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TORT LAW AND THE INHERENT LIMITATIONS OF MONETARY EXCHANGE: PROPERTY RULES, LIABILITY RULES, AND THE NEGLIGENCE RULE

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Abstract

Legal scholars have extensively analyzed legal entitlements in terms of more fundamental component parts, most notably with the remedial structures entailed by property and liability rules. Contrary to the claim made by some scholars, I argue that the negligence entitlement is not fully constituted by property rules, liability rules, or any combination thereof. The entitlement that generates the negligence rule, though partially constituted by both property and liability rules, is best described as a behavioral rule that obligates duty-holders to exercise reasonable care. The breach of this primary duty creates a second-order duty to pay compensation for the proximately caused physical harms, but the payment of compensatory damages does not fully exhaust or satisfy the underlying entitlement. This component of the entitlement explains why duty-holders are subject to punitive damages and perhaps even criminal negligence liability if they choose to act unreasonably in exchange for the payment of compensatory damages. The entitlement takes this form due to the inherent inadequacy of the compensatory damages remedy, an inadequacy that is most pronounced in cases of wrongful death but applies more generally to many instances of physical harm. The article concludes by identifying the distinctive features of the negligence entitlement that must be accounted for by any normative theory seeking to adequately explain tort liability, a condition that is not satisfied by prominent interpretations of tort law, including leading accounts based on the fault principle, pluralism, allocative efficiency, and corrective justice. The underlying rationale for tort liability cannot be derived from a structural (non-normative) analysis of entitlements, but the entitlement structure of the negligence rule still has important implications for the normative theory of tort law.

TORT LAW AND THE INHERENT LIMITATIONS OF MONETARY EXCHANGE: PROPERTY RULES, LIABILITY RULES, AND THE NEGLIGENCE RULE

Mark A. Geistfeld[*]

INTRODUCTION

For generations, legal scholars have studied the components and structure of legal entitlements, and for a good reason. Different combinations of fundamental components form different entitlements.[1] The particular combination embodied in any given entitlement depends on the underlying norm or rationale for the legal rule in question. By analyzing the components and structure of a legal entitlement, one might be able to learn something important about the substantive nature of the law in question.

This type of scholarly inquiry began almost a century ago when Wesley N. Hohfeld sought to identify the "common denominators" of all legal entitlements, "the lowest generic conceptions to which any and all 'legal quantities' may be reduced."[2] The Hohfeldian framework, which consists of a set of jural relations such as an individual right and its correlative duty, "has become a staple of academic legal culture."[3]

In perhaps the most important elaboration of this approach, Guido Calabresi and A. Douglas Melamed analyzed how an entitlement is protected by either a property rule, liability rule, or a rule of inalienability.[4] "An entitlement is

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[*] Sheila Lubetsky Birnbaum Professor of Civil Litigation, New York University School of Law. Copyright 2010 Mark A. Geistfeld. All rights reserved. Thanks to Greg Keating for his helpful comments and conversation. This project was supported by the Filomen D'Agostino and Max E. Greenberg Research Fund of the New York University School of Law.

[1] *See generally* Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822 (1993) (deriving a wide variety of different entitlements from a set of fundamental components).

[2] Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 59 (1913).

[3] Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 751 (1980).

[4] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Although Calabresi and Melamed did not expressly relate their analysis to the Hohfeldian framework, the rules they analyzed can be usefully categorized within that framework. *See generally* Morris, *supra*

protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."[5] An entitlement is protected by a liability rule "[w]henever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it,"[6] a determination usually made by a court in an award of compensatory damages. If given the choice, a duty-holder would convert a property rule into a liability rule whenever the right-holder's selling price for the entitlement under the property rule exceeds the amount the duty-holder would be required to pay under a liability rule (a court award of compensatory damages). To maintain the integrity of a property rule, duty-holders must be prohibited from making choices of this type, and so such conduct is subject to other legal sanctions such as injunctions, punitive damages, and criminal liability.[7] Finally, "[a]n entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller."[8] This framework, like Hohfeld's, is a "classic" that has deeply influenced legal scholarship.[9]

Although Calabresi and Melamed considered how their framework applies to tort law, no one has fully analyzed the extent to which it usefully elucidates the negligence rule. The reason may be that the negligence rule cannot be adequately characterized in these terms. A duty-holder who exercises reasonable care avoids negligence liability for any nonconsensual physical harms suffered by the right-holder, enabling one to "take" another's entitlement to bodily security without the need to pay any compensatory damages whatsoever as required by either a liability rule or property rule.[10] For cases in which a duty-holder acts unreasonably, the right-holder is entitled to receive compensatory damages for the ensuing harms in an amount determined by a court—the defining characteristic of a liability rule. But even this aspect of the entitlement is not fully defined by a liability rule. In certain cases, infringement of the entitlement creates claims for injunctive relief, punitive damages, and perhaps even criminal liability—the remedies and sanctions characteristic of a property rule.[11] Negligence is neither a

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note 1 (elaborating upon the Hohfeldian framework and then analyzing the varied entitlements, including permutations of property, liability, and inalienability rules).

[5] Calabresi & Melamed, *supra* note 4, at 1092.

[6] *Id.*

[7] *Id.* at 1124-1126.

[8] *Id.* at 1092.

[9] James E. Krier & Stewart J. Schwab, *The Cathedral at Twenty-Five: Citations and Impressions*, 106 YALE L.J. 2121, 2122 (1997).

[10] *See* Morris, *supra* note 1, at 876-880 (defining the entitlement for non-negligent injury as an "Uncompensated Taking Rule" that importantly differs from either a property or liability rule).

[11] *See infra* Part I.

property rule, liability rule, nor any combination thereof, notwithstanding the contrary claim of some scholars.[12]

What does this conclusion tell us about the substantive content of the tort right? The answer turns on yet another insightful analysis of entitlements. As Jules Coleman and Jody Kraus have decisively shown, it is misleading to conceptualize a property or liability rule as different ways to protect any given entitlement; these rules are instead constitutive elements of the entitlement itself.[13] To establish this claim, Coleman and Kraus more fully develop the analytical conception of a legal entitlement that is constitutive of an individual right. Any such right entails at least some legitimate claims with respect to the individual interests protected by the entitlement. A right to bodily security, for example, is necessarily associated with some enforceable claims regarding the right-holder's interest in bodily security. "The specific content of these claims is a function of the rule—property, liability or inalienability—applied to them. Therefore, we say that property and liability rules specify the content of rights by generating specific legitimate claims from them."[14] Instead of protecting an entitlement, property and liability rules are components of the entitlement that determine the conditions under which it is satisfied or otherwise legitimately transferred from the right-holder to the duty-holder. In other words, property, liability, and inalienability rules define the "transaction structure" of the entitlement.[15]

Once property and liability rules are conceptualized in this manner, their inability to fully describe the negligence rule has interesting implications. No

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[12] According to Louis Kaplow and Steven Shavell, the negligence rule can be defined as a combination of property and liability rules. "[O]ne may view the negligence rule as a hybrid of a property rule granting a partial entitlement to cause harm and a liability rule (strict liability): provided that the injurer exercises due care, he effectively acquires a property rule entitlement to cause harm; only if he fails to take due care does he become liable for harm." Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 753 (1996). Framing the liability-rule component of negligence as a rule of strict liability ignores the role of punitive damages and criminal negligence, each of which is available for cases in which the defendant decides to act unreasonably in exchange for the payment of compensatory damages. *See infra* notes 27-30 and accompanying text. The negligence rule prohibits such behavior, whereas strict liability does not prohibit duty-holders from creating unreasonable risks in exchange for the payment of compensatory damages. The claim that the negligence rule is fully constituted by a combination of liability and property rules, therefore, mistakenly assumes that the liability-rule component of the entitlement functions as a form of strict liability. This mistake is repeated by the conventional economic analysis of tort law. *See infra* notes 61-65 and accompanying text.

