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The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability

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ABSTRACT. When a tort rule is fully aligned, harms are valued equally across the elements. Because the valuation of harm within duty equals the valuation within the damages remedy, a fully aligned rule gives dutyholders the option to fully comply with the duty with respect to any harm by paying (the equally valued) compensatory damages for that harm. Full alignment characterizes a rule of strict liability but not negligence liability, which partially misaligns the elements for reasons of principle. Owing to its primary reliance on the damages remedy, a fully aligned rule is unable to address adequately the problem of irreparable injury, a common law category encompassing bodily injury and damage to real or tangible property. In cases of irreparable injury, the common law has long recognized the principle that it is better to prevent the harm instead of attempting to compensate for its occurrence with the inherently inadequate monetary damages award. This principle explains why tort law has adopted a default rule of negligence liability that seeks to prevent the irreparable injury of physical harm without imposing undue hardship on the dutyholder. To function in this manner, the negligence rule must misalign the elements so that dutyholders are prohibited from rejecting the primary duty of care (based on a higher legal valuation of harm) in exchange for payment of (the lower-valued) compensatory damages.

The principle of misalignment reorients the interpretation of tort law in a manner that has been missed by leading accounts. It decisively shows that courts have formulated the negligence rule in a fundamentally inefficient manner, while also showing that the rights-based accounts of corrective justice must explain why that form of justice would primarily value the exercise of reasonable care as opposed to the payment of compensatory damages. For reasons revealed by the misaligned negligence rule, that type of explanation can be supplied by a compensatory tort norm that redirects the dutyholder's compensatory obligation from the damages remedy into expenditures that would prevent physical harm, yielding the type of misaligned negligence rule that now constitutes the default rule of tort liability. In a world of irreparable injuries and scarce resources, the varied limitations of tort liability can all be understood in relation to a norm of compensation for reasons fully illustrated by the misaligned negligence rule.

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ESSAY CONTENTS

INTRODUCTION

A point that seems to be self-evidently true can be mistaken, although these types of mistakes are often quite valuable for shedding light on something that had not been adequately recognized. A good example is provided by the tort of negligence, which is easily characterized in an apparently unobjectionable manner that turns out to be wrong. Identifying the source of that mistake reveals something important about the nature of tort liability.

Like other forms of tort liability, negligence is defined by a set of elements that must be satisfied for the legal system to enforce the liability rule against the defendant. The first element of any tort claim—duty—specifies the legal obligation owed by the dutyholder to the correlative rightholder.[1] Negligence liability is based on a duty to exercise reasonable care, the breach of which establishes the second of four elements. The duty to exercise reasonable care involves safety precautions that must be taken by the dutyholder in order to avert threatened harms faced by the rightholder. The element of duty, therefore, determines which risks or threatened harms must factor into the negligence calculus, while the standard of reasonable care determines how the dutyholder should behave in light of those risks. Anything outside the scope of the duty is not part of the dutyholder's legal obligation, and so other elements of the tort must ensure that liability is limited to only those harms that are governed by the duty. Within the tort of negligence, the element of proximate cause (element three) aligns the element of duty with the (final) element of damages, thereby limiting "[a]n actor's liability . . . to those harms that result from the risks that made the actor's conduct tortious."[2] From these well-established rules of tort law, it would seem to follow that negligence liability recognizes an "alignment principle" that fully "aligns the standard of care with compensable harms,"[3] the claim made by Ariel Porat that turns out to be mistaken for interesting reasons.

Tort law aligns these elements to ensure that a defendant's liability is limited to the harms encompassed by the duty. Liability cannot be predicated on harms *outside* of the duty, as there is no legal basis for the imposition of such liability. The elements, therefore, must be partially aligned in the sense that the duty must encompass a harm in order for it to be compensable with

1. The element of duty is only expressly recognized in the tort of negligence, but "[i]t is fundamental that the existence of a legally cognizable duty is a prerequisite to all tort liability." Graff v. Beard, 858 S.W.2d 918, 919 (Tex. 1993) (citation omitted).

2. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (2010).

3. Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 92 (2011) (emphasis omitted).

the damages remedy. It is a separate question whether all harms *within* the duty must be fully aligned with the other elements, requiring a valuation of harm in the duty to exercise reasonable care that equals the valuation of harm in the damages element. The elements would not be fully aligned, for example, if a harm that is positively valued within the duty is not otherwise compensable with the damages remedy, a formulation involving issues of compensation that are obviously distinct from the need to ensure that liability is limited to the harms encompassed by the duty.

Tort law often fully aligns the elements, but there is no principle requiring the complete alignment of elements in the negligence rule. For example, a rule of strict liability fully aligns the damages award with the valuation of harms within the duty, but only because strict liability entails a single obligation to pay compensatory damages for the harms governed by the duty. A duty formulated entirely in terms of the compensatory damages remedy necessarily values harm equally across the elements of duty and the damages remedy. Complete alignment is a characteristic attribute of strict liability, whereas negligence liability involves a fundamentally different type of obligation, one that requires partial misalignment as a matter of principle.

For the most important harm governed by tort law, the duty to exercise reasonable care, is not fully aligned with the element of compensable damages. The duty encompasses risks threatening fatal injury, and yet the loss of life's pleasures due to premature death is not a compensable harm under the common law or the vast majority of wrongful death statutes.[4] This misalignment is not an exception to a more general principle of full alignment. Instead, tort law recognizes that the compensatory damages remedy does not adequately protect the rightholder's interest in physical security: monetary damages do not compensate a dead person, nor do they fully restore the loss in other cases of physical harm. In order to adequately protect the rightholder's interest in physical security, the negligence rule recognizes that accident prevention is far more important than an entitlement to an inherently inadequate award of compensatory damages. The negligence rule accordingly imposes a primary obligation on the dutyholder to exercise reasonable care. In the event of breach, the dutyholder is subject to liability for the ensuing harms, but the secondary obligation to pay compensatory damages is not fully interchangeable with the primary obligation to exercise reasonable care. A dutyholder cannot unilaterally choose to pay compensatory damages in exchange for acting unreasonably; such conduct is prohibited and subject to

4. *See infra* notes 43-45 and accompanying text.

punitive damages and perhaps even criminal negligence liability.[5] Because the duty to exercise reasonable care cannot be fully satisfied by the dutyholder's willingness to pay compensatory damages, the standard of reasonable care is not fully aligned with the element of compensatory damages. The resultant *principle of misalignment* simply recognizes that the compensatory damages remedy does not fully protect the rightholder's interest in physical security, justifying a legal valuation of harm in the standard of reasonable care that can exceed (or be misaligned with) the monetization of harm in the compensatory damages remedy. This tort principle prohibits a dutyholder from choosing to substitute the obligation to pay compensatory damages in place of the (more highly valued) obligation to exercise reasonable care.

The principle of misalignment has deep implications for the ongoing controversy over the underlying rationale for tort liability, one that pits a welfarist norm of allocative efficiency against a rights-based norm of corrective justice.[6] Because there is no consensus in this debate, one must engage in an interpretive exercise in order to identify the most plausible rationale for tort liability. The interpretive exercise has been conceptualized in different ways by different scholars, but there is widespread recognition that any viable interpretation must first offer a minimally plausible description of the important doctrines and practices of tort law.[7] This question of "fit"—whether tort law can be adequately described in terms of efficiency or a rights-based principle of justice—is central to the scholarly debate over the rationale for tort liability, with the efficiency interpretation being particularly dependent on its

5. *See infra* notes 75-76 and accompanying text.

6. *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) ("Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties. If these are alternative camps, they are also to a large measure unfriendly camps: much of the time each treats the other with neglect or even derision.").

7. "It is a commonplace among most jurists that theoretical accounts of any area of the law, including tort, must fit some of the law's principal structural and doctrinal features. It is also often assumed that such accounts must, where possible, make those features both intelligible and normatively respectable." William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605, 648 (2007). For a highly influential formulation of this approach, see RONALD DWORKIN, LAW'S EMPIRE 65-68 (1986), which argues that a constructive interpretation of law has two distinct dimensions—"fit" and "justification"—each of which provides a basis for evaluating the plausibility of different interpretations.

ability to describe the case law.[8] As established by an analysis of the applications and non-applications of misalignment, courts have formulated the negligence rule in a fundamentally inefficient manner, an outcome that may be sufficient to defeat the claim that tort law can be plausibly described as furthering a welfarist norm of allocative efficiency.

Within negligence law, misalignment occurs in only a few critically important instances, but it would be a pervasive feature of an allocatively efficient negligence rule. By relying on the principle of misalignment, courts could have formulated duty to encompass the total social cost of harms as required by the allocatively efficient standard of care, while employing the element of proximate cause to limit liability for general categories of harms (like pain and suffering) in order to avoid the associated inefficiencies created by the damages remedy. Such a limitation of the compensatory damages remedy would reduce the financial incentives to comply with the duty to exercise reasonable care, but that deterrence problem is addressed by the threat of punitive damages and criminal negligence liability. Consequently, courts could have formulated the negligence rule so that it would efficiently promote deterrence without inefficiently increasing the costs of injury compensation. Instead of developing the negligence rule in this manner, however, courts have

8. "[M]ost economic analysts agree that the principle of efficiency by itself cannot provide moral justification . . . ." Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 357 (2007). Consequently,

> 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.

Id.; *see also* Dan M. Kahan, *The Economics—Conventional, Behavioral, and Political—of "Subsequent Remedial Measures" Evidence*, 110 COLUM. L. REV. 1616, 1650 (2010) (arguing that "the very path taken by [law and economics] on its way to its preeminence in legal scholarship generally . . . consists of the accumulation of theoretical analyses demonstrating the efficiency of existing doctrine"). For these reasons, the debate over the relative merits of the efficiency interpretation largely turns on its descriptive capabilities. *Compare* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 1, 313 (1987) (defining "*the* positive economic theory of tort law" as being based on the hypothesis "that the common law of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation" and concluding that the evidence supporting this hypothesis is "considerable"), *with* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 12 (2001) ("Whether or not it fails as a moral ideal, economic analysis certainly fails as an explanation [of tort law].").

limited duty in order to limit liability for important categories of harms (as with most stand-alone emotional and economic harms), thereby inefficiently excluding large swaths of social harms from the standard of reasonable care.[9] By revealing the range of choices that courts could have made while developing negligence law, the principle of misalignment decisively shows that courts have formulated the negligence rule in a fundamentally inefficient manner. This principle accordingly casts considerable doubt on the descriptive claim "that the common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation,"[10] although it also shows that the leading rights-based accounts of corrective justice must be reformulated to explain why that form of justice would primarily value the exercise of reasonable care as opposed to the payment of compensatory damages.

The logic of alignment is more fully described in Part I, which explains why the ordering of the elements in a negligence claim creates the misleading appearance that tort law has adopted a principle of full alignment. The negligence rule only partially aligns the elements to ensure that liability is limited to the harms governed by the duty; it does not otherwise require that the valuation of harm within the duty must be equal to or fully aligned with the compensatory damages remedy. Part II then argues that the negligence rule is based on a principle of misalignment, utilizing the problems of wrongful death and differences in the wealth of individual rightholders to show why the standard of reasonable care is based on a legal valuation of harm that can substantially exceed the award of compensatory damages. As established by this difference, the compensatory damages remedy does not fully protect the rightholder's interest in physical security. This inadequacy explains why the duty to exercise reasonable care is not exclusively enforced by the compensatory damages remedy but instead requires the complementary deterrence mechanisms of punitive damages and criminal negligence liability to remedy the problem of reprehensible, bad-faith breaches. Part III concludes by showing how the principle of misalignment reorients the interpretation of tort law in a manner that has been missed by leading contemporary accounts.

I. THE ALIGNMENT OF DUTY AND DAMAGES

In order for the negligence rule to be coherent, its canonical elements—duty, breach, causation, and damages—must all coherently work together. The

9. *See infra* Section III.A.

10. LANDES & POSNER, *supra* note 8, at 1.

elements, in other words, must be at least minimally or partially aligned. The question for present purposes is whether the negligence rule completely or fully aligns the elements.

A rule of no duty absolves the defendant of legal responsibility for the injuries in question, and so the element of duty determines the types of harms or associated risks for which the defendant is responsible as a matter of tort law. Having identified the harms governed by the duty, the tort inquiry can then determine how a dutyholder like the defendant should act when engaged in behavior threatening such harms—the issue addressed by the standard of reasonable care. Whether the defendant breached the duty to exercise reasonable care must be determined by reference to the threatened harms or risks for which the dutyholder is legally responsible, explaining why the specification of duty is the first element of negligence liability.[11]

To serve this function, duty cannot depend on "factors specific to an individual case" but instead must be "applicable to a general class of cases" involving "categories of actors or patterns of conduct."[12] By defining the element of duty in categorical terms, tort law can then specify the requirements of reasonable care in terms applicable to all similarly situated actors within the category.

For example, the duty to exercise reasonable care is limited to foreseeable risks. According to the *Restatement (Second) of Torts*, "In order that an act may be negligent it is necessary that the actor should realize that it involves a risk of causing harm to some interest of another, such as the interest in bodily security, which is protected against unintended invasion."[13] If the actor knew or should have known that her conduct would create such a risk of injury, then the risk is foreseeable and governed by the duty to exercise reasonable care (absent other reasons for limiting duty). As Oliver Wendell Holmes explained, "the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen."[14]

Having defined the harms or associated risks encompassed by the duty, a tort rule must then specify the behavior required of the dutyholder. The

11. *See* Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921, 1923-29 (2002) (explaining why the standard of care is indeterminate unless the element of duty first specifies the risks governed by that standard).

12. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a (2010).

