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Tort Law in a World of Scarce Compensatory Resources

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Large corporations facing extensive tort liabilities have often gone into bankruptcy, forcing tort plaintiffs to accept pennies on the dollar as compensation for their injuries. Bankruptcy painfully illustrates the social fact that the compensatory properties of tort law depend on the availability of compensatory resources. Although this feature of tort law is self-evident, no one has adequately analyzed whether it matters for substantive tort doctrine, and if so, how.

Wealth would seem to be substantively irrelevant given the rule that excludes evidence concerning the defendant's financial resources when determining breach or compensatory damages. The antecedent tort duty, however, depends on the burden it would impose on the ordinary duty-bearer across the general class of cases the duty governs. The reasonableness of this burden is affected by social facts such as per capita wealth, the replacement of debtor's prison with bankruptcy, the availability of liability insurance, and the social meaning of monetary damages. These normatively relevant facts are largely absent from modern accounts of tort law, even though they contract or expand the scope of substantive tort duties for noncontroversial reasons grounded in widely recognized tort values. An extended historical and doctrinal analysis confirms as much, showing how the scarcity of compensatory resources has shaped the basic structure of tort law—why it employs a default rule of negligence liability, sometimes supplemented by strict liability, while also being limited for wide swaths of negligently caused harms involving economic loss and emotional distress.

Accounting for the availability of compensatory resources reveals normative properties of substantive tort law that are often quite different from the ones modern tort theories depict, including the relation between tort law and criminal law and the vital role deterrence plays in a rights-based tort system. An adequate account of tort law must comprehend how the scarcity of compensatory resources alters substantive tort doctrine in principled ways.

INTRODUCTION

The relationship between tort law and bankruptcy has garnered considerable attention. Faced with widespread tort liabilities, large corporations have

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often declared bankruptcy, forcing tort claimants to accept pennies on the dollar as compensation for their injuries.[1] This compensatory problem is brought into sharp relief by the Supreme Court's recent decision involving Purdue Pharma L.P.'s bankruptcy after it faced at least $40 trillion of potential tort liabilities for manufacturing and distributing Oxycontin, the highly addictive pain killer largely responsible for triggering the opioid-overdose crisis.[2] Although the case turned on the statutory powers of federal bankruptcy courts,[3] it painfully illustrates how bankruptcy affects tort compensation. Under the plan the bankruptcy court approved, "if people experienced a potentially deadly addiction that could be linked to a Purdue prescription, they may receive the minimum payout, $3,500—a paltry sum."[4] Cases like this underscore the self-evident proposition that the compensatory properties of tort law depend on the availability of compensatory resources.

Perhaps because it is so obvious, this property of tort law has been largely ignored. "Compensation of persons injured by wrongdoing is one of the generally accepted aims of tort law."[5] Compensation is a guiding concern of tort law, yet no one has rigorously analyzed whether substantive tort law should be affected by the scarcity of compensatory resources, and if so, how.

To be sure, this kind of problem supplies the subject matter of economics, which seeks to identify the efficient allocation of scarce resources. But the scarcity of compensatory resources does not entail the need to formulate tort rules in an efficient manner. Scarcity can be normatively relevant for other reasons, though the question remains open because no one has seriously pursued this line of analysis.

This surprising lacuna in torts scholarship finds expression in Kenneth Abraham and Catherine Sharkey's recent, provocative claim that there is a "glaring gap in tort theory" involving "its failure to take adequate account of

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1. *See* Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J.F. 525, 527–28 (2024) (describing the "unprecedented number" of tort defendants, many of which "are not even financially distressed," that have filed for bankruptcy "to compensate for what their court filings call the 'failure' of traditional litigation to expeditiously extinguish all lawsuits"); *see also* Luke Sperduto, *Three and a Half Rules for Tort Claims in (and out of) Chapter 11*, 95 AM. BANKR. L.J. 127, 129–30 (2021) ("When a corporation files for bankruptcy due to tort liabilities, tort claimants often recover a smaller share of what they are owed than the company's secured creditors. This is because tort claims are general unsecured claims, which are subordinate to secured claims under state law and the United States Bankruptcy Code.").

2. Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2098 (2024) (Kavanaugh, J., dissenting). For further discussion of this case, see *infra* notes 186–187 and accompanying text.

3. *Id.* at 2084.

4. Ryan Hampton, *The Sacklers Are Walking Off into the Sunset. Reform the System*, N.Y. TIMES (Sept. 11, 2021), https://nytimes.com/2021/09/11/opinion/purdue-sacklers-opioids-oxycontin-settlement.html [perma.cc/F46C-KET2].

5. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 13, at 26–27 (2d ed. 2011).

liability insurance" beyond its "being a mere source of funding."[6] In their view, a satisfactory theoretical account must "recognize the centrality of liability insurance for the doctrinal evolution of tort and . . . incorporate . . . liability insurance as a prominent normative factor driving tort liability."[7] This "glaring gap" extends beyond liability insurance and implicates the deeper question concerning the available resources for compensating tortiously caused injuries: Whereas liability insurance increases compensatory resources, bankruptcy reduces them. Any "glaring gap" in tort theory involving liability insurance necessarily extends to the more fundamental question of how the availability of compensatory resources substantively shapes tort law.

This basic question has never been adequately addressed, making it mysterious why liability insurance—and, by extension, bankruptcy—both implicates issues of funding and appropriately factors into substantive tort law. A large part of the difficulty arises from the firmly established rule that a defendant's financial ability to pay for a judgment "is not alone sufficient to justify legal responsibility . . . and this overarching principle must be taken into account" within substantive tort law.[8] Liability insurance and other factors like bankruptcy affect the availability of compensatory resources and would seem to have obvious importance for tort law, but incorporating those concerns into substantive doctrine would apparently require courts to depart from time-honored tort principles.[9]

Instead of tackling these issues, Abraham and Sharkey sidestep them by arguing that courts pretend to abide by these tort principles while ignoring them: "[C]ourts often honor the frequently followed fiction that common-law decisions are to be based on precedent and principle, not on policy considerations. Mentioning the availability of liability insurance as a factor in decisions about the proper scope of tort liability would conflict with this fiction."[10]

This purported fiction assumes that tort principles do not account for the availability of compensatory resources, forcing courts to ignore those principles if they want to rely on liability insurance when formulating substantive tort doctrine. But it is not plausible that this kind of duplicitous judicial decisionmaking uniformly recurs throughout the United States and perhaps the

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6. Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. 2165, 2169 (2024).

7. *Id.* at 2235–36.

8. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (citation omitted) (discussing the proper formulation of vicarious liability); *see also, e.g.*, FED. R. EVID. 411 ("Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully.").

9. *Cf.* Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 683 (1985) ("Attention to activity and passivity in the context of a given harm precludes consideration of the litigants' wealth, virtue, or need: whatever the relevance of these factors for distribution or moral assessment, they are not elements in the parties' immediate interaction as such.").

10. Abraham & Sharkey, *supra* note 6, at 2243.

common-law world more generally.[11] Hence there is a foundational, surprisingly neglected question of tort law that begs for analysis: Are there tort principles that would enable courts to justifiably rely on bankruptcy, liability insurance, and the general availability of compensatory resources to formulate substantive tort law?

As I will try to demonstrate, insofar as there is a "glaring gap" in tort theory, it involves the failure to recognize how the social fact of scarce compensatory resources fundamentally structures tort law for reasons of common-law principle. The scarcity of compensatory resources has always substantively mattered within the common law. The argument proceeds in five parts.

After identifying the relevant noncontroversial tort principles, Part I explains why courts can defensibly consider matters like insolvency and liability insurance when formulating substantive tort doctrine. To further establish the baseline proposition that substantive tort law depends on the general availability of compensatory resources, Part II asks what the common law would look like under conditions of unlimited compensatory resources and perfect injury compensation. This thought experiment, though obviously unrealistic, employs the historical practice common among ancient societies in the state of nature to compensate injuries with a "social currency" that is normatively different from the ordinary money which greases market exchange. In a world where injuries can always be fairly compensated with social currency, there is no normative concern about the prevention of injury. Without any injury-causing behavior to punish, punitive damages disappear, and the criminal law serves only to sanction those who shirk their compensatory obligations. The substantive structure of the common law would be radically transformed from its present incarnation, providing further support for the baseline proposition that the general availability of compensatory resources has substantive implications for tort law.

Part III introduces the problem of scarce compensatory resources. Following the transition from the state of nature, the newly emergent state enforced legal obligations with ordinary money for paying taxes and the like.[12] By utilizing ordinary money as a form of social currency for enforcing legal obligations within the realm of injury compensation, the common law imbued the monetary damages remedy with a duality of normative meaning that persists to this day—it is both crassly commercial and a normative measure of fair compensation. Two different scarcity problems inhere within this medium for redressing injury.

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11. *Cf.* Weinrib, *supra* note 9, at 681–82 (observing that "the courts' tailoring of liability rules to the operation of insurance would be regarded as bizarre" in Canada, an approach which conforms to "the conception of tort law that is prevalent in non-American common-law jurisdictions").

12. *See* ROBERT SKIDELSKY, MONEY AND GOVERNMENT: THE PAST AND FUTURE OF ECONOMICS 23–27 (2018).

First, money is a poor substitute for bodily injury—there is not enough money to compensate for a lost life, and money does not perfectly replace broken bones or fully correct for the fundamental alteration of one's life. Recognizing this problem, the common law treats premature death and other bodily injuries as irreparable harms that are best prevented *ex ante* instead of being compensated *ex post* with the inherently inadequate monetary damages remedy. The default rule of negligence liability accordingly centers on the equitable prevention of irreparable injury. The normative importance of injury prevention, in turn, justifies both punitive damages and criminal punishment for culpable forms of injury-causing behavior. The compensatory limitations of tort liability accordingly shape the criminal law, contradicting the conventional account that treats tort law as the civilized outgrowth of the punitive practices that organize the criminal law.

As previously discussed, compensatory resources are also scarce because defendants often do not have enough money to satisfy their tort judgments. Under the early common law, a judgment that rendered the defendant insolvent was not simply a financial matter. The compensatory obligation embodied the normative debt of social currency the defendant owed the plaintiff, and so insolvency involved a moral failure that merited punishment.[13] Debtor's prison—a prospect tort defendants faced in many states until the early twentieth century[14]—supplied a powerful normative reason for sharply limiting tort liability. Extensive liabilities for ordinary negligence did not justify a prison sentence; tort liability had to be proportional to the defendant's culpability. The subsequent emergence of modern bankruptcy law eliminated the burden of criminal punishment from this normative calculus. In principle, the transformation of debtor's prison into modern bankruptcy could expand the scope of substantive tort liability, a dynamic that has never adequately factored into the leading accounts of tort law.

Part IV shows how these two problems of resource scarcity have influenced substantive tort doctrine. The relevant tort principles are not the products of any particular rationale for tort liability, such as allocative efficiency or corrective justice. They instead are embedded within the normative calculus that courts necessarily and openly apply when developing substantive tort law in a principled manner. Social facts involving the general availability of compensatory resources, including the spread of liability insurance, factor into this normative calculus in ways that predictably shape substantive tort law's reach, causing it to either contract or expand.

These predictions are borne out in Part V, which confirms that the scarcity of compensatory resources can persuasively explain the basic structure of

13. *See infra* notes 108–114 and accompanying text.

14. *See* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 256 (1974) ("Between 1811 and the end of Reconstruction most but not all of the eastern states gradually prohibited the imprisonment of defaulters except in cases of fraud and in damage suits for alimony, child support, and wrongful behavior.").

modern tort law—why it employs a default rule of negligence liability sometimes supplemented by rules of strict liability and limited for wide swaths of negligently caused harms involving economic loss and emotional distress. Once one recognizes the principled ways in which the availability of compensatory resources affects substantive doctrine, the tort rules governing accidental injury have normative properties that modern tort theories have overlooked—a glaring gap if there ever was one.

I. TORT PRINCIPLES AND COMPENSATORY RESOURCES

To identify the relevant tort principles, we must first define the basic normative problem any court confronts when developing substantive tort law in a principled manner. By first spelling out the necessary rudiments of the normative calculus for solving these problems, we can then start to figure out how substantive tort law could, in principle, be affected by the availability of compensatory resources.

A. *The Normative Calculus of Tort Law*

The foundational need for all legal rules, according to Karl Llewellyn, plausibly stems from the demand for a neutral third party to mediate the conflicting interests of the parties in a dispute: "I should indeed be tempted to argue that the differentiation of anything we can perceive as law begins with this."[15] The conflicting interests at the heart of legal disputes is underscored by Guido Calabresi and Douglas Melamed's influential analysis of legal entitlements:

> Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of "might makes right"—whoever is stronger or shrewder will win. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.[16]

The law resolves these conflicts with legal entitlements: the set of legally enforceable rights and their correlative duties. To be protected by a right, an individual must have some interest that the law prevents others from interfering with merely because doing so would further their own interests or those of society. This formulation of the tort right is set forth at the outset of the multivolume *Restatement (Second) of Torts*: An individual interest that "is protected against any form of invasion . . . becomes the subject matter of a 'right.' "[17]

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15. Karl N. Llewellyn, *What Price Contract? — An Essay in Perspective*, 40 YALE L.J. 704, 719 (1931).

16. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

17. RESTATEMENT (SECOND) OF TORTS § 1 cmt. b (A.L.I. 1965).

This property of a tort right has analytic implications for the normative structure of tort rules. For example, a tort right that protects the individual interest in physical security must give that interest some sort of legal priority over the duty-bearer's potentially invading or conflicting liberty interest. When these two interests come into conflict, the right-holder's prioritized interest in physical security prevails. Regardless of the underlying rationale for tort liability, any tort right necessarily prioritizes the right-holder's legally protected interest over a specified conflicting, subordinate interest of the duty-bearer.

To prioritize among conflicting interests, a tort rule must first normatively distinguish them in a manner that justifies an interpersonal priority of one interest (such as security) over another (such as liberty). Although such a normative distinction ultimately derives from the underlying rationale for tort liability, once that distinction has been drawn, the resultant legal priority defines the substantive content of a tort right and its correlative duty.

