. He just rejects the claim that a general and systematic theory, such as the corrective justice theory of tort law, can, let alone must, provide that account. Coleman instead offers a conventional account of the generation of duties. Duties, for Coleman, stem from general social conventions and, for purposes of tort law, from the refinement of those duties provided within the practice of tort law itself.

In order to satisfy the determinacy criterion, however, Coleman's theory of duty determination would have to explain how a judge could use the concept of a duty in a tort case to decide which party should win. Application of general conventional conceptions of duty typically will not resolve at the level of individualized cases. Coleman therefore tells us that judges look *within* the practice of tort law to discover what duties the parties have. In particular, he

[68] Id. ("I am dubious about the prospects [for] a general theory of first-order duties from which we can derive them all systematically.").

[69] Id. at 34–35.

claims that judges do this by consulting prior decisions, restatements, treatises, and the like.[70] But precisely what does Coleman suppose judges actually do with these sources to determine the content of the parties' duties?[71] What, if anything, guides or constrains their discretion to determine how these sources apply to resolve the case before them? Since, by hypothesis, the conception of duty outside of tort law is equally consistent with any number of possible refinements the practice could make, how should judges decide which refinement is appropriate? Coleman cannot avail himself of Dworkin-style constructive interpretation because he rejects the claim that practices must be interpreted in their best moral light.[72] Coleman therefore needs some theory for how judges use the resources within the practice of tort law to decide the content of duties in the case before them.

I argue that Coleman's semantic theory helps to explain what judges do to determine duties in tort cases. Recall that, according to Coleman's semantic theory, the participants in a practice do not necessarily know a set of rules, but they "grasp" a set of concepts by understanding the role they play in inferences warranted within the practice. As Smith explains, "legal reasoning is different than other modes of reasoning. As first year law students quickly learn, there exists a characteristic mode of legal reasoning, in which only certain types of arguments are acceptable. . . . Learning to 'think like a lawyer' is essentially learning to distinguish legal from non-legal arguments."[73] Just as an understanding of the compositional semantics of English is unnecessary to become a fluent speaker of the English language, judges need not be capable of articulating a theory of legal reasoning in order to be expert in engaging in legal reasoning. This is just the difference between "knowing that" (theoretical knowledge) and "knowing how" (practical knowl-

[70] Id. at 34.

[71] Never mind that most of these sources will unhelpfully provide mere reiterations of the requirement that the defendant should be held liable only if he breached a duty, while rarely offering any assistance in how to determine the existence and content of that duty.

[72] Coleman & Leiter, supra note 38, at 592.

[73] Smith, supra note 1, at 30.

edge).[74] Thus, Coleman's theory implies that judges determine the content of the concept of duty by engaging in legal reasoning, such as reasoning by analogy. They know how to determine whether there is a duty, even though they are not using a theory to make that determination.

Coleman's semantic theory suggests two possibilities for explaining how terms with a deontic plain meaning could acquire a consequentialist meaning within the common law. The first is that judges implicitly turn to economic reasoning to determine the content of vague deontic concepts, such as the concept of duty in torts. Elsewhere, I have suggested that economic analysis can be "vertically integrated" with deontic theories of contract law in precisely this fashion in order to combine the normative superiority of deontic theory with the superior determinacy of economic analysis.[75] The vertical integration strategy argues that judges implicitly use economic analysis to fill the gap between the deontic reasoning required by contract doctrine and the outcome in contracts cases. Thus, the vertical integration approach imagines that common law adjudication has grafted consequentialist concepts onto deontic concepts. The second possibility is that terms that have a deontic plain meaning, within the context of the common law, no longer have a deontic meaning at all. This view holds that while the common law began as a deontic institution, the pressures of determining outcomes, combined with the advent of stare decisis, caused the semantics of the common law's core terms to evolve from their originally deontic meaning to a predominantly consequentialist meaning. Thus, this view argues that the core terms of the common law have undergone radical meaning change. In Part III, I consider the semantic vertical integration account. In Part IV, I consider the semantic radical evolution account.

III. SEMANTIC VERTICAL INTEGRATION

The vertical integration theory argues that the common law in fact has used efficiency-based reasoning to fill in the otherwise in-

[74] What they know is "simply how to engage in a variety of practices in which [the concept figures]. This kind of 'knowing how' is not necessarily reducible to 'knowing that.'" Coleman, supra note 16, at 8.

[75] Kraus, Reconciling, supra note 37.

determinate content of the concepts denoted by the terms in common law doctrine. Coleman considers the possibility that his semantic theory could explain how it is possible for the concept of efficiency to provide the semantic content of deontic terms like "right" and "duty." He anticipates the claim that "[e]fficiency can go beyond the paradigm cases and tell us, systematically and as it were deductively, what duties ought to be enforced. In this way it might be thought that the corrective justice account and the economic analysis are not only compatible, but actually complementary, theories of tort law."[76]

Therefore, although he doubts that any general and systematic theory of duty is plausible, he allows that it is possible and even that economic theory in principle could provide it.[77] But Coleman has two objections to the idea that the economic analysis could combine with the theory of corrective justice to explain how tort law determines the content of first-order duties.

His first objection is that the principle of corrective justice is incompatible with a consequentialist approach to determining first-order duties. Recall Coleman's claim that while the principle of corrective justice does not determine first-order duties, it nonetheless constrains the permissible approaches to their determination. For example, he claims that the principle of corrective justice requires that the content of duties be determined consistently with the proper conditions of (moral or political) responsibility. In turn, those conditions prohibit an efficiency-based rationale for assigning duties in the course of adjudication, for example, to the party in the best position to bear a risk or spread a cost. One reason the conditions of responsibility might prohibit efficiency-based determinations of duty is that they are based on a deontic theory of responsibility. Such a theory would of course prohibit assigning tort liability for a loss solely on the ground that doing so will have beneficial prospective effects, such as the effects of providing incentives

[76] Coleman, supra note 16, at 34.

[77] Coleman states:

> But while I thus have my doubts about the prospects for a general comprehensive theory of enforceable private duties, I certainly haven't proved that such an account could not succeed. It is even conceivable that an economic account could provide the right theory of the underlying duties that our tort institutions protect as a matter of corrective justice.

Id. at 35.

to parties who are in the best position to take precautions to avoid accidents.

If this is Coleman's claim, then his argument amounts to the claim that the principle of corrective justice presupposes the validity of deontic normative theory. And this implies that the principles of corrective justice are incompatible with consequentialism. Yet just as consequentialists claim to have a theory of distributive justice, they can equally claim to have a theory of corrective justice. Utilitarians, for example, can assert that individuals have rights and duties in both distributive and corrective justice.[78] They can argue that these rights are determined either by identifying individual characteristics or dispositions that are likely to increase or decrease utility (for example, prudent people versus reckless people), or by identifying which rights and duties would create incentives for utility-maximizing behavior (for example, incentives for individuals to take efficient precautions). Utilitarians can coherently maintain that corrective justice requires redress for injuries that cause wrongful losses and that the wrongfulness of a loss turns on an assignment of rights and duties that is based exclusively on consequentialist considerations. Thus, this version of Coleman's objection simply begs a foundational question in moral philosophy by presupposing either that consequentialism is wrong as a normative theory or that consequentialist theories of rights are not tenable.

The better interpretation of Coleman's objection is not that the principle of corrective justice entails a deontological theory of responsibility that rules out a consequentialist account of first-order duties, but that tort law in fact cognizes claims in corrective justice for the violation of a type of individual duty which cannot be reconstructed in consequentialist terms and so cannot be accounted for by the economic analysis of tort law. These duties are ones that are *necessarily* correlative to individual rights and so allow a plaintiff to claim compensation only from the individual who violated the plaintiff's right. An institution devoted to promoting efficiency would limit plaintiffs to recovery against the individuals who caused them injury only if this limitation turned out to be the best way to promote efficiency. But because the moral duty asserted is one that necessarily belongs to the injurer, economic analysis can-

[78] See, e.g., L.W. Sumner, The Moral Foundation of Rights (1987).

not fully explain it. If tort law recognizes the existence of individual moral duties that are *necessarily correlative* to individual rights, economic analysis cannot explain these duties because it cannot explain the necessity of their correlativity.

This interpretation of Coleman's objection, of course, is just the bilateralism objection to the economic analysis. Recall that Smith and Coleman argue that economic analysis cannot account for the bilateral structure of common law adjudication. To say that the structure of common law adjudication is bilateral is just to say that the first-order duties recognized by the common law are correlative. The problem is that this interpretation of Coleman's objection begs a different question. The economic analysis explains the bilateral character of common law adjudication (or the correlativity of the rights and duties recognized in common law adjudication) as the best way, for example, to identify the cheapest cost-avoiders and provide sufficient incentives for them to take efficient precautions. It claims, therefore, that the duties tort law recognizes are correlative, *not* because they correspond to necessarily correlative moral duties, but because creating and vindicating correlative rights is, as a contingent matter, the best way to promote the goal of efficiency. It therefore begs the question against the economic analysis to insist that tort law is vindicating necessarily correlative moral rights, when the economic analysis claims tort law is vindicating rights that are correlative only because recognition of such rights is the best way to promote efficiency.