13. RESTATEMENT (SECOND) OF TORTS § 289 cmt. b (1965).

14. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 87 (Harvard Univ. Press 2009) (1881).

negligence rule involves a duty to exercise reasonable care, and so the second element of the negligence claim (breach) determines whether the defendant complied with the requirements of reasonable care. This inquiry compares "the overall level of the foreseeable risk created by the actor's conduct" with "the burdens that the precautions, if adopted, would entail" for the actor or others.[15]

As Judge Learned Hand famously characterized the standard of reasonable care, "[I]f the probability [of injury] be called *P*; the injury, *L*; and the burden [of a precaution that would eliminate this risk] *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether $B < PL$."[16] The Hand formula straightforwardly expresses how the magnitude of the risk encompassed by the duty affects the amount of care required by the duty—an increase in risk *PL* (or the safety benefit of a precaution) increases the amount of reasonable care (the cost or burden *B* of the required precaution).

According to the conventional economic analysis of tort law, the Hand formula entails the type of cost-benefit exercise required by an allocatively efficient negligence rule.[17] However, "the Hand Formula only identifies the basic variables of negligence and their relation to one another. The Formula permits, but does not require, economic valuation of the variables that it identifies. It also (and equally) permits noneconomic valuation of those variables."[18]

As a leading treatise explains:

> In any comparison of costs and benefits, the outcome of the calculus depends heavily on the values assigned to the various interests at stake on both sides of the comparison. Thus, quite different outcomes may be reached in different legal systems because of different valuations of interests at stake, even though the different systems are alike in adhering to a principle of fault that compares benefits and costs.[19]

For example, the Hand formula was first formulated to evaluate an issue of contributory negligence,[20] and the amount of reasonable care required for

15. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. e.

16. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

17. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972).

18. Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 332 (1996).

19. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 85, at 608-09 (5th ed. 1984).

20. *Carroll Towing*, 159 F.2d at 173.

purposes of self-protection does not necessarily generalize to ordinary negligence actions. The issue of contributory negligence involves a comparison of *intrapersonal* interests (cost and risk to self), each of which presumably weighs equally in the negligence calculus (absent paternalism). In contrast, the ordinary negligence inquiry compares *interpersonal* interests (cost to self and risk to others), each of which does not necessarily merit the same weight. A noneconomic valuation can give different weights to different types of competing interpersonal interests based on the underlying rationale for tort liability, such as a norm of individual autonomy and equal freedom.[21] Doing so can yield a standard of reasonable care that requires precautions for purposes of self-protection that are less burdensome than the precautions required for the protection of others, all else being equal.[22]

Consistent with this reasoning, jury instructions in the vast majority of jurisdictions first define negligence as "the failure to exercise ordinary care," and then define ordinary care in terms of "the conduct of the reasonably careful or reasonably prudent person."[23] At most, only five jurisdictions rely on jury instructions consistent with the allocatively efficient cost-benefit test for negligence, but that formulation is not the most plausible interpretation of these instructions.[24] As empirical studies have found, judges, jurors, and lay individuals typically interpret the requirements of reasonable care to mandate safety precautions in excess of the allocatively efficient amount for injuries threatening severe bodily injury to others.[25]

21. *See, e.g.*, Jules Coleman & Arthur Ripstein, *Mischief and Misfortune (Annual McGill Lecture in Jurisprudence and Public Policy)*, 41 MCGILL L.J. 91, 97 (1995) (arguing that tort law mediates and protects interests in liberty and security depending on the extent to which they are "necessary or important to living life in a liberal political culture"); Keating, *supra* note 18, at 354 ("For social contract theory, the interests at stake in accidental risk impositions are not mere preferences properly measured in dollars, but interests in liberty. These interests represent the background conditions necessary for the pursuit of conceptions of the good over the course of complete lives. Accordingly, proper evaluation of risks and precautions requires the qualitative assessment of the way particular risks and precautions burden the liberties necessary for persons to pursue the aims and aspirations that give meaning to their lives.").

22. *See* MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 192-204 (2008) (showing how a norm of autonomy and equal freedom makes the requirements of reasonable care turn on the nature of the interests being traded off, with cases of self-protection involving economically cost-justified care and cases of nonreciprocal risks involving care in excess of that amount).

23. Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 622 (2002).

24. *Id.* at 618-20.

25. A survey of eighty-nine judges found that most applied the negligence standard in a more exacting manner when the conduct threatened serious bodily injury rather than property

To account for this type of balancing, a more general description of the reasonable care inquiry simply recognizes that an increase in the risk governed by the duty, *PL*, will increase the burden *B* of a required precaution, all else being equal. This relation can be expressed by a logical operator denoted ® for reasonable care. The resultant standard of reasonable care (*B* ® *PL*) is one of proportionality—the precautionary burden must not be disproportionately greater than the risk, and therefore the required burdens of reasonable care will increase with increases in risk. Proportionality in this regard is not algebraic (or a constant ratio) but instead refers to the relative importance or weight of the two factors as determined by the underlying norm of tort liability, a normative conception of the type conveyed by maxims like "the punishment must fit, or not be disproportionate to, the crime." The algebraic inequality in the Hand formula is only one type of a more general proportional relation that is embodied in the standard of reasonable care. Consequently, the proportional standard permits, but does not require, the allocatively efficient amount of care.

To be sure, the proportional standard described by ® is more ambiguous than the Hand formula, but that ambiguity also accords with existing practice. Even when all the facts are undisputed, the jury must still decide whether the defendant exercised reasonable care.[26] Consequently, "[t]he jury has a great deal of normative discretion in deciding what is reasonably prudent conduct."[27] To apply the economic version of the Hand formula, the jury does not exercise normative discretion but must decide only factual questions: What is the monetary cost of the threatened injury? What is the monetary cost of the precaution in question? When these questions of fact are not in dispute, reasonable care can be determined as a matter of law by simply comparing the magnitudes of these two monetary amounts: Is *$B* < *$PL*? Proportionality, by contrast, requires the jury to exercise normative discretion even when the facts are not in dispute: Do the conflicting interests merit the same normative

damage, even though the cases were otherwise identical in cost-benefit terms. *See* W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 40-46 (1999). Lay individuals and jurors tend to emphasize safety to an even greater degree, requiring more than the cost-benefit amount of safety for nonconsensual risks threatening serious bodily injury. *See* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 130-34 (2001); *see also* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000) (citing cases and studies in which juries or mock jurors found that the negligence standard was violated by corporate decisions based on cost-benefit analysis of risks threatening serious bodily injury).

26. *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in American Common Law*, 68 FORDHAM L. REV. 407, 434 (1999).

27. *Id.* at 424-25.

weight? The existence of this normative discretion further explains why the proportional standard of reasonable care ($B \mathbin{®} PL$) provides a more general description of negligence practice than the Hand formula ($B < PL$).

Like the more narrowly based Hand formula, the proportional standard clearly shows that the standard of reasonable care is necessarily related to the remedies for breach.[28] In the event that the defendant's unreasonable conduct proximately caused the plaintiff to suffer physical harm—bodily injury or damage to real or tangible property—she is entitled to receive compensatory damages for the ensuing economic harms (like medical expenses) and noneconomic harms (pain and suffering). Consequently, cases of physical harm are governed by the so-called general or ordinary standard of reasonable care that encompasses both the economic or monetary losses proximately caused by the predicate physical harm (denoted $L_{\text{economic}|\text{physical}}$) and the noneconomic or nonmonetary losses proximately caused by that predicate physical harm (denoted $L_{\text{noneconomic}|\text{physical}}$):

$$B \mathbin{®} P \bullet (L_{\text{economic}|\text{physical}} + L_{\text{noneconomic}|\text{physical}})$$

As this formulation reveals, the magnitude of loss—the issue expressly addressed by the element of compensatory damages—is directly related to the dutyholder's obligation to exercise reasonable care. The standard of reasonable care, however, is determined according to a categorical measure of the foreseeable losses in question, whereas the damages award is based on the plaintiff's individual harm. Hence it is an open question whether the legal valuation of loss (L) within the duty, which is applicable to all similarly situated actors, must equal (or be an unbiased estimator of) the amount of damages in a particular case.

To ensure that the plaintiff's harm is encompassed by the duty, the court must find that the category of risks governed by the duty includes the particular risk that caused the plaintiff's injury. Duty is limited to the category of foreseeable risks, and so the imposition of liability requires proof that a foreseeable risk caused the plaintiff to suffer a compensable injury—the issue addressed by the element of proximate cause.[29] Within the negligence rule, the

28. *Cf.* 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 23 (3d ed. 1906) ("The maxim of law, that wherever there is a right there is a remedy, is a mere truism . . . .").

29. This conclusion is not contradicted by the so-called directness test, which subjects the defendant to liability for direct, unforeseeable injuries. This causal rule determines the extent of damages once the plaintiff has established the prima facie case of liability with proof that the defendant foreseeably caused some compensable harm. *See* GEISTFELD, *supra* note 22, at 257-68.

element of proximate cause aligns the element of compensatory damages with the dutyholder's obligation to exercise reasonable care.

Due to the requirement of foreseeability, negligence liability has a structure that was famously recognized in *Palsgraf v. Long Island Railroad*, which held that a plaintiff can recover only by showing that the defendant's breach of duty constitutes "'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial."[30] According to the *Restatement (Second) of Torts*, this requirement is satisfied only if the defendant "create[d] a recognizable risk of harm to the [plaintiff] individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the [plaintiff] is a member."[31] The appropriate interpretation of *Palsgraf* continues to be controversial, but that issue need not be resolved for present purposes.[32] Consistently with *Palsgraf*, courts have limited liability for categories of cases by limiting the scope of duty. As explained by the *Restatement (Third) of Torts*, "in some categories of cases, reasons of principle or policy dictate that liability should not be imposed. In these cases, courts use the rubric of duty to apply general categorical rules withholding liability."[33] By excluding categories of foreseeable risks from the duty when the associated harms are not subject to liability, courts align duty with the element of compensable damages.

30. 162 N.E. 99, 100 (N.Y. 1928).

31. RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965).

32. "The elements of the debate are canonical: (1) What is the nature of duty—is it relational or act-centered?; (2) Is plaintiff-foreseeability a duty inquiry or an aspect of proximate cause?; and (3) Is [the] court or jury the proper arbiter of foreseeability?" W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. (forthcoming Dec. 2011), *available at* http://ssrn.com/abstract-1851316. In my view, much of the disagreement engendered by this debate stems from the failure to recognize that the holding in *Palsgraf* depends on two types of foreseeability. The first involves the question of whether duty should ever be limited by the foreseeability of the plaintiff, a categorical question that must be decided by judges as a matter of law (and accordingly has precedential effect for the formulation of duty in future cases). The second issue of foreseeability concerns the case-specific question of whether the plaintiff was, in fact, foreseeable, a jury question that can be handled under either the element of duty or proximate cause. Both issues were resolved by *Palsgraf* within the element of duty, although debate over the case ignores these two different dimensions of foreseeability and accordingly centers on the appropriate roles of the judge and jury. *Compare* GEISTFELD, *supra* note 22, at 155-59 (analyzing *Palsgraf* in terms of these two types of foreseeability inquiries), *with* Cardi, *supra*, at 1 (finding from an extensive survey of the case law that an "overwhelming[]" number of jurisdictions categorically limit duty on the basis of plaintiff-foreseeability, with a majority leaving the case-specific determination of plaintiff foreseeability for the jury).

33. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a (2010).

To illustrate, consider a car driver who negligently hits a pedestrian. The resultant injuries are greatly distressing to the family members and friends who care about the pedestrian's well being. These third parties are foreseeable victims of the negligence, and so their harms could be governed by the duty to exercise reasonable care. If the tort duty were to encompass these foreseeable third-party harms, the general duty of care would include both the foreseeable risk of physical harm faced by the class of pedestrians (denoted P_1) and the foreseeable risk of pure emotional distress faced by the associated class of family members and close friends (denoted P_2):

$$B \mathrel{\text{®}} P_1 \bullet (L_{\text{economic|physical}} + L_{\text{noneconomic|physical}}) + P_2 \bullet (L_{\text{emotional}})$$

Instead of formulating the duty in this manner, courts have excluded from the duty most foreseeable emotional harms that stand alone or are not caused by an underlying physical harm suffered by the claimant. "Historically, courts were quite restrictive and cautious about permitting recovery for pure emotional disturbance . . . . [A commonly invoked set of] policy concerns often led courts to declare that actors had 'no duty' to prevent pure emotional harm, except in some narrow areas."[34] The bar to recovery partially eroded over time, and today most jurisdictions allow recovery for the negligent infliction of emotional distress under limited conditions. A number of jurisdictions, for example, first recognized such a claim only if the plaintiff was within the "zone of danger" or physically threatened by the defendant's unreasonable conduct, causing her to suffer the emotional distress.[35] The scope of liability has continued to expand somewhat, with different jurisdictions adopting different rules, but the important point for present purposes is that the bar to recovery for stand-alone emotional harms has been accomplished by a limitation of duty.[36]

By limiting duty, courts have aligned the elements. To illustrate, suppose that duty for stand-alone emotional harms is defined by the "zone of danger" rule. Any risk that falls outside of the defendant's duty, by definition, is not governed by the duty to exercise reasonable care. Despite the foreseeable stand-

34. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 8, scope note at 2 (Tentative Draft No. 5, 2007).

35. *See* DAN B. DOBBS, THE LAW OF TORTS § 309, at 839-41 (2000).

36. *See, e.g.*, Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 807-08 (Cal. 1993) (stating that "the law in California" is that "there is no duty to avoid negligently causing emotional distress to another" absent special circumstances); Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993) (holding that "there is no general duty in Texas not to negligently inflict emotional distress"); KEETON ET AL., *supra* note 19, §54 (discussing limitations of recovery for "mental disturbance[s]" in a chapter entitled "Limited Duty").

alone emotional harms that would be suffered by family members or friends who were not in the "zone of danger," the obligation to exercise reasonable care is defined wholly by the foreseeable risk of physical harm and the foreseeable risk of stand-alone emotional harms that would be suffered by those in the "zone of danger."

$$B \mathbin{®} P_1 \bullet (L_{\text{economic}|\text{physical}} + L_{\text{noneconomic}|\text{physical}}) + P_2 \bullet (L_{\text{emotional}|\text{zone of danger}})$$

This limitation of liability for stand-alone emotional harms accordingly aligns the duty to exercise reasonable care with the harms that are compensated by the damages remedy.