An absolute right to physical security, for example, would entail a priority of that interest which prohibits risky actors from threatening it in any way. A pedestrian's legally protected interest in physical security would have absolute priority over the conflicting liberty interests of automobile drivers using the same public roadway. An absolute priority would justify negating these potentially conflicting (absolutely subordinate) liberty interests with a legal rule that prohibits driving anytime the activity would threaten injury to a pedestrian—even if the risk of injury were minuscule. An absolute right to physical security would effectively shut down wide swaths of socially valuable activities, explaining why courts have long recognized, "[m]ost of the rights of property, as well as of person, . . . are not absolute but relative."[18]

Relative rights regularly create interpersonal conflicts. Individuals have a relative right to physical security, just like they have a relative right to liberty. Each right gives legal protection to an identifiable interest—one's interest in physical security, and the other's interest in the exercise of liberty. To equitably resolve conflicts between these two relative rights, tort law must fairly balance or mediate the conflicting interpersonal interests of the two interacting parties. Consequently, the "history of the law of torts has centred around the search for an adjustment between two basic interests of individuals—the interest in security and the interest in freedom of action."[19]

Due to these analytic properties of tort rights and their correlative duties, the normative structure of any tort problem can be defined in terms of the conflicting individual interests in question. For example, in a tort case involving an automobile driver who accidentally injured a pedestrian, the court must determine whether the pedestrian's interest in bodily security is prioritized over the driver's conflicting liberty interest. If so, tort law can justifiably shift the injury costs from the plaintiff's (prioritized) interest onto the defendant's

18. Losee v. Buchanan, 51 N.Y. 476, 485 (1873).

19. JOHN G. FLEMING, THE LAW OF TORTS 7 (5th ed. 1977).

(legally subordinate) interest by way of a judgment for compensatory damages. Absent such a priority, tort law cannot, in principle, shift the injury costs from the plaintiff to the defendant; the loss must instead lie where it fell, absolving the defendant from liability.[20]

Thus, although "[t]ort liability of course depends on balancing competing interests," to "identify an interest deserving protection does not suffice to collect damages from anyone who causes injury to that interest . . . . Not every deplorable act . . . is redressable in damages."[21] Relative rights grant legal protection to the conflicting interests of both the plaintiff and the defendant. Legal protection is not enough. The plaintiff is entitled to compensatory damages only if the injury is to a legally protected interest with a relative priority over the defendant's conflicting, legally protected interest. The balancing of interests can also work in the other direction, with the defendant's interest receiving a relative priority over the plaintiff's conflicting interest, in which case the plaintiff's injury to the legally protected, subordinate interest "does not suffice to collect damages."[22]

The "balancing of interests" in the foregoing quote from the New York Court of Appeals defines the normative calculus of tort law, one that determines whether the plaintiff's injury involves an interest that is legally prioritized over the defendant's conflicting interest. As a leading torts treatise explains, "[t]his process of weighing the interests is by no means peculiar to the law of torts, but it has been carried to its greatest lengths and has received its most general conscious recognition in this field."[23]

The normative calculus of tort law must balance conflicting interpersonal interests for a noncontroversial reason. Like other forms of legal coercion, tort

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20. Once a loss has already occurred, "whatever benefit might be derived from repairing the fortunes of one person is exactly offset by the harm caused through taking that amount away from another." *Id.* at 4. Consequently, in the absence of any legal priority of the plaintiff's impaired interest over the defendant's conflicting interest, a defendant subject to liability could then sue to re-shift the loss back onto the plaintiff on the ground that the plaintiff caused the defendant to suffer this harm. In principle, the cycle would recur endlessly for any arbitrary shifting of the loss. "Hence, a shifting of loss is justified only when there exists special reason for requiring the defendant to bear it rather than the plaintiff on whom it happens to have fallen." *Id.* These special reasons justify a legal priority of the plaintiff's protected, injured interest over the defendant's conflicting interest, with the priority providing the mechanism for shifting the loss in a nonarbitrary manner. The burden of proof then maintains the integrity of this priority. The plaintiff must prove the elements of the prima facie case by a preponderance of the evidence. When the evidence is in equipoise, showing that there is a fifty-percent chance that the plaintiff is entitled to recovery and a fifty-percent chance that the defendant is not responsible, then the respective interests of the two parties are normatively indistinguishable, and the plaintiff must bear the loss. *See* MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 109–11 (2008).

21. Madden v. Creative Servs., Inc., 646 N.E.2d 780, 784 (N.Y. 1995) (quoting Humphers v. First Interstate Bank, 696 P.2d 527, 533 (Or. 1985)).

22. *Id.* (quoting *Humphers*, 696 P.2d at 533).

23. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 16–17 (W. Page Keeton ed., 5th ed. 1984).

liability must minimally satisfy the requirement of formal equality.[24] Hence, there is no doubt that courts must develop substantive tort law by equally accounting for how a liability rule impacts the conflicting, legally protected interests of both right-holders and their correlative duty-bearers. The resultant balancing, mediating, or weighing of these conflicting interpersonal interests defines the normative calculus of tort law.

The exact method or test for balancing conflicting interests turns on the fundamental rationale for tort liability. For example, courts could balance conflicting interpersonal interests in security and liberty by reference to an underlying principle of substantive equality that gives everyone an equal right to self-determination or autonomy. This type of balancing would require courts to determine the relative importance of the conflicting security and liberty interests for individuals to lead a life of their own choosing. Alternatively, the substantive balancing principle could be based on the concern for equal wealth distribution, in which case the less wealthy interest would be prioritized over a conflicting wealthier interest. Another approach translates the varied interests into measures of individual utility or welfare that must receive equal treatment when plugged into a social welfare function, requiring courts to balance conflicting interests in a manner that minimizes the social cost of accidents to maximize social welfare. Exactly how a tort rule balances one conflicting interest over another within the normative calculus of tort law depends on the highly contestable requirement of substantive equality and its implications for the nature of tort liability.[25]

Rather than attempting to resolve this ongoing controversy about the underlying rationale for tort liability, the normative calculus of tort law is defined only in relation to a principle of formal equality that requires courts to consider how a substantive tort rule affects the conflicting interests of both right-holders and duty-bearers. The normative calculus does not otherwise specify how courts must balance, mediate, or weigh these conflicting interests.

Because it does not fully determine the answers to tort questions, the normative calculus of tort law gives shape to what Cass Sunstein calls "incompletely theorized agreements" that enable judges to be "clear on the result" for the case at hand "without agreeing on the most general theory that accounts for it."[26] These incompletely theorized agreements are based on intermediate

24. *See* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1 (2000) ("No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance.").

25. Different theories of justice disagree about "which specific kind of equality is required by the more abstract idea of treating people as equals." WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 4 (2d ed. 2001). Put differently, "the fundamental argument is not whether to accept equality, but how best to interpret it." *Id.*

26. CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 4–5 (2d ed. 2018) (emphasis omitted).

moral principles, such as fairness or reasonableness.[27] As Stephen Smith explains, intermediate moral principles are "more general than the particular rules that they are employed to justify," while also being "narrower than the foundational principle or principles that define comprehensive moral theories" for justifying tort liability.[28] Intermediate moral principles of fairness and reasonableness are the normative medium through which courts specify how conflicting interpersonal interests are balanced, weighed, or mediated in the normative calculus of tort law. This kind of normative reasoning enables courts to reach incompletely theorized agreements about a tort rule's fairness or reasonableness—the same kind of justificatory approach courts regularly use in other areas of the law.[29]

Thus, in applying the normative calculus of tort law, judges need only agree that they must fairly or reasonably balance the conflicting interpersonal interests. They need not otherwise agree about the fully theorized meaning of reasonableness or fairness derived from a comprehensive rationale for tort liability, such as Kantian right, liberal egalitarianism, or utilitarianism. The institutional requirement to treat "like cases alike" then provides the mechanism that, in principle, enables courts to coherently develop tort law over time and across cases based on these incompletely theorized agreements.[30]

Hence, the normative calculus of tort law can accommodate diverse conceptions about what is good or right as a matter of substantive equality, which on one view is necessary to legitimize judicial decisionmaking in a society riven by competing conceptions of fairness and justice.[31] Even within a tort system like the modern one that recognizes such a plurality of values, there is an identifiable normative calculus that structures substantive law.

B. *Policy and Principle Within the Normative Calculus of Tort Law*

The normative calculus of tort law requires courts to formulate substantive tort rules by giving equal consideration to the conflicting interests of right-holders and duty-bearers. Does this calculus obligate courts to consider only the interests of the individual litigants, or can they also consider the relevant class of right-holders and duty-bearers? Would it be defensible for courts to

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27. Stephen A. Smith, *Intermediate and Comprehensive Justifications for Legal Rules*, *in* JUSTIFYING PRIVATE RIGHTS 63, 69 (Simone Degling Michael Crawford & Nicholas Tiverios eds. 2021).

28. *Id.*

29. *Cf. id.* ("The distinguishing feature of judicial justifications for legal rules, at least so far as their form is concerned, is that they are almost always expressed in terms of intermediate moral principles.").

30. For more extensive analysis, see Mark A. Geistfeld, *Unifying Principles Within Pluralist Tort Adjudication*, *in* TORTS ON THREE CONTINENTS: HONOURING JANE STAPLETON 13 (Kylie Burns, Jodi Gardner, Jonathan Morgan & Sandy Steel eds. 2024).

31. Steve Hedley, *Private Law Theory: The State of the Art* 8–9 (Sep. 5, 2021), http://dx.doi.org/10.2139/ssrn.3917777 (summarizing views of different scholars taking this position).

further consider other societal interests? Addressing these questions implicates the distinction between policy and principle.

"Decisions . . . are matters of policy, not principle," when "they must be tested by asking whether they advance the overall goal [of promoting the general good], not whether they give each citizen what he is entitled to have as an individual."[32] For example, the general good might be promoted by discriminatory practices against a minority of individuals in violation of their rights. The rights individuals hold against others, even a majority of them, accordingly turn on matters of principle, not policy. Thus, to properly protect tort rights and enforce their correlative duties, "[j]udges must make their common-law decisions on grounds of principle, not policy."[33]

This normative property of tort law would seem to render irrelevant the availability of compensatory resources, such as the funding provided by liability insurance. A defendant's financial ability to pay for the tort judgment does not justify tort liability.[34] Instead, a defendant's wealth, along with the opportunity to insure against tort liability, is relevant for attaining the efficient and fair distribution of resources across society.[35] How, then, could the availability of compensatory resources be a normatively relevant factor for determining the duty a defendant in principle owed to the plaintiff right-holder? The apparently obvious negative answer to this question may explain why scholars so far have assumed that liability insurance—and by extension, the availability of compensatory resources—can factor into substantive tort law only as a matter of policy, not principle.[36]

The assumption that liability insurance only implicates policy concerns fails to recognize how tort principles can legitimately encompass a range of social considerations beyond the case at hand. The "form . . . of a principle . . . describes a general right everyone is supposed to have."[37] As a matter of formal equality, any principle for justifying a general right also applies with equal force to the correlative general duty. By definition, the formulation of a general

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32. RONALD DWORKIN, LAW'S EMPIRE 223 (1986).

33. *Id.* at 244.

34. *See supra* note 8 and accompanying text.

35. Differences in individual wealth obviously matter for social schemes of redistributing wealth across society. Liability insurance is relevant to the socially efficient allocation of resources. *See* Tom Baker & Peter Siegelman, *The Law and Economics of Liability Insurance: A Theoretical and Empirical Review*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 169, 174 (Jennifer H. Arlen ed. 2013) (according to "canonical" economic model, the optimal outcome involves insurance contracts that shift risks "away from risk-averse parties who find bearing them costly" within a legal regime of liability rules that "provide both injurers and victims with incentives to take optimal care, and engage optimally in risky activities").

36. *See, e.g.*, Abraham & Sharkey, *supra* note 6, at 2243; Weinrib, *supra* note 9, at 684 ("Deploying insurance considerations to resolve tort disputes . . . entails an instrumentalist and legislative conception of law."); *see also* Zhong Xing Tan, *The Enigma of Interpersonal Justice in Private Law Theory*, 43 OXFORD J. LEGAL STUD. 699, 703 (2023) ("Any attempt to take loss-spreading reasoning seriously within the adjudicatory framework of private law invariably runs up against concerns of intractability.").

37. DWORKIN, *supra* note 32, at 242.

tort duty is categorical in nature; it applies equally to everyone within the general category of cases the duty governs. Consequently, as the *Restatement (Third) of Torts* explains, "when liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty," which is based on "relatively clear, categorical, bright-line rules of law applicable to a general class of cases."[38] A principled analysis of the duty question accordingly turns on the varied social facts that are normatively relevant within the general category of cases the duty governs, an inquiry not dependent on case-specific facts such as the defendant's wealth or ownership of an insurance policy.

A principled categorical evaluation of duty is still governed by the normative calculus of tort law. The principle of formal equality obligates courts to equally account for the conflicting interests of both right-holders and duty-bearers. In a negligence case, the normative calculus of reasonable care asks whether the defendant failed to take a safety precaution and incur the associated burden on liberty that was reasonable in light of the reduced threat or risk to the plaintiff's interest in physical security.[39] The underlying normative problem—the fair way to balance conflicting interpersonal interests in liberty and security—does not disappear when courts address the antecedent question of whether the defendant owed a duty of care. As applied to the element of duty, the normative calculus is simply reoriented from the individual case to the general category of cases the duty governs, thereby enabling courts to consider normatively relevant facts beyond those in the case at hand.

To apply the normative calculus of tort law to the element of duty, courts must equally account for how the duty affects both the ordinary right-holder and the ordinary duty-bearer across the general class of cases to which the right and its correlative duty apply. Although conducted at a higher level of generality than the normative calculus of reasonable care, the duty inquiry involves the same sort of balancing or weighing of conflicting interpersonal interests.[40]

Because the normative calculus of tort law applies to both the formulation of reasonable care and to its antecedent duty, we can rely on one element to obtain normative guidance about the other. Under any plausible conception

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38. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. a (A.L.I. 2010).

39. *See id.* § 3 cmt. e.