Indeed, the present question is whether the economic analysis is a plausible candidate theory for explaining not merely what duties tort law recognizes but how tort law itself *affirmatively determines* the content of the first-order duties it vindicates. Coleman's view is that tort law recognizes an independent class of first-order moral duties that are necessarily correlative. His claim is that economic analysis could not determine the content of these duties because it is inconsistent with the independent moral theory from which those rights derive. That this moral theory makes these duties necessarily correlative, according to Coleman, is sufficient to disqualify, as an acceptable theory for determining the content of those duties, any theory that in principle cannot explain such correlativity. Coleman's objection begs the question because the economic analysis does not concede that the rights whose content tort law recognizes

and determines are necessarily correlative to duties derived from an independent moral theory. Instead, it claims the rights recognized and determined by tort law are correlative only because correlative rights in fact best serve the purpose of pursuing efficiency.

Coleman has a second objection to the claim that tort law uses economic analysis to provide the content of the first-order duties it vindicates in corrective justice. He argues that, in order to play that role, the economic analysis would have to use efficiency "to discover an independent class of duties that are analytically prior to our liability practices,"[79] but the economic analysis does not and cannot recognize such duties. Coleman elaborates as follows:

> In order for the first-order duty to be a ground of liability, the specific first-order duties of care that one has must be defensible as standards of conduct. This means that the duties articulated in the law of torts purport to express genuine reasons for acting, or standards with which one ought to comply. Tort law recognizes that failure to comply with such duties legitimately exposes one to a certain kind of legal responsibility or liability. The duties, in this sense, come first—normatively, as well as logically. If they are to come first normatively, then they must express reasons for acting quite apart from the imposition of liability.
>
> In the economic analysis, the fundamental question is how to allocate costs between defendant and plaintiff. Rather than being logically prior to the liability as the ground of it, the duty not to harm is construed in the economic analysis as a *consequence* of the liability. Thus the "primary" duty simply falls out of the economic grounds for imposing a duty to compensate, and is not a duty that is independently defensible as a standard of conduct apart from the role it plays in warranting or explaining a liability judgment. In that sense, economic analysis eliminates the concept of duty in tort law—that is, it eliminates the concept of something that can be defended as a standard of conduct and not merely as a condition of liability.[80]

Coleman's claim is that the principle of corrective justice necessarily operates on a class of first-order moral (or political) duties that

[79] Coleman, supra note 16, at 35.
[80] Id. at 35 n.19.

are defined independently of tort law. Yet the economic analysis of law, in his view, does not recognize any such independent theory. Economic analysis, however, can claim that the best political theory provides normative principles that license tort law to create and enforce a class of rights that will serve the purpose of promoting efficiency. On this view of the economic analysis, the primary duties do not "fall out." Those duties are derived from, or licensed by, a general political theory that permits the pursuit of efficiency in tort law. More importantly, however, Coleman's corrective justice theory certainly cannot treat the first-order duties of tort law as given entirely by an independent moral or political theory. After all, Coleman concedes that the content of the first-order duties, wherever they originate, are indeterminate outside of tort law. His theory is that *tort law itself* determines the content of these duties in the course of adjudication. As a matter of logic, tort law cannot determine the content of first-order duties by turning to the independent moral theory from which those indeterminate duties derive. If that theory contained sufficient resources to determine the content of those duties, then that theory would also fully specify those duties. If that were true, then the first-order duties would, so to speak, come to tort law with their content fully determined, and tort law would simply recognize and vindicate claims to corrective justice by determining whether these rights were violated. There would be no need for tort law to determine the content of duties in order to determine whether they were violated.

Thus, Coleman's claim that the duties imposed by tort law must be derived from a normatively prior standard of conduct cannot be sustained given his view that the content of the concept of duty in tort law is articulated in, and defined by, the practice of tort law itself. Tort law cannot purport to impose liability by first identifying pre-existing duties grounded in standards of conduct that are logically and normatively prior to tort law's imposition of liability and, at the same time, claim to be the very source of the content of these duties. Either tort law discovers the fully articulated content of duties outside of tort law and then imposes liability for their breach (the standard of conduct model), or tort law is itself the source of the content of the duties it enforces, in which case they cannot be said to be logically and normatively prior to tort law (the condition of liability model). In short, for Coleman, the content of

duties recognized in tort law cannot be derived from a normatively prior and independent standard of conduct. Thus, there is no normative or logical barrier to the use of economic analysis to generate the content of the concept of duty in a corrective justice account of tort law. The economic analysis can be defended on the ground that pursuit of efficiency within the institution of tort law is justified according to a normatively prior and independent standard of conduct set out by a normative political theory. Or it can be defended as a mode of reasoning within tort law that is independent of any normative principles outside of tort law. Because Coleman must claim that the sui generis mode of reasoning judges use to determine the content of duties in tort law is also independent of any normative principles outside of tort law, any objection to the economic analysis based on its independence from normative principles outside of tort law would apply with equal force to Coleman's own theory.

IV. RADICAL SEMANTIC EVOLUTION

The economic analysis of the common law can be defended, however, without marrying it to a corrective justice theory. Let us begin with the reasonable hypothesis that the terms in common law doctrine originally had a deontic meaning and that the common law itself was conceived of as a social institution that served the purpose of adjudicating a plaintiff's claim for compensation for losses allegedly caused by a defendant's violation of a duty that was understood to be correlative to a right of the plaintiff (that is, the common law originally had a bilateral structure). Giving the deontic theorists the benefit of the doubt, then, let us also suppose that judges, then and now, insist that their actual and express reasoning is not purely consequentialist, that the plain meaning of their express reasoning is deontic, and that the common law requirement that actions be based on an alleged breach of a defendant's duty that was correlative to a right of the plaintiff (that is, that the common law has a bilateral structure) could conflict with the most effective means of pursuing efficiency. Given these judges' objections, the defense of the contextualist convergence thesis first requires an argument to show that it is possible for terms with a deontic plain meaning to acquire a consequentialist meaning within a social practice. Then it requires an argument to show that it is plau-

sible to suppose that the terms of the common law have in fact acquired a consequentialist meaning. This argument would provide a reasonable explanation for why judges would use terms with deontic plain meanings to express their reasoning and insist that it accurately reflects their actual reasoning, even though, properly understood, both their actual and express reasoning is predominantly consequentialist.

To demonstrate that terms with a deontic plain meaning could acquire a consequentialist meaning within a social practice, let us begin by returning to Coleman's semantic theory. That theory explains how the content of concepts can be determined within a practice. But Coleman claims that the determination of the content of concepts within a practice is constrained by the inferential role those same concepts play in other social practices. Thus, while tort law does, in Coleman's view, determine the content of the concept of duty, the range of content tort law may permissibly assign to the concept of duty is constrained by the role the concept plays in corrective justice generally and in the other social practices in which it figures. Therefore, if the concept of duty plays a deontic inferential role in other social practices, tort law could not coherently specify the content of the concept of duty within tort law in a way that would be inconsistent with the deontic inferential role the concept plays in social practices generally. It might then appear that if the concept of duty plays a deontic inferential role in other social practices, then it is an inherently deontic concept. Thus, the economic analysis could not coherently claim that tort law uses the principle of efficiency to determine the content of the concept of duty.

However, Coleman's view addresses only the question of how the content of concepts is determined. It does not address the question of how *terms* in a practice acquire their meaning. That is, Coleman's semantic theory does not answer the logically independent question of how a given concept comes to be affiliated with a given word. In the technical jargon of philosophers of language and linguists, Coleman's semantic theory does not explain how morphemes (the marks and sounds that constitute the basic units of meaning in a language) acquire their associated semantic content. Coleman's theory explains that the content of a concept is determined by the inferential role it plays in all social practices in which it figures. But it does not explain how those concepts change

within those practices or how the terms used by participants in social practices come to denote particular concepts.

Ordinarily, the natural course would be for participants in a practice to express their reasoning using terms widely understood to denote the concepts they use in their reasoning. As Coleman explains, however, the concepts used in a practice evolve to suit its particular purpose. Hence, the content of a concept used in one social practice is in part controlled by the role it plays in all practices, but it is also given by the particular role it plays in that particular practice. Thus, the content of a concept used in the common law is derived from two sources: the inferential roles it has in all other social practices in which it figures (its inferential "common denominator" or "core" meaning), and the unique inferential roles it plays in the common law (its "idiosyncratic" or "practice-specific" meaning).

When participants in a social practice choose terms to express their reasoning, they will choose terms that denote concepts with the common denominator of meaning that comes closest to expressing the concepts they use. Yet because practices may have or develop idiosyncratic inferential norms, the overlap between the core meaning of a concept and its meaning in a particular practice may change over time. Even if the terms used in a practice initially denote concepts that have a core meaning that is the same as the meaning in that practice, as the inferential norms of that practice evolve, those terms may develop idiosyncratic meaning—they may come to denote concepts that play inferential roles in that practice that the same core concept does not play in other practices. According to Coleman's semantic theory, we can still say that the various practices use or have the same concept, even if the concept plays some different inferential roles in each practice, provided there is a significant overlap in the inferential roles the concept plays in all of the practices.

Now suppose a particular practice uses a term to denote a concept used in many practices, but over time the inferential role of that concept evolves to the point where it lacks most of the inferential roles it has in all other practices. That is, suppose that the inferential role of the concept denoted by that term evolves within the practice so dramatically over time that this concept is no longer the same as the one that used to be denoted by that term. In that

event, we would say that the term no longer has the same meaning it initially did within this practice. The initial concept the term denotes has not changed, but the meaning of the term has changed in this particular practice. Thus, evolutionary changes in conceptual structure can effect a radical change in the meaning of terms that continue to denote their original meaning in all other practices.