The same type of outcome occurs with respect to pure economic loss, which is any "pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property."[37] Consider again the negligent driver who physically harms a pedestrian. Suppose the injured pedestrian is a sole proprietor who employs five individuals, and those five workers lose their jobs because the injured proprietor can no longer run the business. Although the injured proprietor (as pedestrian) can recover for the lost profits caused by the physical harm, the workers cannot recover their lost wages from the negligent driver pursuant to the economic loss rule. Once again, the limitation of liability is accomplished by a limitation of duty:

> Two distinct rules tend to limit recovery of stand-alone economic loss: (1) Subject to qualifications, one not in a special or contractual relationship owes no duty of care to protect strangers against stand-alone economic harm; and (2) again subject to qualifications, those in a special relationship arising out of contract or undertaking may not owe a duty of care to each other; rather, each party is limited to the contract claim, with all its limitations.[38]

Ordinarily, any duty with respect to pure economic loss is based on the defendant's voluntary undertaking of the duty or the defendant's contractual or other type of special relationship with the plaintiff, like that between an attorney and client, and so the duty governs situations, such as legal or

37. Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 713 (2006).

38. *Id.* at 714; *see also* DOBBS, *supra* note 35, § 452, at 1282 ("When commercial or economic harm stands alone, divorced from injury to person or property, courts have not imposed a general duty of reasonable care.").

accounting malpractice, that usually do not involve physical harms.[39] The duty of reasonable care as expressed in the prior equation continues to apply in cases threatening physical harm, aligning the element of duty (exclusion of the foreseeable risks of pure economic loss) with the element of damages (no compensatory damages available for pure economic loss).

Across the spectrum of potential harms—physical harms, stand-alone emotional harms, and pure economic loss—it looks like the negligence rule recognizes an "alignment principle" that "[fully] aligns the standard of care with compensable harms."[40] This appearance, which is logically created by the ordering of elements as described above, is deceptive. The foregoing discussion only shows that tort law *partially* aligns the standard of care with compensable harms to ensure that the defendant does not incur liability for harms that fall *outside* of the duty. The elements are aligned only to the extent that a risk must have a positive value within the duty in order for the harm to be compensable with the damages remedy. A *full* alignment of the two elements, by contrast, would completely align risks both *outside* and *inside* the duty, thereby ensuring that the defendant does not incur liability for harms that fall outside of the duty (as per partial alignment) while equally valuing or aligning the risks across all elements of the tort claim. Nothing in the prior discussion shows that the negligence rule fully aligns the elements in this manner.

II. THE PRINCIPLE OF MISALIGNMENT

The concept of alignment has obvious appeal, as it suggests the sort of logical consistency that is required for the varied elements of a tort claim to work together coherently. When compared to a fully aligned negligence rule, a partially aligned rule would seem to be logically inconsistent in some manner. After all, the difference between full and partial alignment necessarily involves instances of misalignment, which could indicate that something is misguided or not quite right about the inquiry. One might therefore be surprised to learn that the negligence rule embodies important instances of misalignment. As Ariel Porat has observed, these "'misalignments' . . . have thus far been ignored by the legal scholarship."[41] One will also have a hard time finding express

39. DOBBS, *supra* note 35, § 452, at 1285-87.

40. Porat, *supra* note 3, at 92 (emphasis omitted). As defined by Professor Porat, the "alignment principle" corresponds to the concept of full alignment as I define that term. *See infra* Section II.C (discussing Porat's analysis of alignment as applied to differences in individual wealth).

41. Porat, *supra* note 3, at 84.

discussion of misalignment in the case law. Nevertheless, once the logic of alignment is developed, it becomes quite evident that the negligence rule misaligns the elements for reasons of principle.

If the elements of the negligence rule were fully aligned, then any risk within the element of duty would be equally valued within all other elements. A fully aligned negligence rule draws no distinction between the manner in which harms are valued by the standard of reasonable care and by the compensatory damages remedy. Without any difference in the legal valuation of harm across the elements, the negligence rule would give dutyholders the option to forgo the exercise of reasonable care (and thereby create a risk of harm) in exchange for paying (identically valued) compensatory damages for the resultant injuries. A principle of full alignment, therefore, assumes that the negligence rule is indifferent between the dutyholder exercising reasonable care and otherwise paying compensatory damages for all injuries proximately caused by the unreasonably risky behavior.

The negligence rule is not formulated in this manner, and for a good reason. Physical harm is a type of irreparable injury, and for centuries the common law has recognized that the prevention of such an injury is better than compensation via the damages remedy. Consequently, the negligence rule imposes a primary obligation on dutyholders to exercise reasonable care. To enforce this obligation, the negligence rule only partially aligns the elements to ensure that the defendant does not incur liability for risks that are outside of the duty. The elements within the duty are not fully aligned; the valuation of harm within the standard of reasonable care can exceed the amount of compensatory damages. The resultant misalignment of the elements makes it possible for tort law to prohibit dutyholders from choosing to forgo the exercise of reasonable care in exchange for the payment of compensatory damages, a prohibition that is enforced with punitive damages and criminal negligence liability in cases of reprehensible, bad-faith breach. The misalignment of the negligence elements, therefore, is justified by the principle that in cases of irreparable injury, the interests of the rightholder are best protected by an entitlement that seeks to prevent such harms instead of compensating rightholders with an inherently inadequate award of compensatory damages. Consequently, it would be a mistake to think that a fully aligned negligence rule is somehow more consistent or coherent than a partially aligned rule is. Misalignment can be consistent, coherent, and principled.

A. The Problem of Irreparable Injury

Since at least the seventeenth century, the common law has defined an injury as being "irreparable" if it "cannot be adequately measured or compensated by money."[42] For example, monetary damages cannot compensate a dead rightholder for the premature loss of life, a compensatory problem so severe that under the early common law, "the right of action for tort [was] put an end to by the death of [the rightholder]."[43] The paradigmatic example of an irreparable injury is premature death.

To address the compensatory problem created by the common law bar to recovery, state legislatures have enacted wrongful death statutes that enable statutorily specified plaintiffs to recover from the defendant for their own injuries caused by the violation of the decedent's tort right.[44] The decedent, however, is not compensated. In the event of a fatal accident, the defendant dutyholder does not have to pay damages for the manner in which premature death has caused the decedent rightholder to suffer a loss of life's pleasures.[45] Wrongful death statutes do not make premature death a fully compensable harm.

Due to the irreparable injury inherent in a case of wrongful death, it would be "cheaper for the defendant to kill the plaintiff than to injure him."[46] For example, the average jury verdict in New York City between 1984 and 1993 in a case of wrongful death was over $1 million, whereas verdicts in cases of brain

42. BLACK'S LAW DICTIONARY 856 (9th ed. 2009).

43. FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 61-62 (Stevens & Sons, Ltd. 11th ed. 1920) (1887).

44. *See* DOBBS, *supra* note 35, § 299, at 815 ("Wrongful death statutes create a new cause of action for the benefit of survivors; it is not merely a continuance of the deceased's own claim. At the same [time] they provide or have been interpreted to mean that no new cause of action is created unless the deceased himself would have been able to sue had he lived."); *see also* John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 733-37 (2000) (describing the adoption of wrongful death statutes in the United States during the nineteenth century).

45. *See, e.g.*, Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1, 6-7, 20-22 (2005) (finding that the decedent's loss of life's pleasures is not compensable by the compensatory damages remedy in the vast majority of states).

46. KEETON ET AL., *supra* note 19, § 127, at 945.

damage averaged over $3 million.[47] The average award for a herniated disc was over $500,000.[48] Obviously, a herniated disc is not half as bad as wrongful death, and yet such a relative measure of damages is routinely produced by wrongful death actions.[49] Indeed, compensatory damages can be zero in a case of wrongful death.[50]

This practice has been described by a leading nineteenth-century treatise as "one of the least rational parts of our law,"[51] but the common law approach to premature death has undeniable logic. Damages for the loss of life's pleasures are available only when the plaintiff has a cognitive awareness of her loss.[52] Without any evidence showing that a decedent is cognitively aware of her lost life, tort law has no basis for an award of compensatory damages.[53] As the New York Court of Appeals explained in a related context, "placing the burden of compensation on the negligent party also serves as a deterrent, but purely punitive damages—that is, those which have no compensatory purpose—are prohibited unless the harmful conduct is intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence."[54] Because they are unable to

47. *See* Edward A. Adams, *Venue Crucial to Tort Awards: Study: City Verdicts Depend on Counties*, N.Y. L.J., Apr. 4, 1994, at 1.

48. *Id.* at 5 (citation omitted).

49. Similar conclusions were reached by an empirical study of reported American appellate decisions in accident cases from the period 1875-1905. "[V]ery serious, disabling injuries—amputation or the equivalent—involve on average a larger loss [as measured by the compensatory damages award] than the typical death case ($9107 versus $4704)." Posner, *supra* note 17, at 84. When cases of serious, disabling injuries are excluded, "the average recovery in a nondeath case is still 52 percent of the average recovery in a death case." *Id.* This latter finding is consistent with the other empirical finding, discussed in the text, that the average damages award for a herniated disc in New York City was about half the average award for wrongful death.

50. *E.g.*, Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 811 (Ct. App. 2003) (upholding a substantial punitive damages award in a wrongful death case in which the decedent's estate received no compensatory damages).

51. POLLOCK, *supra* note 43, at 61.

52. *See* 2 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 8.1(4), at 388 (2d ed. 1993) (noting that "[c]ourts have rejected a pain and suffering claim when the plaintiff is not aware of pain, as where he is comatose" (citing cases)); *see also* Keene v. Brigham & Women's Hosp., Inc., 775 N.E.2d 725, 739 (Mass. App. Ct. 2002) (concluding that there should be no award of damages for loss of enjoyment of life when the "plaintiff lacks the cognitive awareness of his loss"), *modified on other grounds*, 786 N.E.2d 824 (Mass. 2003).

53. *Cf.* THOMAS NAGEL, MORTAL QUESTIONS 7 (1979) ("[I]f there is a loss, someone must suffer it, and *he* must have existence and specific spatial and temporal location even if the loss itself does not.").

54. McDougald v. Garber, 536 N.E.2d 372, 374 (N.Y. 1989) (citations omitted) (concluding that a comatose plaintiff could not be compensated for the loss of life's pleasures).

compensate a dead person, tort damages for the decedent's loss of life's pleasures are foreclosed in a case of wrongful death.

Despite the logic of the common law approach, it would be irrational if the absence of a damages remedy implied that tort law is simply not concerned about a decedent's loss of life's pleasures. When tort law emerged from the writ system in the nineteenth century, the problem of accidental harm was particularly salient in light of the Industrial Revolution. "By virtually all accounts—contemporary accounts as well as those of historians writing a century later—the United States witnessed an industrial-accident crisis of world-historical proportions."[55] Moreover, "[b]ecause of the relatively primitive state of medical care, a far higher proportion of accidents ended in death in the mid-nineteenth century than today, or even than in the late nineteenth century."[56] In facing the widespread occurrence of accidental death—the most serious harm to a rightholder's interest in physical security—how could courts defensibly ignore that injury while developing tort law?

When evaluating this issue, one must be cognizant of the New Jersey Supreme Court's observation that "[w]hat may have been the real reason for the establishment of this rule of the common law we may not be able to discover."[57] Nevertheless, the common law did not plausibly respond to an issue of profound importance by irrationally ignoring it. The more plausible interpretation is that the common law developed liability rules in recognition of this inherent limitation of the compensatory damages remedy.

For centuries, courts have formulated rules to address the inadequacy of the compensatory damages remedy. Prior to the merger of law and equity, the jurisdiction of the two courts was determined by the irreparable injury rule, pursuant to which "equity would take jurisdiction only if there were no adequate remedy at law."[58] The legal remedy of compensatory damages "was considered adequate only if it was as complete, practical, and efficient as the equitable remedy," a definition that still "prevails today."[59] Thus, in contractual cases or those otherwise involving threatened damage to property interests, if compensatory damages would be inadequate, courts will grant the equitable remedies of injunctive relief or specific performance to prevent the

55. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 22 (2004).

56. Witt, *supra* note 44, at 731.

57. Grosso v. Del., L. & W. R.R., 13 A. 233, 235 (N.J. 1888), *overruled on other grounds by* LaFage v. Jani, 766 A.2d 1066 (N.J. 2001).

58. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 699 (1990).

59. *Id.* at 700.

irreparable injury when doing so would not impose undue hardship on the dutyholder.[60] As explained by a leading late nineteenth-century treatise, "judges have been brought to see and to acknowledge . . . that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it . . . ."[61]

This particular solution to the problem of irreparable injury has not been adopted by tort law. Despite the inadequacy of the compensatory damages remedy, a rightholder typically cannot enjoin a dutyholder from engaging in risky activity threatening the irreparable harms of premature death or severe bodily injury.[62] If this equitable remedy were available for ordinary conduct that threatens bodily injury, then tort law would effectively shut down vast numbers of socially valuable interactions, such as automobile driving. Injunctive relief would unduly restrict risky behavior and impose undue hardship on dutyholders, producing a loss of social value that explains why tort law does not ordinarily employ this remedy.[63]

Although tort law does not ordinarily rely on equitable relief to address the inherent inadequacy of the compensatory damages remedy, it can still recognize the established legal principle that in cases of irreparable injury, the threatened interests of the rightholder are best protected by an entitlement that seeks to *prevent* such harms. To do so, tort law obligates risky actors to exercise

60. *See* 1 DOBBS, *supra* note 52, § 2.1(1), at 50, § 2.5(2), at 90-92.

61. JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 1357, at 844-45 (students' ed. 1907) (1887). In discussing this quotation, Professor Douglas Laycock has observed that when evaluated

> as a description of what courts do[,] Pomeroy's statement . . . is not quite right . . . . But it captures an important insight. . . . Remedies that prevent harm altogether are better for plaintiffs, and plaintiffs should have such remedies if they want them and if there is no good reason to deny them. A general preference for damages is not a reason unless there is a reason for the preference. Judges act on these premises, whether or not they consciously acknowledge all that Pomeroy imputed to them.

Laycock, *supra* note 58, at 689 (paragraph break omitted).

62. *See* DOBBS, *supra* note 35, §377, at 1047 & n.5 (stating that injunctions are "occasionally available in tort cases" and citing instances where injunctions were available in cases involving property interests, dignitary rights, and constitutional rights).

63. *Compare* Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty To Exercise Reasonable Care*, 44 WAKE FOREST L. REV. 899 (2009) (discussing how courts have limited negligence liability due to concern that the duty to exercise reasonable care would unduly restrict the exercise of individual autonomy), *with* Laycock, *supra* note 58, at 732-49 (discussing the rule that monetary damages provide the remedy for harms that would otherwise be irreparable when equitable relief would interfere with countervailing rights or impose undue hardship).

reasonable care. The duty of reasonable care specifies those precautions that a dutyholder must take in order to eliminate a risk of loss faced by rightholders. This obligation is based on a legal valuation of the loss (denoted *L*), which includes the loss of life's pleasures in a case of wrongful death.[64] Because the risk of fatal injury is included in the duty, the negligence rule obligates dutyholders to reduce these risks when required as a matter of reasonable care (*B* ® *P*•*L*). The rule of negligence liability is formulated to prevent wrongful death without imposing undue hardship on the dutyholder, thereby conforming to the general manner in which the common law addresses the problem of irreparable injury.

The problem of irreparable injury is not limited to cases of premature death. In a case of severe bodily injury, compensatory damages do not plausibly make the plaintiff rightholder "whole," nor are they designed to do so.[65] As the California and Wisconsin Supreme Courts each observed more than a century ago, "No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages."[66] Serious bodily injury fundamentally alters one's life. A healthy person with ordinary wealth faces substantially different choices from a quadriplegic who has been made wealthy by a large tort award. "Self-altering injuries constrain one's ability to maintain [or pursue] a set of commitments. These constraints are harms."[67] The damages remedy obviously benefits the accident victim, but its efficacy is inherently limited by the poor manner in which money can substitute for lost bodily integrity. The problem is starkly illustrated by premature death, but any significant bodily injury is an irreparable injury.

64. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 4, 6 (2010) (defining "physical harm" to include physical impairment of the body caused by death, and then stating the general rule of negligence liability for having caused "physical harm").

65. The difficulty, once again, involves the problem of compensating the badly injured plaintiff for the loss of life's pleasures. *Cf.* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1977) (stating that a damages award for the loss of life's pleasures is not supposed to "restore the injured person to his previous position" but should instead only "give to the injured person some pecuniary return for what he has suffered or is likely to suffer").

66. Zibbell v. S. Pac. Co., 116 P. 513, 520 (Cal. 1911) (quoting Heddles v. Chi. & Nw. Ry., 42 N.W. 237 (Wis. 1889)).

67. Sean Hannon Williams, *Self-Altering Injury: The Hidden Harms of Hedonic Adaptation*, 96 CORNELL L. REV. 535, 581 (2011); *see also* Robert E. Goodin, *Theories of Compensation*, 9 OXFORD J. LEGAL STUD. 56, 68-69 (1989) (arguing that modes of compensation based on the restoration of welfare do not adequately account for how bodily harm can limit the ability of a victim to pursue a life plan of her choosing).

The ordinary duty of reasonable care, however, is not limited to bodily injury but applies more generally to "physical harms," a tort term that means "the physical impairment of the human body . . . or of real property or tangible personal property."[68] Once again, this aspect of the duty to exercise reasonable care can be understood in relation to the problem of irreparable injury.

According to the judicial conception of an irreparable injury,

> Damages are inadequate if plaintiff cannot use them to replace the specific thing he has lost. This is by far the most important rule in determining the doctrinal relationship among remedies. The emphasis on replaceability turns the alleged preference for damages on its head. Money is an adequate remedy if, and only if, it can be used to replace the specific thing that was lost. That is to say, money is never an adequate remedy in itself. It is either a means to an end or an inadequate substitute that happens to be the best we can do at acceptable cost.[69]

Based on this conception of irreparable injury, compensatory damages are adequate "for only one category of losses: to replace fungible goods or routine services in an orderly market."[70] As a categorical matter—the relevant frame for purposes of the tort duty—real property and tangible property are not fungible goods. Consequently, damage to such property will ordinarily be irreparable to some extent for a reason suggested by Oliver Wendell Holmes: "a thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being . . . ."[71]

The category of physical harms encompassed by the ordinary duty to exercise reasonable care, therefore, consists entirely of irreparable injuries for which an award of compensatory damages would ordinarily be inadequate. This duty seeks to prevent irreparable injuries without imposing undue hardship on the dutyholder, the same type of approach the common law otherwise employs to address the problem of irreparable injury.[72]

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68. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 4.

69. Laycock, *supra* note 58, at 703.

70. *Id*. at 691.

71. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

72. This reasoning does not imply that the duty must be defined entirely in terms of irreparable injuries, or that any irreparable injury is necessarily encompassed by the duty. The negligence duty excludes most instances of pure economic or financial loss, the paradigmatic instance of a *reparable* injury, but it also excludes most stand-alone emotional harms, a paradigmatic instance of an *irreparable* injury. *See supra* notes 33-40 and accompanying text. The limitation of duty in both instances can be justified by the need to ensure the adequate

B. The Misaligned Negligence Rule, Punitive Damages, and Criminal Negligence Liability

To address the problem of irreparable injury, the negligence rule must misalign the elements. If the legal valuation of harm within the standard of reasonable care were necessarily equal to or fully aligned with the legal valuation of harm in the element of compensatory damages, then the negligence rule could not make one element (the exercise of reasonable care) more important than another (the payment of compensatory damages). Dutyholders would have the option to pay compensatory damages instead of exercising reasonable care, making tort law highly vulnerable to the problem of irreparable injury posed by cases of wrongful death and other instances of physical harm. In order to place a higher value on the prevention of irreparable injury, the negligence rule must misalign the elements.

To be sure, a self-interested dutyholder rationally values harms in terms of the amount of damages that she would have to pay in the event of liability, but the standard of reasonable care requires the dutyholder to "give to the respective interests concerned the value which the law attaches to them."[73] The standard of reasonable care can place a value on the rightholder's interest in physical security that exceeds the monetization of harm in the damages remedy. Unlike the fully aligned rule, a misaligned negligence rule can address the problem of irreparable injury by prohibiting dutyholders from choosing to forgo the exercise of reasonable care (based on a higher legal valuation of the threatened harm) in exchange for the payment of compensatory damages.

To enforce this prohibition, negligence liability must be complemented by other deterrence mechanisms, explaining why the plaintiff can recover punitive damages in virtually all the states "only when the tortfeasor has committed quite serious misconduct with a bad intent or bad state of mind such as malice."[74] A tortfeasor can have the requisite "bad state of mind" that is subject to punitive sanctions even if she fully expects to pay compensatory damages for having violated the right.[75] This prohibition is further enforced by the threat of

compensation of physical harms in a world of scarce resources. *See* GEISTFELD, *supra* note 22, at 161-72. So conceptualized, the duty is formulated to adequately protect the individual interest in physical security, a concern that is inextricably tied to the problem of irreparable injury but not wholly defined by it.

73. RESTATEMENT (SECOND) OF TORTS § 283 cmt. e (1965).

74. DOBBS, *supra* note 35, § 381, at 1062.

75. Perhaps the best example of this rule is *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981), in which the court upheld a substantial punitive award based on the finding that the defendant manufacturer had concluded that it would be cheaper to pay compensatory

criminal negligence liability: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such willfulness, recklessness or wickedness, on the part of the party at fault, as amounted to

damages than to remedy a defectively designed automobile. The court was concerned that "in commerce-related torts, the manufacturer may find it more profitable to treat compensatory damages as a part of the cost of doing business rather than to remedy the defect." *Id*. at 382. The court then concluded that "[d]eterrence of such 'objectionable corporate policies' serves one of the principal purposes" of punitive damages. *Id*. The very fact that the court found Ford's corporate policy "objectionable" implies that Ford's willingness to pay compensatory damages did not absolve it from the primary obligation to sell a nondefective product, the conclusion reached by other courts. *See* Barrett v. Ambient Pressure Diving, Ltd., No. 06-CV-240, 2008 WL 4934021, at *6 (D.N.H. Nov. 17, 2008) ("By making punitive damages available in product liability actions, Pennsylvania law discourages the sale of products known to be defective when the seller is willing to accept the payment of ordinary compensatory damages for product liability as a reasonable cost of doing business."); Man v. Raymark Indus., 728 F. Supp. 1461, 1467 (D. Haw. 1989) ("Punitive damages serve to deter manufacturers as, unlike with compensatory damages, the defendant is prevented from making the 'coldblooded calculation' that it is more profitable to pay claims than correct a defect." (quoting Campus Sweater & Sportswear Co. v. M. B. Kahn Constr. Co., 515 F. Supp. 64, 106-07 (D.S.C. 1979), *aff'd,* 644 F.2d 877 (4th Cir. 1981))); Fischer v. Johns-Manville Corps., 472 A.2d 577, 584 (N.J. Super. Ct. App. Div. 1984) ("Were punitive damages to be withheld, those entrepreneurs who act with flagrant disregard of the public safety would be able to write off the public's injury as a cost of doing business by the payment of compensatory damages, for which there is typically insurance coverage. . . . Thus, it is only the threat of punitive damages which can ultimately induce these entrepreneurs and others to act with a reasonable modicum of responsibility." (citation omitted)), *aff'd,* 512 A.2d 466 (N.J. 1986); *see also* DOBBS, *supra* note 60, § 3.11(3), at 323 (observing that punitive damages can be justified for "cases in which, in the absence of such liability, the defendant would find it profitable to continue its misconduct because profits are high and compensatory damages are low" (footnote omitted)).

This conclusion finds further support in the widely recognized rule that although a court "must presume that 'a plaintiff has been made whole for his injuries [through the award of compensatory damages],' exemplary damages are permitted if the wrongdoing 'is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.'" Bennett v. Reynolds, 315 S.W.3d 867, 874 (Tex. 2010) (quoting State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003)). The deterrence rationale for punitive damages encompasses all cases in which the defendant's tortious conduct was motivated by an expectation that it might be able to avoid liability, creating a shortfall in expected liabilities that must be offset by a punitive award in order to maintain the appropriate financial incentives for complying with the duty. By implication, a pure retributive rationale for punitive damages presumes that the defendant fully expected to pay compensatory damages that would make the plaintiff "whole" by exhausting the claims generated by the rights violation unless the breach was reprehensible. The defendant, therefore, cannot rely on the compensatory damages remedy to avoid retribution for having reprehensibly breached the behavioral obligation primarily required by the tort right. *Cf.* Lane v. Hughes Aircraft Co., 993 P.2d 388, 402 (Cal. 2000) (Brown, J., concurring) ("The purpose of punitive damages is to *prevent* oppression, fraud and malice, not merely to force defendants to internalize the social costs of that conduct.").

criminality . . . ."[76] Consequently, even though a number of states do not recognize punitive damages in a case of wrongful death, any ensuing deterrence problems are addressed by the threat of liability for criminally negligent homicide.[77] A dutyholder cannot choose to forgo the exercise of reasonable care in exchange for paying the "price" of compensatory damages, a prohibition that is then enforced with punitive damages and criminal liability.

This rule does not require punitive sanctions for each and every rights violation. The duty to exercise reasonable care is defined in terms of the objective standard of the reasonable person: a safety precaution is required by the duty when it would be taken by a reasonable person in the circumstances confronting the dutyholder. Owing to the objective nature of this inquiry, the negligence rule often requires legal conclusions that do not accurately describe the particular facts or subjective traits of the parties in any given case. Once the objective nature of the liability rule is compared to the actual, subjective traits of the defendant in a particular lawsuit, it becomes apparent that negligence liability has components of both personal fault and strict liability. For deterrence purposes, punitive damages are only required in the former cases, explaining why these sanctions are available only when the defendant acted with the requisite "bad state of mind."

One can breach the duty to exercise reasonable care without being a reprehensible actor who merits punishment. The objective component of the liability rule means that some dutyholders will be deemed negligent, even

76. Lake Shore & Mich. S. Ry. v. Prentice, 147 U.S. 101, 114-15 (1893) (quoting Hagan v. Providence & Worcester R.R., 3 R.I. 88, 91 (1854)). "[T]he overwhelming majority of jurisdictions allow crimes based on ordinary negligence." State v. Hazelwood, 946 P.2d 875, 884 n.17 (Alaska 1997) (applying criminal statute prohibiting negligent discharge of oil). However, ordinary negligence "applies in only a relatively few modern statutory crimes . . . . [F]or the most part, . . . something more than negligence is required for criminal liability," such as "a risk greater than simply an unreasonable risk" or "a subjective awareness of the unreasonable risk he [the dutyholder] creates." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.4(a)(2), at 264 (2d ed. 2003). These added requirements for criminal liability correspond to those required for awarding punitive damages.