40. *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) (relying on case law to demonstrate that the same normative calculus which courts apply to determine the requirements of reasonable care are reframed in categorical terms for determining whether there was a duty to exercise reasonable care in the first instance), *with* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf: *Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1888 (2011) (expressing dismay over the finding that seven jurisdictions "expressly incorporate the Learned Hand formula for breach as part of their foundational test for the existence of a duty," with the vast majority of states relying on multi-factor tests that "contain some or all of the elements" of the Learned Hand formula for evaluating reasonable care).

of reasonable care, an increase in the burden of exercising care makes it less likely that the precaution will be reasonable, all else being equal.[41] By implication, an increase in the burden faced by the ordinary duty-bearer across the relevant category of cases makes it more difficult to justify the tort duty, whereas a decreased burden has the opposite effect, all else being equal.

This normative attribute of the tort duty has an important implication: It explains why the duty can properly account for the availability of compensatory resources while still adhering to the principle that liability does not turn on the defendant's ability to pay for the tort judgment. The financial capacity of an individual defendant is a case-specific fact which does not properly factor into a principled evaluation of a general tort duty governing a category of cases. To apply the normative calculus of tort law in the requisite categorical manner, courts must first consider the burden the duty would impose on the ordinary duty-bearer within the relevant category of cases. Courts must then compare that burden to the protection such a duty would afford the legally protected interest of the ordinary right-holder. Whereas the financial capability of an individual defendant is irrelevant to this inquiry, the compensatory resources available to the ordinary duty-bearer can affect the normatively relevant burden of the duty.

The burden a general tort duty imposes on the ordinary duty-bearer depends, in part, on the community's compensatory resources. For the ordinary duty-bearer, any given tort duty will be more burdensome and more likely to be unreasonable in an impoverished community as compared to an affluent community, all else being equal. Hence, there is a principled reason for contracting or expanding the scope of a tort duty to account for the general availability of compensatory resources.

II. THE COMMON LAW UNDER CONDITIONS OF PERFECT INJURY COMPENSATION

Thus far we have identified analytic reasons, inherent in the structure of tort rights and their correlative duties, showing why the availability of compensatory resources is substantively relevant as a matter of principle. This conclusion can be tested with a conceptual analysis, or thought experiment, asking what the common law would look like under conditions of perfect injury compensation. Compensation can be perfect only if there are no binding constraints on the resources for compensating injuries. In a world of unlimited

41. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. e (A.L.I. 2010) ("Conduct is negligent if its disadvantages outweigh its advantages, while conduct is not negligent if its advantages outweigh its disadvantages. . . . The 'advantages' of the conduct relate to the burden of risk prevention that is avoided when the actor declines to incorporate some precaution."); Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2002 (2007) ("It is . . . true, all else being equal, that the reasons against taking the precaution tend to increase with its cost, whereas the reasons in favor of the precaution tend to increase with the reduction of injury likelihood or severity that the precaution would effect. Almost no one contests that.").

compensatory resources, what would the common law look like? If the common law would be fundamentally altered, then the scarcity of compensatory resources presumably has substantive implications for the common law of torts.

This analytical approach is analogous to the one employed in the Coase Theorem, which analyzes tort rules under the unrealistic assumption that there are no transaction costs, thereby showing why and how transaction costs can be important for legal analysis.[42] The unrealism of a modeling assumption can be an effective way to isolate the importance of that assumed factor. So, too, the unrealistic assumption of perfect injury compensation can help to show why and how the availability of compensatory resources shapes substantive tort law.

A. *Social Currency as the Medium of Compensatory Exchange*

Clear statements about ideal compensation are not hard to find. For example, in defining the meaning of "just compensation" in the Takings Clause of the Fifth Amendment in the United States Constitution, the Supreme Court held that "in view of the combination of those two words," there is "no doubt that the compensation must be a full and perfect equivalent for the property taken."[43] Ideal compensation involves a full and perfect equivalent for the harm in question.

This compensatory ideal poses an evident problem for tort law's method of compensating bodily injuries. The fundamental tort problem centers on the equitable mediation, balancing, or "adjustment between two basic interests of individuals—the interest in security and the interest in freedom of action."[44] In the event of liability, the defendant's subordinate liberty interest is legally responsible for harming the plaintiff's prioritized security interest. Due to the normative difference between these two conflicting interests, a perfectly compensatory currency for redressing the plaintiff's injury must be socially constructed to equitably burden the defendant's liberty interest by an amount that completely redresses the plaintiff's bodily injury. How can the defendant's paid compensation be a full and perfect equivalent for the plaintiff's bodily injury?

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42. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (proving that if there are no transaction costs in a world of well-defined property rights, then the individuals who either create or are harmed by an externality will efficiently resolve their conflict regardless of how legal entitlements are initially assigned). Despite the obvious unrealism of this thought experiment (as Coase recognized), it has a number of important implications for how the law can address the problem of externalities in a world of transaction costs. *See* Steven G. Medema, *Coase Theorem*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 248, 250–52 (Alain Marciano & Giovanni Battista Ramello eds., 2019).

43. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

44. FLEMING, *supra* note 19, at 7.

A compensatory currency with these normative properties was utilized by ancient societies that existed prior to the emergence of centralized government, an era somewhat misleadingly called the "state of nature."[45] A close look at this currency shows why the compensatory ideal for bodily injury is conceptually sound.

The term "primitive money" is "the sort one encounters in places where there are no states or markets."[46] But as the economic anthropologist David Graeber explains:

> In fact, the term "primitive money" is deceptive . . . since it suggests that we are dealing with a crude version of the kind of currencies we use today. But this is precisely what we don't find. Often, such currencies are never used to buy and sell anything at all. Instead, they are used to create, maintain, and otherwise reorganize relations between people: to arrange marriages, establish the paternity of children, head off feuds, console mourners at funerals, seek forgiveness in the case of crimes, negotiate treaties, acquire followers—almost anything but trade in yams, shovels, pigs, or jewelry.[47]

Because this is a "totally different conception of what money, or indeed an economy, is actually about," the term "social currenc[y]" is the label Graeber gives to the medium of exchange that can normatively reorganize human relations across a variety of social settings.[48] Without otherwise employing this label, others have identified how social currency normatively differs from ordinary money.[49]

By reorganizing social relations in the requisite normative sense, social currency can fulfill the compensatory ideal of providing a full and perfect equivalent for bodily injury. Consider, for example, the available historical materials from medieval Ireland which largely consist of "a series of law codes" that "endlessly and meticulously" specify the amount of compensation for various injuries.[50] The compensatory currency was not used for commercial exchange. "The authors of the law codes didn't even know how to put a price on most goods of ordinary use" because "no one seems ever to have paid money

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45. The state of nature in the social-contract models of Hobbes and others connotes a period of "disorderly and chaotic violence" badly in need of social ordering, whereas the currently dominant model shows "that the violence of the state of nature had a kind of spontaneous order, founded in the systematic organization of vengeance." James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41, 41–42 (1995).

46. DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 129 (2011).

47. *Id.* at 130 (footnote omitted); *see also* A. HINGSTON QUIGGIN, A SURVEY OF PRIMITIVE MONEY: THE BEGINNINGS OF CURRENCY 12 (1949) ("The objects that are the nearest approach to money-substitutes may be seen to have acquired their functions by their use, not in barter, but in social ceremony.").

48. GRAEBER, *supra* note 46, at 130.

49. *See, e.g.*, GEORG SIMMEL, THE PHILOSOPHY OF MONEY (Tom Bottomore & David Frisby trans., Routledge 4th ed. 2011) (1907); VIVIANA ZELIZER, THE SOCIAL MEANING OF MONEY: PIN MONEY, PAYCHECKS, POOR RELIEF, AND OTHER CURRENCIES (2017).

50. GRAEBER, *supra* note 46, at 172.

for them."[51] Instead, "money was employed almost exclusively for social purposes," particularly injury compensation.[52] "The key to the system was a notion of honor" whereby injury compensation, in principle, could be the full and perfect equivalent for the honor one would otherwise lose for having been harmed by another.[53]

The same kind of compensatory practices recurred throughout ancient societies.[54] Absent a centralized government for protecting individuals from being attacked by others, attaining full compensation or equitable balance within the normative realm of honor was extraordinarily important for reasons William Miller forcefully emphasizes: "Honor was what provided the basis for your counting for something, for your being listened to, for having people have second thoughts before taking your land or raping you or your daughter."[55] By compensating for the victim's loss of honor, as Graeber explains, the injurer's payment of social currency also restored the victim's "power, in the sense of the ability to protect oneself, and one's family and followers, from any sort of degradation or insult."[56] Receiving full compensation enabled the victim to regain lost honor and thereby eliminate the concomitant vulnerability to future attacks, demonstrating why this remedy was vitally important in the state of nature.

In principle, social currency could equitably compensate death. To be sure, the decedent could not be compensated, but these compensatory practices arose in an era when there was no status accorded to individuals outside of their membership in a family, clan, or tribe. "The individual is but part of the kin. If he be injured, it is the kin which is injured. If he be slain, it is the blood of the kin that has been shed, and the kin is entitled to compensation or to vengeance."[57] Having killed someone from another clan, the injurer (or more accurately, the injurer's clan) could in principle fully compensate the

51. *Id.*

52. *Id.*

53. *Id.*; *see also* DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 2 (1999) ("While it would be pointless to try to define what constituted wrongdoing, since this is inevitably specific to particular cultures, it is noteworthy that medieval culture seems to have been concerned more with dishonour than with loss.").

54. *See* WILLIAM IAN MILLER, EYE FOR AN EYE 20 (2006); *see also* A.S. DIAMOND, PRIMITIVE LAW, PAST AND PRESENT 395 (reprt. 2004)(1971) ("[T]here is less variation in these sanctions between peoples of the same stage of economic development than in any other branch of the law.").

55. MILLER, *supra* note 54, at 101.

56. GRAEBER, *supra* note 46, at 172.

57. E. SIDNEY HARTLAND, PRIMITIVE LAW 48 (Kennikat Press 1970) (1924). Taken to its extreme, this idea, for example, explains why "[a]mong the Goajiro Indians, someone who accidentally hurt himself had to compensate his own family because he shed the blood of the family." SIMMEL, *supra* note 49, at 387.

injured clan through the requisite payment of social currency that would fully restore the injured clan's honor.[58]

By assuming that social currency is perfectly compensatory within the requisite normative realm, we effectively rule out the need for revenge—by assumption, compensation will attain the requisite equitable balance. We also assume that injurers always have enough social currency to fully compensate their victims. The absence of such a resource constraint does not eliminate the value of social currency, because this medium of exchange can also be used to readjust many other types of social relations aside from injury compensation.[59]

Under these conditions, the normative ideal of perfect compensation via the payment of social currency is a form of debt cancellation the injurer otherwise owed to the victim. "Exchange encourages a particular way of conceiving human relations" because it "implies equality, but it also implies separation. It's precisely . . . when the debt is cancelled, that equality is restored *and* both parties can walk away and have nothing further to do with each other."[60]

The outcome of this compensatory exchange is captured by Arthur Ripstein's interpretation of the modern compensatory damages remedy in tort cases as involving "a normative claim about the relation between wrongdoing and repair."[61] On this normative account of injury compensation, "the sole rationale for granting damages at all—for bringing the coercive and cumbrous machinery of the state to bear on a particular defendant to require him to compensate the plaintiff he has injured—is the respect in which damages make it as if the wrong had never happened."[62] The wrongdoing or debt is cancelled, ending the matter.

Modern tort law's compensatory aims are historically linked to compensatory practices within the state of nature. The social problem of injury compensation largely structures the model of evolutionary legal development that derives the formation of the early state from the need to replace the self-help remedies for injury-causing behaviors with state-enforced compensatory remedies. This model "has collected some imposing authority over the last couple

58. *See* HARTLAND, *supra* note 57, at 48 ("If he commit a wrong, the whole kin is involved; and every member is liable, not as an individual, but as part of the kin that committed the wrong."); *see also* HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 126 (Cambridge Univ. Press 2012) (1861) ("[P]rimitive law considers the entities with which it deals, i.e. the patriarchal or family groups, as perpetual and inextinguishable.").

59. GRAEBER, *supra* note 46, at 130 ("Often, these [social] currencies were extremely important, so much so that social life itself might be said to revolve around getting and disposing of the stuff.").

60. *Id.* at 122.

61. Arthur Ripstein, *As if It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1961 (2007).

62. *Id.*

of centuries" and has dominated the field since the late nineteenth century.[63] The model depicts an evolutionary process that transformed social currency within the state of nature into the monetary compensation the modern legal system utilizes—a process described more fully in Part III.

For present purposes, the important point is that social currency is the medium of exchange for attaining full compensation or equitable balance. Thus, as a conceptual matter, the tort system would be perfectly compensatory, in the requisite normative sense, if there were no constraints on the amount of social currency for compensating injury.

B. *The Obviated Need for Deterrence and Punishment*

Under conditions of perfect compensation, tort liability cannot be justified with deterrence reasoning. A duty-bearer who acts tortiously can fully repair any wrongfully caused injuries through the payment of perfectly compensatory damages, eliminating any reason to deter injury-causing behavior. To be clear, deterrence can be an incidental consequence of a duty insofar as duty-bearers choose to comply with the legal obligation when they would not otherwise act in this way absent such a duty. But deterrence does not justify a tort duty or the imposition of liability in a world of perfect injury compensation.

Corrective-justice theorists emphasize this point in rejecting economists' deterrence-based arguments.[64] The logic of this position can be reframed in compensatory terms. Tort liability fully corrects for the injustice of injury-causing behavior when compensatory damages "make it as if the wrong had never happened."[65] The normative ideal of full and perfect compensation explains why deterrence is irrelevant for corrective justice.

For these same reasons, there is no need for either tort law or criminal law to punish anyone for injuring another. Even if someone decides to act tortiously and is willing to pay compensatory damages for having done so, that payment is perfectly compensatory and makes the plaintiff normatively whole. The compensatory damages remedy eliminates any normative concerns about the occurrence of injury, obviating the need to punish a defendant wrongdoer with punitive damages or criminal liability for having engaged in the injury-causing behavior.

Once again, this compensatory property can explain leading corrective-justice accounts of tort law. On this view, "[p]unitive damages are inconsistent

63. Whitman, *supra* note 45, at 42 (explaining that this evolutionary model "was articulated and embraced, with variations, by some of the greatest names in the history of legal scholarship" and "has been applied to explain the rise of legal systems all over the early civilized world").