[13] Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L. J. 1335 (1986).

[14] *Id*. at 1342-1343.

[15] *Id*.

matter how they are employed, property and liability rules depend on some sort of exchange between the right-holder and duty-holder as the means for satisfaction or transfer of the entitlement. A property rule relies on a consensual transaction between the parties, most abstractly represented by monetary exchange, whereas a liability rule relies on the monetary exchange effectuated by a court award of compensatory damages. If monetary exchange were not sufficient for always satisfying or otherwise transferring the claims of an entitlement, then the transaction structure of the entitlement could not be fully constituted by a property rule, liability rule, or any combination thereof. The transaction structure of the negligence rule has this property, indicating that there is something inherently inadequate about monetary exchange that explains why the negligence entitlement takes this form.

This reasoning is more fully developed in Part I below, which analyzes the entitlement of the negligence rule and shows that its transaction structure is not wholly constituted by property and liability rules. Due to the inherent limitations of monetary exchange, the entitlement is only fully satisfied by the duty-holder's exercise of reasonable care in cases of nonconsensual risky interactions. Although the entitlement is best described as a behavioral rule—one requiring the duty-holder to exercise reasonable care—Part II explains why the negligence entitlement is not necessarily justified by a principle that unreasonable behavior or legal fault is essential to tort liability. The entitlement for the negligence rule is analytically capable of incorporating supplementary rules of strict liability, yielding an entitlement that does not conform to the fault principle. Whether the entitlement should be defined in this manner depends on normative argumentation concerning the appropriate justification for tort liability, not on the analytical characteristics of legal entitlements. Nevertheless, the entitlement analysis has normative relevance for reasons given in Part III. The analysis identifies distinctive features of the negligence entitlement that must be accounted for by any normative theory seeking to adequately explain tort liability, a condition that is not satisfied by prominent interpretations of tort law, including those based on pluralism, allocative efficiency, and corrective justice. The underlying rationale for tort liability cannot be derived from a structural (non-normative) analysis of entitlements, but the entitlement structure of the negligence rule still has important implications for the normative theory of tort law.

I. THE NEGLIGENCE ENTITLEMENT AND THE LIMITS OF MONETARY EXCHANGE

A. The Entitlement Structure of the Negligence Rule

The entitlement for the negligence rule, like any other tort entitlement, is at least partially constituted by a property rule, which utilizes the right-holder's consent to satisfy or otherwise transfer the entitlement. The *prima facie* case for

tort liability requires the absence of consent, and so the right-holder's informed consent turns tortious behavior into socially acceptable behavior.[16] "For example, consent turns trespass into a dinner party; a battery into a handshake; [or] a theft into a gift."[17] As applied to the negligence rule, consent negates the tort duty pursuant to the doctrine of assumed risks, including cases in which the right-holder expressly assumes the risk by contractually agreeing to absolve the duty-holder of negligence liability—the type of exchange contemplated by a property rule.[18] The negation of duty in these cases implies that the right-holder's consent is sufficient to satisfy or otherwise transfer the entitlement, the outcome attained by a property rule. Hence, the negligence rule is generated by an entitlement that is constituted, at least in part, by a property rule.[19]

For various reasons, the negligence entitlement is not wholly constituted by a property rule. The type of voluntary exchange contemplated by a property rule is simply infeasible for wide swaths of risky behavior. For example, the risk of automobile accidents cannot be fully regulated by voluntary exchange because transaction costs ordinarily make it infeasible for duty-holders (drivers) to gain consent for the activity from right-holders (such as other drivers and pedestrians). Lacking consent, the interaction would be prohibited by a property rule (and subject to punitive sanctions), thereby eliminating automobile driving and other risky activities that occur in contexts where transaction costs are prohibitively

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[16] Modern tort law originated with the writ of trespass, and allegations of wrongdoing under that writ "were thought to be inappropriate where the defendant had acted with the consent of the plaintiff." D. J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 41-42 (1999). Modern tort law continues to limit liability to nonconsensual interactions. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 18, at 112 (5th ed. 1984) (explaining why consent "goes to negative the existence of any tort in the first instance"); *see also* DAN B. DOBBS, THE LAW OF TORTS § 95, at 218 (2000) ("In many cases, consent is not a true affirmative defense [to an intentional tort] but instead marks a deficiency in the plaintiff's prima facie case."); *id.* § 212 (explaining why the prima facie case for negligence liability depends on the absence of consent).

[17] Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996).

[18] *See* RESTATEMENT OF THE LAW, TORTS: APPORTIONMENT OF LIABILITY § 2 (2000) (describing the rule governing expressly assumed risks).

[19] To be sure, in many cases tort law does not limit the tort duty based on the right-holder's voluntary consent, but the reason involves the difficulty of reliably determining whether the right-holder had sufficient information and choice with respect to the relevant range of safety alternatives, not because of any inherent inalienability of the tort right. *See* MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 299-310, 323-25 (2008); *see also* Mark A. Geistfeld, *The Value of Consumer Choice in Products Liability*, 74 BROOK. L. REV. 781 (2009) (identifying various doctrines in products liability that appear to disregard informed consumer choice and then explaining why these doctrines can be adequately conceptualized as furthering the value of informed consumer choice). Indeed, if the tort right were inalienable, then a plaintiff presumably would be barred from voluntarily selling a tort claim to the defendant in a settlement.

high. The obvious problems with this outcome readily explain why a property rule does not fully define the transfer structure of the negligence entitlement.

Even when the parties are able to contract with one another, a property rule continues to be an undesirable method for exclusively regulating these risky activities. Such an entitlement would permit a right-holder to restrict the activities of the duty-holder (via injunctive relief) to those forms of behavior that could not harm her. The right-holder could also transfer the entitlement in exchange for money. The demand for payment would not be limited by a norm of compensation, and so the right-holder could extract virtually all of the net benefit that the duty-holder would otherwise derive from the risky behavior. An entitlement with a transaction structure that is wholly defined by a property rule gives the right-holder a one-sided advantage in risky interactions, an outcome that is problematic in various respects and violates at least some specifications of the principle of equality.[20]

By contrast, a liability rule involves a compensatory exchange (in an amount determined by a court) to address the harms suffered by the right-holder, while also enabling the duty-holder to reap the benefits of the risky behavior. The entitlement recognizes the interests of both the right-holder and duty-holder, giving it the capacity to eliminate any one-sided advantage for the right-holder that would otherwise violate the principle of equality.

These reasons explain why the entitlement for the negligence rule is partially constituted by both a property rule and a liability rule. The property-rule component permits the satisfaction or transfer of the entitlement via the right-holder's consent (as recognized by the assumed risk rule). However, consensual exchange is frequently infeasible and otherwise vulnerable to the hold-up problem, and so the negligence rule is also partially constituted by a liability rule. The liability-rule component permits a duty-holder to engage in the risky behavior without the right-holder's consent and subjects the duty-holder to liability for compensatory damages for negligently caused harms. Fully consensual exchange is both desirable in some respects and problematic in others, creating distinctive roles for the property- and liability-rule components of the negligence entitlement.

Having identified these two components of the negligence entitlement, we now need to consider how they can be combined. Recall that liability and property rules define the transaction structure of an entitlement for reasons given by Jules Coleman and Jody Kraus.[21] As they also show, a property rule and liability rule

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[20] *See, e.g.,* GEISTFELD, TORT LAW: THE ESSENTIALS, *supra* note 19, at 94-95 (explaining why tort rules that further the value of individual autonomy would violate the principle of equality if the right-holder's unilateral choices could increase the substantive tort obligations faced by the duty-holder).

[21] *See supra* notes 13-15 and accompanying text.

can be combined in two different ways, depending on the functional role played by a liability rule in the transactional structure.