77. "Under some statutes, punitive damages clearly are not recoverable in wrongful-death actions, though they may be available in survival actions." 22A AM. JUR. 2D *Death* § 225 (2003) (footnotes omitted). The threat of criminally negligent homicide, however, applies to any case in which a tortfeasor would otherwise be subject to punitive damages but for state law limitations in wrongful death suits. *See, e.g.*, Carraway v. Revell, 116 So. 2d 16, 20 (Fla. 1959) (affirming that "the character of negligence necessary to sustain a conviction for manslaughter is the same as that required to sustain a recovery for punitive damages"). Moreover, risky conduct threatening premature death will almost invariably threaten serious bodily injury as well, and so the threat of punitive damages in cases of bodily injury also gives dutyholders in these jurisdictions a financial incentive to exercise reasonable care with respect to fatal risks.

though they cannot be "blamed" for their conduct in light of their own subjective traits. As Oliver Wendell Holmes explained:

> If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.[78]

In these cases, the liability rule is framed exclusively in terms of negligence—the failure to comply with an objectively defined standard of reasonable care subjects the defendant to negligence liability for the ensuing injuries—but any rationale for liability must consider how the objective rule applies to individuals who cannot realistically comply with that standard. These defendants are not blameworthy for their "congenital defects" but nevertheless are subject to negligence liability. Without any personal fault or "guilty neglect," as Holmes put it, tort law has no basis for punishing the defendant.

Unreasonable risky behavior is often the result of inadvertence, mistake, or even adherence to conventional practices (like exceeding the speed limit on a highway). As illustrated by these common forms of negligent behavior, the duty to exercise reasonable care often involves unrealistic behavioral demands (always pay attention, never make mistakes, and never exceed the speed limit when others routinely do so). By not complying with an unrealistic behavioral demand, one can violate the duty without being personally blameworthy or at "fault" in the colloquial sense. In this critical respect, the objectively defined negligence rule is a form of "strict" or "no fault" liability.[79] In these cases, the negligent actor breached the primary duty to exercise reasonable care without reprehensibly rejecting that obligation. The payment of compensatory damages does not fully substitute for the breach of the primary duty to exercise reasonable care—the plaintiff, after all, has suffered an irreparable injury—but that difference does not merit a punitive response in these cases.

A defendant who deliberately rejects or recklessly ignores the plaintiff's right to physical security, by contrast, is subject to moral condemnation, even if the defendant fully expects to pay compensatory damages for the ensuing

78. HOLMES, *supra* note 14, at 99.

79. *See* GEISTFELD, *supra* note 22, at 95-98 (explaining how the objectively defined negligence rule contains pockets of strict liability and immunity from liability).

harms. In the event of an accident, such a decision would not be excused or justified. The payment of damages cannot compensate a decedent rightholder for the premature loss of life, nor can monetary damages fully restore an injured plaintiff's loss of health or physical capabilities. The plaintiff's right requires the exercise of reasonable care. By deliberately rejecting or recklessly ignoring the primary value protected by the right, a defendant has the "bad state of mind" that subjects her to punitive damages. These punitive sanctions accordingly enforce the primary duty of care, with the two aspects of the tort claim coherently working together to offset the inherent limitations of the compensatory damages remedy.[80]

C. Misalignment and Differences in Individual Wealth

The compensatory damages remedy is not fully protective of the individual tort right for a related reason that further explains why the negligence rule is based on a principle of misalignment. The amount of compensatory damages in any given case importantly depends on the lost income suffered by the plaintiff, yielding damage awards for plaintiffs with high income that substantially exceed the damages received by those with low income, all else being equal. When the elements are fully aligned, the amount of compensatory damages establishes a legal valuation of harm that must equal the valuation employed by the standard of reasonable care. High tort awards for wealthy victims accordingly imply a higher valuation of their lives as opposed to the lives of those with less wealth, who receive lower tort awards, all else being equal. If the elements were fully aligned, the negligence rule would alter the standard of reasonable care based on this difference in the wealth of individual rightholders.[81]

The problem with this approach is recognized by Ariel Porat, who nevertheless insists that tort law has adopted a principle of full alignment:

> Not surprisingly I could not find a single court decision suggesting that a different standard of care applies to driving in rich and poor neighborhoods . . . . If a court were required to explain the application of the same standard of care in both locales, it would rightly reason that the lives and limbs of the rich and poor have identical social value and are therefore deserving of the same level of legal protection. But as

80. For a more complete discussion, including the implications of this approach for the constitutionally permissible ratio of compensatory and punitive damages, see Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263 (2008).

81. *See* Porat, *supra* note 3, at 86.

> convincing as such reasoning may be, *I* would argue that it is inconsistent with the courts' long practice of awarding higher damages to high-income victims. This practice suggests that their lives and limbs are more highly valued by the law relative to those of low-income victims. To be consistent with this practice it seems that potential injurers should take greater care toward the rich than the poor, just as they should be more careful in their interactions with high-value property.[82]

Contrary to this reasoning, tort damages do not represent the legal valuation of the harm in question, a point that judges expressly make when instructing juries on how to determine compensatory damages for pain and suffering.[83] The tort right in question is correlative to a duty to exercise reasonable care that categorically treats the security interest of all rightholders equally, regardless of differences in wealth. Any dutyholder who decides not to exercise reasonable care because she would have to pay low damages to poor people has acted no differently from the dutyholder who decides to disregard fatal risks because wrongful death damages are so low. In both cases, the reprehensible rejection of the primary duty to exercise reasonable care would subject the defendant to punitive damages and perhaps even liability for criminal negligence.[84] For cases in which the defendant breached the duty, compensatory damages simply provide indemnification for tortiously caused harms. As a matter of indemnification, individuals who suffer more extensive losses (like those whose injuries prevent them from earning a lot of money) receive more damages than otherwise similarly situated individuals who suffer less extensive losses (because they would have earned less money). The difference in damages stems from different magnitudes of compensable harm (lost income) and not from any different treatment of the individual interest in physical security.

Moreover, the compensatory damages remedy cannot be modified within the existing structure of tort law to redress the brute fact of wealth inequality. Consider a rule that would require a rich defendant to compensate a poor plaintiff for the wealth inequality, yielding damage awards across cases that do not suffer from the variability identified by Porat. Such a remedy assumes that

82. *Id*. at 86-87.

83. *See, e.g.*, COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 15.4 (2005) ("You are not trying to determine value, but an amount that will fairly compensate the plaintiff for the damages he has suffered.").

84. *See supra* notes 75-76 and accompanying text.

the underlying duty makes the defendant legally responsible for the inequality, because a harm must be positively valued within the duty in order for it to be compensable with the damages remedy (the requirement of partial alignment).[85] The justification for formulating the duty to exercise reasonable care in this manner is hard to identify.[86] But even if the tort duty were formulated in this manner, there must still be a causal connection between the defendant's failure to exercise reasonable care and the plaintiff's lack of wealth. Outside of the manner in which the defendant's negligent conduct caused the plaintiff to lose income, property, or other forms of wealth, there is no causal connection between the defendant's breach and the plaintiff's relative lack of wealth. As a matter of causation and the complementary requirement of partial misalignment, poor plaintiffs will ordinarily receive lower compensatory damages than wealthier plaintiffs, all else being equal.

To equally value the security interest of all rightholders, regardless of differences in individual wealth, the negligence rule must misalign the elements. Each rightholder's protected interest in physical security must have a legal valuation within the duty that is equal to the valuation applicable to all other rightholders. That equal valuation will necessarily diverge from the awards of compensatory damages that are based on lost income and other forms of lost wealth. Misalignment in this respect can be justified by a principle of equality that requires equal treatment of individuals (in this

85. *See supra* text accompanying notes 40-41.

86. Why should the duty to exercise reasonable care entail a responsibility to compensate all harms that the rightholder suffers because of an unjustified wealth inequality? Outside of her membership in the relevant political community, what is the basis for giving the individual dutyholder such a responsibility? Wouldn't collective responsibility justify a collective remedy (wealth redistribution via tax transfers and so on) and not a modification of the individual tort duty and its compensatory damages remedy? *Cf.* Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, *in* OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 237, 251-52 (Jeremy Horder ed., 2000) ("[I]t is highly implausible to think that, in principle, the manner in which I ought to act toward others in my daily life is in any way a function of my or their wealth. How I treat others should remain constant even against a range of different possible background schemes of distributive justice and, indeed, at least in certain sorts of cases, it should transcend membership in any particular political community. These intuitions are especially strong where personal injury is concerned. It surely cannot be correct that the degree of risk or bodily harm that I can permissibly impose on another person depends in any way on the wealth of either of us."); *see also* Gregory Mitchell & Philip E. Tetlock, *An Empirical Inquiry into the Relation of Corrective Justice to Distributive Justice*, 3 J. EMPIRICAL LEGAL STUD. 421, 421, 429 (2006) (reporting results of an empirical study suggesting that most individuals conclude that a negligent or intentional tortfeasor ought to provide compensation for the tortiously caused injuries, even if the tortfeasor is substantially less wealthy than the injury victim).

instance, with respect to the interest in physical security) while permitting differences in individual wealth under certain background conditions.[87]

III. MISALIGNMENT AND THE NATURE OF TORT LIABILITY

Although tort law does not require that duty be fully aligned with damages, it is still an open question whether any particular misalignment is justified, which is the inquiry undertaken by Professor Porat.[88] He identifies five misalignments of concern. As previously discussed, the misalignment involving damage awards for lost income can be justified by the need to ensure that the duty to exercise reasonable care gives equal treatment to the security interest of all rightholders, regardless of individual differences in income or wealth.[89] Another misalignment identified by Porat stems from a misapplication of the doctrine of negligence per se and has no broader implications for negligence liability.[90] The final three misalignments—involving issues of "probabilistic recovery," whether offsetting risks should reduce damages, and whether the injurer's self-risk should be considered in setting the standard of care—are ones that Porat cannot justify as a matter of allocative efficiency. This leads Porat to conclude that these misalignments must instead find justification in corrective justice or some other rights-based rationale for tort liability.[91] Whether these misalignments are justifiable cannot be directly resolved by the principle of misalignment, although the principle does have implications for the substantive nature of tort liability that help to resolve the matter.

87. *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 65-120 (2000) (explaining why the principle of equality can permit wealth inequalities that occur under conditions in which everyone starts with an "equality of resources").

88. *See generally* Porat, *supra* note 3.

89. *See supra* Section II.C.

90. Porat argues that the limitation of liability to the harms caused by tortious risks means that courts will ignore some foreseeable risks of physical harm, relying on an example involving negligence per se. Porat, *supra* note 3, at 124 n.123. The misalignment produced by the rule of negligence per se, however, does not generalize to all of negligence law as Porat assumes. The misalignment instead pertains to the manner in which negligence per se limits liability to the risks contemplated by the statute, even if other foreseeable risks would be recognized by the common law duty. The misalignment, therefore, is based on misapplication of negligence per se. *See* GEISTFELD, *supra* note 22, at 221-28 (arguing that unless the statute either creates a new duty or otherwise preempts an existing common law duty, the statutory safety standard can be incorporated into the common law duty so that violation of the statute, involving a smaller set of risks, is sufficient to establish negligence with respect to the full set of risks encompassed by the common law duty, contrary to the black-letter formulation of negligence per se).

91. *See* Porat, *supra* note 3, at 139.

Tort scholars continue to disagree about the appropriate rationale for tort liability, caught in an ongoing debate that pits a welfarist norm of allocative efficiency against a rights-based norm of corrective justice.[92] Both types of norms can justify the principle of misalignment, although each misaligns the negligence rule in a different manner. A set of misalignments that are clearly required by an allocatively efficient negligence rule has been decisively rejected by courts, an outcome that could fatally undermine the interpretive claim that tort law can be plausibly described as furthering the goal of allocative efficiency. In this respect, the misaligned negligence rule supports the rights-based interpretations of tort law, although it also shows that leading accounts of corrective justice must be reformulated. For reasons revealed by the principle of misalignment, such a reformulation can be based on a norm of compensation. Misalignment reorients the interpretation of tort law in a manner that has been missed by leading accounts.

A. Allocative Efficiency

An allocatively efficient negligence rule minimizes the total social cost of accidents, which includes both the cost of safety precautions and the cost of accidental injuries. The cost of accidental injuries can often be reduced by spreading the risk with insurance (as revealed by the robust market for insurance).[93] To be maximally or first-best efficient, the negligence rule must lead to outcomes that minimize the cost of insuring the injuries that occur when risky actors exercise the first-best amount of care.[94]

When adequately enforced, a negligence rule would induce risky actors to exercise the first-best amount of care if it required any precaution that cost less than the associated reduction in total injury costs, a standard of reasonable care embodied in the Hand formula, $B < PL$. But in order for this standard to require the first-best amount of care, the duty must encompass all injuries that comprise the total social costs of accidents.

Such an expansive conception of duty was integral to the development of tort law in the latter half of the nineteenth century and embraced by leading

92. *See supra* note 6.

93. Under the common condition in which there is a decreasing individual marginal utility of wealth (the analytic characteristic of risk aversion), actuarially fair insurance reduces the total cost (measured in terms of reduced individual utility) of accidental monetary harms. *See, e.g.*, HAL R. VARIAN, MICROECONOMIC ANALYSIS 180-81 (3d ed. 1992).

94. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26-28 (1970).

scholars of the era, including Oliver Wendell Holmes.[95] This conception of duty was also famously relied on by Judge Andrews in his dissenting opinion in the influential case *Palsgraf v. Long Island Railroad*:

> Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain.[96]

When the actor owes a duty "to the world at large" so that "all those in fact injured may complain," the standard of reasonable care encompasses all injuries that comprise the total social cost of accidents, yielding a negligence rule that can obligate dutyholders to exercise the amount of care that minimizes the total social cost of accidents. A duty owed to the "whole world" makes it possible for the negligence rule to require the maximally efficient or first-best forms of precautionary behavior.