64. *See* Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 638 (2002) ("For corrective justice, deterrence plays no role in defining the nature of the wrong.").

65. Ripstein, *supra* note 61, at 1961.

with corrective justice for reasons both of structure and of content."[66] By relying on a normative ideal of full and perfect compensation, this formulation of corrective justice renders both deterrence and punishment irrelevant. Punitive damages also cannot convey any expressive message, because the payment of perfectly compensatory damages already "make[s] it as if the wrong had never happened."[67]

Of course, duty-bearers might try to shirk their compensatory obligation. In that event, the need for punishment arises. Enforcing an obligation to pay compensation, however, is quite different from employing either punitive damages or the criminal law to punish someone for having engaged in the injury-causing behavior. The common law would be fundamentally altered in a world of perfect injury compensation and unlimited compensatory resources.

III. THE SCARCE COMPENSATORY RESOURCE OF ORDINARY MONEY

Conceptually (though not realistically), the exchange of social currency in the state of nature attained full and perfect compensation or equitable balance in the realm of honor. The emergence of centralized government and other changed social conditions transformed the normative properties of injury compensation.

In the state of nature, full compensation could be attained for fatal injuries only because the entitlement was held by the family, clan, or tribe to which the decedent belonged.[68] In these ancient societies, as Henry Sumner Maine explained, the individual's status within "the household of which he forms a part" largely determined "the rules which he obeys," leaving "the very smallest room for Contract" or the ability of individuals to mutually agree upon the rights and duties governing their interactions.[69] As Maine then famously demonstrated, the development of "progressive societies" involved "a movement *from Status to Contract*."[70] Once individuals were freed from the shackles of their status within the collective and could voluntarily create their own rights and duties, any entitlement to compensation was their own and not held by the collective to which they belonged. The development of individual rights had compensatory consequences—in the event of fatal injury, the decedent right-holder could never be compensated after the fact with monetary damages, an inherent compensatory problem that did not exist in the state of nature.

Whereas perfect compensation eliminates a legal concern about preventing injuries, the inability to adequately compensate premature death and other irreparable injuries made it necessary for the common law to prohibit certain

66. ERNEST J. WEINRIB, CORRECTIVE JUSTICE 97 (2012).

67. Ripstein, *supra* note 61, at 1966.

68. *See supra* note 57 and accompanying text.

69. MAINE, *supra* note 58, at 311–12.

70. *Id.* at 170.

kinds of injury-causing behaviors (like murder). These prohibitions—enforced with punitive measures—have always shaped both the common law of crimes and of torts. The use of punishment to correct for imperfect compensation traces further back into the state of nature, where the exchange of social currency could not attain equitable balance in cases of aggression. An aggressive attack instead merited a punitive response to protect the victim's honor—the "eye for an eye." Punishment has long been tied to the inadequacy of compensatory damages.

Following the transition from the state of nature, the newly centralized government was able to sufficiently secure the public peace over time. Individuals no longer had to maintain their honor to deter others from attacking them. Today, the compensatory ideal does not strike an equitable balance between the honor of injurers and their victims—a fundamental alteration in the normative character of compensatory damages.

Changed social conditions also transformed social currency into ordinary money. The origins of money, though unknown, are connected to injury compensation. Economists emphasize the considerable advantages of utilizing money for trade as compared to the barter of goods, but these exchanges depend on the seller trusting the pocketed money can buy goods in future transactions.[71] On one account, social currency naturally fit this bill and evolved into the medium of exchange for trade between clans and other kinds of communities.[72] Another account locates the origins of money in the early state, which issued coins and the like as the means for subjects to pay taxes or tributes in exchange for services.[73] According to the "dominant model of the origins of law and the state," the most important service the early state provided was to protect individuals and provide them with legal avenues for injury redress.[74] Once mediated through the legal system, injury compensation was effectuated with the same money used to pay taxes and buy goods in the marketplace.

After social currency merged into commercial or commodified money, its social meaning inexorably changed. "What happens, for instance, when the same money once used to arrange marriages and settle affairs of honor can also be used to pay for the services of prostitutes?"[75] As the market economy developed and money became increasingly infused with the impersonal mo-

71. *See* SKIDELSKY, *supra* note 12, at 23–27.

72. PAUL EINZIG, PRIMITIVE MONEY: IN ITS ETHNOLOGICAL, HISTORICAL AND ECONOMIC ASPECTS 380 (2d ed. 1966) ("The payment of blood money between tribes must have largely contributed towards the origin of inter-tribal currencies which, in turn, must have led to the development of currencies on a nation-wide scale. It provided probably the earliest inducement for the development of an agreed monetary unit between two communities."); GRAEBER, *supra* note 46, at 45 ("The problem [with the claim that barter economies preceded the origins of money] is that history shows that without money, such vast barter systems do not occur.").

73. SKIDELSKY, *supra* note 12, at 25–26.

74. *See* Whitman, *supra* note 45, at 41–43.

75. GRAEBER, *supra* note 46, at 177.

rality of commercial transactions, it could no longer fully embody the interpersonal morality of social currency.[76] Money today is not the kind of social currency that can readily readjust social relations to obtain an equitable balance between the interacting parties.

These changes in social conditions bring us into the modern world, where money is a scarce compensatory resource inherently incapable of attaining perfect injury compensation across all cases.

A. *Torts, Crimes, and the Limits of Monetary Damages*

In the state of nature, the exchange of social currency was not the only way to obtain equitable balance between injurers and their victims. Perfect compensation could also involve replacement in kind, an ideal embodied in the moral code known as *Lex Talionis* or the talion,[77] captured by the biblical passage commonly paraphrased as "an eye for an eye, a tooth for a tooth."[78] In cases of intentional wrongdoing, blinded victims could not regain their eyesight by gouging out the eyes of their injurers. Nevertheless, the remedy effectuated a normative replacement in kind—a blinded victim would restore their honor and attain equitable balance by intentionally inflicting the same indignity on the injurer.

This normative calculus changed in cases of accidental harm, justifying a compensatory remedy—"the value of an eye for an eye."[79] Compensation in cases of accidental harm would restore equitable balance—the injurer did not benefit at the expense of the victim's person or property—while deterring others from engaging in such risky conduct by sending the message: *Don't expect to benefit at my expense!* [80]

Ordinary money could serve this equitable function. For example, in discussing early Germanic cultures' compensatory practices involving the use of ordinary money, James Whitman refers to the way in which a compensatory "payment could also belong, in a non-commercial way, to an economy of honor and shame."[81] Here, Whitman is summarizing the historical conclusions of the German scholar Wilhelm Eduard Wilda, who observed that "all Germanic legal systems" refer to "[c]ompensatory 'amends,' " which means " 'correction,' the making good of a wrong that has been done through payment of money or money's worth."[82] Because the compensatory payment of money was infused with this normative meaning, it was "an admission that the wrong

76. *See generally* GRAEBER, *supra* note 46 (developing this theme at length).

77. MILLER, *supra* note 54, at 20–21.

78. *See Exodus* 21, 24.

79. *See* Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U. L. REV. 1517, 1517 (2016).

80. *Id.* at 1541–50 (discussing role of compensation in state of nature).

81. Whitman, *supra* note 45, at 63 (summarizing the position of Wilhelm Eduard Wilda).

82. *Id.* (translating WILHELM EDUARD WILDA, DAS STRAFRECHT DER GERMANEN 314 (Halle, C.A. Schwetschke & Sohn 1842))

had been committed, and to that degree a humiliation on the part of the payor, and accordingly to some degree a reestablishment of honor for the injured party."[83]

By accepting monetary compensation, injury victims could retain their honor—and restore equitable balance with their injurers—because they always had the choice to exact revenge instead. As William Miller explains, "[r]evenge always coexisted with a compensation option. The conceptual underpinning was exactly the same in either case: both revenge and compensation were articulated solely in idioms of repayment of debts and of settling scores and accounts."[84] The revenge option gave injury victims the means to attain equitable balance when compensation would not adequately restore their lost honor.

These practices subsequently shaped the early common law in medieval England, which "simply codified existing custom" in the preceding state of nature.[85] In this era:

> The distinction between crime and tort was not a difference between two kinds of wrongful acts. In most instances, the same wrong could be prosecuted either as a crime or as a tort. Nor was the distinction a difference between the kinds of persons who could initiate the actions. Victims could initiate actions of both kinds. According to the lawyers, victims who preferred vengeance over compensation prosecuted their wrongdoers for crime. Victims who preferred compensation over vengeance sued their wrongdoers for tort.[86]

Over time, the criminal law became the exclusive province of the state, leaving the victims of crime with a tort claim for monetary compensation. The rise of punitive damages within tort law then became the injury victim's surrogate to obtain retribution for reprehensible misconduct that the compensatory damages remedy could not adequately redress. But unlike its counterpart in the state of nature, the punitive remedy is embodied in an award of monetary damages. This tort remedy enables an injured victim to exact financial revenge without engaging in any violence—a civilized attribute of the tort remedy which gained further value as the market economy developed. The only way to punish a corporate wrongdoer—the cause of widespread injury in modern society—is by inflicting financial pain through a tort award of punitive damages. These developments have led to the now conventional understanding that the early common law "approach[ed] the field of tort through the field of crime."[87]

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83. *Id.* (emphasis omitted).

84. MILLER, *supra* note 54, at 25.

85. Whitman, *supra* note 45, at 53.

86. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59–60 (1996) (paragraph structure eliminated).

87. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 530 (2d ed. 1968); *see also* DOBBS, HAYDEN & BUBLICK, *supra* note 5, § 4, at 3 ("American

However, the premise that tort damages are the civilized outgrowth of punitive revenge (the province of criminal law) is belied by the historical practices that entwined the two remedies. We effectively disentangled the two in our earlier thought experiment, which demonstrated how perfect compensation obviates the need for criminal punishment.[88] By implication, the inherent inadequacy of monetary tort remedies generates the rationale for criminal liability: If the only legal response to murder and other forms of highly culpable injury-causing misconduct involved inadequate monetary sanctions, the public peace would be unduly threatened. Hence, the need to criminally punish injury-causing behavior stems from the failure of monetary damages to adequately protect basic tort rights—a relationship between these two fields of the common law opposite from the conventional account.

B. *The Normative Duality of Monetary Damages*

Having historically situated the monetary damages remedy, we can now see why it is supposed to retain at least some of social currency's normative properties. This duality is most apparent when monetary damages compensate the nonmonetary injuries of pain and suffering. Tort law recognizes that these damages "cannot restore the injured person to his previous position" and instead are supposed to "give to the injured person some pecuniary return for what he has suffered or is likely to suffer."[89] "[S]ome pecuniary return" for pain and suffering can be adequately compensatory only if the monetary damages serve as social currency that adequately restores plaintiffs to the same normative positions they occupied prior to their injuries.

For reasons nonmonetary injuries make clear, ordinary money is an ideal form of social currency within a welfarist conception of tort law. Individuals can use ordinary money in whichever ways would best promote their utility or welfare. A tort plaintiff's pain and suffering could be fully and perfectly compensated by the amount of money that would restore their welfare to the level prior to injury. Tort rules formulated to maximize social welfare can fully reorder social relations with the compensatory exchange of ordinary money.[90]

However, the normative calculus of tort law is not necessarily welfarist; it only shapes the incompletely theorized agreements that courts use to develop substantive tort law by relying on a plurality of values, including both welfarist

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common law, including tort law, grew out of English common law. In the development of early English law, tort law in turn grew out of criminal law.").

88. *See supra* Section II.B.

89. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (A.L.I. 1979).

90. This conclusion holds even for wrongful death if potential victims can be compensated prior to the risk imposition. *See* Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries,* 83 CALIF. L. REV. 773, 804–05, 819 (1995) (defining, respectively, the amount of compensatory damages in contractual or noncontractual settings that would equate the right-holder's welfare in the injured and noninjured states of the world prior to the imposition of the risk).

and nonwelfarist rationales for tort law.[91] Within a nonwelfarist tort system, tort damages that fully restore the plaintiff's lost welfare do not inevitably attain perfect compensation. Serious bodily injury fundamentally alters one's life. A healthy person with ordinary wealth faces substantially different choices than someone who has been made wealthy by a large compensatory damages award for lost limbs. "Self-altering injuries constrain one's ability to maintain [or pursue] a set of commitments. These constraints are harms."[92] Ordinary money's capacity to enhance welfare does not perfectly satisfy the compensatory demands of a pluralist tort system that is also concerned about giving individuals a fair opportunity to lead a life of their own choosing.

In a pluralist tort system, ordinary money can function as social currency only if its commercial or commodified meaning is socially distinguishable from its normative meaning in reordering the relationship between a plaintiff and defendant. This distinction explains why the damages rule only requires "some pecuniary return" for nonmonetary injuries rather than the amount that would fully restore the plaintiff's welfare to the pre-injury state. "Some pecuniary return" can be adequately compensatory in a normative sense even if its market value does not fully restore the plaintiff's welfare to the pre-injury state.

So, too, punitive damages must be a form of social currency. A financial penalty can serve as a form of interpersonal punishment only if it readjusts the relationship between the plaintiff and defendant in the requisite normative sense—the defining property of social currency.

By contrast, compensatory damages for economic harms are wholly a matter of ordinary commercial money. For these types of harms, "compensatory damages are designed to place [the plaintiff] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed."[93] One dollar of a financial loss is fully compensated by one dollar of damages, an equivalency based on the market value of a dollar and not on any further social meaning.

Excepting compensation for economic harms, the monetary damages remedy embodies a duality of normative meaning—it is both fully commodified and imbued with a social meaning for reordering relationships between injurers and their victims. This normative duality raises an obvious question: Is it possible in a mature market economy to adequately distinguish money's commodified meaning from its normative meaning in (re)ordering social relationships?

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91. *See supra* Section I.A.

92. 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).