Coleman's theory of how the content of concepts is determined, therefore, provides no reason for doubting that common law terms, which originally denoted a deontic concept and continue to have a deontic plain meaning, could have come to denote a consequentialist concept, such as efficiency, in the practice of the common law. His semantic theory has no bearing on how the inferential roles of concepts within a practice can change and thus on how the meaning associated with particular terms within a particular practice can change. Coleman's theory usefully points out that meaning is contextual and, in particular, that the meaning of terms is given by the inferential role played by the concepts they denote within the practice. It does not, however, demonstrate that those terms must denote the same concept that they denote in other contexts. In short, Coleman's semantic theory tells us what "meaning" is, but not what particular terms in a practice must mean. In principle, any term (that is, any morpheme) can be used in a practice to denote any concept. Figuring out which concepts the terms in common law doctrine denote is therefore an empirical, not a philosophical, question.

Still, the most natural empirical hypothesis is that English-speaking participants in a practice would choose to express their reasoning in the English language. It would be odd, to say the least, to make up a private language when English would do just fine. Moreover, it would be positively perverse to use English words to denote concepts antithetical to the ones they denote in common English. To make the efficiency interpretation of common law terms plausible, it is not enough to show that it is merely possible. There must also be a plausible explanation of *why* doctrinal terms with a deontic plain meaning have a consequentialist meaning in the common law. Ironically, the key to answering this question is to take the internal point of view of the common law even more seriously than do the deontic theorists who use it to criticize the explanatory claims of the economic analysis. Deontic theorists claim

their theory provides a more plausible account of the internal point of view of the participants in the practice of the common law—particularly, that of judges—than economic theories. They believe this because deontic theory provides the most natural account of the meaning of the express language judges use to explain their decisions. To account for the internal point of view of judges, though, a theory must do more than provide a plausible surface semantics for the language judges employ. If that language is supposed to mirror the actual reasons judges use to decide cases—as the deontic convergence thesis claims—then the deontic theorists' account of the internal point of view is plausible only if it is reasonable to suppose that judges actually can use deontic reasoning to decide cases.

Everyone grants that judges are not, and do not take themselves to be, free to decide cases however they like. But they cannot apply legal doctrine to the particular facts of a case without interpreting it. It is in the course of this unavoidable judicial interpretation of legal doctrine that the concepts of the common law acquire their content. The fundamental insight of Coleman's semantic theory is that the content of concepts is determined by nothing more than the inferential uses to which those concepts are put. The judicial interpretation of common law terms in the course of adjudication is the causal locus for the common law's development of novel inferential roles.

Since the raison d'être of the concepts used in the common law is to decide the outcomes of disputes, and judges are charged with making and explaining justified decisions, it makes sense that judges would select the concepts that are best suited to this task. I argued above that the justification for the outcome of a judicial decision turns on the normative force of the principle generating the reasons for the outcome *and* the extent to which those reasons determine the outcome. Just as highly determinate but normatively impotent reasoning cannot justify the outcome it determines, normatively powerful but highly indeterminate reasoning does little to justify an outcome it purports to explain. Since the determinacy of a concept is a major factor affecting the ability of judges to make and justify their decisions, judges would select, all else equal, concepts that are more capable of determining outcomes. Thus, the determinacy of concepts would be a significant factor affecting the

concepts and attending inferential practices that evolve in common law adjudication.

The explanation, then, for why common law terms have a consequentialist meaning is twofold. First and foremost, deontic theory itself often runs out as a conceptual resource for applying its reasoning to particular factual settings. For example, as we have seen, the very first-order duties on which the principle of corrective justice is supposed to operate in tort are, according to Coleman, largely unspecified. The deontic interpretation of a doctrine may direct a judge to do corrective justice between the parties. In order to actually decide the case, though, she must first determine whether the defendant had a primary duty to the plaintiff. In many cases, she will look in vain to deontic theory for assistance in carrying out that central, indeed primary, task of tort law. Coleman claims the judge must look to tort law itself for the answer because tort law serves the purpose of specifying first-order duties. But unless previous tort cases have answered the particular question of duty raised in her case, tort law simply redirects the question to the judge. Although Coleman claims that deontic theory limits the judge's discretion by prohibiting her from using certain kinds of reasons in determining the duty, it provides no affirmative direction.[81] Coleman fails to explain *how* tort law is supposed to determine duties when deontic moral theory cannot do the job. To say that judges simply exercise "discretion" is just to concede that judges decide on the basis of any permissible reason they choose. Quite apart from whether such discretion in fact undermines the justification of judicial decisions as a matter of moral or political theory, this conjecture cannot be reconciled with the internal judicial point of view. Common law judges abhor discretion because they perceive it to be inconsistent with their mandate to decide cases on the basis of law and not on the basis of their own personal opinions. They are educated and trained to decide cases on the basis of legal reasons, which they sincerely regard as external to their personal point of view. If all the legal reasons available to them fail to determine a result in a given case, then to decide that case they

[81] Responding to Coleman, I argue that general political theory provides the ultimate limits on the judicial determination of duty and that it is an open question whether this theory, deontic or not, would prohibit exclusively efficiency-based reasoning in the common law. See supra Part I.

would have no choice but to rely on their own nonlegal reasoning. They therefore prize reasoning that uses concepts that, at least in principle, determine results.

Thus, it is the indeterminacy of deontic concepts that creates the need for judges to look elsewhere for principled and normatively significant guidance to fill the gaps in reasoning they confront when trying to interpret deontic language by using a deontic moral theory. The contextualist convergence thesis holds that common law judges instinctively, gradually, and implicitly turned to efficiency-based reasoning to fill those gaps. The principle of efficiency would be attractive not merely because of its superior determinacy, but also because of its obvious normative relevance to the prospective effect of judicial decisions. Since the common law provides much of the foundation for a market economy, most judges would realize, at some level, the profound economic stakes of the precedents they set in their decisions. Although common law doctrine, on its deontic interpretation, prohibits judges from deciding cases solely on the basis of the prospective effects of the precedent it would set, by the mid-nineteenth century common law judges would have been acutely aware of those consequences. It is simply implausible to suppose that judges put prospective blinders on in order to adhere to the tenets of a deontic theory that fails to provide them with the conceptual resources necessary to reach a decision solely on the basis of the ex post perspective it mandates. Judges would naturally turn to the palpable prospective effects of their decisions, and these effects can be understood in economic terms.[82]

[82] Richard Posner long ago expressed just this view:

> The typical common law case involves a dispute between two parties over which one should bear a loss. In searching for a reasonably objective and impartial standard, as the traditions of the bench require him to do, the judge can hardly fail to consider whether the loss was the product of wasteful, uneconomical resource use. In a culture of scarcity, this is an urgent, an inescapable question. And at least an approximation to the answer is in most cases reasonably accessible to intuition and common sense.

Richard A. Posner, Economic Analysis of Law 99 (1st ed. 1972). He continues:

> In deciding what outcome is "right," the judge presumably does not decide which of the parties is the "better" person. . . . Almost by default, the judge is compelled to view the parties as representatives of activities—owning land, growing tulips, walking on railroad tracks, driving cars. And where a choice

To be sure, judges did not, and do not, say this is what they are doing. And it is unlikely that they did, or currently do, understand themselves to be using efficiency-based reasoning. The norms of common law adjudication require adherence to precedent under the principle of stare decisis. Common law judges are bound to decide common law cases by using the reasoning found in prior cases. We are presuming that all of this reasoning has a deontic plain meaning. Judges would not have been, and are not now, free to substitute their own language for the language of the common law. But they would have been not only free but compelled to interpret this language in order to faithfully discharge their duty to follow the common law doctrine found in past cases. Since deontic theory provides inadequate assistance, judges would have had to use their own sense of what values predominated the cases before them. The economic analysis argues that they turned to efficiency-based reasoning, even if they did not understand their reasoning in these terms.

There are several reasons why judges would not understand themselves to be using efficiency-based reasoning when interpreting and applying common law doctrine. First, even most contemporary judges are not trained in economics, and, at least until relatively recently, economic theory was not sufficiently developed to provide a rigorous analysis. More importantly, judges are trained to decide cases using the quintessentially legal reasoning of analogy to prior cases.[83] They would attempt to discern the most relevant points of similarity and distinction between the current case and prior cases. In addition, they would use interpretive maxims and other judicial canons to piece together their opinions. Economic analysis claims to provide the best theory of the basic principles underlying the otherwise disparate patchwork quilt of reasoning and judicial technique that makes up most common law decisions. It claims that the collective wisdom of judicial instinct manifest in

> must be made between competing activities, it is natural, and comfortably objective and neutral, to ask which is more valuable in the economic sense.

Id. at 328.

[83] For a discussion of the role of analogy in legal reasoning, see Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument (2005). I do not, however, mean to endorse Weinreb's claim that analogical reasoning admits of no theoretical reconstruction.

thousands of decisions over hundreds of years reflects an instinctive and unarticulated concern to promote efficiency. The principle of efficiency not only provides the best account of most outcomes of common law cases, but also explains the appeal and persistence of the standard arguments to which judges are attracted. The principle of efficiency provides the deep explanation that unifies the judicial attraction to what appear to be diverse modes of judicial reasoning. Since judges are not theorists, let alone economists, they do not try to develop theories of the law, and there is no reason to suppose they would be particularly capable of generating such theories.[84] Their expertise lies in case-by-case adjudication and the bringing to bear of their highly refined capacity for legal reasoning in making judgments about which precedents are most relevant and how they apply. It is the appeal and systematic character of these judgments that economic analysis purports to explain. Moreover, aside from obvious exceptions, such as Judges Posner and Easterbrook on occasion, even if judges were to understand their own reasoning in economic terms, they would also understand that the common law requires their judgments to be couched in its doctrinal language. Thus, even if judges consciously understood that economic analysis provides the best theoretical account of the implications of their tutored intuitions, most would not feel free to recast their reasoning in terms of efficiency. They likely would take their roles as common law judges to require them to continue to reason in the fashion prescribed by the common law—that is, using terms with deontic plain meaning but informed by precedents whose joint effect is to take efficiency into account. Even those judges who would otherwise characterize their reasoning as based

[84] As Posner argues, "[m]any common law doctrines are economically sensible but not economically subtle. They are commonsensical. Their articulation in economic terms is beyond the capacity of most judges and lawyers but their intuition is not." Richard A. Posner, Economic Analysis of Law 232 (3d ed. 1986). Posner further argues:

> The fact that with few exceptions lawyers and judges are not self-consciously economic in their approach to law is a trivial objection to the positive economic analysis of the common law. The language of economics is a language designed for scholars and students, not for the people whose behavior the economist studies.