One form of a liability rule legitimates the transfer, yielding the following entitlement of a combined property and liability rule:

> [E] If the content of *B*'s entitlement is given by both a property and a liability rule, then *B* has two claims: One is to the liberty to seek a transfer through *ex ante* agreement with *A*; the other is to recompense in the event *A* imposes a transfer upon him.[22]

For this entitlement, "[a] claim to repair … does not rest on a right having been invaded, but is instead a condition of a right having been fully respected—of its claims having been fully exhausted."[23] By necessarily exhausting all claims generated by the right, the payment of compensation pursuant to the liability-rule component of the entitlement legitimates the transfer or otherwise fully satisfies the entitlement.

Rather than legitimate a transfer, a liability rule can instead serve as a sanction or remedy for the duty-holder's failure to satisfy the entitlement. When formulated in this manner, the liability rule does not legitimate the transfer, yielding the following entitlement of a combined property and liability rule:

> [E'] If the content of *B*'s entitlement is given by a combination of property and liability rules, then *B* has two legitimate claims: One is to *ex ante* agreement as *both necessary and sufficient* for legitimate transfer; the other is to recompense in the event *A* imposes a transfer on him after either negotiations fail or *A* foregoes them.[24]

Simply put, the difference between the two entitlement forms [E] and [E'] "is just the difference between the claim that conduct is conditionally wrong depending upon the payment of compensation, and the claim that some conduct is wrong, whether or not compensation is paid."[25] Consequently, "it is obvious that the key, but inadequately examined, issue in tort theory is whether liability rules ought to be thought of as they are in [E], as justifying forced transfer, or in [E'], as denying the legitimacy of forced transfer."[26]

For our purposes, the puzzle posed by a comparison of [E] and [E'] is that neither one obviously describes the negligence rule. In the vast majority of cases, a negligent defendant is liable for compensatory damages and nothing more. The absence of punitive damages or injunctive relief could mean that the defendant's breach of the duty to exercise reasonable care is merely a "conditional wrong"

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[22] Coleman & Kraus, *supra* note 13, at 1349.
[23] *Id.* at 1356.
[24] *Id.* at 1350.
[25] *Id.* at 1357.
[26] *Id.*

that is fully remedied by the payment of compensatory damages as per the entitlement [E]. According to this interpretation, the compensatory damages award fully satisfies the plaintiff's tort right, explaining why there are no other claims (punitive damages or injunctive relief) generated by the rights-violation. The problem with this interpretation, of course, is that in *some* cases the rights-violation gives the plaintiff a claim for compensatory damages in addition to punitive damages. The rights-violation could also subject the defendant to liability for criminal negligence. These extracompensatory remedies or sanctions imply that the mere payment of compensatory damages does not always legitimate the rights-violation as per the entitlement [E']. Across the spectrum of cases, it appears that the negligence rule ordinarily takes the form of entitlement [E], while taking the form [E'] in exceptional cases.

This description of the entitlement, however, is superficial; it does not adequately account for the conditions under which the rights-violation generates claims for punitive damages and the like. Doing so clearly shows that the negligence rule is based on an entitlement of the type represented by [E'].

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."[27] For the same cases in which a negligent actor is subject to punitive damages, she can also incur liability for criminal negligence.[28]

These punitive sanctions have decisive implications for the entitlement structure of the negligence rule. A defendant can have the "bad state of mind" required for punitive damages even if she fully expects to pay compensatory damages for having violated the right.[29] The entitlement accordingly prohibits the

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[27] DOBBS, THE LAW OF TORTS, *supra* note 16, at § 381.

[28] "[T]he overwhelming majority of jurisdictions allow crimes based on ordinary negligence." State v. Hazelwood, 946 P.2d 875 (Alaska 1997). 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: "a risk greater than simply an unreasonable risk" and/or "a subjective awareness of the unreasonable risk he [the duty-holder] creates." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.4(a) (2d ed. 2003). These added requirements for criminal liability correspond to those required for purposes of punitive damages.

[29] Perhaps the best example of this rule is Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757 (Cal. 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 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 810. The court then concluded that "[d]eterrence of such 'objectionable corporate policies' serves one of the principal purposes" of punitive damages. *Id.* The court could find the policy to be objectionable only if the defendant manufacturer's willingness to

duty-holder from rejecting the duty to exercise reasonable care in exchange for the payment of compensatory damages, a prohibition that is then enforced with punitive damages and criminal sanctions. In order for the negligence rule to function in this manner, the entitlement must take the form [E'] rather than [E].

This entitlement structure does not require punitive sanctions for each and every rights-violation. Unreasonable risky behavior is often the result of inadvertence, mistake, or even adherence to conventional practices (like exceeding the speed limit on a highway). In these cases, the defendant is not personally blameworthy or culpable, although she nevertheless is subject to negligence liability. Under the negligence rule, the standard of reasonable care is objectively defined by reference to the conduct of the reasonable person—a hypothetical legal construct that does not have to realistically describe the defendant in question. Someone who does not comply with an unrealistic behavioral demand (always pay attention; never make mistakes; never follow customary practices when doing so would be objectively unreasonable) is not personally blameworthy or at "fault" in the colloquial sense, making the objectively defined rule of negligence liability "strict" in this particular way.[30] Without any personal fault, tort law has no basis for punishing the defendant. The negligence rule, therefore, does not need to permit routine claims for punitive sanctions in order to be derived from entitlement structure [E'].

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 harms. The plaintiff's right requires the exercise of reasonable care. By deliberately rejecting

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pay compensatory damages did not absolve it from the obligation to comply with its primary duty to sell a nondefective product.

The court's conclusion in this regard is supported by 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) (citations omitted). The deterrence rationale for punitive damages encompasses all cases in which the defendant's conduct was based on an expectation that it could avoid liability in at least some cases. By implication, a pure retributive rationale for punitive damages can assume that the defendant fully expected to pay compensatory damages. The retributive rationale also presumes that compensatory damages "make the plaintiff whole." Retribution, therefore, must find justification in the defendant's failure to comply with the primary duty of care, which becomes reprehensible when done with the requisite bad state of mind. The reprehensibility of the conduct has nothing to do with the defendant's willingness to pay compensatory damages.

[30] *See* Geistfeld, TORT LAW: THE ESSENTIALS, *supra* note 19, at 95-98 (explaining how the objectively defined negligence rule creates pockets of strict liability and immunity from liability).

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.

Unlike the entitlement [E'], extracompensatory sanctions would *never* be justified by the entitlement structure [E]. Such an entitlement, by definition, is exhausted or fully satisfied by the payment of compensatory damages, and so *any* award of punitive damages cannot be squared with this form of the entitlement. Hence the entitlement structure of the negligence rule most plausibly takes the form [E'].

This conclusion about the entitlement structure of the negligence rule has an important implication. Regardless of the form of unreasonable behavior, the defendant's payment of compensatory damages does not fully satisfy or transfer the plaintiff's tort right for cases in which the plaintiff has not otherwise consented to the risky interaction (as per [E']). The unreasonable conduct is wrong, even though compensatory damages have been paid, and so the entitlement for the negligence rule is structured by reference to some inadequacy of the compensatory damages remedy.[31]

B. The Inherent Limitations of the Compensatory Damages Remedy

The inherent limitations of compensatory damages could not be more obvious once one looks at the most severe type of injury governed by tort law—wrongful death. A tort rule uses the damages remedy to provide redress to the plaintiff for the violation of his or her right, and an award of damages could not compensate a dead right-holder for the premature loss of life.

The manner in which tort law handles the problem of premature death has posed an ongoing puzzle. According to Frederick Pollock's highly influential 1887 treatise:

> This is one of the least rational parts of our law. The common law maxim is *actio personalis moritur cum persona*, or the right of action for tort is put to an end by the death of either party…. At one time it may have been justified by the vindictive and *quasi*-criminal character of suits for civil injuries. A process which is still felt to be a substitute for private war [the "blood feud"] may seem incapable of being continued on behalf of or against a dead man's estate…. But when once the notion of vengeance has

[31] The ensuing analysis of the compensatory damages remedy is largely derived from Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. (forthcoming 2011).