93. RESTATEMENT (SECOND) OF TORTS § 903 cmt. a. (A.L.I. 1979).

The answer is a resounding "yes" for Arthur Ripstein, who maintains that compensatory damages make a plaintiff normatively whole.[94] This normative possibility has also been insightfully developed by Margaret Jane Radin.[95] The same basic idea underlies John Goldberg's useful distinction between "full compensation" involving indemnity for a loss, and "fair compensation" that is an "overtly normative determination based on consideration not only of the losses suffered by the victim, but also of the character of the defendant's conduct, mitigating circumstances that do not rise to the level of recognized defenses, and the power dynamic between the parties."[96]

These normative characterizations of the compensatory damages remedy assume that money's commercial meaning can be adequately distinguished from its social meaning. There is considerable doubt whether this type of normative distinction can be fully drawn in a kinetic consumerist society. If the value of money is reflexively cashed out in terms of its consequences for consumer welfare, is there anything left for a nonwelfarist reordering of social relations? To the extent that money's commodified meaning weakens its ability to function as social currency, this social fact will prevent the compensatory damages remedy from fully attaining its normative ideal in reordering social relationships.[97]

But even if commercial money can still adequately serve as a form of social currency, its ability to function in that normative manner is considerably constrained by the irreparable nature of bodily injuries and the scarcity of money. These two limitations of the monetary damages remedy create inherent compensatory problems.

C. *The Irreparable Injury of Wrongful Death*

The claim that tort damages are adequately compensatory is bankrupted by the common-law rule that barred recovery in the event of the right-holder's death. The most severe bodily injury of all—premature death—received *zero* compensatory damages. There is no respect in which this damages rule restored right-holders to the normative position they occupied prior to the fatal injury, regardless of whether tort damages are supposed to be fair or full.

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94. *See* Ripstein, *supra* note 61, at 1961.

95. *See* Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 57 (1993) (using the philosophical concept of incommensurability to develop a conception of compensation which "is understood not as a commensurable quid pro quo for harm, but rather as a form of redress: affirming public respect for the existence of rights and public recognition of the transgressor's fault with regard to disrespecting rights").

96. John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 437–38 (2006).

97. *Cf.* ZELIZER, *supra* note 49, at 200 (quoting SIMMEL, *supra* note 49, at 444–45) ("To classical theorists the 'mathematical character' of money filled social life with 'measuring and weighing,' with an 'ideal of numerical calculability,' which necessarily blunted personal, social, and moral distinctiveness.").

The manner in which tort law handles the problem of premature death has posed an ongoing puzzle. According to Frederick Pollock's 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 an end to 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 been put aside, and that of compensation substituted, the rule *actio personalis moritur cum persona* seems to be without plausible ground.[98]

This compensatory problem motivated state legislatures to enact wrongful-death statutes that enable statutorily specified plaintiffs (either certain family members or the decedent's estate) to recover for their own injuries caused by the defendant's violation of the decedent's tort right.[99] In effect, this statutory development skirted the compensatory problem by reinstating a compensatory practice from the state of nature—the compensatory entitlement is held by a collective to which the decedent belonged.

The decedent, however, is still the right-holder in the first instance, unlike his status in the state of nature. As Pollock observed, "[i]t 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."[100] The decedent right-holder is not compensated, relieving the defendant from the obligation to pay damages for the decedent's loss of life's pleasures.[101] Wrongful-death statutes do not alter the disturbing fact that it often would be "cheaper for the defendant to kill the plaintiff than to injure him."[102]

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98. FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 40–41 (Phila., The Blackstone Publ'g Co. 1887) (paragraph structure omitted).

99. *E.g.*, Thompson v. Estate of Petroff, 319 N.W.2d 400, 403–05 (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"); KEETON ET AL., *supra* note 23, at 947.

100. POLLOCK, *supra* note 98, at 45.

101. *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).

102. KEETON ET AL., *supra* note 23, § 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* Geistfeld, TORT LAW, *supra* note 20, at 358 (quoting Edward A. Adams, *Venue Crucial to Tort Awards; Study: City Verdicts Depend on Counties*, N.Y.L.J., April 4, 1994, at 1, 4).

The common-law approach would be irrational, as Pollock claimed, if the absence of a damages remedy means that the common law is simply not concerned about premature death. An obvious rejoinder is that the criminal law provides the requisite protection. This response is not fully persuasive, however. Individuals often fatally injure someone else without engaging in criminal misconduct, as frequently occurs in motor-vehicle crashes.[103] Criminal liability does not attach to all accidents causing premature death, and in these cases, tort law does not compensate decedents for their loss of life's pleasures. We return, then, to Pollock's claim that there is no "plausible ground" for this feature of the common law.

Pollock assumes that the damages remedy supplies the only protection against wrongful death, and so the common-law rule barring recovery implies that tort law does not protect individuals from fatal injuries. However, if tort law otherwise adequately accounts for these harms outside the damages remedy, then it could fairly protect individuals from the threat of premature death even in the absence of both criminal and tort liability. Put somewhat differently, although wrongful-death damages are neither fair nor full for the decedent right-holder, the tort right might nevertheless be constructed to fairly protect right-holders from bodily injury, including premature death. In that event, imperfect injury compensation via the damages remedy for wrongful death would influence the negligence rule's substantive formulation. We discuss these issues at greater length in Part IV.

D. *The Problem of Insolvency*

The discussion so far has shown that compensatory resources are scarce in part because no amount of money can fully repair a lost life or a badly injured body. The other primary reason for the scarcity of compensatory resources stems from the social fact that defendants often do not have enough financial assets to satisfy a tort judgment—the problem of insolvency.

In light of debt's historical importance and the associated obligations that normatively ordered social relations in ancient societies, it should come as no surprise that one's failure to pay off a compensatory debt—or any other debt for that matter—was an egregious wrongdoing. Hence, many of the "common words for 'debt' in European languages" are "synonyms for 'fault,' 'sin,' or 'guilt'; just as a criminal owes a debt to society, a debtor is always a sort of criminal."[104]

An insolvent injurer accordingly incurred severe penalties for failing to compensate. For example, "in the *Laws of Hammurabi* (Mesopotamia, *ca.* 1750 B.C.), when a negligent farmer has flooded the whole district and cannot pay the damages, his neighbors may sell him and his property and divide the

103. *E.g.*, People v. Boutin, 555 N.E.2d 253, 254 (N.Y. 1990).

104. GRAEBER, *supra* note 46, at 121.

proceeds."[105] Penalties of this type were common in the state of nature.[106] "Even in ancient systems that relatively humanely punished most wrongs by private actions to compensate injured parties based on a published price schedule, the 'punishment' of debt slavery lurked behind the payments owed—often mandating a payment so high that compromise, kin payments, or slavery were the common outcomes."[107]

Likewise, "[b]ankrupts in England were treated as criminals by early statutes."[108] Having "existed in England for three hundred years," imprisonment for debt was an "unquestioned piece of the cultural baggage" imported into the American colonies.[109] Consequently, the "only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt."[110]

Debt bondage continues to be shockingly common around the world today,[111] although matters have improved considerably for insolvent debtors in the United States and elsewhere. "Imprisonment for debt has been abandoned by the advancing columns of civilization. America took the lead in the humane reform among English-speaking nations," a reform often enshrined in state constitutions.[112]

The transition from debtor's prison to modern bankruptcy required lawmakers to disentangle money's dual purposes for facilitating ordinary commercial transactions and reordering social relations. One's failure to pay off a commercial debt is normatively different from the failure to pay off a moral debt. The adoption of bankruptcy law accordingly involved "the redefinition of debt from a moral to an economic offense."[113]

Within the realm of injury compensation, this redefinition was not complete until the early twentieth century. For example, "[b]etween 1811 and the end of Reconstruction most but not all of the eastern states gradually prohibited the imprisonment of defaulters except in cases of fraud and in damage

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105. James Lindgren, *Measuring the Value of Slaves and Free Persons in Ancient Law*, 71 CHI.-KENT L. REV. 149, 207 (1995).

106. *Id.*

107. *Id.* at 209.

108. ELMER D. BROTHERS, MEDICAL JURISPRUDENCE: A STATEMENT OF THE LAW OF FORENSIC MEDICINE 22 (1914).

109. BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 22 (2002).

110. *Id.* at 79.

111. *See* Kate Hodal, *One in 200 People is a Slave. Why?*, GUARDIAN, https://theguardian.com/news/2019/feb/25/modern-slavery-trafficking-persons-one-in-200 [perma.cc/5NTT-D6F6] (last modified Oct. 19, 2022).

112. BROTHERS, *supra* note 108, at 22.

113. MANN, *supra* note 109, at 84; *see also* COLEMAN, *supra* note 14, at 283 ("Although the concept of 'respectability' persisted into the modern era, it declined in significance after the Revolution, thereby helping to create the attitudes essential to a world in which the discharge of debts became an accepted solution to the problems of insolvency."). "Nor was there a place for imprisonment for debt in the emerging world of the business corporation." *Id.* at 261.

suits for alimony, child support, and wrongful behavior."[114] The exceptional treatment of wrongful behavior giving rise to tort liability persisted in many states into the early twentieth century.[115]

Today, of course, insolvent defendants do not face imprisonment and can file for bankruptcy. But before we can properly analyze how bankruptcy affects substantive tort law, we must first determine how the problem of insolvency—and debtor's prison—previously influenced the development of substantive tort law.

IV. THE RELEVANCE OF SCARCE COMPENSATORY RESOURCES FOR SUBSTANTIVE TORT LAW

Compensatory resources are scarce for two basic reasons: Ordinary money is a poor substitute for the irreparable harm of bodily injury, and defendants often do not have enough money to fully satisfy their compensatory obligations. Both sources of scarcity factor into the normative calculus of tort law and change the substantive common law from its idealized compensatory form into a set of rules that largely characterize the modern tort system and its relation to the criminal law. Having identified the reasons why substantive tort law depends on the availability of compensatory resources, we can now fill in the heretofore missing account of how bankruptcy and liability insurance shape substantive tort doctrine as a matter of principle.

A. *Compensatory Scarcity and the Normative Calculus of Tort Law*

A perfectly compensatory social currency can always attain the requisite equitable balance in cases of bodily injury, eliminating the legal concern about preventing injury. The social currency perfectly substitutes for the victim's lost bodily integrity in the relevant normative sense, thereby erasing any inherent normative difference between the victim's physical-security interest and the injurer's conflicting liberty interest. Premature death and other irreparable bodily injuries, however, preclude such compensation and accordingly alter the normative balance between security and liberty.

Without more, an entitlement to an inherently inadequate compensatory damage award does not adequately protect the individual interest in physical security. More protection is vitally important. Unless they are adequately secure from the threat of bodily injuries and premature death, individuals are severely constrained in their ability to live freely in the world. The meaningful exercise of liberty depends on a baseline of adequate physical security.[116] To

114. COLEMAN, *supra* note 14, at 256.

115. BROTHERS, *supra* note 108, at 21–22 ("A judgment at law is usually for a specified sum of money payable to the adversary party to the suit, and in default of payment the goods of the judgment debtor may be seized and, in most states, where the action was founded upon tort, the debtor himself may be imprisoned in default of payment.").

116. *See, e.g.*, DWORKIN, *supra* note 24, at 148–49 ("[A]ny competent baseline liberty/constraint system would include a principle of security: this would mandate constraints on liberty

provide this foundation for effective agency, tort rules can justifiably prioritize one's security over another's conflicting liberty to equitably prevent the irreparable injury of physical harm.[117]

Until the twentieth century, however, the same underlying problem of scarce compensatory resources made it unjustifiable to prioritize security over liberty. In the early stages of economic development, a society must expend most of its wealth to satisfy basic needs like hunger and shelter. The per capita GDP in the United States in 1820, for example, was $1,287 measured in 1990 international dollars (equal to around $3,150 today).[118] For the ordinary person, an obligation to compensate another's injury would largely or wholly drain the financial resources minimally required to maintain a healthy existence. In this era, the ordinary right-holder's interest in physical security was normatively indistinguishable from the ordinary duty-bearer's interest in having sufficient financial assets to buy food and shelter; tort law could not defensibly prioritize one interest over the other.

The prospect of debtor's prison made it even more difficult for tort law to prioritize a right-holder's interest in physical security over the duty-bearer's conflicting liberty interest. Until the early-twentieth century, individuals who were rendered insolvent by tort judgments faced the prospect of going to jail because of debt.[119] Forms of tort liability that regularly threatened insolvency, therefore, implicated the ordinary duty-bearer's interest in avoiding prison. This interest was not merely a severe deprivation of liberty; it often was functionally indistinguishable from a direct threat to the physical security of the imprisoned debtor:

> In the harsh, uncompromising words of an English judge of the sixteenth century, a debtor in prison "ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle, and puts them in a pound." If the debtor cannot feed himself,

necessary to provide people with enough physical security and enough control over their own property to allow them to make and carry out plans and projects."); GREGORY C. KEATING, REASONABLENESS AND RISK: RIGHT AND RESPONSIBILITY IN THE LAW OF TORTS 196 (2022) ("The basic role of the state, on a liberal view, is to establish the institutional and material conditions of effective agency so that people may pursue happiness as they conceive it . . . . Safety secures the physical and psychological integrity that is a precondition of effective agency.").

117. *See* KEATING, *supra* note 116, at 198 ("Because serious physical harm severely impairs basic powers of human agency—whereas most benefits do not comparably enhance our powers of agency—we have reason to assign special priority to the avoidance of harm."). *See generally* Seana Valentine Shiffrin, *Harm and Its Moral Significance*, 18 LEGAL THEORY 357 (2012) (discussing the nonwelfarist reasons for prioritizing the prevention of harm over the loss of benefits associated with precautionary measures); Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 128–39 (2001) (explaining why cost-benefit analysis is conventionally conducted in a manner that places a relative priority on a potential victim's interest in physical security over a potential injurer's conflicting liberty interest).

118. *See* ANGUS MADDISON, MONITORING THE WORLD ECONOMY 1820–1992, 23 tbl. 1-3 (OECD Development Centre 1995).

119. *See supra* Section III.D.