Id. at 233.

on efficiency are therefore compelled to explain and justify their opinions using language with a deontic plain meaning.

The common law is thus a potentially misleading practice. It presents itself to the public as a deontic institution devoted exclusively to deciding cases on the basis of considerations that are not exclusively consequentialist. Yet, on this account, common law decisions are made on the basis of exclusively consequentialist reasoning. The resulting inconsistency between actual judicial reasoning and the plain meaning of express judicial reasoning underwrites the deontic critique of the economic analysis. The current explanation holds that this inconsistency is a direct result of the fact that the deontic meaning of the core terms of common law doctrine cannot determine the outcomes of actual disputes and that the normative significance of the economic prospective effects of common law decisions, given the principle of stare decisis, would be obvious to common law judges. The contextualist convergence thesis plausibly contends that common law judges had to decide cases by using judicial language with a deontic plain meaning, even though that meaning was often insufficient to determine case outcomes and their cases regularly had palpable prospective economic stakes. Under these circumstances, judges gradually adapted the meaning associated with common law terms over time, developing a specialized meaning for the originally deontic terms they used. It is this specialized meaning, evolved and grasped through common law reasoning itself, that judges take themselves to be using when they express their legal reasoning in opinions. While they are no doubt mindful that their use may differ from, or even contradict, the plain meaning lay people will attribute to their words, they also understand that they are writing for a legal audience of judges and lawyers who will fully understand that the concepts denoted by these terms are grounded in common law precedent, not plain meaning. And since the plain meaning of these concepts has no clear implications for the resolution of disputes, laypeople will understand only that the law applied a vague concept to their benefit or detriment. To understand why, they will have to consult the cases and attempt to gain an understanding of the legal point of view.

The contextualist convergence thesis is plausible, then, because economic analysis was, and remains, a normatively relevant, intuitively available, and relatively determinate resource for filling the

interpretive void left by a deontic interpretation of common law doctrine. It was, and is, not necessarily accessible to judges in a theoretical form, but is available to them through an intuitive grasp of economic reasoning that has evolved in the form of norms governing reasoning by analogy, the use of judicial maxims, "fairness" and "justice" intuitions, and the like. It should be unsurprising that participants in a practice are not necessarily in the best position to provide the most accurate theory of the practice's underlying principles. As Coleman reminds us, to be fluent in the language of the law, judges need not be experts in "knowing that." It is enough that they "know how." To paraphrase Justice Potter Stewart, judges know the right result when they see it, even if they do not know that the principle of efficiency explains their intuition and the correctness of that result.

V. BILATERALISM AND DUTY

This explanation of the plausibility of the contextualist convergence thesis allows us to characterize and defend the economic account of the bilateral structure of the common law. The bilateral structure of the common law results, in the first instance, from the fact that it is a body of law that governs only the adjudication of disputes formally brought by plaintiffs against defendants. The common law is not a body of statutes or regulations promulgated by a governmental body for purposes of regulating future conduct. Moreover, as explained above,[85] the common law is committed to a particular kind of bilateral structure, one that recognizes only the rights of plaintiffs that are correlative to duties of defendants and that vindicates these rights by requiring the defendant to compensate the plaintiff. In addition, in tort and contract law, not all plaintiffs harmed by a defendant's breach of duty have a right correlative to that duty.

For example, under tort doctrine, defendants owe duties only to plaintiffs who suffered foreseeable injuries as the proximate result of the defendant's breach of duty. Thus, tort law's bilateral structure consists in a rule that entitles plaintiffs to recover only for losses resulting from a defendant's breach of a duty owed to the plaintiff, notwithstanding proof that the defendant caused their in-

[85] See the discussion of semantic vertical integration, supra Part III.

juries.[86] Similarly, under contract doctrine, a plaintiff who sustains injuries as a result of a defendant's breach of contract is not entitled to compensation for those injuries unless the defendant owed the breached duty (to perform the contract) to that plaintiff.[87] Except under limited circumstances provided by third party beneficiary doctrine, a promisor owes a duty of performance only to his promisee. Therefore, contract law's bilateral structure includes the rule that, typically, only the promisee can recover from the promisor for breach of contract because only the promisee has a right correlative to the promisor's contractual duty.

Coleman and Smith both reject the economic analysis of the common law on the ground that it cannot provide an adequate account of the bilateral structure of the common law. Coleman further argues that the economic analysis cannot explain the concept of duty in tort law. But as the discussion above demonstrates, the concept of duty in tort law is just a particular feature of tort law's bilateral structure. Thus, if the economic analysis cannot explain bilateralism, a fortiori it cannot explain the concept of duty. Economic analysis could, however, explain some features of bilateralism, even if it is unable to explain the particular version of bilateralism that includes the concept of duty in tort law.

The core of Coleman's and Smith's objections is that the economic analysis of law is fundamentally a prospective regulatory enterprise, while the common law is fundamentally a retrospective enterprise. The most basic challenge for the economic analysis is to explain why it is plausible to suppose that a backward-looking body of law is in fact devoted to an exclusively forward-looking enterprise. The common law is a backward-looking body of law, in the first instance, because it operates only through the mechanism of adjudication of disputes. Unlike a prospective regulatory body, the common law is inherently and irreversibly passive: common law judges cannot take initiative and issue regulations on their

[86] As Coleman puts the point, "[i]n tort law it is not enough to show that the defendant imposed unreasonable risks which led (causally) to the loss of which the plaintiff complains. The plaintiff must also establish that the defendant owed her a duty of care. Failure to establish that is a bar to recovery." Coleman, supra note 16, at 23.

[87] As Smith puts the point, "[t]he defendant has a duty in justice to make good *to the plaintiff* the harm she caused the plaintiff. From the legal perspective, remedies are viewed as just that—remedies, and they are presented as the means by which a wrong is remedied." Smith, supra note 1, at 133.

own, but rather must await the initiation of a suit for the occasion to regulate, and, even then, they can regulate only by setting a precedent. Intuitively, it would seem to make little sense for a passive adjudicatory system to be devoted to a prospective regulatory enterprise, given that the latter could instead be pursued through a governmental regulatory body with the power to investigate and regulate on its own initiative. Thus, the economic analysis of the common law might find it difficult to explain why it makes sense to pursue efficiency by waiting for plaintiffs to bring claims against defendants. Why not instead pursue efficiency through an agency that could issue regulations that provide everyone with incentives to take efficient precautions against accidents?

Even if the choice to pursue prospective regulation within the passive form of the common law could be rationalized, it is difficult to explain why the common law would further reduce its available means of regulation by confining itself to the recognition and vindication of only correlative rights. For example, why would tort law limit the occasion for adjudication, its only method of regulation, to the occurrence of actual injuries? Why not allow uninjured plaintiffs to recover from any defendant who has not taken efficient precautions, even if the defendant has not injured anyone? Even if economic analysis can explain the actual injury requirement, why not require defendants who cause injury by failing to take efficient precautions to pay into a fund or suffer a penalty rather than compensating the injured party? Further, the economic analysis must explain why the common law would opt yet further to impede the possible modes of pursuing its prospective regulatory goals by insisting that the duties of defendants do not extend to all persons injured by their breach. For example, why would tort law prohibit recovery by certain plaintiffs who were injured by a defendant's breach of duty? Why not instead allow anyone injured as a result of negligent conduct to recover their losses from the negligent party? Finally, why limit the permissible remedies for rights violations to compensatory damage awards rather than allowing for the possibility that other amounts might provide the optimal incentives for individuals to take efficient precautions?

Both Coleman and Smith understand that the economic analysis does offer an explanation for the bilateral structure of the common law. In general, the economic analysis argues that the bilateral

structure of the common law is justified because it reduces the costs of identifying the cheapest cost avoider and creating appropriate incentives for those individuals to take efficient precautions. For example, according to the economic analysis of tort law,

> the victim sues the injurer rather than seeking out the person who is in fact in the best position to reduce accidents at the lowest cost . . . [because] the costs of searching on a case-by-case basis for the person who might be the better cost avoider is too high . . . . [A] general rule in which the victim sues the alleged injurer is the second-best alternative.[88]

Similarly, the economic analysis rationalizes the compensation of victims on the ground that it serves "the goals of inducing victims to litigate, and inducing both victims and injurers to take optimal precautions."[89] Both Coleman and Smith sometimes treat the tension between the prospective regulatory character of economic analysis and the confined adjudicative structure of the common law as evidence that the economic analysis fails the transparency criterion. But as Smith defines and defends it, the mere counterintuitiveness of the fit between the economic analysis and the structure of the common law does not violate the transparency criterion. The transparency criterion requires only a plausible account of why judges use the language they do in explaining their decisions. Although the lack of an apparent fit between the common law structure and the prospective character of the economic analysis may signal that the economic analysis will likely fail to satisfy the transparency criterion, it does not by itself establish that failure.