> been put aside, and that of compensation substituted, the rule *actio personalis moritur cum persona* seems to be without plausible ground.[32]

The compensatory rationale for tort liability motivated state legislatures to enact 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.[33] But as Pollock observed, "It is certain that the right of action, or at any rate the right to compensation, given by the statute is not the same which the person killed would have had if he had lived to sue for his injuries."[34] In the event of a fatal accident, the defendant duty-holder does not have to pay damages for the manner in which premature death has caused the decedent right-holder to suffer a loss of life's pleasures.[35] Wrongful-death statutes do not alter the startling fact that it would be "cheaper for the defendant to kill the plaintiff than to injure him."[36] For example, the average jury verdict in New York City from 1984-1993 in a case of wrongful death was over $1 million, whereas the average verdict in a case of brain damage averaged over $3 million.[37] The average award for a herniated disc was over $500,000.[38] 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.

Although Pollock deems this practice to be irrational, 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.[39] Without any evidence showing that a decedent is cognitively aware of her

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[32] FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 52-53 (1887).

[33] *E.g.*, Thompson v. Estate of Petroff, 319 N.W.2d 400, 405 (Minn. 1982) (interpreting Minnesota's wrongful-death statute as furthering the purpose recognized by "modern tort theory," under which "the primary reason for the existence of a cause of action is to provide a means of compensation for the injured victim").

[34] Pollock, *supra* note 32, at 59.

[35] *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, 18-33 (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).

[36] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, *supra* note 16, § 127, at 945. For example, the average jury verdict in New York City from 1984-1993 in a case of wrongful death was over $1 million, whereas the average verdict in a case of brain damage averaged over $3 million. *See* Edward A. Adams, *Venue Crucial to Tort Awards: City Verdicts Depend on Counties*, N.Y.L.J., April 4, 1994, at 1,4.

[37] *See* Edward A. Adams, *Venue Crucial to Tort Awards: City Verdicts Depend on Counties*, N.Y.L.J., April 4, 1994, at 1, 4.

[38] *Id*.

[39] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, *supra* note 16, at 535. *See also, e.g.* Keene v. Brigham & Women's Hosp., Inc., 775 N.E.2d 725, 739 (Mass App. Ct.) (concluding

lost life, tort law has no basis for an award of compensatory damages. "To be sure, 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."[40]

Despite the logic of the common-law approach, it would be irrational as Pollock claimed if the absence of a damages remedy implied that tort law is simply not concerned about a decedent's loss of life's pleasures. Premature death is the most serious setback to a right-holder's interest in physical security, so how could tort law defensibly ignore that harm?

"What may have been the real reason for the establishment of this rule of the common law we may not be able to discover…."[41] Nevertheless, the common law did not plausibly respond to this fundamental issue in such an obviously irrational manner. The more plausible interpretation is that the common law developed liability rules in recognition of this inherent limitation of the compensatory damages remedy.

The inadequacy of the compensatory damages remedy has long been recognized by the common law. In contractual cases or those otherwise involving threatened damage to property interests, the inadequacy of compensatory damages justifies the equitable remedies of injunctive relief or specific performance to prevent an "irreparable injury."[42] 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...."[43] In tort cases, equitable remedies are not ordinarily available for conduct threatening bodily injury.[44] Despite the inadequacy of the compensatory damages remedy, a right-holder typically cannot enjoin duty-holders from engaging in risky activity threatening the irreparable harms of premature death or severe bodily injury; otherwise tort law would effectively shut down large swaths of social interactions involving activities like automobile driving. Unable to rely on equitable relief to address the inherent inadequacy of the compensatory damages

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that there should be no award of damages for loss of enjoyment of life when plaintiff lacks cognitive awareness of his loss), *modified on other grounds*, 786 N.E.2d 824 (Mass. 2003).

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

[41] Grosso v. Delaware, L. & W. R.R., 13 Atl. 233, 235 (N.J. 1888).

[42] *See* Dan B. Dobbs, 2 LAW OF REMEDIES § 2.1(1), at 58; § 2.5(2), at 129-32 (2d ed. 1993).

[43] 3 J. Pomeroy, EQUITY JURISPRUDENCE § 1357, at 389 (1st ed. 1887) (emphasis in original).

[44] *See* Dobbs, LAW OF TORTS, *supra* note 16, §377, at 1047 & n.5 (stating that injunctions are "occasionally available in tort cases" and citing instances involving property interests, dignitary rights, and constitutional rights).

remedy, tort law can still recognize the principle that in cases of irreparable harm the best means of protecting the right involves the *prevention* of such harms by obligating risky actors to exercise reasonable care. Doing so would yield an entitlement to bodily security that cannot be fully satisfied by the duty-holder's payment of compensatory damages, explaining why the resultant entitlement structure for the negligence rule can only be fully satisfied by the right-holder's voluntary consent or the duty-holder's compliance with the primary duty of care—the entitlement structure [E'].

The inadequacy of the compensatory damages remedy is not limited to cases of premature death. In a case of severe bodily injury, compensatory damages do not plausibly make the plaintiff right-holder "whole," nor are they designed to do so.[45] As the California Supreme Court observed almost 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."[46]

To be sure, compensatory damages for severe bodily harm could, in theory, make the plaintiff "whole" by restoring her welfare to the level that existed prior to the injury. Such a damages award is still objectionable for the obvious reason that a right-holder's life in the noninjured state of the world is fundamentally different from her life in the injured state. A healthy person with ordinary wealth faces substantially different choices than 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."[47] 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.

We can now see why the negligence entitlement has a transaction structure that is not fully constituted by a property rule, liability rule, or any combination thereof. Such a transaction structure requires some sort of monetary exchange, which is either impossible (premature death) or deeply problematic (disabling injuries). Instead of exclusively relying on an inherently inadequate transactional structure, the negligence rule directly protects the right-holder's interest in

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[45] The problem, yet again, involves compensation for the way in which severe bodily injuries have caused the right-holder to suffer a loss of life's pleasures. *Cf.* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979) (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").

[46] Zibbell v. Southern Pacific Co., 116 P. 513, 520 (Cal. 1911).

[47] 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).

physical security by giving the duty-holder an obligation to reduce the risk of physical harm through the exercise of reasonable care.[48] The inherent limitations of monetary exchange explain why the exercise of reasonable care—not merely the payment of compensatory damages—is required by the entitlement in cases of nonconsensual risky interactions.

II. THE NEGLIGENCE ENTITLEMENT AND THE FAULT PRINCIPLE

The black-letter formulation of negligence liability requires the defendant to have breached a duty to exercise reasonable care, so the plaintiff's entitlement to pursue a negligence claim is transparently based on the defendant's breach of this duty. The black-letter formulation, however, does not enable one to conclude whether the duty can be fully satisfied by either the exercise of reasonable care or the payment of compensatory damages, and each interpretation has its scholarly supporters.[49]

As we have found, that issue can be resolved by the entitlement structure of the negligence rule, which gives duty-holders a primary obligation to exercise reasonable care, the breach of which can generate a secondary obligation to pay compensatory damages to the right-holder. Satisfaction of the secondary obligation—the payment of compensatory damages—is not a sufficient reason for breaching the primary obligation to exercise reasonable care. The defendant's payment of compensatory damages to the plaintiff does not adequately restore the plaintiff's protected interest in bodily security. A severely injured plaintiff, for example, is not made "whole" by an award of compensatory damages, no matter how many millions of dollars are involved. Due to inherent limitations of this and other forms of voluntary exchange, the duty is fully satisfied only by the exercise of reasonable care in cases of nonconsensual risky interactions. By reducing risk or the instances in which the right-holder will be seriously injured or killed, the duty-holder's exercise of reasonable care directly protects the right-holder's interest in physical security. The prevention of injury is the core of negligence law.

Although the negligence rule is primarily defined by the requirements of reasonable care, it does not follow that negligence liability is necessarily based on

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[48] *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 stating general rule of negligence liability for having caused "physical harm").