> he should hope for "the charity of others." If none is forthcoming, "let him die, in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment."[120]

In 1800, one inmate of a New York debtor's prison concluded that "imprisonment for debt was a form of capital punishment wielded by private creditors with the acquiescence of the state."[121] Some states subsequently adopted a reform that released debtors from jail "who were genuinely impoverished or who were willing to assign all of their property for the benefit of their creditors," an outcome that "produced what Governor Oliver Wolcott of Connecticut was later to call a 'civil death.'"[122]

To be clear, this penalty's severity bolsters incentives to prevent injury and avoid the associated tort liabilities, but one cannot confidently steer clear of tort liability for accidental harms (and even for some intentional torts) except by foregoing risky conduct altogether—an infeasible option. The looming prospect of debtor's prison factors into the normative calculus of tort law and explains why the characteristic tort rule before the twentieth century was one of "no liability" rather than negligence liability.[123] Unable to normatively distinguish the injury victim's security interest from the injurer's associated liberty interest, tort law had to let the loss lie where it fell—on the injured party.

Once again, accounting for the general availability of compensatory resources sheds new light on tort law's development. "The prevailing view of American tort history regards nineteenth-century tort doctrine as deliberately structured to accommodate the economic interests of emerging industry."[124] The associated claim that courts limited liability to "subsidize" the newly industrializing economy is hard to square with available evidence.[125] The foregoing analysis provides additional historical reasons for rejecting the subsidy thesis. By limiting liability to avoid depressing economic development, courts could defensibly rely on the associated concern of ensuring that individuals would have the financial ability to maintain their physical health. The lack of social wealth in this era largely eliminated the normative difference between one's security interest and another's conflicting liberty interest chiefly concerned about survival. This reason of principle justified extensive rules of "no liability."

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120. MANN, *supra* note 109, at 88 (quoting Dive v. Maningham (1551) 75 Eng. Rep. 96, 108–09; 1 Plowden 60, 68).

121. *Id.* at 102, 105 (describing arguments in a newspaper published by William Keteltas while he was in debtor's prison).

122. COLEMAN, *supra* note 14, at 252.

123. Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981) (arguing that the dominant rule in the 19th century was one of no liability or an immunity from liability or a privilege of conduct that would otherwise be a tortious form of negligence liability).

124. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1717 (1981).

125. *See id.*

Changing social conditions altered this normative calculus. Life expectancy at birth significantly improves with a "sharp increase" in GDP per capita, underscoring the relation between survival and wealth.[126] Throughout the twentieth century, social wealth accumulated. From 1900 to 1950, the GDP per capita in the United States increased from $4,096 to $9,573 measured in constant 1990 international dollars; by 1992 it had further increased to $21,558 (approximately $52,817 in current dollars).[127] Consumption patterns changed accordingly. "By comparison with the conveniences and comforts widely available in developed economies at the end of the 20th century, everyday life two centuries ago was most akin to what we know today as 'camping out.' "[128] With the financial capacity to improve living conditions beyond the bare necessities, individuals had discretionary income to acquire other kinds of goods and services characteristic of modern life's conveniences and comforts. The increased social wealth made it possible for tort law to normatively distinguish between one's physical security and another's conflicting liberty interest involving the expenditure of financial resources.

A compensatory tort obligation became less burdensome for another important reason. Unlike the conditions tort defendants faced until the early twentieth century, modern defendants rendered insolvent by a tort judgment do not go to prison. They instead file for bankruptcy, which extinguishes most types of debt and ensures that these individuals will have enough assets to maintain basic living conditions after the bankruptcy court has fully resolved all outstanding creditor claims.[129] A compensatory tort obligation no longer threatens debtor's prison nor the physical security of the duty-bearer.

Due to the increase in social wealth and emergence of modern bankruptcy law, tort law throughout the twentieth century could more sharply distinguish between one individual's interest in physical security and another's conflicting liberty and economic interests. Rather than being largely concerned about survival and avoiding debtor's prison, the ordinary duty-bearer now has the resources to consume modern life's conveniences and comforts. This kind of liberty interest is normatively distinguishable from the security interest, providing the foundation for tort rules designed to prevent injury.

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126. Richard A. Easterlin, *The Worldwide Standard of Living Since 1800*, J. ECON. PERSPS., Winter 2000, at 7, 12.

127. MADDISON, *supra* note 118, 23 tbl. 1-3 (OECD Development Centre 1995).

128. Easterlin, *supra* note 126, at 11.

129. As Stephen Gilles explains:

> Every potential tortfeasor enjoys automatic asset protection in the form of exemptions from collection (valid even against intentional torts) and in the form of an optional bankruptcy discharge (valid against all but intentional torts). . . . The upshot . . . is that in most states individuals are entitled to commit torts while keeping much of their home equity, their retirement savings, most or all of their income, and their trust fund (if they have one).

Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 623 (2006).

B. *Changes in the Normative Calculus of Negligence Liability*

Recognizing that compensatory resources are scarce and injury compensation is imperfect, the common law has adopted the concept of an irreparable injury—one that "cannot be adequately measured or compensated by money."[130] According to the judicial conception of an irreparable injury, "[d]amages are inadequate if [a] plaintiff cannot use them to replace the specific thing he has lost."[131] Consequently, compensatory damages are adequate "for only one category of losses: to replace fungible goods or routine services in an orderly market."[132] Bodily injuries are not fully fungible with any other goods or services, making them a paradigmatic example of an irreparable harm.

For conduct threatening irreparable injuries such as premature death, "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."[133] This equitable principle, though conventionally framed in remedial terms, has behavioral implications for substantive tort law.

For example, this equitable principle justifies the privilege of self-defense. As the *Restatement (Third) of Torts* explains:

> An actor is justified in responding to the immediate threat or the infliction of violence or confinement with necessary and proportional force. It is both unrealistic and unfair to ask someone who is suddenly and wrongfully attacked to be content with the possibility of a subsequent tort lawsuit against, or criminal prosecution of, the assailant.[134]

The associated commentary never mentions the problem of irreparable injuries, although it must be the reason why prohibiting individuals from defending themselves against impending attacks would be both "unrealistic and unfair." A monetary damages award, even if coupled with criminal punishment for the wrongdoing, cannot adequately compensate a lost life or broken bone. Hence it would be both unfair and unrealistic to require individuals to rest on these remedial rights rather than empower them to prevent the irreparable harm through self-defense.

The prevention of irreparable harms also provides an equitable rationale for negligence liability. A negligence duty seeks to prevent the irreparable harm of bodily injury without imposing undue hardship on the duty-bearer—

130. *Irreparable injury*, BLACK'S LAW DICTIONARY (11th ed. 2019).

131. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 703 (1990).

132. *Id.* at 691.

133. JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 1357, at 844–45 (Students' ed. 1907) (1881).

134. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 21 cmt. c (A.L.I., Tentative Draft No. 6, 2021).

the same type of approach the common law otherwise employs to address the problem of irreparable injury.[135]

Injunctive relief prevents irreparable injuries by prohibiting the injury-threatening behavior altogether when it would be equitable to do so:

> Damages are the standard remedy for personal injury only because personal injuries can rarely be anticipated in time to prevent them by injunction. But where an injunction is possible, the irreparable injury rule is obviously satisfied: if it happens, the physical injury to the plaintiff will be irreparable. The most common examples are injunctions against family violence . . . . The issue also arises when courts are asked to enjoin conduct that creates a risk of serious injury. When the risk is great enough, those injunctions are routinely granted.[136]

In the absence of injunctive relief, there is no other remedy for preventing irreparable harms such as premature death. The monetary damages remedy, by definition, does not suffice. For the negligence rule to equitably prevent irreparable harms, it must instead formulate required forms of reasonably safe behavior.

The duty to exercise reasonable care encompasses foreseeable risks of fatal injuries.[137] For this purpose, fatal injuries are not valued in terms of the compensatory damages remedy; they instead receive "the value which the law attaches to them."[138] The duty accordingly obligates risky actors to take reasonable measures to reduce risks of foreseeable fatal injuries, regardless of the compensatory damages they might otherwise owe for causing wrongful death.

To be clear, compensatory damages are necessary to adequately enforce the duty: In the absence of any compensable harms, there is no liability and no way for tort law to enforce the negligence prohibition of unreasonably dangerous behaviors. The inability to compensate a dead right-holder, however, does not eliminate the associated tort obligation. Risky conduct threatening fatal harms routinely threatens other bodily injuries as well, and liability for those injuries enables the duty to meaningfully protect against the threat of premature death.[139] In the case of fatal injuries, wrongful-death statutes create

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135. Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 162–64 (2011) (showing how the ordinary duty to exercise reasonable care equitably responds to the problem of irreparable injury).

136. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 42 (1991) (footnotes and paragraph structure omitted).

137. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 4, 6 (A.L.I. 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").

138. *See* RESTATEMENT (SECOND) OF TORTS § 283 cmt. e (A.L.I. 1965).

139. Courts have recognized as much in other contexts, such as the rule limiting a manufacturer's liability for pure economic losses. *See* Trans States Airlines v. Pratt & Whitney Can., Inc., 682 N.E.2d 45, 53 (Ill. 1997) ("[W]e believe that the incentive to manufacture safe products remains unabated under the [rule barring recovery for pure economic losses]. . . . Where the

additional liabilities that have turned the tort duty into an even more robust method for preventing premature death.

Consequently, the equitable prevention of irreparable injuries is furthered by negligence law's behavioral obligations, not by the inherently inadequate compensatory damages remedy. Therein lies the rights-based deterrence rationale for negligence liability.[140]

The problem of irreparable injury, which substantively shapes the tort rules of negligence liability and the privilege of self-defense, stems from the scarcity of compensatory resources. This important normative property, however, has not factored into leading theories of tort law.

For example, the conventional economic analysis of tort law assumes that the measure of compensatory damages is also employed within the standard of reasonable care.[141] Using the same measure of injury costs to align these two elements is fully defensible under conditions of perfect injury compensation.[142] But to account for how scarce compensatory resources result in irreparable injuries like premature death, tort law must legally evaluate these injuries within the standard of care by their social value and not their associ-

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product causes personal injury or other property damage, the manufacturer may yet be subject to liability in tort. Because no manufacturer can predict with any certainty that the damage his unsafe product causes will be confined to the product itself, tort liability will continue to loom as a possibility. Therefore, in our view, the incentive to build safe products is not diminished."). A defendant who consciously disregards the obligation to exercise reasonable care also faces the prospect of punitive damages, a remedy that helps to maintain the integrity of the primary duty to exercise reasonable care. *See infra* Section IV.C. But in the absence of such reprehensible behavior, tort law does not award punitive damages. This property of the damages remedy accordingly rules out deterrence-based proposals to increase wrongful-death damages in all cases so that they account for the decedent's loss of life's pleasures. *See* Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 542 (2005) (proposing that courts should take "account of the welfare loss to the decedent," a change which "would significantly alter wrongful death cases by producing far higher recoveries in many cases").

140. To be more precise, "deterrence is not merely influencing conduct, but doing so in a particular way: by creating a prudential reason" not to engage in the conduct. Sandy Steel, *Deterrence in Private Law*, *in* PRIVATE LAW AND PRACTICAL REASON: ESSAYS ON JOHN GARDNER'S PRIVATE LAW THEORY 123, 124 (Haris Psarras & Sandy Steel eds., 2023). By incorporating fatal harms into the standard of reasonable care, the negligence rule clearly creates a prudential reason for duty-bearers to avoid engaging in such unreasonable misconduct. "But reasons are cheap." *Id.* at 128. The more interesting question is whether deterrence supplies a *decisive* reason for formulating the duty in this manner. It does. In the absence of a compensatory remedy for fatal harms, their prevention must be the decisive reason for including them in the duty. *Cf. id.* at 140 & n.43 (arguing that "duties to bear a deterrent burden" can be justified "when we are under a moral duty to bear a burden, and the duty is one of sufficient importance that it may be enforced," as can occur when "compensation is not sufficient next best conformity to a duty not wrongfully to harm").

141. *See* Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 92 (2011) (emphasis omitted) (explaining why the negligence rule "will, at least in theory," only "provide efficient incentives in all circumstances" if it "aligns the standard of care with compensable harms").

142. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 389 (5th ed. 2008) (demonstrating that within the economic analysis of tort law, individuals are indifferent between being injured or otherwise receiving perfect compensation).

ated (inherently inadequate) amounts of compensatory damages. The measure of injury costs is "misaligned" across these two elements, making it possible for tort law to equitably prevent premature death and other bodily injuries in the face of the inherently inadequate damages remedy—a form of deterrence reasoning missing from the conventional economic interpretation of tort law.[143]

The failure to account for irreparable injuries also undermines prominent accounts of corrective justice. The thrust of this interpretive approach is that tort liability redresses the wrongdoing of a defendant who violated the plaintiff's correlative tort right. So interpreted, "tort law 'corrects' the injustice—restores the pre-existing equilibrium—by ordering that the full value of the loss be transferred to the responsible party via a damage payment equal to the value of the loss."[144] By assuming that compensatory damages are "equal to the full value of the loss," these accounts utterly ignore the problem of irreparable injuries and the fundamental importance of preventing those harms in the first instance.[145]

For example, Arthur Ripstein defends the corrective-justice interpretation on the ground that compensatory damages as a normative matter "make it as if the wrong had never happened."[146] His reasoning is straightforward: "Although few people would be indifferent between being free of injury and being injured and receiving compensation, adequate compensation can enable a person to have (almost) the same range of options."[147] Compensatory damages adequately correct for the injustice, eliminating the prevention of bodily injury as a principled concern of substantive tort law. As Ernest Weinrib puts it, "[f]or corrective justice, deterrence plays no role in defining the nature of the wrong."[148]

It is striking how closely this account of corrective justice conforms to our earlier account of tort law under idealized compensatory conditions. Perfectly compensatory damages entirely erase the wrongdoing and fully restore normative equilibrium, in which case there is no further reason to worry about preventing bodily injuries.[149]

But in a world of scarce compensatory resources, this account does not persuasively describe tort law. Contra Ripstein, there is no "adequate compensation" for wrongful death or severe bodily injuries which "can enable a person

143. *See generally* Geistfeld, *supra* note 135 (developing and defending this interpretation of the negligence rule and showing why it undermines the conventional economic interpretation of tort law).

144. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 570 (2003). Although corrective justice scholars disagree about important matters, they agree on this proposition and related matters. *Id.*

145. *Id.*

146. Ripstein, *supra* note 61, at 1961.

147. *Id.* at 1984.