Instead, Coleman rejects the economic analysis explanation of bilateralism because he takes bilateralism to be an essential feature of tort law. In his view, tort law would not be tort law if it did not have a bilateral structure. Yet according to the economic analysis, bilateralism is a contingent, not essential, feature of tort law. It is justified only because it happens to provide a second-best solution to an empirical problem for the efficient prospective regulation of behavior. For Coleman, the only acceptable explanation of bilater-

[88] Coleman, supra note 16, at 19.
[89] Id.

alism is one that explains why tort law could not in principle accomplish its purpose without a bilateral structure. He argues that the corrective justice account of tort law does just that. Bilateralism is logically necessary for any institution devoted to vindicating rights in corrective justice. But for a body of law devoted to providing efficient incentives, the desirability of bilateralism in tort law is entirely contingent on the existence of high search and administrative costs. Thus, Coleman's complaint is that according to the economic analysis, "in the absence of search, administrative, and other transaction costs, these structural features of tort law would be incomprehensible."[90] An explanation of bilateralism that does not explain why bilateralism is *necessary* to the purpose of tort law does not, Coleman argues, explain a crucial fact about the practice of tort law: namely, that bilateralism is an *essential* feature of tort law. Thus, Coleman concedes that the economic analysis explains bilateralism, but he denies that it explains *tort law's* bilateralism because it cannot explain why bilateralism is essential to tort law.

The economic analysis has two responses to Coleman's objection. The first is to point out the false premise in Coleman's argument—that essential properties of social practices are essential because they serve an essential purpose. In fact, a property of a social practice can be essential even though it does not serve a purpose that is essential to the practice. If we translate Coleman's claim into what philosophers call the semantics of "possible worlds," it holds that tort law has a bilateral structure in every possible world in which it exists and that this is true because tort law not only serves the same purpose in every possible world in which it exists, but also cannot serve that purpose in any possible world unless it has a bilateral structure. But the latter two propositions do not follow from the first. Even if tort law has a bilateral structure in every possible world in which it exists, it does not follow that this is true because tort law serves the same purpose in every possible world in which it exists. Suppose, with Coleman, that tort law does in fact serve the purpose of corrective justice in the actual world and that everyone agrees that tort law has a bilateral structure in all possible worlds in which it exists. One reason tort law might have a bilateral structure in every possible world in which it exists is that tort law

[90] Id. at 21.

serves the same purpose in all those worlds (that is, it has an essential purpose), and it cannot serve that purpose without a bilateral structure. But that is not the only possible reason. A bilateral structure can be an essential part of our concept of tort law whether or not the purpose it serves is essential to tort law. We might view bilateralism as essential to the concept of tort law because tort law has always had a bilateral structure in the actual world, even if it were conceded and well-known that the purpose bilateralism (and tort law) serves in the actual world has changed over time.

Thus, even if bilateralism is essential to tort law, it would not follow that tort law, and its bilateral structure, could not serve a different purpose in another possible world. On this view, it would be true that in order to *be* tort law in another possible world, it must have a bilateral structure. But it would not follow that tort law would have to serve the same purpose it serves in the actual world. Likewise, even if tort law has a bilateral structure in every world in which it exists, and it serves the purpose of corrective justice in some possible worlds, it does not follow that it serves that purpose in the actual world. This is just to say that even if bilateralism is essential to tort law and to the purpose of serving corrective justice, it does not follow that the purpose of serving corrective justice is essential to tort law.

Of course, if Coleman assumed the premise that *corrective justice* is essential to tort law and that bilateralism is essential to pursuing corrective justice, then he could validly infer that bilateralism is essential to tort law. The economic analysis, however, denies only that corrective justice is essential to tort law. Thus, the economic analysis can concede that bilateralism is essential to tort law without conceding that corrective justice is essential to tort law. It explains the essentiality of bilateralism to tort law as an artifact of the historical and continued use of the concept of tort law in the actual world in which it was created. Some features of concepts are essential by definition. To see this, assume it is a conceptual truth that all bird species have wings and an empirical fact that all birds use their wings to fly. Now suppose we discover a new animal that has all the other characteristics of birds but does not use its wings to fly. Although we would deny that this new animal could be classified as a bird if it lacked wings, we would not reject its classification as a bird solely on the ground that, unlike all other birds, this species

does not use its wings to fly. Similarly, economic analysis regards the essential character of bilateralism in tort law to be a brute fact about our concept of tort law, whatever purpose bilateralism serves. But the economic analysis does deny that it is a brute fact about our concept of tort law that bilateralism in tort law serves the same purpose in every possible world in which tort law exists. The economic analysis can consistently maintain that bilateralism is an essential property of tort law but that tort law's bilateralism serves the purpose of promoting economic efficiency in the actual world, even if tort law's bilateralism is not essential to that purpose (that is, tort law's bilateralism does not promote efficiency in all possible worlds). Thus, the economic analysis fails to account for the essential character of bilateralism in tort law only if Coleman is right that corrective justice is an essential purpose of tort law. Of course, this claim simply begs the question against the economic analysis, which claims that, in the actual world, tort law pursues efficiency, not corrective justice. Thus, the essential character of bilateralism in the common law provides no basis for rejecting the economic analysis of the common law.

The second response to the bilateralism critique is to concede that economic analysis does not fully explain why tort law has a bilateral structure. Imagine, for example, that efficiency would in fact be best pursued by abandoning the correlativity requirement and allowing noninjured parties to sue negligent defendants. Or imagine the more radical possibility that efficient regulation of individual conduct is best pursued not through adjudication but by agency regulation. In either of these examples, the economic analysis would have to concede that the bilateral structure is ill-suited to its purpose. Yet this concession would not entirely undermine the claim that economic analysis explains tort law. Indeed, most of the explanatory claims of the economic analysis could be perfectly preserved.

If the contextualist convergence thesis is right, then tort law could well have started out as a deontic institution, in effect designed to serve corrective justice, just as Coleman maintains. Because of its inherent indeterminacy, though, the content of its core deontic concepts was given by efficiency-based reasoning. On this account, the bilateral structure of the common law (and the deontic plain meaning of its doctrinal terms) is explained by its original de-

ontic purpose. But the evolution of the common law transformed what was conceived, so to speak, as a deontic institution into a predominantly consequentialist institution. The pursuit of those consequentialist ends, to be sure, is constrained by the remnants of the common law's deontic past. Perhaps the most dramatic constraint is the core of its bilateral structure—common law judges lack the authority to switch from adjudication to positive regulation, and their ability to modify the correlativity and duty requirements is severely constrained by the principle of stare decisis. Yet many of the common law concepts *can* be explained by the economic analysis as having evolved a consequentialist meaning, notwithstanding their deontic plain meaning. While the dead hand of its deontic past still controls some of the common law's form and content,[91] there is no theoretical barrier to the economic analysis's claim that it provides the best explanation of the remainder. There is, therefore, no inconsistency or inadequacy in the explanation of the common law offered by the economic analysis. Although it can claim to provide a genuine explanation of all of the common law, including its bilateral structure and its concepts, it need not do so. It can concede the deontic aspiration in the origins of common law and yet maintain that this aspiration inevitably gave way to the prospective regulatory aspirations of the economic analysis.

Finally, let us turn to Coleman's claim that the economic analysis of tort law cannot explain the concept of duty in tort law. As I explained above, the concept of duty in tort law is a particular feature of its bilateral structure. Tort law would still have a bilateral structure even if it lacked the concept of duty or had a different concept of duty. In tort law, duty operates with the doctrines of proximate cause and foreseeability to limit the liability of defendants to a subset of persons who are injured by their negligent conduct. Tort defendants are liable for the harm caused by breach of their duties

[91] For example, the language and doctrine of remedies in contract law bear evidence of the undue influence of contract law's deontic past. The notion that all failures to perform promises are breaches triggering an award of damages as compensation for a wrongful loss, as well as the invalidity of under- and supra-compensatory liquidated damage clauses, reflects theoretically mistaken deontological reasoning that is inconsistent with many of contract law's core doctrines—especially the doctrine of strict liability, which makes intent irrelevant to the determination of breach.

only to individuals to whom those duties are owed. Coleman argues:

> Since on the economic analysis the goal is to provide the economically optimal incentives for potential injurers, there is no reason to exclude from the ambit of liability those victims to whom the defendant owed no specific duty of care. If the law is to provide the desired incentives, then injurers must face the full social costs of their conduct, not just the costs that might befall those to whom the injurers had a specific duty of care.[92]

At least in principle, however, economic analysis does provide explanations for the duty of care in tort law. For example, in *Palsgraf v. Long Island Railway*,[93] Judge Cardozo held for the majority that the defendant was not liable for the injury to the plaintiff caused by the defendant because the defendant did not breach any duty it owed to her. It did not owe the plaintiff a duty because it was not foreseeable that the defendant's negligent conduct would harm the plaintiff.[94] The question Judge Cardozo's opinion fails to answer is why a defendant's duty to act non-negligently is owed only to plaintiffs that it can foresee would be injured by its negligent conduct. The economic analysis can argue that the plaintiff foreseeability limitation is justified on the ground that imposing liability for negligently caused harm to unforeseeable plaintiffs would lead to inefficient activity level effects. If tort law seeks to provide incentives to engage only in efficient behavior, and defendants are held liable for the costs their negligent behavior imposes on unforeseeable plaintiffs, they will have to determine what activities to engage in—what to do and how carefully to do it—by attempting to take into account effects of their behavior that are, by hypothesis, unforeseeable. If they are unforeseeable, then there is no reason to believe defendants will be able, correctly and cost-effectively, to determine what behaviors to engage in. The resulting risk is that they will either under- or overestimate the expected costs of these unforeseeable losses. Clearly, by not taking them into account at all, defendants are underestimating the expected costs of their activities. This is Coleman's point when he states that,

[92] Coleman, supra note 16, at 23.
[93] 162 N.E. 99 (N.Y. 1928).
[94] Id. at 99.

according to the economic analysis of law, "injurers must face the full social costs of their conduct, not just the costs that might befall those to whom the injurers had a specific duty of care."[95] But once we impose liability for unforeseeable losses, it is not clear that defendants will not systematically overestimate those expected losses and therefore inefficiently reduce their levels of activity and/or take inefficient precautions when engaging in those activities. Whereas the *Palsgraf* limitation on duty of care leads defendants to underestimate, or under-internalize, the expected costs of their negligent conduct, eliminating the limitation leads to the risk that defendants will overestimate, or over-internalize, the expected costs of their negligent conduct. For the economic analysis, the question of whether the *Palsgraf* duty-of-care limitation is justified turns on this empirical question.[96] Economic analysis can thus explain the *Palsgraf* limitation on the ground that it reflects the reasonable empirical conjecture that over-internalization is more likely than under-internalization.