[49] *See* Nicholas J. McBride, *Duties of Care—Do they Really Exist?*, 24 OXFORD J. LEGAL STUD. 417, 417-419 (2004) (claiming that the "vast majority of tort scholars working today seem to" interpret negligence liability in terms of a duty to pay damages, whereas only a minority of scholars recognize the primary duty of care). Based in part on the laws governing punitive damages and injunctions, McBride concludes that the negligence rule is based on a primary duty of care. *Id.* at 425-432.

the fault principle or the "conception that fault is essential to liability."[50] As an analytic matter, any legal entitlement or right entails one or more legitimate claims with respect to the interests protected by that right or entitlement.[51] The entitlement that generates negligence liability can also entail other legitimate claims with respect to the right-holder's protected interest in physical security, including claims of strict liability.

To be sure, the duty-holder's exercise of reasonable care ordinarily exhausts the claims generated by the tort entitlement, leaving an injured right-holder without a claim for compensatory damages in cases lacking negligent behavior or legal fault—the outcome required by the fault principle. For abnormally dangerous activities, however, a duty-holder can exercise reasonable care and still be subject to (strict) liability for the ensuing harms.[52] The exercise of reasonable care in these cases does not exhaust the right-holder's claims against the duty-holder, implying that the underlying tort entitlement is not defined solely by reference to the fault principle.

This conceptualization of the entitlement recognizes that negligence liability is the default rule in tort law that can govern risky behavior in tandem with other liability rules. For example, a strictly liable actor who breached the duty of care is also subject to negligence liability.[53] The rule of strict liability for abnormally dangerous activities, therefore, does not *displace* the primary duty to exercise reasonable care, but instead utilizes compensatory damages to *supplement* the duty, resulting in the twin obligations to exercise reasonable care and to pay compensatory damages for any ensuing harms. The duty to exercise reasonable care is a primary but not exclusive duty, and so the underlying entitlement of the right-holder requires the exercise of reasonable care in all cases and the payment of compensatory damages in some of these cases. Such a substantive basis of liability cannot be supplied by the fault principle.

Invoking a rule of strict liability to discredit the fault principle is hardly revealing. The foregoing analysis, however, locates the rule of strict liability within the same entitlement that generates negligence liability. The two forms of tort liability are not necessarily based on two entitlements, with strict liability implicating a "different concept of responsibility" than negligence liability as per

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[50] Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification,* 30 HARV. L. REV. 409, 417 (1917) (arguing that instances of liability without fault could be reclassified into a body of law other than torts).

[51] See Coleman & Kraus, *supra* note 13, at 1342 ("Each legitimate interest … that is marked as a right is *necessarily* associated with, and in fact entails, some legitimate claims.").

[52] RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977).

[53] *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973) (applying Texas law) (upholding jury verdict finding that defendants failure to warn of asbestos hazards was subject to both negligence and strict products liability).

a conventional interpretation of these rules.[54] Instead, negligence and strict liability can be the constitutive elements of a single tort entitlement.

The reasons for conceptualizing the entitlement in this manner are like those invoked by the conventional analysis of property rules, which treats punitive damages as an integral component of the entitlement.[55] A property rule limits the entitlement transfer to consensual exchanges, with punitive damages prohibiting unilateral takings in order to protect the integrity of the property-rule entitlement. In the same manner, strict liability can be conceptualized as an integral component of the entitlement that is required to maintain the integrity of the negligence rule. Without the damages remedy afforded by strict liability, the negligence rule in this class of cases no longer adequately protects the right-holder's interest in physical security.

To be sure, entitlements can be narrowly defined so that each entitlement creates only those claims recognized by a single tort rule. Under this approach, the entitlement that generates the negligence rule is distinct from the entitlement that generates a rule of strict liability. Such a narrowly defined entitlement for the negligence rule could then find justification in the fault principle, with strict liability presumably depending on a different concept of responsibility.

As an analytic matter, however, the entitlement does not need to be defined in these narrow terms. An entitlement or right generates one or more legitimate claims. The same entitlement that generates the claims embodied in the negligence rule can also generate supplementary claims embodied in a rule of strict liability. Whether the entitlement should be defined broadly or more narrowly cannot be determined by a structural analysis of entitlements. "[T]he choice of which rule or rules to apply depends on the foundational theory."[56]

Consequently, the baseline rule of negligence liability does not necessarily establish any fundamental commitment to the fault principle. The negligence entitlement can be defined narrowly or broadly, with the latter formulation yielding rules of (strict) liability that do not conform to the fault principle. To choose between these two formulations of the entitlement, one must rely on normative argument regarding the foundational theory of tort liability. That theory could be supplied by the fault principle, but the reasons will be normative and cannot be derived from the mere fact that negligence is the baseline rule of liability in tort law.

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[54] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) (contrasting the rule of strict liability for construction defects with the rules of negligence liability for design and warning defects).

[55] *See supra* notes 6-8 and accompanying text.

[56] Coleman & Kraus, *supra* note 13, at 1343.

III. IMPLICATIONS FOR THE SUBSTANTIVE BASIS OF TORT LAW

Because the structure of an entitlement depends on the foundational theory for the legal rule, the analytic properties of the entitlement can have implications for the substantive basis of liability. An entitlement structure could be incompatible with a particular substantive rationale for tort law, in which case the analytic properties of the entitlement effectively rule out the associated normative theory. So, too, the structure of an entitlement could increase the range of plausible normative theories. The structure of the negligence entitlement, for example, need not entail a commitment to the fault principle. In these and perhaps other respects, the analysis of entitlements can shed light on the underlying rationale for tort liability.

There are two types of rationales for tort liability. One adopts a "pluralistic" interpretation of tort law that embraces multiple, potentially conflicting justifications for the varied rules of tort law; the other relies on a foundational theory, typically based on either allocative efficiency or corrective justice, which provides a unitary justification for the individuated tort rules.[57] The problem with pluralism is made evident by the entitlement structure(s) of the negligence rule, whereas the unified theories of allocative efficiency and corrective justice can each be squared with the entitlement structure of the negligence rule, although doing so requires an alteration of the approaches advocated by leading theorists in each camp.

A. Pluralistic Rationales for Tort Liability

Different tort rules apparently serve different purposes, leading some scholars to conclude that tort law serves multiple, potentially conflicting purposes.[58] The pluralistic rationale for tort liability suffers from a problem that is made apparent by the analytic properties of the negligence-rule entitlement.

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[57] For discussion of the two approaches, see Christopher J. Robinette, *Tort Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329 (2007).

[58] *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 20 (3d ed. 2007) ("[T]ort law as it actually operates does not serve any single goal, but a set of different goals whose strength is likely to vary with the situation…. In some cases concern for corrective justice will dominate, but in others deterrence or concern for loss distribution will be key…. For those who seek perfect clarity, this may be an unsatisfying state of affairs."); IZHAK ENGLARD, THE PHILOSOPHY OF TORT LAW 64-65 (1992) ("The rhetoric of tort law is pluralistic: law-givers and courts rely on a multitude of contrasting reasons in imposing liability. From a formal point of view, the justifications of substantive liability rules are a mixture of corrective justice and distributive justice, of instrumental and non-instrumental reasons."); ROBERT STEVENS, TORTS AND RIGHTS 326 (2007) ("If the account given in this book is correct, attempts to construct unitary theories to explain the law of torts are wrong-headed."); Robinette, *supra* note 57.

By embracing multiple, potentially conflicting rationales for tort liability, pluralists implicitly assume that each entitlement is defined in the narrowest possible terms. If each tort rule were derived from its own individual entitlement, then each could have its own particular rationale. Different tort rules could then have conflicting purposes, but each rule nevertheless would be internally consistent with its own distinctive entitlement. In contrast, if different tort rules were generated by a single underlying entitlement, then the varied rules would all be unified by that entitlement, making them fundamentally consistent with each other. Pluralist interpretations, therefore, implicitly assume that tort law consists of a set of narrowly defined entitlements, with each tort rule corresponding to its own unique entitlement that can serve its own particular purpose.