The total social cost of accidents is also comprised of the cost of insuring against those injuries that do occur. As is well known, the tort system (which ordinarily requires legal representation) is an incredibly expensive method for compensating injuries as compared to alternative insurance mechanisms that do not ordinarily require one to procure legal representation in order to receive indemnification for covered losses.[97] Moreover, monetary compensation for nonmonetary injuries can be inefficient.[98] To minimize the total social cost of

95. "The growth of negligence from the omission of a preexisting, specific duty owed to a limited class of persons to the violation of a generalized standard of care owed to all ensured the emergence of Torts as an independent branch of law." G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 18 (1980). For a discussion of the leading nineteenth-century scholars who held this view, including Holmes, see *id.* at 18-19.

96. Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

97. *See* HOLMES, *supra* note 14, at 88 ("Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise."). For a more extended discussion that explains why tort liability substantially increases insurance costs as compared to other insurance mechanisms, including data that support this conclusion, see Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 625-31, 639-43 (1998).

98. By definition, a nonmonetary injury does not reduce the victim's wealth, and so it must otherwise increase her marginal utility of wealth in order for monetary compensation to be

accidents, the tort rule must deny recovery when alternative insurance mechanisms are less costly than the tort system.

If it would be inefficient in this respect to provide tort damages for a class of injuries, courts could exculpate the defendant from liability under the element of proximate cause for reasons given by Andrews:

> What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad[.] He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy.[99]

Based on the "public policy" of allocative efficiency, courts could rely on the element of proximate cause to deny liability for categories of cases. Doing so would create a misalignment between duty and damages, producing a negligence rule that both induces the first-best amount of care (based on a duty owed to the world) while efficiently minimizing the costs of injury compensation (by limiting liability as a matter of proximate cause). Under the formulation of liability advocated by Andrews, the negligence rule can attain the first-best safety outcome while minimizing the insurance inefficiency that is characteristic of tort damages, yielding the maximal or first-best efficient outcome.

To illustrate, consider how this approach applies to stand-alone emotional harms. Pursuant to Andrews's formulation, all types of emotional harm would be included within the duty to exercise reasonable care. The dutyholder, therefore, could be obligated to exercise the amount of precaution that would be first-best efficient in light of the total social cost of accidents (assumed for present purposes to involve only two types of injuries, physical harms and the related stand-alone emotional harms suffered by others):

$$B < PL_{\text{physical harm}} + PL_{\text{stand-alone emotional harm}}$$

allocatively efficient. *See, e.g.*, John E. Calfee & Paul H. Rubin, *Some Implications of Damage Payments for Nonpecuniary Losses*, 21 J. LEGAL STUD. 371 (1992).

99. *Palsgraf*, 162 N.E. at 103-04 (Andrews, J., dissenting).

For cases in which the dutyholder did not exercise reasonable care, those rightholders who suffer only emotional harm could be denied recovery on grounds of proximate cause—the "public policy" of allocative efficiency would not be furthered in such a case, justifying the limitation of liability for the reasons given by Andrews. The common law had long denied recovery for stand-alone emotional harms on the ground that such harms were too "remote" and therefore not proximately caused by the defendant's negligence.[100] Indeed, the limitation of liability on grounds of proximate cause is the primary policy-driven tool for controlling the limits of tort liability in the civil law jurisdictions of Europe.[101] An approach that categorically limits liability for stand-alone emotional harms as a matter of proximate cause, therefore, had ample precedential support at the time of *Palsgraf*.

To be sure, such a limitation of liability would undermine the financial incentive for complying with the duty, but that incentive is restored by the threat of punitive damages and criminal liability. If the dutyholder were to reject the safety obligation for the reason that it would be cheaper to pay compensatory damages, she would be subject to punitive damages and perhaps even criminal negligence liability for cases in which the risky conduct causes physical harm.[102] When the risky conduct threatens both physical harm and stand-alone emotional harm—the problem analyzed above—the safety obligation can be rendered enforceable with the threat of punitive damages and criminal negligence.

Within the conception of negligence liability advocated by Andrews, the tort duty decouples the safety obligation from the compensatory damages remedy in just the way that is permitted by the principle of misalignment. The misaligned elements of the negligence claim, therefore, could serve as two

100. *See, e.g.*, Francis H. Bohlen, *Right To Recover for Injury Resulting from Negligence Without Impact*, 50 AM. L. REG. 141, 146 (1902) (stating that the first "principal" reason for denying recovery for stand-alone emotional harms is that "it is too remote" and then criticizing this ground for the denial of recovery). Courts employed the same approach for limiting recovery for pure economic loss. *See, e.g.*, JOHN G. FLEMING, THE LAW OF TORTS 170 n.50 (5th ed. 1977) (stating that "[t]he principled denial of liability for economic loss used to be put on grounds of remoteness" under the English common law (citation omitted)).

101. *See, e.g.*, 2 CHRISTIAN VON BAR, THE COMMON EUROPEAN LAW OF TORTS 487 (2000) (observing that in cases of "pure economic loss . . . the courts' willingness to reject claims for want of causation is at its greatest all over Europe"); *id.* at 169 (explaining that the "legal problem" of whether noneconomic damage is recoverable in Europe depends on "questions of attributability, particularly in the field of causality"); A.M. Honoré, *Causation and Remoteness*, *in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 7, 35-38 (M. Nijhoff ed., 1971); Jaap Spier & Olav A. Haazen, *Comparative Conclusions on Causation*, *in* UNIFICATION OF TORT LAW: CAUSATION 127, 133-37 (J. Spier ed., 2000).

102. *See supra* notes 75-76 and accompanying text.

different instruments for attaining the maximally efficient outcome in the two different dimensions of precautionary behavior and injury compensation, an outcome that cannot be obtained by a fully aligned negligence rule.[103]

Instead of concluding that risky actors owe a duty "to the whole world" as argued by Judge Andrews in his dissenting opinion, *Palsgraf* limited the scope of duty.[104] The full import of this holding is subject to an ongoing debate that is not relevant for present purposes.[105] The important point is that *Palsgraf* represents one of those rare "moments in the intellectual history of a legal subject when two theoretical approaches stood in solid opposition."[106] Consistent with the majority ruling in *Palsgraf*, courts have foreclosed recovery for general categories of harms by a limitation of duty. For example, courts deny recovery for pure economic loss and stand-alone emotional harms by limiting duty, not on the grounds of proximate cause as argued by Andrews in dissent.[107] To support these limitations of duty, some courts have cited *Palsgraf*.[108] The lasting legacy of the case arguably involves the manner in which it helped to crystallize the conception of duty as the appropriate basis for establishing categorical limitations of liability.[109]

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103. Because it values harms equally in both the standard of reasonable care and the compensatory damages remedy, a fully aligned negligence rule is limited to the single instrument of the compensatory damages remedy to control the two conflicting variables of injury compensation and precautionary behavior. The resultant insurance-safety tradeoff does not exist under the misaligned negligence rule. When the elements are misaligned, the negligence rule provides two instruments for regulating these two conflicting variables: any insurance inefficiencies could be handled by the limitation of liability as a matter of proximate cause, with precautionary behavior being governed by a separate instrument—the duty to exercise reasonable care enforced with both compensatory and punitive damages. The two-instrument formulation can attain first-best efficiency, whereas the single-instrument formulation is plagued by the insurance-safety tradeoff and can only attain the second-best (relatively inefficient) outcome that minimizes the inefficiencies inherent in this tradeoff. This conclusion suggests that Professor Porat is incorrect when he claims that "misalignment should ring a warning bell that the law is probably inefficient and should be modified." Porat, *supra* note 3, at 85.

104. *Palsgraf*, 162 N.E. at 99-101.

105. *See supra* note 32 (describing the central elements of the debate).

106. WHITE, *supra* note 95, at 97.

107. *See supra* notes 33-40 and accompanying text.

108. *See* William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 9-10 (1953) ("Wisconsin, New Mexico, Georgia, New Hampshire, and Maryland all have followed *Palsgraf* in holding that a plaintiff who is himself in a position of safety cannot recover for mental shock and injury brought about by the sight of harm or peril to another person, or to property, within the danger zone." (citations omitted)).

109. *Palsgraf* was decided during a pivotal period when tort scholars like Leon Green were working out the relation between duty and proximate cause, and then-Judge Cardozo was

By limiting duty, courts have formulated the negligence rule in a fundamentally inefficient manner. In general, the total social cost of accidents includes physical harms, stand-alone emotional harms, and at least some forms of pure economic loss.[110] For risky conduct threatening each type of harm, the allocatively efficient first-best amount of care (B^*) requires any precaution with a burden less than the associated reduction in the total social cost of injury:

$$B^* < PL_{\text{physical harm}} + PL_{\text{emotional harm}} + PL_{\text{economic loss}}$$

The standard of reasonable care under current law, however, does not consider the total social cost of accidents. Leaving aside exceptional cases, risky actors have no duty with respect to stand-alone emotional harms and pure economic loss. Dutyholders are not obligated to exercise reasonable care with respect to these risks, resulting in a negligence standard that is largely limited to the foreseeable risk of physical harm:

$$B < PL_{\text{physical harm}}$$

This limited duty will ordinarily require precautions that are less than the first-best efficient amount ($B < B^*$).

This inefficiency in the standard of reasonable care did not inhere in the bilateral structure of liability that the modern tort system inherited from the writ system. The existence of duty in tort law is a "historical accident" of the

well aware of these issues when he penned the *Palsgraf* opinion. *See id*. at 4-5. The role that *Palsgraf* has played in the development of limited-duty rules is largely ignored by the ongoing debate over the importance and meaning of the case. *See* discussion *supra* note 32 (describing the "canonical" elements of the debate). As a doctrinal matter, however, following *Palsgraf* an "overwhelming" number of jurisdictions limit duty on the basis of plaintiff-foreseeability. Cardi, *supra* note 32, at 1 (describing results from an extensive survey of the case law).

110. Some forms of pure economic loss like lost profits may not be social costs but instead could be an individual loss that is fully offset by another's gain. *See* W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 1 (1982). However, not all forms of economic loss can be characterized in this manner. Medical monitoring claims, for example, seek recovery for the financial costs of diagnostic treatment for physically noninjured plaintiffs who are at risk of suffering physical harm (like cancer). These claims, which involve a form of pure economic loss, have been denied by a number of courts. *See* D. Scott Aberson, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WM. MITCHELL L. REV. 1095, 1114 (2006). Although courts are sharply divided on the issue of whether these damages should be recoverable, *see id.*, there is no question that medical monitoring is a social cost that ought to be included within the duty for purposes of efficiency analysis. At least some forms of pure economic loss, therefore, contribute to the total social cost of accidents.

English common law.[111] In developing this new element, courts could have misaligned the elements, with duty requiring the first-best efficient amount of care and the element of proximate cause then limiting liability for the general class of cases in which tort compensation would be inefficient. Instead of taking that approach, *Palsgraf* and subsequent courts have inefficiently formulated the element of duty so that it excludes important categories of accident costs from the standard of reasonable care. Courts had a choice about the matter, and they chose an inefficient formulation of duty.

Because the principle of misalignment shows that courts could have formulated the negligence rule to attain maximal or first-best efficiency, their failure to do so creates a problem for the efficiency interpretation that has not been previously recognized. Others have argued that any limitation of duty is inefficient for essentially the same reason that any other limitation of liability could be inefficient: it reduces the financial incentive for dutyholders to take costly precautions that would avoid those injuries for which the dutyholders are not financially responsible.[112] This argument assumes that dutyholders must be subject to liability for compensatory damages for any given injury in order for them to have an adequate financial incentive to exercise the efficient amount of care with respect to that injury. As previously established, however, the threat of punitive damages and criminal negligence liability makes it possible for courts to fully enforce a duty to exercise reasonable care governing risks (such as premature death) for which the injury in question is not compensable by the damages remedy.[113] A limitation of liability, therefore, does not necessarily undermine the financial incentive for complying with the duty to exercise reasonable care. The inherent inefficiency of a limited duty instead pertains to its omission of social costs from the calculus of reasonable care, effectively foreclosing any inquiry into the amount of care required by allocative efficiency. The principle of misalignment shows that courts have formulated the negligence rule in a fundamentally inefficient manner.

This inefficient choice is a substantial piece of evidence tending to disprove the descriptive claim "that the common law of torts is best explained as if

111. Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 66 (1934).

112. COLEMAN, *supra* note 8, at 23 (arguing that "[i]f 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"); *see also* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 47-48 (1998) (arguing that duty is limited by a requirement of "substantive standing," and that "[i]f the point of tort law is to internalize externalities, the law should be imposing liability even where substantive standing is lacking").

113. *See supra* notes 74-80 and accompanying text.

judges who created the law . . . were trying to promote efficient resource allocation."[114] A comparison of total social costs and total social benefits is obviously required by any effort to allocate scarce resources in an efficient manner. So, too, this efficiency calculus is obviously skewed by rules excluding a considerable number of social harms from the comparative exercise. Indeed, courts have also excluded an obvious social benefit from the duty—the manner in which the dutyholder's exercise of care reduces the risk of self-injury.[115] Courts have formulated duty so that the negligence calculus fundamentally diverges from the efficiency calculus.

Given the dominant role of negligence liability within the tort system, this development would seem to defeat the efficiency interpretation of tort law. The principle of misalignment is easily justified by a norm of allocative efficiency. A tort system that is concerned about the promotion of allocative efficiency, however, would rely on misalignment to a far greater extent than has been recognized by negligence law. Even when the negligence rule misaligns the elements, it often does so inefficiently. At least two significant instances of misalignment, involving the absence of liability for the imposition of tortious risk (or "probabilistic recovery") and the failure to reduce damages by offsetting risks, cannot be squared with the concern for efficiency.[116] The most important rule of tort law did not evolve during the twentieth century in the manner predicted by the efficiency interpretation.

