

PHL 333

Philosophy of Law

Dr. Jeff Johnson
Corrective Justice

Non-Economic Theories of Torts

- Prevalence of economic analyses in tort scholarship
- Epstein 1973
- Fletcher 1972
- Rejection of the law and economics paradigm
- Moral justification
- Justice

Jules Coleman

- Grad student early 1970s
- Dworkin's lecture
- Discussion with Joel Feinberg
- Gift of Calabresi's book
- Auditing NYU law school class
- Dissertation
- Justice and fault liability
- Sympathetic understanding of law and economics
- Informed critic of law and economics

Justice

- Retributive justice
- Distributive justice
- John Rawls
- David Gauthier
- Aristotle
- Corrective justice
- Different contemporary interpretations
- Coleman's evolving views

Losses

- Losses
- Economic losses
- Torts as a system for dealing with losses
- Law and economics: efficiency
- Coleman: the system must be just
- Coleman: fault liability must be just
- Conceptual explanations
- Normative explanations

Liability

- Leave the losses where they lie
- Shift the losses to the injurer
- Strict liability
- Fault (negligence) liability
- Torts as a mechanism for shifting liability
- Wrongful losses
- Non-blameworthy losses
- Wrongful gains?

Corrective Justice

- Torts as a mechanism for annulling wrongful losses
- But several mechanism could do this
- Agent neutral annulment
- Bilateralism
 - This defendant caused this injury to this plaintiff
 - This plaintiff is entitled to compensation from this defendant
- “Corrective justice imposes a duty of repair on those responsible for the wrongful losses they impose on others”
- Coleman’s later reservations

Evidence for an Explanation of Tort Law

e₁. Common law history of torts

e₂. Strict liability

- Defendant acted
- Victim suffered a compensable loss
- Defendant's action caused the loss

e₃. Fault (negligence) liability

- All of the above, plus the defendant's action was at fault

e₄. Change from strict liability to fault liability

Evidence for an Explanation of Tort Law

e5. This change was in the direction of increased efficiency.

e6. *Vincent v. Lake Erie Transportation*

e7. Centrality of causation in the law (Epstein)

e8. Non-reciprocal risks (Fletcher)

e9. Bilateralism (Coleman)

e9. Aristotle's corrective justice

Alternative Explanations of Tort Law

t₁. Law and economics (Coase, Calabresi, Posner)

t₂. Epstein's strict liability

t₃. Fletcher's non-reciprocal risks

t₄. Coleman's corrective justice

t₅. Johnson's secular natural law

- Be sure to discuss t₁
- Be sure to discuss a couple of the others
- One option would be to compare the economic analysis to the (corrective) justice explanations
- What's the best explanation?