Perhaps Coleman might explain this particular limitation on the duty of care on the apparently deontic ground that defendants are not ordinarily held morally responsible for the unforeseeable consequences of their behavior—those that they cannot possibly take into account when deciding how to behave. On this view, it is fair to hold a defendant accountable to persons it should have known would be injured by its negligent conduct, but it is unfair to hold that same defendant accountable to persons it could not have known would be injured by its negligent conduct. Thus, it is only fair to limit the penalty for immoral conduct to compensating the losses such conduct imposes on individuals whom a reasonable person would have expected to suffer losses as a result of the conduct.

[95] Coleman, supra note 16, at 23. See also Posner, supra note 84, at 170 ("In some cases a defendant escapes liability for the consequences of his negligence on the ground that those consequences are unforeseeable. If this just meant that the accident had been unlikely and therefore unexpected, it would arbitrarily and drastically truncate the defendant's liability, for most accidents are low-probability events.").

[96] Cf. Steven Shavell, Economic Analysis of Accident Law 129 (1987) ("[I]t might not be undesirable to limit liability for certain accidents: if the possibility of some type of accident is overlooked, then there would clearly be no decrease in injurers' incentives caused by reducing liability for that type of accident."). Note that this argument is not an affirmative reason for reducing the magnitude of liability; it says only that reducing liability may not have a detrimental effect on incentives.

While this view may sound plausible, we can tell an equally plausible deontic story with the opposite conclusion: the defendant's negligent conduct is morally wrongful, so it should be held accountable for all losses created by its conduct, whether it could foresee them or not. All that is necessary for it to avoid liability for unforeseeable losses is to avoid negligent conduct. If it is not unreasonable or unfair to require a defendant to refrain from engaging in negligent conduct, then it cannot complain when it is held morally responsible for all the harm its negligence causes.

Thus, deontic theory does not provide an obvious or unambiguous explanation of the duty of care in tort law: one account explains the duty of care, while the other makes it not merely a mystery but a mistake. More importantly, whether or not the deontic explanation of the limitation of the defendant's duty of care in *Palsgraf* is compelling, it is not the only game in town. The explanation provided by the economic analysis provides an equally plausible story for and against the *Palsgraf* duty limitation. If deontic moral theory can explain the concept of duty, so too can the economic analysis. I therefore suspect that Coleman's real objection is not that deontic moral theory provides the only explanation for the concept of duty in tort law or that all plausible deontic moral theories explain, rather than contradict, the *Palsgraf* limitation. Instead, his real objection is a variant on his objection to the economic explanation of bilateralism: it rests the explanation of an essential feature of tort law on the necessarily contingent answer to an empirical question.

In Coleman's view, if the concept of duty is essential to tort law, then an adequate explanation of it must explain not only what purpose the concept of duty serves in tort law, but also why the concept of duty is essential to serving that purpose. According to the deontic story that explains the concept of duty, deontic moral theory *necessarily requires* that defendants' duties be limited to the avoidance of harm to foreseeable plaintiffs. For Coleman, this is the right *kind* of explanation because, if it is right, it explains why tort law could not accomplish its purpose without the concept of duty. It explains why tort law has the concept of duty in every possible world in which tort law exists. But according to the economic analysis story that explains the concept of duty, economic theory only contingently requires that defendants' liability be limited to

harms suffered by foreseeable plaintiffs and that defendants' duty in tort law therefore should extend only to foreseeable plaintiffs. If the expected sum of over-internalized costs resulting from the imposition of liability for harms caused to unforeseeable plaintiffs is less than the expected sum of under-internalized costs resulting from the *Palsgraf* duty limitation, then the economic analysis would be unable to explain the *Palsgraf* duty limitation.

The economic analysis has two responses analogous to its two responses to Coleman's objection to its explanation of bilateralism. Recall that the economic analysis can agree that bilateralism is an essential feature of tort law without conceding that it serves an essential purpose. Here too, the economic analysis can agree that the *concept* of duty is an essential feature of tort law without conceding that American tort law's *particular conception* of duty is essential to tort law. Thus, it agrees that tort law has the concept of duty in every possible world in which tort law exists, but it denies that tort law has the same conception of duties—duties with the same content—in every possible world in which tort law exists. According to the economic analysis, the concept of duty is essential to tort law because it is essential to its pursuit of either efficient regulation or corrective justice. The concept of duty is necessary for tort law to serve the purpose of efficient regulation because it allows judges to modify the scope of liability to create optimal incentives for individuals to choose efficient levels of activities and to take efficient levels of precautions. It is necessary for the tort law to pursue corrective justice assuming that the correct deontic moral principle prohibits imposition of liability on defendants for losses caused by their negligent conduct but sustained by unforeseeable plaintiffs. The economic analysis further holds that, on the one hand, in those possible worlds (including the actual world) in which tort law serves the purpose of promoting efficient behavior, the content of the duties in tort law will vary depending on empirical variables relevant to calculating optimal incentives. On the other hand, in those possible worlds in which tort law serves corrective justice, the content of tort law's duties will presumably remain the same. Of course, the economic analysis has no stake in this being true—tort law's conception of duty could also vary among the possible worlds in which tort law pursues corrective justice, for example, either for

mundane empirical reasons or because the content of deontic morality itself varied among possible worlds.

Thus, the economic analysis can and does explain the concept of duty in tort law—or, in any event, it is not logically or conceptually incapable of doing so. The economic analysis even has an explanation for the particular conception of duty in American tort law. Since the economic analysis does not regard the particular conception of duty in American tort law as an essential feature of tort law, the fact that its explanation is based on contingent facts rather than conceptual necessity does not undermine the adequacy of its explanation. Moreover, even if its (contingent) explanation of the conception of duty in *Palsgraf* fails, the concept of duty does not necessarily fall out of the economic analysis just because it would make defendants liable to all plaintiffs they negligently harm. The economic analysis could still maintain that the duty of care should extend only to plaintiffs injured by the breach, on the ground that this system economizes on search and information costs associated with identifying the cheapest cost avoider. This conception of duty would still exclude liability to noninjured third parties, thereby preserving one defining feature of bilateralism. Finally, this explanation is fully consistent with the claim that the concept of duty is essential in tort law. The proposition that the concept of duty is essential to tort law does not entail a corresponding proposition that a particular conception of duty is essential to tort law.

The second response to Coleman's claim that the economic analysis lacks an explanation of the concept of duty concedes, arguendo, that the economic analysis cannot account for the concept of duty. The economic analysis can instead invoke the historical explanation that although the common law has evolved to its predominately consequentialist orientation, it is not yet completely free of its original deontic moorings. If Coleman is right that the concept of duty cannot be accounted for by the economic analysis, then the economic analysis can maintain that this concept is a vestige of the common law's deontic origins, which should have—but have not quite yet—withered on the vine.[97] On this view, the con-

[97] Indeed, in modern tort law, it is a small and specialized class of cases in which liability for negligent injury is avoided because of the limitation on the defendant's scope of duty.

cept of duty in tort law is a doctrinal creation that subverts the consequentialist purpose animating most of tort law. The economic analysis can explain the concept of duty by explaining it away as an historical artifact inconsistent with the evolved purpose of tort law.

VI. EFFICIENT EVOLUTION AND THE CONTEXTUALIST CONVERGENCE THESIS

Smith and Coleman each consider and reject the possibility that the theories of the efficient evolution of the common law might qualify as genuine economic explanations of the common law.[98] In this Part, I argue that the seminal model of the efficient evolution of the common law provides additional theoretical support for the contextualist convergence argument. At most, Smith's and Coleman's objections tell against the capacity of the efficient evolution theory to qualify as a genuine explanation of tort law only if the theory is interpreted as offering a free-standing, independent explanation of the common law. Understood as a supporting component of the overall explanation of the common law offered by the economic analysis, however, the efficient evolution theory is not subject to any of the objections Smith and Coleman level against it.