B. Corrective Justice

In response to the efficiency interpretation of tort law, a number of scholars have argued that tort law is best understood as a form of corrective justice. Under the principle of corrective justice, tort liability must be justified solely in terms of individual rights and their correlative duties.[117]

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114. LANDES & POSNER, *supra* note 8, at 1.

115. *See* Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*, 29 J. LEGAL STUD. 19, 19 (2000) ("As applied by courts, the Hand Rule balances the injurer's burden of precaution and the victims' reduction in risk. In this application, risk to oneself does not increase the duty owed to others. Economists, however, use the Hand Rule to minimize social costs, which requires balancing the burden of precaution against the reduction in risk to everyone. For economists, risk to oneself counts in determining the duty owed to others.").

116. *See* Porat, *supra* note 3, at 108-23. Another example is provided by the misalignment pertaining to the risk of self-injury faced by the dutyholder. *See id.* at 129-33; *supra* note 115 and accompanying text.

117. *E.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 65-66 (1995).

The principle of misalignment can justify the type of prohibition that is constitutive of an individual right to physical security. As Jules Coleman and Jody Kraus have observed, "It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?"[118] A forced transfer of this type is foreclosed by a misaligned negligence rule that places a higher valuation of harm within the standard of care than within the damages remedy, thereby prohibiting dutyholders from unilaterally forcing a transfer of the right by choosing to substitute the (lower-valued) payment of compensatory damages (a "price set by third parties"—the courts) in place of the (higher-valued) duty to exercise reasonable care. The principle of misalignment undergirds the type of prohibition that is constitutive of an individual right to physical security.

Due to the principle of misalignment, the individual right or entitlement protected by the negligence rule is not fully constituted by a liability rule (the subject of Coleman and Kraus's observation), but instead is best described as a behavioral rule that primarily obligates the dutyholder to exercise reasonable care.[119] For this reason, however, the principle of misalignment is not necessarily a matter of corrective justice.

According to Coleman:

> Corrective justice claims that when someone has wronged another to whom he owes a duty of care, he thereby incurs a duty of repair. This means that corrective justice is an account of the second-order duty of repair. *Someone* does not incur a second-order duty of repair unless he has failed to discharge some first-order duty. However, the relevant first-order duties are not themselves duties of corrective justice. Thus, while corrective justice presupposes some account of what the relevant first-order duties are, it does not pretend to provide an account of them.[120]

Insofar as corrective justice is a principle that only governs the second-order duty of repair—the payment of compensatory damages—it has no evident

118. Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338-39 (1986).

119. *See generally* Mark A. Geistfeld, *Tort Law and the Inherent Limitations of Monetary Exchange: Property Rules, Liability Rules, and the Negligence Rule*, 4 J. TORT L., no. 1, art. 4 (2011), http://www.bepress.com/jtl/vol4/iss1/art4 (arguing that as a consequence of misalignment, the negligence rule is neither a property rule, liability rule, nor any combination thereof, but instead is best described as a behavioral rule).

120. COLEMAN, *supra* note 8, at 32.

connection to the first-order or primary duty of reasonable care. The relation between these two elements is addressed by the principle of misalignment, making it unclear how corrective justice relates to misalignment.

Indeed, the misaligned negligence rule would seem to make corrective justice relatively unimportant. If the demands of corrective justice are fully satisfied by the payment of compensatory damages (or satisfaction of the second-order duty), then what explains why a defendant with the requisite "bad state of mind" can still incur liability for punitive damages and even criminal liability? In these cases, the defendant's payment of compensatory damages is a form of corrective justice, and yet there is still something wrong about the defendant's conduct that merits a punitive response. An account of corrective justice that is limited to the second-order duty of repair, therefore, can only explain the practice of awarding compensatory damages without otherwise explaining the primary duty of care and the extracompensatory remedies that enforce it—the core feature of the misaligned negligence rule.[121]

By underscoring the inherent inadequacy of the compensatory damages remedy, the principle of misalignment shows that the negligence rule primarily values the prevention of injury. Some accounts of corrective justice have addressed the first-order duty of care, but these formulations deny that deterrence is an aspect of corrective justice.[122] For reasons highlighted by the principle of misalignment, any rights-based rationale for tort liability will be lacking unless it can explain why the negligence rule primarily values the prevention of injury as opposed to the compensation of injuries with the damages remedy.

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121. *See* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 711-12, 724 (2003) (identifying these problems and concluding that any effort to explain tort law entirely in terms of the second-order duty to pay compensatory damages is merely to "explain the law by reference to the functions it serves [the enforcement of the second-order remedial right], without actually laying bare the concepts that are deployed within the law"). To explain punitive damages, the corrective justice account must move beyond the compensatory damages remedy, which can be done for reasons I give in the next Section. For alternative corrective justice accounts that seek to explain punitive damages in relation to a limitation of the compensatory damages remedy, see ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 152 (1999); and Amir Nezar, Note, *Reconciling Punitive Damages to Corrective Justice via Tort Law's Moral Accounting Interest*, 121 YALE L.J. (forthcoming 2011).

122. *See* RIPSTEIN, *supra* note 121, at 11-12 (arguing that deterrence is only of "secondary concern" to corrective justice because it is "derivative[]" of the retrospectively set remedies required by corrective justice); Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 625 (2002) (arguing that a function of deterrence, "which comes on the scene after the wrong has been defined," is "not inconsistent" with corrective justice but is also "not part of corrective justice either").

C. Misalignment and Compensation

The misaligned negligence rule primarily values the exercise of reasonable care, and that first-order duty would be a form of corrective justice if the exercise of reasonable care were to involve the satisfaction of a compensatory obligation. By satisfying such an obligation, the dutyholder's reasonable conduct would be correctively just vis-à-vis the rightholder. A compensatory tort right, however, would seem to entail a rule of strict liability, but for reasons revealed by the principle of misalignment, the default rule of negligence liability can be derived from a compensatory norm. The principle of misalignment shows why tort law can be interpreted in terms of a compensatory norm that extends the principle of corrective justice to the first-order or primary duty of care, the core feature of the negligence rule.

The first American treatise on tort law was written by Francis Hilliard in the mid-nineteenth century, and he described the "nature" of tort liability in compensatory terms: "The liability to make reparation for an injury is said to rest upon *an original moral duty*, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another."[123] This form of responsibility is expressed by the common law maxim *sic utere tuo ut alienum non laedas*—use your own so as not to injure another.[124] The maxim locates the compensatory duty in the fact of injury-causing conduct rather than the unreasonableness of the injurer's behavior, and so it has frequently been invoked by courts and commentators to justify rules of strict liability.[125]

This form of responsibility is also recognized by the *Restatement (Third) of Torts*, which justifies strict liability in terms of a

123. 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 84 (Boston, Little, Brown & Co. 2d ed. 1861) (footnotes omitted); *see also* WHITE, *supra* note 95, at 3 & n.2 (identifying the first edition of Hilliard's treatise as the "first American treatise on Torts").

124. The maxim literally means, "Use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1238 (5th ed. 1979). As applied to risky behavior not involving the use of property, the maxim yields a common law principle that "under the common law a man acts at his peril." HOLMES, *supra* note 14, at 76 (emphasis omitted) (stating that "some of the greatest common-law authorities" held this view).

125. *See, e.g.*, Perkins v. F.I.E. Corp., 762 F.2d 1250, 1256-57 (5th Cir. 1985) (noting that under Louisiana law, the *sic utere* maxim is the basis for the rule of strict liability governing ultrahazardous activities); Commonwealth *ex rel.* Att'y Gen. v. Russell, 33 A. 709, 711 (Pa. 1896) ("'Sic utere tuo non alienum laedas' expresses a moral obligation that grows out of the mere fact of membership in civil society. In many instances it has been applied as a measure of civil obligation, enforceable at law among those whose interests are conflicting.").

> position [that] resonates deeply in public attitudes: if the person in the street is asked whether a party should be liable for injuries that the party causes, the person's answer is likely to be affirmative. These perceptions and attitudes can be easily explained: when a person voluntarily acts and in doing so secures the desired benefits of that action, the person should in fairness bear responsibility for the harms the actions cause.[126]

The principle of outcome responsibility—that a defendant can be legally responsible for having foreseeably caused physical harm to another, regardless of personal fault or blameworthiness—has also been recognized by other legal systems. For example, one legal scholar has concluded that liability based on outcome responsibility "is an old, fundamental element of European private law."[127]

More generally, outcome responsibility accords with the formulation of liberal egalitarianism in terms of an abstract principle that "[t]reating people with equal concern requires that people pay for the costs of their own choices."[128] One who chooses to impose a foreseeable risk of physical harm on another can be required to pay for the cost of that choice, yielding a compensatory tort obligation that does not require personal fault or blameworthiness.

The difficulty with this rationale for tort liability, of course, is that rules of strict liability are exceptional—the default rule of tort law is one of negligence liability. Nevertheless, the connection between such a compensatory norm and negligence liability is clearly drawn by Hilliard's mid-nineteenth-century torts treatise: "Upon this principle [to use your own so as not to injure another], the action of *trespass on the case* lies, in general, where one man sustains an injury by the misconduct or negligence of another, for which the law has provided no

126. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. f (2010); *see also* Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 118 (1924) ("The concept universal among all primitive men, that an injury should be paid for by him who causes it, irrespective of the moral or social quality of his conduct, . . . still dominates the opinion of the sort of men who form the average jury.").

127. Nils Jansen, *Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability*, 24 OXFORD J. LEGAL STUD. 443, 443, 469 (2004) (arguing that liability based on outcome responsibility, as opposed to blameworthiness, "is constitutive for the modern European law of extracontractual liability").

128. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 74 (2002). For a good example, see DWORKIN, *supra* note 87, at 76, which explains why "equality of resources requires that people pay the true cost of the lives they lead . . . ."

other adequate remedy."[129] Hilliard's reference to the absence of an "adequate remedy" can be considered in relation to the problem of an irreparable injury or one that cannot be adequately remedied by compensatory damages. To address the problem of irreparable injury, a compensatory norm utilizes the misaligned negligence rule as the default rule of tort liability.

The rule of strict liability does not adequately address the problem of irreparable injury for reasons established by the principle of misalignment. Under a rule of strict liability, the risks governed by the duty are necessarily fully aligned with the harms for which the dutyholder is strictly liable.[130] As we have found, the full alignment of elements renders the liability rule incapable of adequately responding to the problem of irreparable injury.[131] This problem is addressed by misaligning the elements, yielding negligence liability as the default tort rule governing accidental harms.

To see why, consider how strict liability responds to the problem of an irreparable injury such as premature death. Aside from the obligation to pay compensatory damages, the strictly liable dutyholder incurs no behavioral tort obligations.[132] In deciding how to behave, a self-interested dutyholder rationally takes any safety precaution with a burden (B) costing less than the expected liability costs that she would otherwise face by creating the risk (the amount of compensatory damages D discounted by the probability of accident P). For a fatal risk, the dutyholder is not obligated to pay any compensatory damages for the decedent's loss of life's pleasures ($D = 0$).[133] The self-interested dutyholder will ignore these risks in deciding how safely to behave, reducing and potentially eliminating her incentives for taking costly

129. HILLIARD, *supra* note 123, at 84.

130. *See supra* notes 3-4 and accompanying text (explaining why a rule of strict liability necessarily values harms equally within the elements of duty and damages).

131. *See supra* Section II.B.

132. To be sure, a strictly liable defendant can act in a manner that merits punitive damages. *See* Owens-Ill., Inc. v. Zenobia, 601 A.2d 633 (Md. 1992) (upholding punitive damage awards for products liability claims based solely on strict liability). However, the punitive award is not merited by the mere fact that the conduct subject to strict liability (such as the sale of a defective product) proximately caused the plaintiff's injury. *See id.* at 653 (following the majority rule by requiring proof of "actual malice" to justify an award of punitive damages in a product case). Indeed, proof of ordinary negligence does not support a claim for punitive damages. *See supra* notes 77-80 and accompanying text. Consequently, the additional proof required to support a claim for punitive damages, such as actual malice or deliberate indifference, would necessarily establish ordinary negligence liability in addition to strict liability. The claim of strict liability does no independent work in these cases, and so in this respect strict liability entails no behavioral tort obligation beyond the duty to pay compensatory damages.

133. *See supra* note 45 and accompanying text.

precautions that would reduce the risk of a fatal accident ($B > P \bullet D = 0$). The dutyholder will act in a similar manner when creating risks that threaten injuries to rightholders with little or no wealth. For each type of case, the compensatory damages remedy (D) is substantially lower than the social valuation of the loss (L). To solve this problem, the dutyholder must incur a behavioral obligation based on the social valuation of loss and not merely the compensatory damages remedy. This solution yields a default rule of negligence liability that does not merely price risky behavior in terms of the dutyholder's expected liability for compensatory damages, but rather utilizes a suite of deterrence mechanisms to enforce the primary duty to exercise reasonable care (B ® PL). The misalignment of elements characteristic of negligence liability directly responds to the problem of irreparable injury within a compensatory tort system.

Instead of limiting the compensatory obligation to the payment of compensatory damages, the misaligned negligence rule locates the compensatory obligation in the standard of reasonable care. A dutyholder's compensatory obligation can be defined by the burden that she would incur under ideal compensatory conditions. This compensatory obligation, in turn, can determine the amount of care required by the negligence rule.[134]

Under ideal compensatory conditions, there are no irreparable injuries. An injured rightholder could always be fully compensated by the compensatory damages remedy ($D = L$), and so a compensatory tort system would rely on strict liability. Dutyholders would rationally make safety decisions to reduce their total cost of care (the term B) and expected liabilities ($PD = PL$), leading them to voluntarily take the cost-justified safety precautions expressed by the economic version of the Hand formula, $B < PL = PD$. The total burden of the dutyholder's compensatory obligation, therefore, equals these economically cost-justified precautionary expenditures in addition to the expected liabilities for the reparable injuries caused by the remaining or residual risks.