The structural analysis of entitlements shows that tort rules need not be defined in such a narrow manner. As we have found, the negligence rule can be based on an entitlement that also generates the legal claims embodied in the rule of strict liability for abnormally dangerous activities. This more broadly specified entitlement satisfies the analytic properties of a legal right, just like the more narrowly defined entitlements assumed by the pluralists. Whether the tort entitlement should be broadly or narrowly defined depends on an underlying foundational theory for the entitlements.

In order to define entitlements in the narrowest possible terms, pluralists must rely on a foundational theory of entitlements that justifies such a formulation. While eschewing any overarching purpose for tort liability, pluralists implicitly invoke a unified theory of entitlements, belying their claim that tort law can be coherently understood without resort to some underlying principle.[59]

B. The Efficiency Rationale for Tort Liability

Because the entitlement structure for the negligence rule is formulated to address the inherent inadequacies of monetary exchange, it would seem to foreclose an economic interpretation of negligence liability. The absence of exchange, however, is a condition that is incorporated into the conventional economic analysis of tort law:

> Where impediments to successful negotiations are substantial, inefficiencies in the initial allocation may not be overcome through mutually advantageous exchange. Unable to rely upon the exchange process to overcome inefficiencies, a court must allocate entitlements efficiently from the outset. In doing so, the court continues to rely upon the exchange process, though in a different manner. Instead of relying upon exchange to *rectify* inefficiencies, including inefficient judicial

[59] *But see* Robinette, *supra* note 57 (arguing that pluralism can be applied in a principled manner).

> decisions, the court relies upon the market paradigm to help it *identify* the efficient outcome it seeks to replicate.
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> ….
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> If transaction costs are high, a property rule is likely to prove inefficient because transfer to more valued use requires negotiations. Consequently, property rules may lead to entitlements being held by individuals who value them less. Under a liability rule, individuals who value entitlements more than those on whom the rights are initially conferred can secure the entitlements without ex ante negotiations: they can compel transfers to themselves and pay damages. In such cases, the entitlement is secured by the party who most values it, thus duplicating the outcome of the Coasean market exchange process. When transaction costs are high, therefore, efficiency considerations may necessitate the foregoing of property rules in favor of liability rules.[60]

To overcome the inherent limitations of voluntary exchange, the conventional economic analysis of tort law interprets the negligence rule as being constituted by a liability rule (or more precisely, a liability rule held by the potential victim with respect to unreasonable risks, and a property rule held by the risky actor with respect to reasonable risks).[61] So formulated, negligence liability only "prices" unreasonably risky behavior and gives the duty-holder the option to act unreasonably when doing so would be less costly than complying with the duty to exercise reasonable care. Like any other properly formulated pricing mechanism, such a negligence rule yields socially efficient outcomes when individuals respond to the prices in a self-interested manner.

When negligence liability merely establishes a price for unreasonable behavior, duty-holders will predictably breach that duty when confronted by a standard of reasonable care that is set at an inefficiently high level:

> How will injurers react if the level of due care is set above optimal care? If injurers exercise optimal care, they are liable for those accidents that would not have occurred had they exercised the higher level of due care. By increasing their level of care, they can reduce their liability. At optimal care, however, the cost of increasing care exceeds the cost of accidents avoided by increasing care. Therefore, it does not pay for injurers to increase care above optimal care.[62]

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[60] Coleman & Kraus, *supra* note 13, at 1335-1337.

[61] *See supra* note 12.

[62] Marcel Kahan, *Causation and Incentives to Take Care Under the Negligence Rule,*, 18 J. LEGAL STUD. 427, 432 (1989) (footnotes omitted). A complete efficiency analysis of the problem also considers how the standard of care affects the duty-holder's level of participation in the risky activity. *See* Steven Shavell, *Do excessive legal standards discourage desirable activity?*, 95 ECON. LETTER 394, 395 (2007).

In effect, an inefficiently high standard of reasonable care functions no differently than a rule of strict liability:

> The incentives created by a negligence rule with a level of due care higher than optimal care are similar to those created by strict liability, which is like a negligence rule with an infinite level of due care. Under either rule, injurers will not exercise more than optimal care even though they could thereby reduce their liability.[63]

This interpretation of negligence liability cannot be squared with the entitlement structure of the negligence rule, which is not wholly constituted by liability rules, property rules, or any combination thereof (unlike the rule of strict liability). The negligence entitlement instead is satisfied only by the duty-holder's exercise of reasonable care (assuming the activity is not otherwise abnormally dangerous); a duty-holder does not have the option of acting unreasonably simply because it would be cheaper to do so. A duty-holder who acted in such a manner would have the "bad state of mind" required for punitive damages and liability for criminal negligence.[64] These punitive sanctions enforce the primary duty of reasonable care by prohibiting duty-holders from reprehensibly rejecting the duty in exchange for paying an inherently inadequate award of compensatory damages. Consequently, negligence liability does not merely "price" unreasonable behavior as assumed by the conventional economic analysis of tort law.

The negligence entitlement accordingly poses a challenge for the economic interpretation of tort law. Unless there is an efficiency rationale for the entitlement structure, negligence liability cannot plausibly be interpreted in terms of allocative efficiency. The absence of a plausible efficiency rationale for negligence liability would cast considerable doubt on the broader descriptive or positive claim that tort rules tend to be allocatively efficient, a claim that is essential to the economic interpretation of tort law.[65]

This particular challenge can be answered. The entitlement structure of the negligence rule can be justified by an efficiency rationale that is based on the inherent limitations of monetary exchange, although that rationale differs from the one provided by the conventional economic analysis of tort law.

According to the conventional economic analysis of negligence liability, a duty-holder rationally tries to minimize the total costs she would incur by engaging in the risky activity. The duty-holder's expected liability costs equal the probability that an injury will occur (denoted P) multiplied by the total amount of

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[63] Kahan, supra note 62, at 432 n.18.

[64] *See supra* notes 27-29 and accompanying text.

[65] *See generally* Mark A. Geistfeld, *Fault Lines in the Positive Economic Analysis of Tort Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS (Jennifer H. Arlen ed. forthcoming 2011) (explaining the importance of descriptive accuracy for the economic analysis of tort law).

damages for which the duty-holder would be liable (denoted D). The duty-holder can reduce the amount of expected liability costs ($P \bullet D$) by acting safely. Ordinarily, a precaution imposes a cost or burden on the duty-holder (denoted B). For example, driving slowly eliminates specific risks created by higher speeds, but also costs the driver in terms of lost time. A rational driver, therefore, will compare the burden (B) of the safety precaution with the expected liability costs that she would otherwise incur by not taking the precaution and eliminating this particular liability risk ($P \bullet D$). Suppose the duty-holder decides to act unreasonably because it would be cheaper to forego the required safety precaution and face liability instead ($B > P \bullet D$). This decision will often be inefficient. For a fatal risk, the duty-holder is not obligated to pay any compensatory damages for the decedent's loss of life's pleasures ($D = 0$).[66] As a consequence, tort damages in a case of wrongful death can be zero.[67] The duty-holder will predictably ignore these risks in deciding how safely to behave, reducing her incentives for taking costly precautions that would reduce the risk of a fatal accident (in the extreme case, $B > P \bullet D = 0$). Rather than making an efficient safety decision, the duty-holder has instead exploited the inherent limitations of compensatory damages in a case of premature death. The identical safety problem would exist under strict liability as well. To address this inefficiency, tort law must make negligence the default rule of liability—one that is not displaced, but only supplemented by a rule of strict liability. As the default rule, an efficient negligence rule does not merely price risky behavior in terms of the duty-holder's expected liability for compensatory damages, but instead obligates the duty-holder to exercise the socially efficient amount of care.