[98] The hypothesis of the efficient evolution of the common law was first advanced in 1977 by George Priest and Paul Rubin in separate papers. See George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977); Paul H. Rubin, Why Is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977). Since then, a large related literature has developed. See, e.g., Christopher J. Bruce, Testing the Hypothesis of Common Law Efficiency: The Doctrine of Informed Consent, 6 Res. L. & Econ. 227 (1984); Robert Cooter & Lewis Kornhauser, Can Litigation Improve the Law without the Help of Judges?, 9 J. Legal Stud. 139 (1980); Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. Econ. Lit. 1067 (1989); E. Donald Elliott, The Evolutionary Tradition in Jurisprudence, 85 Colum. L. Rev. 38 (1985); John C. Goodman, An Economic Theory of the Evolution of Common Law, 7 J. Legal Stud. 393 (1978); Gillian K. Hadfield, Bias in the Evolution of Legal Rules, 80 Geo. L.J. 583 (1992); Adam J. Hirsch, Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism, 32 Fla. St. U. L. Rev. 425 (2005); Jack Hirshleifer, Evolutionary Models in Economics and Law: Cooperation Versus Conflict Strategies, 4 Res. L. & Econ. 1 (1982); Lewis Kornhauser, A Guide to the Perplexed Claims of Efficiency in the Law, 8 Hofstra L. Rev. 591 (1980); William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235 (1979); Ramona L. Paetzold & Steven L. Willborn, The Efficiency of the Common Law Reconsidered, 14 Geo. Mason L. Rev. 157 (1991); R. Peter Terrebonne, A Strictly Evolutionary Model of Common Law, 10 J. Legal Stud. 397 (1981).

Professor George Priest created the classic model of the efficient evolution of the common law.[99] According to that model, the pool of inefficient rules will be less stable than the pool of efficient rules because efficient rules are less likely to be litigated than inefficient ones. As judges replace or reinterpret rules in the course of litigation, the new rules and interpretations that are efficient are more likely to survive than those that are inefficient. Over time, therefore, the pool of efficient rules will increase relative to the pool of inefficient rules. This means that the rules of the common law will, over the course of their development, increase in their average efficiency, irrespective of the methods of decision judges use.

It is true that judicial reasoning is causally irrelevant on the efficient evolution model, but this does not mean that the causal mechanism specified in the efficient evolution model is causally irrelevant to judicial decisionmaking. That causal mechanism serves continually to increase the size of the set of precedents that will have characteristics indicative of efficient rulings and lack characteristics indicative of inefficient rulings. If this mechanism actually exists, then it helps to explain how and why judges would come to view considerations conducive to efficiency as relevant to the interpretation of common law doctrine. Given that judges decide cases based on the reasoned examination of precedents, judges would over time have an increasing tendency to interpret and apply the common law doctrines in a way that contributes to efficiency. On the assumption that judges interpret these precedents to decide their cases, the fact that efficient precedents come to predominate over time suggests that judges would learn to intuit and internalize the relevant efficiency considerations underlying these precedents, even though they would not necessarily realize that the causal relevance of the considerations they identify can be traced to the efficiency of the precedents. The efficient evolution model explains why judges would come to interpret common law doctrines as inconsistent with inefficiency, not by directly taking account of efficiency in their analysis, but by indirectly attending to factors that are relevant to determining the efficiency of a decision, whether judges know it or not. They would simply be confident that they "know it when they see it." Thus, the efficient evolution

[99] See generally Priest, supra note 98.

model helps to explain why and how the common law evolution would engender a judicial sensibility averse to inefficient rules and conducive to efficient ones, even though judges would not likely conceive of themselves as deciding cases on the basis of efficiency considerations, let alone provide express explanations of their decisions in terms of efficiency.

Once we conceive of the efficient evolution model as postulating a causal mechanism that helps to explain why the contextualist convergence thesis is plausible, Coleman's and Smith's objections have no force. Consider Coleman's objections first. Coleman first argues that efficient evolution theory cannot qualify as a theory of tort law because it

> cannot serve as a functional explanation of the core of tort law. . . . [It] cannot even purport to explain the existence or shape of [the common law] . . . . [It] cannot explain why tort law is distinct from the other parts of the private law, nor why any of these parts have the characteristic features and central concepts that they have. [It] start[s] from the assumption that tort law has its characteristic bilateral structure, and make[s] no pretense of explaining this structure.[100]

Coleman is surely correct that the efficient evolution model itself does not explain the conceptual structure of common law adjudication, including the particular concepts that distinguish the private law areas from each other, and its bilateral structure. But, of course, the efficient evolution model purports not to explain, but to explain away, the entire process of judicial decision making. It is an interesting and difficult question whether the efficient evolution model by itself constitutes any kind of explanation of tort law. Coleman describes it as a causal functional account, but, as we have previously seen, he then dismisses it in part because it does not provide an adequate account of tort law's conceptual structure. This criticism begs the question against causal functionalist accounts of social practices. Apparently, Coleman rejects them as nonstarters because they fail to account for the constitutive properties of social practices, which are always given by the internal point of view. An external explanation, though, starts from the premise

[100] Coleman, supra note 16, at 27.

that it is possible to reveal a deeper truth about a practice by attending to nonconceptual, or nonintentional, features of the practice. Whatever the merits of this kind of explanation, it certainly cannot be dismissed solely on the ground that it will miss the internal features that constitute and define the practice. The external theorist would respond that the explanations of the internal features describe a mere surface phenomenon but miss the deeper truth about the practice and thus fail to provide the "real" explanation.

To be fair, Coleman does consider the possibility that an external explanation (for example, a causal functionalist explanation) of a social practice might give us reason to doubt that "our conceptual apparatus maps onto or represents the way the world really is—whether our concepts 'carve the world at its joints.'"[101] But Coleman insists this explanation still would not qualify as an explanation of a social practice. Instead, it might justify the conclusion that "the self-understanding of participants in tort law, as reflected in the content of the concepts they employ, may be mistaken."[102] Thus, Coleman allows that an external explanation, such as the efficient evolution theory, might satisfy the transparency requirement by arguing that judges misunderstand the "true nature" of their own practice. Coleman describes this as a "metaphysical" claim, as opposed to a conceptual inquiry. The efficient evolution theory, on this view, does not purport to explain the concepts of the common law, but instead purports to reveal a metaphysical truth about a social practice that demonstrates that the participants in the practice are mistaken about what it is they are really doing. Smith makes much the same claim when he dismisses efficient evolution theories because they must claim that "although judges think their decisions are motivated by concepts like consent, in reality judges are mere cogs in a socio-evolutionary process, whereby inefficient rules are inevitably eliminated over time."[103]

There are two responses to Coleman's and Smith's objections. The first is to clarify the implications of the efficient evolution model if it were interpreted, as Coleman and Smith interpret it, as

[101] Id. at 24.
[102] Id.
[103] Smith, supra note 1, at 28.

a purported free-standing theory of the common law. It is true that the efficient evolution model demonstrates that common law reasoning is causally irrelevant to its claim that the common law evolves efficiently. But it does not follow that judges do not know what they are doing or that what they say they are doing and what they are "really" doing are two metaphysically different things. The efficient evolution theory makes no claim about the structure or content, let alone truth or falsity, of judicial reasoning. It merely claims that the common law will evolve efficiently whether or not judges are in fact doing what they believe and say they are doing. It does not posit, as Smith's criticism implies, some mysterious causal force that operates on the judicial thought process to create in them the psychological illusion that they are deciding cases on the basis of reasons when they are in fact not. Smith seems to think that the efficient evolution theory postulates that we are like the human beings in the movie *The Matrix*: duped by external forces into believing we are leading the lives we subjectively experience, when in reality we have never left our hermetically sealed artificial "cloning birth eggs," in which our sole "real" purpose is to serve as batteries for an artificial intelligence. It is possible for judges to be "cogs in a socio-evolutionary process" and still be deciding cases for the reasons they believe, just as we all are cogs in a bio-evolutionary process even though we are nonetheless still acting on the basis of our own reasoning. In short, the efficient evolution theory does not require a defense of the claim that judges are mistaken, deluded, or intentionally misrepresenting their reasoning in cases. Its hypothesis is as simple as it is powerful: for purposes of efficient evolution, judicial reasoning just does not matter. It does not claim that judicial decisions based on reasoning do not occur, and, as I argued above, it does not mean that the evolutionary process does not indirectly affect how judges reason.

It is true that judges who take themselves to be deciding cases based on deontic reasoning might well be surprised to learn that common law doctrines will become more efficient over time no matter what they do. They probably believe that the properties of the common law turn entirely on what they do. This is why the efficient evolution hypothesis is so surprising (and perhaps wrong). But if judges' beliefs about the overall efficiency of common law rules are wrong, it hardly follows that their core beliefs about their

practice—their internal point of view—are wrong. Consider the more familiar case of market actors: most buyers and sellers in competitive markets take themselves to be engaged in self-interested, profit-maximizing behavior. They may well be surprised to learn that the inevitable effect of their self-interested conduct is to deprive sellers of the opportunity to make monopoly rents and thereby to maximize consumer surplus. Even though these market actors might have mistaken beliefs about the collective, long-term effects of their behavior, it does not follow that they do not understand the norms and practices that constitute a well-functioning market. There is just an additional fact about markets that they do not know. Is that fact a "metaphysical" fact that somehow contradicts their beliefs about reality? I am not sure why this should matter, but I hardly think the stakes here need be metaphysical. In the end, the efficient evolution theory claims merely to point out an interesting property that emerges from self-interested, costly adjudication over an extended period of time. It need make no claim to have explained the common law itself; its only claim is to have observed something very interesting about the common law.