Total Burden of Compensatory Obligation = Cost-Justified Precautions + Fully Compensatory Damages

Contrary to this ideal compensatory world, rightholders routinely suffer irreparable injuries. The compensatory damages remedy does not fully compensate the irreparable injuries of bodily harm and damage to tangible or

134. For a more rigorous demonstration of the following argument, see Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114 (2001), which explains why injuries that are monetized in terms of the rightholder's willingness to accept the risk produce a windfall for dutyholders that can be fully offset by a standard of care set above the cost-minimizing amount.

real property, explaining why tort law does not employ a general rule of strict liability but instead relies on the default rule of negligence liability. The ensuing duty to exercise reasonable care can be derived from the dutyholder's compensatory obligation as defined above.

If tort law formulated the standard of reasonable care as a matter of economically cost-justified safety precautions, dutyholders would not incur their full compensatory obligations to rightholders. A dutyholder would spend the same amount of resources on safety precautions as under ideal compensatory conditions (the rule of strict liability in a world without irreparable injuries) but would not have to pay the rightholder for the loss of life's pleasures in the event of a fatal accident ($D < L$). The economically cost-justified standard of reasonable care, therefore, requires a dutyholder to expend fewer resources than required by the compensatory tort right.

Compensatory Obligation > Cost-Justified Precautions + Limited Compensatory Damages

To eliminate this windfall, tort law can require the dutyholder to expend those resources on injury prevention.

Compensatory Obligation = Precautions Exceeding Cost-Justified Amount + Limited Compensatory Damages

The added safety expenditures exceed the amount required by an economic cost-benefit analysis, but reduce risk when the duty to exercise reasonable care is also enforced by punitive damages and criminal negligence liability in cases of reprehensible, bad-faith breach. The rationale for requiring these added safety expenditures is not obscure. Dollar for dollar, the prevention of premature death and other irreparable injuries provides better protection of the rightholder's interest in physical security than does an award of monetary damages.

Consistent with this reasoning, empirical studies have found that judges and jurors interpret reasonable care as requiring safety precautions in excess of the economically cost-justified amount when the risky conduct threatens serious bodily harm.[135] Such a demanding standard of reasonable care offsets the inherent limitations of the compensatory damages remedy, thereby coherently linking the elements of negligence liability, even though the amount of compensatory damages is misaligned with the legal valuation of the rightholder's protected interest in physical security.

135. *See supra* note 25 and accompanying text.

So conceptualized, the two factors addressed by the standard of reasonable care (the burden of precaution *B* and the associated risk of injury *PL*) are proportional to a norm of compensation in a manner that varies across cases, the type of standard that is currently employed by the tort system.[136] For reasons just discussed, the prevention of injury has greater weight in some cases, requiring precautions in excess of the economically cost-justified amount. In other cases, the compensatory norm requires the economically cost-justified standard of reasonable care as per the Hand formula. Important examples include cases involving parties in a contractual relationship (as in products liability) or reciprocally situated parties who as an objective matter are simultaneously and equally rightholders and dutyholders vis-à-vis each other (like automobile drivers).[137] In both contexts, rightholders effectively pay for the burden of the tort obligation (either through higher contract prices or in their role as reciprocally situated dutyholders). When a rightholder both pays for and benefits from the tort duty, the compensatory norm translates into a concern for protecting the rightholder's full set of interests (encompassing both the *B* and *PL* terms in the standard of reasonable care), thereby justifying the formulation of reasonable care that minimizes costs for the rightholder ($B < PL$). Different types of risky interactions create different types of compensatory problems that in turn affect the appropriate formulation of reasonable care.

When the standard of reasonable care is derived from a compensatory obligation, the exercise of reasonable care can be a form of corrective justice. "[C]orrective justice is a general moral principle that is concerned . . . with repairing harm."[138] An irreparable injury, however, cannot be adequately repaired by the damages remedy. To adequately repair or compensate rightholders for an irreparable injury, tort law instead imposes a primary obligation on risky actors to exercise reasonable care. The standard of reasonable care can be derived from a compensatory obligation while also comporting with the common meaning of compensation as "something that counterbalances or makes up for an undesirable or unwelcome state of

136. *See supra* notes 18-28 and accompanying text.

137. *See* GEISTFELD, *supra* note 22, at 191-204; *see also* Mark A. Geistfeld, *Efficiency, Fairness, and the Economic Analysis of Tort Law*, *in* THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 234 (Mark D. White ed., 2009) (showing that an allocatively inefficient compensatory tort right satisfies the relevant requirements of modern welfare economics, including the Pareto principle).

138. Perry, *supra* note 86, at 237.

affairs."[139] So conceptualized, the exercise of reasonable care satisfies a compensatory obligation, making it a form of corrective justice.[140]

For example, an automobile driver cannot ordinarily pay compensation to a pedestrian prior to their risky interaction, and in the event that the pedestrian is killed in an accident, the driver cannot provide ex post compensation with the damages remedy. The only way to prevent this corrective injustice is to give the pedestrian rightholder the compensation to which she is entitled. Tort law does so by requiring the dutyholder to exercise reasonable care. The duty of reasonable care specifies required forms of precautionary behavior that would prevent the rightholder from suffering injury in the first instance. As explained above, this precautionary burden can be specified in a manner that equals the total burden that the dutyholder would otherwise incur under ideal conditions of full compensation. Thus, under the negligence rule, the dutyholder can satisfy the compensatory obligation by incurring these expenses through the exercise of reasonable care that directly protects the rightholder's interest in physical security. The exercise of reasonable care can be a form of corrective justice.

The principle of misalignment accordingly reveals the immanent logic of a compensatory rationale for negligence liability that does not limit the principle of corrective justice to the second-order duty to pay compensatory damages. Instead of foreclosing the corrective justice interpretation, the principle of misalignment shows how it can be reoriented to explain why tort law is primarily concerned with the prevention of injury as opposed to the redress of injuries with the compensatory damages remedy.

CONCLUSION

Based on the ordering of the elements in a negligence claim, it is seemingly straightforward to evaluate the negligence rule by considering the legal basis for the obligation (duty), the substantive nature of that obligation (the exercise of reasonable care), and the appropriate relation between a breach of that duty and the remedy (the element of proximate cause aligning the breached duty with the final element of compensatory damages). The remedy comes last and seems to have been fully entailed by the elements that have preceded it, making it conceptually uninteresting.

139. THE NEW OXFORD AMERICAN DICTIONARY 347 (2d ed. 2005).

140. *Cf.* Perry, *supra* note 86, at 237 (stating that corrective justice "protects a legitimate entitlement because interference with the entitlement harms the entitlement-holder").

This mode of analysis misses an important attribute of negligence liability, perhaps the most important one. The legal valuation of harm for purposes of reasonable care differs from the monetization of injury for purposes of compensatory damages. The misalignment of these elements is based on the principle that an irreparable injury cannot be adequately redressed by the compensatory damages remedy, a problem that is wholly obvious when considered in relation to accidents involving wrongful death. Having recognized the inherent inadequacy of the compensatory damages remedy in cases of physical harm, one is then forced to reconsider the nature of the duty and its substantive obligations. Insofar as the inadequacy of the remedy can be offset by a revision of the substantive duty, the elements will be misaligned. So conceptualized, the substantive basis of liability depends on the inefficacy of the compensatory damages remedy, an attribute of negligence liability that cannot be captured by the mode of analysis that logically follows from the ordering of elements.

The principle of misalignment, of course, does not completely sever the relationship between the elements of duty and compensatory damages. Unless the constituent elements of a tort coherently work together, the tort will be incoherent or unprincipled in application. Hence it should be no surprise that negligence law partially aligns the elements of damages and duty, limiting the compensatory damages remedy to only those harms that are positively valued by the duty.[141]

As a matter of coherence, the amount of care required by the duty is also related to the amount of harm in question.[142] That relation, however, does not imply that the elements must be fully aligned in the sense that the negligence rule must equally value harm across the elements, giving dutyholders the option to pay compensatory damages instead of complying with the equally valued duty to exercise reasonable care.

For example, I have long argued that the method for determining compensatory damages for pain and suffering would be substantially improved if it were expressly defined in terms of the safety decision required by the primary duty.[143] This formulation, however, would not yield damages awards

141. *See supra* Part I.

142. *See supra* notes 28-29 and accompanying text.

143. This method for monetizing a pain-and-suffering injury relies on established economic methodology commonly employed by federal administrative agencies in devising regulations for the protection of human health and safety. *See* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 796-803 (1995) (developing this approach and showing that it satisfies the relevant tort requirements pertaining to the calculation of damage awards). If

that equal the valuation of injury within the duty to exercise reasonable care. For example, a rightholder might be willing to accept $10 to face a 1-in-100,000 risk of being badly burned by the activity in question, yielding an implicit monetization of $1 million for the burn injury in that particular context.[144] If that context corresponds to the type of safety decision contemplated by the duty, then $1 million is the appropriate measure of the burn injury to employ within the duty with respect to that particular safety decision. If the duty to take that safety precaution is breached in a nonreprehensible manner, then my claim is that $1 million also provides a defensible measure of compensatory damages for the burn injury. Nevertheless, the legal valuation of the burn injury is not equivalent across the elements of duty and damages. Obviously, a dutyholder cannot choose to forgo this duty and intentionally burn a rightholder in exchange for the payment of $1 million compensatory damages for the injury in a tort suit. When faced with that type of exposure, the rightholder might not accept any amount of money, yielding an implicit valuation of infinity for the injury. As illustrated by this extreme example, the $1 million monetization of the injury within the duty depends on the amount and nature of the risk, context-dependent factors that change once the duty has been breached (and the risk of injury increased under nonconsensual conditions). The issue of what one must do to comply with a duty fundamentally differs from the issue of how a court should redress a breach of that duty in a tort suit, severing any necessary equivalency between the valuation of harm within the duty and the compensatory damages remedy. The valuation of injury within the duty (such as the $1 million figure) can be inadequate when employed within the compensatory damages measure (as in cases of reprehensible breaches), which is why the legal valuation of harm within the duty can exceed the valuation of harm within the damages remedy.

juries determined compensatory damages in this manner, the awards would be based on the safety decision required by the tort right. *See* Mark A. Geistfeld, *Due Process and the Determination of Pain and Suffering Tort Damages*, 55 DEPAUL L. REV. 331, 347-57 (2006).

144. Because $10 is the lowest amount of money the rightholder would accept to face the risk, she must be indifferent between receiving the $10 or otherwise facing the risk and incurring the expected injury cost of the pain and suffering:

$$\$10 = P \bullet L_{\text{noneconomic|physical}}$$
$$\$10 = (1/100{,}000) \bullet L_{\text{noneconomic|physical}}$$
$$\$1{,}000{,}000 = L_{\text{noneconomic|physical}}$$

Thus, in evaluating the safety decision required by the tort duty, the rightholder would monetize this particular pain-and-suffering injury at $1 million. (The cost of risk aversion is impounded in the $10 figure, so the problem can be solved without express consideration of the individual's utility function.)

The resultant misalignment of the elements within the negligence rule has implications for the substantive nature of tort liability. In addition to undermining the claim that tort law can be plausibly described as furthering a welfarist norm of allocative efficiency, the principle of misalignment shows why the negligence rule can be derived from a compensatory norm, one that gives much-needed content to the corrective justice account of tort law. A compensatory rationale for tort liability would seem to be contradicted by the various ways in which tort law limits the availability of compensatory damages, explaining why tort scholars have summarily dismissed this interpretation. But as I have shown at length elsewhere, a norm of compensation can describe and justify the important doctrines and practices of tort law.[145] In a world of irreparable injuries and scarce resources, the varied limitations of tort liability can all be understood in relation to a norm of compensation. The misaligned negligence rule fully illustrates the logic of a compensatory rationale for tort liability.

For reasons identified by the principle of misalignment, a compensatory tort right is not adequately protected by the compensatory damages remedy. The substantive basis of liability accordingly depends on the inefficacy of the compensatory damages remedy, yielding a misaligned negligence rule that can require a dutyholder to satisfy the compensatory obligation through the exercise of reasonable care. This reasoning explains why courts and commentators routinely discuss negligence liability in compensatory terms.[146] As one court explained while interpreting a wrongful death statute, "[u]nder modern tort theory, the primary reason for the existence of a cause of action is to provide a means of compensation for the injured victim."[147] The court then quoted Oliver Wendell Holmes, the intellectual architect of modern tort law:

145. *See generally* GEISTFELD, *supra* note 22, at 81-377 (developing a conception of the compensatory tort right and showing how it can explain the important doctrines and practices of tort law, including negligence liability and the other important limitations of liability).

146. *See* KEETON ET AL., *supra* note 19, § 85 (stating that the "Principles of Compensation in American Legal Systems" include both the "fault principle" embodied in negligence liability and the "strict accountability principle" embodied in rules of strict liability); WHITE, *supra* note 95, at 149, 176 (describing the mid-twentieth-century "consensus" conception of tort liability as a "compensation system").

147. Thompson v. Estate of Petroff, 319 N.W.2d 400, 405 (Minn. 1982). In this case, the court was interpreting a statutory provision that permits a tort action to survive the death of the dutyholder, but wrongful death statutes typically encompass these claims in addition to those involving compensation for the violation of the decedent's tort right. *See, e.g.*, *id.* at 403 ("Our original survival statute . . . provided that a cause of action arising out of injury to the person died with the person of either party except as provided in the wrongful death act." (quoting Lavalle v. Kaupp, 61 N.W.2d 228, 229 (Minn. 1953))).

"[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms."[148] Rather than departing from such a norm of compensation, the misaligned negligence rule instantiates it.

148. *Id.* (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 115 (M. Howe ed., 1963) (1881)).