The standard of reasonable care specifies those precautions that a duty-holder must take in order to eliminate a probability of causing a loss for a right-holder. This obligation is based on the legal valuation of the loss (denoted L), whereas safety precautions under a pure liability rule such as strict liability only depend on the compensatory damages for which the defendant would be liable (D). The legal valuation of loss in a case of wrongful death includes the loss of life's pleasures, even though that loss is not a compensable form of damages ($L > D = 0$).[68] The elements in this respect are "misaligned," with the element of duty relying on a valuation of loss that substantially exceeds that valuation within the element of

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[66] *See supra* notes 35-39 and accompanying text.

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

[68] *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").

compensatory damages.[69] Because the risk of fatal injury is included in the standard of reasonable care, duty-holders can be obligated to act efficiently with respect to the risk of fatal injury ($B < P \bullet L$). Duty-holders would rationally breach this duty if liability were always limited to compensatory damages ($B > P \bullet D = 0$). To maintain the integrity of the duty to exercise reasonable care, the efficient negligence rule must be supplemented by other remedies—punitive damages and criminal negligence liability—that deter or otherwise prohibit duty-holders from acting in this inefficient manner.

The inherent inadequacy of compensatory damages accordingly supplies an efficiency rationale for the default rule of negligence liability, a rule that is otherwise hard to explain with the conventional economic analysis of tort law.[70] Moreover, this rationale is based on the negligence rule that is actually employed by the tort system, whereas the conventional economic analysis of tort law is based on a negligence rule that merely "prices" risky behavior and therefore cannot be squared with the entitlement structure of the negligence rule.

A focus on entitlements nevertheless reveals the inherent limitation of economic analysis. The formulation of an efficient tort rule requires a comparison of costs and benefits. Such a cost-benefit analysis depends on prices, which in turn depend on the initial allocation of property rights or legal entitlements.[71] Consequently, cost-benefit analysis cannot determine initial entitlements; the entitlements must instead be determined by the normative rationale for tort liability.

To be sure, tort entitlements can be justified in a manner that requires efficient tort rules. For example, such a rationale for tort entitlements can be derived from the norms of utilitarianism or welfarism more generally.[72] The rationale, however, is one of utilitarianism or welfarism, not allocative efficiency. When viewed through the prism of entitlements, there is no efficiency rationale for tort liability.

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[69] *See* Geistfeld, *Principle of Misalignment*, *supra* note 31.

[70] "The negligence rule is usually the base line around the world…. Given the basic [economic] analysis of negligence versus strict liability, it is difficult to see what explains this." Hans-Bernd Schaffer & Frank Muller-Langer, *Strict Liability versus Negligence*, *in* TORT LAW AND ECONOMICS 37 (Michael Faure ed. 2009). The deterrence problem posed by cases of wrongful death strongly enhance the efficiency rationale for negligence liability because the efficiency rationale for strict liability depends on its ability to reduce risk relative to negligence liability. *See* Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611 (1998) (explaining why the high transaction costs of strict liability relative to first-party insurance implies that strict liability can be more efficient than negligence liability only if it reduces risk below the level attainable by the negligence regime).

[71] *E.g.,* Lewis A. Kornhauser, *Wealth Maximization*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 679-83 (Peter Newman ed. 1998).

[72] *See generally* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2006).

C. 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. One of the leading proponents of this approach, Jules Coleman, explains the conception in these terms:

> 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.[73]

Insofar as corrective justice is limited to the second-order duty of repair, it cannot address the important question of whether satisfaction of that second-order duty is also sufficient for satisfying the first-order duty, one that Coleman has elsewhere characterized as posing "the key, but inadequately examined, issue in tort theory."[74] As we have found, the mere payment of compensatory damages (satisfaction of the second-order duty) does not necessarily satisfy the first-order duty of care. A negligent 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—the core feature of the negligence rule—a problem that Coleman recognizes but is unable to solve persuasively.[75]

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[73] JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 32 (2001).

[74] Coleman & Kraus, *supra* note 13, at 1357.

[75] As Coleman explains,

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

COLEMAN, PRACTICE OF PRINCIPLE, *supra* note 73, at 34.

Coleman is "dubious about the prospects [for] a general theory of first-order duties from which we can derive all of them systematically." *Id.* Coleman instead maintains that

> much of the content of first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. These generate conventions that give rise to expectations among individuals regarding the kind and level of care they—we—can reasonably demand of one

Others have criticized the corrective-justice interpretation for its inability to determine the primary duties of tort law. As Benjamin Zipursky has observed, if "the issue of whether there is a right of action in tort is distinct from the issue of what the remedy should be," then "corrective justice theory misses a link in the inference from tortious conduct to the imposition of liability."[76] "For example, although one who has wrongfully injured another has a duty to repair that loss [as a matter of corrective justice], this principle does not explain why courts impose punitive or nominal damages…. Corrective justice theory is similarly unable to explain why a variety of injunctive remedies are available."[77] Without any necessary connection between a first-order duty of tort law, such as the duty to exercise reasonable care, and the second-order duty of repair (to pay damages for the first-order breach), any effort to explain tort law entirely in terms of the second-order duty is merely to "explain the law by reference to the functions it

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> another. The content of these duties is then *further* specified in the practice of tort law itself—in the process of litigation, in the development of case law, in the writing of restatements, and the like…. [T]here is no reason to *suppose* that [first-order] duties must be derivable from some theory, nor that providing such a theory is a condition for an adequate explanation of our tort practices.

Id. at 34-35.

Coleman's proposed method for deriving the content of first-order duties is lacking. "[T]he notion that the finder of fact can identify, rather than create, a norm applicable to injuries involving everyday activities is problematic. Often we do not have norms capable of self-application even to everyday activities." Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1196 (2001). The existence of widespread norms is dubious given the diverse values of contemporary society, and existing norms ordinarily do not have the level of detail required for resolution of a negligence case. *Id*. at 1195-97. To be sure, the jury in a negligence case can develop a pre-existing norm when applying it to the particular facts at hand, but "a new rule is made again for each case, and the rule may differ from case to case even when the facts do not." *Id.* at 1197. Negligence practice simply does not involve the development or refinement of norms as assumed by Coleman.

Even when tort law can resort to pre-existing norms, Coleman's account is still problematic. Whereas the substance of first-order duties under the early common law were presumably constituted by pre-existing norms, custom today plays a highly circumscribed role in negligence cases. *See* GEISTFELD, TORT LAW: THE ESSENTIALS, *supra* note 19, at 214-216 (explaining why the evolution of society from small, close-knit communities into a highly industrialized global economy means that "custom now narrows the negligence inquiry in only a few important ways"). When courts are unable to rely on pre-existing norms of behavior to determine the requirements of reasonable care, they must resort to some other abstract norm or principle. According to Coleman, that norm or principle is not one of corrective justice, so his account of corrective justice cannot explain how courts determine the most important component of the negligence entitlement—the amount of care that the duty-holder must take in order to satisfy fully the right-holder's entitlement to bodily security.

[76] Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 712 (2003).

[77] *Id*. at 711.

serves [the enforcement of the second-order remedial right], without actually laying bare the concepts that are deployed within the law."[78] Zipursky accordingly concludes that the corrective justice account of the second-order duty of repair is conceptually uninteresting.