The second response to Coleman's and Smith's objections is to re-characterize the efficient evolution theory as a component in the contextualist convergence interpretation of the economic analysis, as I have explained above. On this view, none of Coleman's and Smith's objections tell against the combined explanation of the common law. The contextualist convergence account does provide an explanation of the conceptual structure and content of the common law. And there is no tension between actual and express judicial reasoning. Smith claims:

> [the] socio-evolutionary process could be used to explain why judges continue to reason using irrelevant concepts like duress: judges reason in this way because rules that are based directly on a concept like efficiency are too difficult to apply or, alternatively, are unlikely to be accepted by other judges or citizens.[104]

On the combined account I am suggesting, however, judges continue to use reasoning based on concepts with a deontic plain meaning because they attach a consequentialist meaning to those

[104] Id.

concepts. They do this not because concepts like efficiency are too difficult to apply (in fact, they are easier to apply), but because these otherwise deontic terms actually have efficiency-based meanings in the common law. Judges do not use efficiency language to explain their opinions because they are required by the linguistic conventions of the common law to cast their reasoning in terms that have a deontic plain meaning. Moreover, they do not necessarily understand their reasoning in the technical terms of the best theory that explains it (the economic theory). Rather, judges reach their answers using analogical reasoning to interpret precedents whose salient features—because of the common law evolutionary forces—are proxies for efficiency-based reasoning.

One of Coleman's claims, however, is that even this combined theory fails to explain the important differences between contract and tort. To evaluate this claim, though, more would have to be said about what is supposed to differentiate them. On Coleman's view, contract and tort are conceptually distinct legal enterprises, presumably because they are defined by different core concepts. For example, concepts such as promise and consent play a central role in contract law but only a peripheral role in tort law. Likewise, negligence plays a central role in tort law but only a peripheral role in contract law. But concepts such as promise and consent will be given efficiency-based interpretations by the economic analysis, just as it gives efficiency-based interpretations to the core concepts in tort law. To claim that these concepts, so interpreted, will therefore fail to sufficiently distinguish contract from tort because they are all, in the end, servants of efficiency is no more compelling than to claim that deontic theory cannot differentiate between contract and tort because both of them serve a deontic conception of justice. If the economic analysis fails, it is because it cannot provide an adequate semantics for these concepts that explains the role they play in judicial decisions. Yet the burden of the argument I have advanced here is that the economic analysis in fact does this better than deontic moral theory.

Finally, by blending the efficient evolution theory with the contextualist convergence thesis, we can dispose of Coleman's other objection to the efficient evolution theory. Coleman argues that the efficient evolution theory is not plausible unless it can demonstrate that tort law is, in fact, efficient: "[e]conomic analysis needs

an argument to show that tort law has developed over time in a way that approximates an efficient reduction in accident costs. Only then is there even prima-facie reason to look for a causal mechanism . . . ."[105] Since a functionalist causal explanation justifies the claim that a practice serves a particular purpose by completely discounting the intentions of the participants in the practice, Coleman rightly observes that its only alternative is to demonstrate that the practice in fact serves the alleged purpose by empirical demonstration. It is not enough, therefore, to hypothesize the efficient evolution mechanism. If it were demonstrated that the common law had not in fact become more efficient over time, or had in fact become less efficient over time, this would undermine the claim that tort law serves the purpose of efficiency.

Coleman is right that the efficient evolution model by itself stands in need of empirical confirmation of its hypothesized causal mechanism and that this confirmation must be provided by some independent evidence that the common law has evolved more efficient rules over time. But the combined contextualist convergence and efficient evolution explanation can hypothesize a combined causal mechanism that includes judicial reasoning as a contributing causal factor. If judges are inclined to use efficiency-based reasoning (whether or not they realize it) because of the problem of relative deontic indeterminacy, then the combined theory hypothesizes two independent, mutually supportive causal mechanisms leading to an increase in the efficiency of the common law, both as a result of litigation selection effects and conceptual change in judicial reasoning.

CONCLUSION

The economic analysis of law has met with philosophical skepticism since it first emerged in the legal academy. Although philosophers attacked its explanatory credentials from the start, their withering criticism of its normative credentials as a free-standing moral theory appeared to drive a stake through its heart. Yet over the next twenty-five years, philosophers have marveled in contemptuous amazement as the apparently dead body of economic analysis took its seat at the head of the legal academic table and

[105] Coleman, supra note 16, at 28.

reigned unchallenged as the predominant theoretical mode of analysis in private law scholarship and pedagogy. The economic analysis of the common law (and, for that matter, of every area of law) has been either indifferent or affirmatively dismissive and disrespectful to its philosophical critics, which has only added insult to injury. Miffed philosophers have returned to the living-dead body time and time again, pinching it and themselves to confirm that it was still alive and that they were not dreaming. Quite clearly, the philosophers just did not get it. Exactly what is the appeal of a mode of analysis based on a normative principle that does not pass the laugh-aloud test? The answer, I believe, is that the economic analysis provides traction on countless doctrinal puzzles on which other theories—and deontic moral theories in particular—provide little purchase.

Although most economic analysts agree that the principle of efficiency by itself cannot provide moral justification, they rightly perceive that it identifies an important value, embedded throughout the common law, which any viable moral theory would include as a worthy contender alongside the other values it recognizes. Moreover, they believe with good reason that the prospective effects of common law rulings typically dwarf the effects on the parties in a dispute and that the common law plays a foundational role in underwriting the free market economy. This is enough to assure the economic analyst that she is not wasting her time. But the economic analysis of the common law would not have had such a deep and widespread impact in the legal academy if it did not have something even more important going for it. Its impressive level of fit with case outcomes, combined with its comparatively high degree of determinacy, makes it at least a force to be reckoned with for any common law scholar and a dream come true for the law professor in the classroom. The economic analysis has cleaned off and dressed up previously obscure and vague common law doctrines like a drill sergeant transforming disheveled Marine recruits at boot camp. One by one, the new soldiers have been lined up over the years in well-organized parade formation. Ambiguous language has been translated into relatively crisp concepts, and the concepts have been unified under a single rubric. The relative explanatory clarity, precision, and coherence of the economic analy-

sis, compared to all its predecessors, has been self-evident even to many of its harshest critics.

Philosophers have recently started to catch on: everyone has been prepared to cut the economic analysis some normative slack because of its self-evident explanatory prowess. While normative arguments for reform have always had their place in common law scholarship, the price of admission has always been a credible claim to having actually clarified how a court reached its result in a given case and what is likely to influence a court's decision on a related case in the future. So the philosophers have put their noses to the grindstone. Perhaps if they could bring to light the explanatory inadequacy of the economic analysis, its living-dead body would finally disintegrate like a vampire exposed to the sun. Smith and Coleman have been busy. They know that the fields of contract and tort scholarship are dominated by the economic analysis, yet they are still mystified that anyone takes it seriously, *especially* as an explanatory theory. Their combined efforts have been formidable. Casual observations about the awkward fit between doctrinal language and the concept of efficiency have been developed into a formal philosophical critique. Off-the-cuff rationalizations by economic analysts have been processed into formal arguments and then systematically and rigorously dismantled and discredited. One gets the feeling after reading the philosophers' work that there is, in their view, little left to discuss. I hope to have placed some philosophical ballast on the other side of this particular debate.

Both Smith's and Coleman's critiques raise genuine, deep, and important questions, not only about the foundations of the economic analysis of law, but also about the foundations of any purported explanation of an area of law. They clearly demonstrate that it is impossible to provide a respectable legal explanation without at least understanding the basic jurisprudential and philosophical issues underlying any legal explanatory exercise. But they devote insufficient attention to analyzing the chief attraction that explains the predominance and longevity of the economic analysis: its perceived superior determinacy. The core of my response to Smith and Coleman has been that they overlook entirely the central theoretical and practical role that determinacy plays in explanation and justification generally, and in the explanation of judicial reasoning in particular, where determinacy is prized, if not

above all else, no less than any other virtue. To lawyers, law professors, legal scholars, and especially judges, the Holy Grail is a legal argument that demonstrably leads to a particular result. As I have been at pains to emphasize, however, I am most certainly not implying that nothing succeeds like success, even if the success is achieved by applying a normatively bankrupt but highly determinate principle. Once the normative relevance of a principle is established, though—as I believe it has been for the principle of efficiency—it is difficult to overestimate the importance of its relative determinacy in legal argument.

Finally, I should add that I am not unaware of the recent attacks from *within* the law-and-economics community on the explanatory credentials of the economic analysis of the common law. The growing field of behavioral law and economics has called into question many of the core premises of traditional economic analysis, especially the postulate of individual rationality. Second generation law-and-economics scholars have exposed pervasive logical fallacies in the relatively simplistic early models of the economic analysis.[106] Economic analysts have surveyed the results of twenty-five years of economic analysis in particular fields, such as contract law, and found them to have yielded little of explanatory or normative value.[107] Further, because of the realization that the economic reconstructions of common law doctrine often reveal understandable but faulty economic reasoning by judges, a growing number of economic analysts of the common law now confine their claims to corporate contexts exclusively and disavow ambitious explanatory claims in favor of predominantly normative arguments.[108] Nonetheless, the case for the explanatory economic analysis of the common law has not yet gone to court. My only point has been that if and when the time comes, the case should be decided on the merits by the jury, not summarily dismissed by philosopher judges for its failure to state a philosophically respectable claim.

[106] These include the early models of the efficient evolution of the common law.

[107] See, e.g., Eric A. Posner, Economic Analysis of Contract Law After Three Decades: Success or Failure?, 112 Yale L.J. 829 (2003).

[108] See, e.g., Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 Yale L.J. 541 (2003); Robert E. Scott & George G. Triantis, Embedded Options and the Case Against Compensation in Contract Law, 104 Colum. L. Rev. 1428 (2004).