To be sure, the defendant's payment of compensatory damages to the plaintiff is a form of corrective justice, but that conclusion has no explanatory power for reasons given by John Gardner:

> [S]ome legal norms are themselves norms of corrective justice. The norm of tort law according to which (legally recognized) wrongdoers are required to pay reparative damages in respect of those (legally recognized) losses that they wrongfully occasion, on the ground that they wrongfully occasioned those losses, is one such. It is a norm by which some people are to get back at least some of what they lost from the person at whose hands they lost it. As Coleman himself says: 'These features of tort law are plain to anyone without the benefit of theory.' So when people ask 'what is tort law for?', they are already asking, by necessary implication, what the legal norm of corrective justice itself is for. That norm is part of the law, 'plain to anyone'. Corrective justice, in other words, is part of the thing that needs to be rationally explained, part of the *explanandum*. So how can Coleman, or anyone else, think that it is (even the beginning of) the rational explanation?[79]

Because the defendant's payment of compensatory damages to the plaintiff is a form of corrective justice, any account of corrective justice that is limited to the second-order duty of repair merely states a definitional truth that provides no insights into the underlying rationale for tort liability. Or as Gregory Keating has put it, corrective justice lacks explanatory power because tort law is not a "remedial institution."[80]

Corrective justice need not be limited to the second-order duty of repair, however. For example, two of the leading proponents of corrective justice, Arthur Ripstein and Ernest Weinrib, each claim that corrective justice governs both the first-order duty of care and the second-order duty of repair.[81] Breach of the first-

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[78] *Id*. at 724.

[79] John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice*, at 19, U. Oxford Legal Research Paper Series, No. 1/2010 (Jan. 2010) (quoting JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 21), available on-line at http://ssrn.com/abstract=1538342.

[80] Gregory C. Keating, *Is Tort a Remedial Institution?*, USC Legal Studies Research Paper No. 10-10 (2010) (arguing that remedial responsibilities in tort are both logically and normatively subordinate to primary duties), available on-line at http://ssrn.com/abstract=1633687.

[81] *See* Arthur Ripstein, *As If It Never Happened*, 48 WM. & MARY L. REV. 1957, 1964 (2007) ("In the account that I will offer, duties of conduct and duties of repair are inseparable.");

order duty of care would be a corrective injustice that in turn is remedied by the second-order duty of repair. So conceptualized, corrective justice could explain negligence *law* as opposed to merely negligence *liability* for compensatory damages.

This approach, though, is "a non-starter" according to Gardner:

> Most torts are not injustices at all, let alone corrective injustices. They are violations of norms of honesty, considerateness, trustworthiness, loyalty, humanity, and so on…. [I]t is hard to see how a tort of nuisance, defamation, inducing breach of contract, or trespass to land could ever be a corrective injustice. The only corrective injustice, where these torts are concerned, comes later when one fails to pay the reparative damages for their commission.[82]

The difficulty of identifying a corrective-justice rationale for tortious behavior is particularly apparent with respect to the negligence rule. The entitlement gives priority to the primary duty of care and is only fully satisfied when the duty-holder strives to prevent injury (via the exercise of reasonable care). The prevention of injury, however, is not a component of corrective justice according to Ripstein and Weinrib.[83] The negligence entitlement can also be specified in a manner that incorporates the supplementary claims of strict liability. Any such claim of strict liability, however, cannot be a form of corrective justice according to Ripstein and Weinrib.[84] On this view, the only clear form of corrective justice within the negligence rule involves liability for compensatory damages, explaining why Coleman's formulation of corrective justice exclusively addresses the second-order duty of repair.

Thus, the entitlement structure of the negligence rule poses a distinct challenge for corrective justice. Can the entirety of the negligence entitlement—the first-order duty of care; the second-order duty of repair; the relation between the two duties; and the supplementary claims of punitive damages and strict

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ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 76 (1995) ("corrective justice serves a normative function: a transaction is required, on pain of rectification, to conform to its contours").

[82] Gardner, *supra* note 79, at 28-29 (citation omitted).

[83] ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 11-12 (1999) (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").

[84] *See* Arthur Ripstein, *Tort Law in the Liberal State*, 1 J. TORT L., Issue 2, Art. 3, at 30 (2007) (arguing that as a matter of corrective justice, "harm-based tort[s] require fault, in the sense of excessive danger"), available online at www.bepresscom; WEINRIB, THE IDEA OF PRIVATE LAW, *supra* note 81, at 177 (arguing that strict liability violates the requirement of equality inherent in corrective justice by unilaterally favoring the interests of the plaintiff).

liability—be explained in terms of corrective justice? In my view, such an explanation can be derived from a compensatory entitlement.[85] Regardless of the merits of that position, given the centrality of negligence within tort law, any interpretation that cannot explain the entitlement for the negligence rule is a poor candidate for explaining tort law more generally.

CONCLUSION

An analysis of entitlement structures should always be understood in relation to the well-known observations that were made by Guido Calabresi and Douglas Melamed in their classic exposition of property rules, liability rules, and inalienability rules:

> Framework or model building has two shortcomings. The first is that models can be mistaken for the total view of phenomena, like legal relationships, which are too complex to be painted in any one picture. The second is that models generate boxes into which one then feels compelled

[85] A sketch of the argument is as follows. A tort norm of compensation can be derived from the value of individual autonomy and the requirement of equal treatment. The norm can be satisfied by voluntary exchange but is not wholly defined by the right-holder's actual consent; the compensatory norm instead is based on some conception of reasonable consent. *Cf. supra* notes 19-21 and accompanying text (explaining why a property rule can violate the principle of equality). A compensatory formulation of the negligence entitlement is not immediately transparent, however, because a primary duty of compensation directly translates into a rule of strict liability. But for reasons discussed in Part I above, the inherent limitations of monetary exchange prevent duty-holders from exercising this form of corrective justice. An automobile driver, for example, 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. Despite this problem, the risky activity cannot be banned for reasons of autonomy and equal treatment. The only way to prevent this corrective injustice is to give the pedestrian right-holder the compensation to which she is entitled. Tort law does so by requiring the duty-holder to exercise reasonable care. This precautionary burden can be specified in a manner that equals the total burden that the duty-holder would otherwise occur under conditions of full compensation. Thus, under the negligence rule, the duty-holder can satisfy the compensatory obligation by incurring these expenses as required forms of reasonable care that directly protect the right-holder's interest in physical security. When the first-order duty is formulated in this manner, the duty-holder's exercise of reasonable care satisfies a compensatory obligation and is a form of corrective justice. Breach of that duty is a corrective injustice—the right-holder has not been adequately compensated as required by the initial entitlement, and this injustice is not fully remedied by the second-order duty of repair (due to the inherent inadequacy of compensatory damages). Other aspects of the entitlement for the negligence rule, including the supplementary claims for punitive damages and strict liability, can also be justified by such a compensatory duty. *See generally* GEISTFELD, TORT LAW: THE ESSENTIALS, *supra* note 19 (developing a compensatory conception of the tort right and showing how it can explain the important doctrines and practices of tort law, including the negligence rule and its varied no-duty rules).

> to force situations which do not truly fit. There are, however, compensating advantages. Legal scholars, precisely because they have tended to eschew model building, have often proceeded in an ad hoc way, looking at cases and seeing what categories emerged. But this approach also affords only one view of the Cathedral. It may neglect some relationships among the problems involved in the cases which model building can perceive, precisely because it does generate boxes, or categories.[86]

The model of property and liability rules assumes the availability of exchange, either via ex ante voluntary transactions or a court's ex post award of compensatory damages. This model, while extraordinarily useful in other contexts, does not "truly fit" tort law. Monetary exchange of any type is not always feasible, particularly with respect to the most important issue addressed by an individual right to bodily security—the case of premature death. Even when damages can be paid to the accident victim, monetary exchange in the absence of consent does not ordinarily make a physically injured plaintiff "whole." Due to these limitations of monetary exchange, the negligence rule offers a different view of the Cathedral, one that focuses on the importance of preventing harm in the first instance. This view is obscured by the practice of tort law, which necessarily involves litigation over an injury for which a plaintiff seeks an award of monetary damages. Tort litigation is undoubtedly centered on the damages remedy, but the tort entitlement is not. Lacking consent of the right-holder, the only way for a duty-holder to fully satisfy the entitlement of the negligence rule is through the exercise of reasonable care. Negligence is a behavioral rule. This much follows from the structure of the negligence entitlement. Why the entitlement defensibly takes that form is a question that can only be answered by normative argument.

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[86] Calabresi & Melamed, *supra* note 4, at 1127-1128.