148. Weinrib, *supra* note 64, at 638.

149. *See supra* Section II.B.

to have (almost) the same range of options" they had prior to the injury. The damages remedy for these irreparable harms cannot "make it as if the wrong had never happened." Rather than rely on the inherently inadequate monetary damages remedy, tort law strives to prevent these irreparable injuries by incorporating their social values into the obligation to exercise reasonable care—contrary to Weinrib's claim that "deterrence plays no role in defining the nature of the wrong." The inadequacy of compensatory damages makes deterrence especially valuable. Deterrence is an essential property for understanding tort law that is overlooked by formulations of corrective justice which assume that compensatory damages can always normatively correct for wrongdoing and fully restore normative equilibrium.

The substantive implications of this deterrence reasoning extend beyond the requirements of reasonable care. The foregoing discussion does not rule out the possibility that, in some cases, duty-bearers can reduce their costs by acting negligently and paying (inherently inadequate) compensatory damages instead of complying with a demanding behavioral obligation to exercise reasonable care. To address this problem, the common law relies on punitive remedies.

C. *Punitive Damages and Criminal Liability*

To prevent the irreparable injuries of premature death and other physical harms, tort law uses negligence liability as the baseline rule governing accidental injury. This liability rule obligates duty-bearers to act reasonably, thereby prohibiting them from choosing to engage in unreasonably dangerous behaviors in exchange for the payment of (inherently inadequate) damages as compensation for any ensuing (irreparable) harms. A defendant who consciously disregards or intentionally violates the plaintiff's tort right is subject to punishment under both tort law and criminal law.

First consider punitive damages, which, according to the courts, "are aimed at deterrence and retribution."[150] The deterrence rationale encompasses all cases in which the defendant's conduct was motivated by an expectation of avoiding full liability for the tortious behavior, requiring an extra compensatory penalty to eliminate the expected wrongful gain and thereby deter such behavior.[151] By implication, the retributive rationale unambiguously applies to cases in which the defendant expects to incur liability and pay compensatory damages. Retribution, as courts have widely recognized, can be justified by the defendant's decision to forego the exercise of reasonable care in exchange for the payment of compensatory damages.[152]

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150. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

151. *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (rigorously specifying the deterrence rationale for punitive damages).

152. *See, e.g.*, Man v. Raymark Indus., 728 F. Supp. 1461, 1467 (D. Haw. 1989) (quoting Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 107 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981)) ("Punitive damages serve to deter manufacturers as, unlike

Once again, compensatory resource scarcity elucidates an important normative property of tort law. "[T]he legal culture lacks a full normative account of the relationship between retributive goals and punitive damages."[153] The defendant's bad-faith rejection of the primary obligation to exercise reasonable care, even when coupled with the payment of compensatory damages for the breach, is reprehensible only because the compensatory damages remedy does not adequately protect the tort right in cases of irreparable injury. This inherent limitation of the compensatory damages remedy stems from the scarcity of compensatory resources and creates a retributive rationale for punitive damages—a property consistent with our earlier finding that perfectly compensatory damages obviate the need to punish injury-causing conduct.[154]

Like compensatory damages, punitive damage awards are issued in ordinary money and are also subject to the inherently limited ways in which that medium of exchange can fairly redress wrongdoing. After all, if money were sufficient for retributive purposes, wealthy individuals could intentionally kill or sexually attack others and buy their way out of responsibility by paying monetary damages. These kinds of retributive problems create a complementary role for criminal liability, explaining why "punitive or exemplary damages have been assessed . . . upon evidence of such [willfulness], recklessness or wickedness, on the part of the party at fault, as amounted to criminality.' "[155]

In these cases, criminal liability and tort liability for punitive damages combine to enforce the primary tort duty to exercise reasonable care. Punitive damages vindicate the plaintiff's underlying tort right by punishing the defendant for having reprehensibly rejected the normative perspective that the right requires: A good-faith effort to avoid injury by exercising reasonable care.[156] Criminal liability then addresses how this kind of reprehensible behavior threatens public peace—the fractures in the baseline of adequate physical security that would emerge if duty-bearers could flout their obligations to protect others from the irreparable injury of physical harm.

In most cases, however, a punitive response is not merited. Due to its primary emphasis on preventing the irreparable injury of physical harm, the duty

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with compensatory damages, the defendant is prevented from making the 'coldblooded calculation' that it is more profitable to pay claims than correct a defect."); 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."), *aff'd*, 512 A.2d 466 (N.J. 1986).

153. Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2085 (1998).

154. *See supra* Section II.B.

155. Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 114–15 (1893) (quoting Hagan v. Providence & Worcester R.R., 3 R.I. 88, 91 (1854)).

156. *See generally* Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263 (2008) (showing how punitive damages fully vindicate the rights-violation by first eliminating the expected wrongful gains of the reprehensible behavior, and then by increasing the award in a constitutionally permissible amount to punish the defendant for having reprehensibly rejected the perspective the right requires).

to exercise reasonable care often entails unrealistic behavioral obligations (always pay attention and do not exceed the speed limit on the highway even 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" as a matter of ordinary morality. In this critical respect, the objectively defined negligence rule often functions as a form of "strict" or "no fault" liability, which does not involve the type of blameworthy wrongdoing that merits punishment.[157]

Throughout its varied elements, the negligence rule accounts for the important substantive implications flowing from the manner in which scarce compensatory resources lead to the problem of imperfect injury compensation and the concomitant need to prevent these irreparable harms. The resultant, behaviorally demanding standard of reasonable care effectively functions as a rule of no-fault or strict liability in many cases, explaining why one can breach that duty and cause irreparable injury without incurring any obligation beyond the duty to pay (inherently inadequate) compensatory damages. However, when a defendant reprehensibly breaches the duty, the payment of compensatory damages does not adequately correct for the injustice of wrongfully causing irreparable harm. The normative value of preventing these irreparable injuries accordingly justifies punishing the wrongdoer for a bad-faith breach of the duty to exercise reasonable care, warranting awards of punitive damages and, in some cases, the imposition of criminal negligence liability.

D. *Changes in the Normative Calculus of Strict Liability*

Under conditions of scarce compensatory resources, the problem of irreparable injury justifies prioritizing *ex ante* prevention over *ex post* monetary compensation. To do so, tort law must prioritize the right-holder's interest in physical security (the protected object) over the duty-bearer's compensatory obligation and the associated burden on liberty. By justifying a relative interpersonal priority of the individual interest in physical security, the problem of scarce compensatory resources also creates two distinctive rationales for strict liability.

1. Deterrence and the Evidentiary Rationale for Strict Liability

The difficulty of proving negligent misconduct predictably creates a deterrence problem. If the reasonable-care standard requires a particular safety precaution, but the plaintiff is unable to prove as much, the defendant will avoid negligence liability despite having acted unreasonably.[158] Evidentiary

157. *See* GEISTFELD, *supra* note 20, at 180–91 (showing why duty-bearers who are unable to realistically comply with the objectively defined standard of reasonable care are fairly subject to no-fault or strict liability for creating a nonreciprocal risk that injured a right-holder).

158. As one court observed:

problems can impair a duty-bearer's financial incentive to exercise reasonable care. Why incur the costs of a precaution if there are no liability consequences for failing to do so?

Strict liability sidesteps this evidentiary problem. As Oliver Wendell Holmes explained, in these cases "the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken."[159] Rather than have the court make the safety decision based on the evidence a plaintiff presents, strict liability "throws" that decision on duty-bearers. To minimize their total cost of acting safely and compensating residual harms, strictly liable actors will take any precaution that reduces their liability (injury costs) in a cost-effective manner. If these risky actors would forego any of these precautions in a negligence regime because of proof problems, the shift to strict liability would increase safety measures and reduce the incidence of irreparable injury.[160]

Courts in the nineteenth century recognized this evidentiary rationale for strict liability.[161] In the early twentieth century, this deterrence reasoning helped justify workers' compensation statutes that displace negligence liability with a regime subjecting employers to no-fault or strict liability for work-related injuries.[162] Courts subsequently relied on this evidentiary rationale to justify strict products liability.[163]

Strict liability in these cases is not ideal; its deterrence properties wholly depend on the (inherently inadequate) compensatory damages remedy. But strict liability can still improve upon the deterrence capabilities of an underenforced negligence rule. Like that baseline negligence rule, these strict liability rules are formulated to equitably prevent irreparable injuries like premature death.

> It is not doubted that due care might require the defendant to adopt some device that would afford [reasonable protection against the injury suffered by plaintiff.] Such a device, if it exists, is not disclosed by the record. The burden was upon the plaintiff to show its practicability. Since the burden was not sustained, a verdict should have been directed for the defendant.

Cooley v. Pub. Serv. Co., 10 A.2d 673, 677 (N.H. 1940).

159. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 117 (Boston, Little, Brown & Co. 1881).

160. *See* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 22 & n.28 (1980) (showing how strict liability can reduce risk by reducing "activity" levels, where "activity" is any aspect of risky behavior that is outside the ambit of negligence liability due to evidentiary limitations).

161. *See* POLLOCK, *supra* note 98, at 393.

162. *See* N.Y. Cent. R.R. v. White, 243 U.S. 188, 197 (1917).

163. *See, e.g.*, Cushing v. Rodman, 82 F.2d 864, 869 (D.C. Cir. 1936) (imposing liability without proof of fault in a defective food case by stating that "[r]estricting recovery by the injured member of the public to cases predicated upon negligence is a seriously inadequate means of securing the social interest in the individual safety, because of the great difficulty of proof for the plaintiff").

2. Compensatory Rules of Strict Liability

The discussion so far has shown why the scarcity of compensatory resources places deterrence at the center of tort law. Negligence is the liability default rule for good reason, strongly pulling tort law theories in that direction. A deterrence rationale for strict liability is complementary and comfortably fits within this conceptual framework. But by making deterrence and conduct-based liability rules so vitally important, the problem of scarce compensatory resources masks the extent to which tort law is based on a compensatory norm.

Consider the customary practices in the state of nature that first defined the common law. In this era, injury victims had the remedial alternatives of pursuing punishment—"an eye for an eye"—or receiving compensation—"the value of an eye for an eye." As we have found, these two remedies are complementary responses to the scarcity of compensatory resources and the resultant problem of imperfect injury compensation.[164] The early common law then improved upon this remedial scheme by having the state exact punishment through the criminal law, enabling victims to pursue tort claims for compensation.[165] Despite this important legal development, the normative fact remained that the victim suffered grievous injury and deserved compensation embodied in the entitlement of the "value of an eye for an eye."

This compensatory rule of strict liability is not dependent on fault or deterrence-based reasoning for an evident reason. If I hurt myself while pursuing my own ends, I incur the injury costs. Similarly, if while pursuing my ends I instead hurt you, I should still incur the injury costs as a matter of reciprocity or fairness: I should, in other words, pay you "the value of an eye for an eye." Such a reciprocity norm straightforwardly explains why there was "a deep sense of early common law morality that one who hurts another should compensate him."[166]

This compensatory norm of strict liability was first embodied in the early common-law rule that "a man *acts* at his peril," which, according to Holmes, "seems" to have been "adopted by some of the greatest common-law authorities."[167] The "peril" of risky conduct resides in the obligation to compensate the ensuing injuries, regardless of fault. To be clear, this principle, as Holmes quickly pointed out, is not correctly specified. The common law limits liability to foreseeable harms; liability does not extend to all the causally related harms flowing from one's acts.[168] Foreseeability is a necessary condition for making

164. *See supra* Section III.A.

165. This is the basic thesis of the self-help model of legal development. *See* Geistfeld, *supra* note 79, at 1523–25.

166. Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1412 (1961); *see also* Francis H. Bohlen, *The Rule in* Rylands v. Fletcher: *Part I*, 59 U. PA. L. REV. 298, 309 (1911) ("There is every reason to believe that the original conception was that legal liability for injury of all kinds depended not upon the actor's fault, but upon the fact that his act had directly caused harm to the plaintiff.").

167. HOLMES, *supra* note 159, at 82.

168. *See id.* at 95.

actors legally responsible for the injurious consequences of their risky behaviors, thereby altering the compensatory norm so that a "man acts at his [foreseeable] peril." This foreseeability-based norm does not have a fault requirement and therefore translates into strict liability.

As Holmes also famously demonstrated, tort law employs a default rule of negligence liability, not strict liability.[169] Once again, this structural feature of tort law can be squared with compensatory rules of strict liability. To equitably prevent bodily injuries and other irreparable harms, the baseline negligence rule prioritizes the right-holder's security interest over the duty-bearer's conflicting liberty interest. This same priority justifies supplemental compensatory rules of strict liability: The fact of injury to the right-holder's prioritized security interest creates a compensatory obligation for the duty-bearer's conflicting, subordinate liberty interest, regardless of whether the exercise of liberty was reasonable. "So understood, important areas of strict liability involve the same sort of judgments about the importance of various liberty and security interests as does the fault system."[170]

3. Right-Holders' Resources as a Limit of Compensatory Liability

A compensatory norm seems to justify a general rule of strict liability for all accidental harms as a complement to the behaviorally demanding negligence standard of reasonable care. The threat of punitive damages for culpable forms of unreasonably dangerous behaviors would enforce the baseline duty to exercise reasonable care, while the strict liability rule provides compensation for the residual harms. Why, then, does modern tort law only employ strict liability in highly circumscribed circumstances?

Once again, an adequate analysis of the tort problem implicates the scarcity of compensatory resources—in this instance, involving the compensatory resources of right-holders rather than duty-bearers. As a matter of principle, judges are supposed "to enforce . . . rights up to the point at which enforcement ceases to be in the interests of those the rights are supposed to protect."[171] Tort law cannot justifiably enforce a compensatory right when doing so would ultimately work to the net detriment of the right-holders who are supposed to be compensated.

This constraint on the fair or just enforcement of individual rights is often irrelevant. For many risky interactions, right-holders would benefit from more extensive enforcement, and so any liability limitations stem from a concern about imposing excessive liability on duty-bearers. Right-holders are con-

169. *See* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1257 (2001) ("Holmes' great breakthrough . . . was his decision to organize tort law around the principle of liability for negligence [which] gave torts a conceptual and doctrinal center.").

170. ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 71 (1999).

171. DWORKIN, *supra* note 32, at 392 (discussing constitutional rights); *see also id.* at 390 ("[T]he point of constitutional adjudication is not merely to name rights but to secure them, and to do so in the interests of those whose rights they are.").

cerned about excessive liability, however, when they effectively pay for the burdens that duty-bearers incur to comply with the tort obligation. In such cases, tort law can justifiably limit liability to protect right-holders.

For example, a tort obligation to install airbags in a reasonably designed automobile will prompt the manufacturer to increase the vehicle's price to cover that cost. Likewise, the vehicle's price will cover the manufacturer's other liability costs, including those of injury compensation. The equilibrium contract price in a market based on the normatively justified set of entitlements accordingly embodies the full cost of the tort obligation. Because consumer right-holders fully pay for the correlative tort obligations of manufacturer duty-bearers, liability can be excessive by unreasonably burdening the legally protected interests of these right-holders via increased prices.

To make a contractual undertaking worthwhile, a seller must cover all costs of performing the contract, including those obligations incurred by virtue of tort law. Right-holders who bear the costs of a correlative duty essentially pay for their entitlement to compensatory damages, altering the normative calculus of tort law.

In what respect is it equitable or fair to require someone else to compensate your injury when you are the one paying for that compensation? Paying for an entitlement to injury compensation is exactly the same thing an individual does when purchasing insurance. A purely compensatory tort obligation running from duty-bearers to the right-holders who ultimately incur those costs collapses into an insurance transaction.

For the ordinary right-holder of this type, a purely compensatory tort entitlement significantly increases their total costs without providing a sufficient offsetting benefit because the tort damages function as a form of duplicative, unnecessary insurance for them. For example, the ordinary consumer has health insurance covering medical expenses.[172] Consumers purchase these policies regardless of their entitlement to tort compensation for product-caused injuries. Their ability to recover compensatory damages for the medical expenses of treating these injuries does not obviate their need to purchase broader insurance covering medical expenses unrelated to product-caused injuries, like those for treating diseases, illnesses, and so on. Rather than providing these right-holders with a valuable source of injury compensation, an entitlement to tort compensation routinely provides them with duplicative insurance. And because plaintiffs cannot recover for the same injury from both their insurer and the tort defendant, separate proceedings (subrogation actions) are required to eliminate double recoveries.[173] The considerable costs of these subrogation actions are tacked onto the increased expenses these right-

172. In 2020, 92% of the U.S. population had health insurance. *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: SELECTED ECONOMIC CHARACTERISTICS (2023), https://data.census.gov/table?q=DP03 [perma.cc/4569-WYXD].

173. *See, e.g.*, Associated Hosp. Serv. v. Pustilnik, 439 A.2d 1149, 1150 (Pa. 1981) (enforcing subrogation claim by a health insurer with respect to reimbursed medical expenses that a tort defendant had also compensated).

holders bear because of the duplicated coverage. Hence, a purely compensatory rule of strict liability works to the net detriment of the right-holders the liability rule is supposed to compensate.[174]

Courts have recognized as much: "Strict liability . . . was never intended to make the manufacturer or distributor of a product its insurer."[175] Strict products liability instead fairly protects consumer right-holders by obligating commercial sellers to provide reasonably safe, non-defective products, with the compensatory damages remedy enforcing that obligation. Strict products liability, in other words, is justified by deterrence reasoning and not by the fairness of compensation.

For these same reasons, a purely compensatory rule of strict liability can also be excessively costly for right-holders outside contractual settings. A wide range of risky behaviors contribute to the background level of reasonable risk in a community. For example, reasonably safe driving can still cause a crash. This familiar form of risky behavior is part of the background level of reasonable risk a community tolerates. The duty governing these kinds of common, risky social interactions burdens the ordinary person while creating risks (such as by driving); it also protects them from the risky behavior of others (like passing drivers on the roadway). For the category of risky interactions comprising the background level of reasonable risk in the community, the ordinary right-holder is also a reciprocally situated duty-bearer who incurs the full burden of the duty. This distributive outcome—like in contractual settings—eliminates a compensatory rationale for strict liability.[176]

By implication, a purely compensatory rule of strict liability can be fair for right-holders only for risky interactions outside contractual settings that create nonreciprocal or abnormal dangers above the background level of reasonable risk in the community. The resultant compensatory rule of strict liability for abnormally dangerous activities has been adopted by "almost every . . . state."[177] In justifying this compensatory form of strict liability, the *Restatement (Third) of Torts* observes that this "position resonates deeply in public attitudes . . . [for reasons] that 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 action causes."[178]

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174. Tort damages for pain and suffering are not duplicative insurance, but their primary insurance value to right-holders stems from the manner in which they effectively indemnify prevailing tort plaintiffs for their legal fees owed to contingency-fee lawyers. For more extensive discussion of these insurance issues, see MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 66–71 (3d ed. 2020).

175. Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 552 (Cal. 1991) (en banc).

176. For more rigorous demonstration, see Geistfeld, *supra* note 79, at 1564–82.

177. Dyer v. Me. Drilling & Blasting, Inc., 984 A.2d 210, 216 (Me. 2009).

178. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 cmt. f (A.L.I. 2010) (sentence structure omitted); *see also id.* § 20 cmt. e (justifying the rule of strict liability for abnormally dangerous activities in cases of blasting on the ground that "the defendant chooses to engage in blasting for reasons of its own benefit"); *id.* § 20 cmt. i ("In such

The fairness of this highly circumscribed compensatory obligation stems from its limitation to cases in which right-holders do not ultimately pay for their entitlements to tort compensation.

4. The Compensatory Norm in Tort Law

The compensatory rule of strict liability for abnormally dangerous activities traces back to compensatory practices in the state of nature involving the "value of an eye for an eye." According to the conventional narrative, tort law has jettisoned this reciprocity norm as a barbaric relic of the uncivilized past.[179] But as the preceding analysis has shown, the modern tort system continues to enforce this compensatory norm, now justified by deep "public attitudes" recognizing that "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 action causes."[180] This engrained public attitude about the fairness of compensation has extensive empirical support, demonstrating the ongoing relevance of reciprocity norms for organizing social relations.[181]

The reciprocity norm of compensation has ongoing relevance masked by the scarcity of compensatory resources. That scarcity generates the baseline rule of negligence liability supplemented by two different, complementary forms of strict liability: one based on deterrence, the other on fair compensation. This latter rule of strict liability for abnormally dangerous activities is the only overtly compensatory rule. It is quite circumscribed, creating the misleading appearance that the compensatory norm is basically irrelevant in modern tort law.

Contrary to appearances, the compensatory norm still largely occupies the same position within the modern tort system as it did in the state of nature. The injurious interactions in the state of nature were limited to cases in which the member of one family, clan, or tribe harmed someone from another. These social interactions were neither contractual nor reciprocally situated within a community's background level of reasonable risk—there was not one political community in the state of nature but many independent clans and the like. An injury-causing interaction between two clans was inherently nonreciprocal, justifying a compensatory rule of strict liability—the "value of an eye for an eye"—to attain equitable balance in cases of accidental injury.[182]

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a situation, it can be said that the defendant is deliberately engaging in risk-creating activity for the sake of the defendant's own advantage.").

179. *See, e.g.*, James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908) (concluding that "the old law has been radically transformed" insofar as "[t]he ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril").

180. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 cmt. f (A.L.I. 2010).

181. *See* Mark A. Geistfeld, *Folk Tort Law*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 338 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

182. *Id.* at 344-45 (citing MILLER, *supra* note 55, at 24-26 (2006)).

Changes in social conditions have rendered this application of strict liability rare. Unlike the state of nature, modern social relations involve contractual webs governing myriad kinds of risky behaviors. And when individuals are not mutually cooperating in this way, they engage in a variety of other kinds of social interactions in which they regularly occupy the roles of both a right-holder and a duty-bearer.[183] As reciprocally situated duty-bearers, right-holders incur the costs of compensatory obligations they are owed. The fair protection of right-holder interests under these conditions limits purely compensatory forms of strict liability to nonreciprocal dangers above the communal background level of reasonable risk. This compensatory rule of strict liability, therefore, applies to the same kinds of social interactions as it did in the state of nature. The primary difference is that modern social interactions hardly ever involve these kinds of objectively defined nonreciprocal risks; they are "abnormally dangerous activities."[184]

Although this compensatory form of strict liability now has limited application, it has an important implication for the normative properties of tort law. A purely compensatory tort rule, by definition, is wholly justified in terms of fair or reasonable injury compensation and not by injury deterrence (unlike negligence and related rules of strict liability formulated to overcome the evidentiary hurdles of proving negligence liability). A purely compensatory tort rule is allocatively inefficient: The compensatory transfer merely shifts the injury costs from one party to the other while creating the associated transaction costs. In the absence of deterrence, social costs are minimized by letting the loss fall on the injured accident victim. How, then, can a compensatory rule of strict liability be squared with the normative calculus of tort law defined in terms of both welfarist and nonwelfarist rationales for tort liability?

Though allocatively inefficient, a tort obligation to compensate these kinds of injuries does not violate a welfarist rationale for tort liability. These compensatory transfers find justification in Pareto optimality, a normative cornerstone of welfare economics that formulates liability rules so that the risky behavior makes no one worse off.[185] A purely compensatory rule reorients the welfarist inquiry from allocative efficiency, or cost minimization, to

183. *See* Mark A. Geistfeld, *Tort Law and Civil Recourse*, 119 MICH. L. REV. 1289, 1302–04 (2021).

184. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 (A.L.I. 2010).

185. In the same way that deterrence can justifiably shape tort law even if tort liability does not optimally deter, the ideal of full compensation embodied in the Pareto principle can justifiably shape tort law under second-best conditions of imperfect injury compensation. *See generally* Mark A. Geistfeld, *Risk Distribution and the Law of Torts: Carrying Calabresi Further*, J.L. & CONTEMP. PROBS., no. 2, 2014, at 165 (showing how a compensatory norm generates tort rules that adequately satisfy the demands of the Pareto principle for social interactions constrained by transaction costs). As for the central normative importance of the Pareto principle for welfarist interpretations of tort law, see LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 54–56, 54 n.76 (2002) for an argument that any nonwelfarist rationale for tort law violates the Pareto principle and should be rejected for that reason.

Pareto optimality. The reasons for doing so are internal to the logic of welfarism.[186] A compensatory rule, such as strict liability for abnormally dangerous activities, accordingly satisfies the basic requirements of both fairness and welfarist rationales within the normative calculus of tort law, albeit in a more normatively complex manner than conventional economic theories depict by exclusively focusing on cost minimization and allocative efficiency.

In yet one more respect, then, the problem of scarce compensatory resources alters the normative calculus of tort law in a predictable way that conventional tort theories have not recognized. Like duty-bearers, right-holders do not have unlimited compensatory resources and accordingly have a reasonable interest in minimizing their injury compensation costs. For cases in which right-holders ultimately bear the costs of the correlative tort duties, a purely compensatory tort rule would be contrary to their interests; it would unduly increase the ordinary right-holder's total costs of injury compensation. The relevant interests of these right-holders are best protected by deterrence-based liability rules obligating risky actors to prevent injuries through the exercise of reasonable care. Compensatory rules of strict liability can only fairly or reasonably protect right-holders who do not ultimately pay for their tort entitlements to compensation, providing another important example of how the scarcity of compensatory resources shapes substantive tort law.

E. *The Normative Relevance of Liability Insurance*

Insurance covering defendants' tort liabilities enhances their compensatory resources. However, "[t]he fact of insurance generally has no probative value in proving the two issues prevalent in every negligence case—negligence and damages."[187] Consequently, there is a "firmly established" evidentiary rule which "prohibits disclosure at the trial that the defendant is insured against liability."[188] The irrelevance of liability insurance for establishing liability may explain why there is a "glaring gap" in tort theory involving "its failure to take

186. The requisite logic is inherent within cost-benefit analysis. For a purely compensatory entitlement, right-holders implicitly measure the cost of injury in terms of the minimum amount of money they would accept as compensation for facing the risk. Without any compensatory transfer, a right-holder would rationally and reasonably measure the associated injury costs at infinity. When plugged into cost-benefit analysis, an infinite measure of injury costs rules out the risky behavior and eliminates the prospect the right-holder will incur an uncompensated loss. Mark A. Geistfeld, *The Tort Entitlement to Physical Security as the Distributive Basis for Environmental, Health, and Safety Regulations*, 15 THEORETICAL INQUIRIES L. 387, 394–96 (2014). Thus, in order for welfarism to justify risky interactions of this type, it must enforce the compensatory transfer that underlies the right-holder's willingness to accept compensation in order to face the risk. The appropriate welfarist evaluation of the compensatory transfer is based on the Pareto principle, not on the cost-benefit analysis for identifying allocatively efficient outcomes.

187. J. E. Lyerly, *Evidence: Revealing the Existence of Defendant's Liability Insurance to the Jury*, 6 CUMB. L. REV. 123, 123 (1975).

188. *Id.*; *see also, e.g.*, FED. R. EVID. 411.

adequate account of liability insurance" beyond its being "a mere source of funding."[189]

Though irrelevant for proving negligent misconduct or the amount of compensable harm, the availability of liability insurance is relevant to the antecedent element of duty. Unlike the case-specific inquiries concerning unreasonable behavior and compensatory damages, the element of duty entails a categorical inquiry that accounts for the burden the tort obligation would impose on the ordinary duty-bearer across the cases the duty governs.[190] The nature of this inquiry provides a principled basis for making the availability of liability insurance relevant to the tort duty—the only aspect of the tort claim for which courts expressly rely on liability insurance to formulate substantive tort doctrine.[191]

Due to the negligence rule's unrealistic behavioral demands—always pay attention, never make mistakes—the ordinary duty-bearer is simply unable to exercise reasonable care at all times in all places. Risky actors inevitably face the risk of incurring liability for negligence. The associated costs of financial uncertainty, due to risk aversion or otherwise, factor into the burden of the tort duty.

Just as other kinds of insurance policies reduce the cost that policyholders would otherwise bear when confronting significant risks of uninsured financial losses, liability insurance reduces costs for duty-bearers by enabling them to transfer the risk of tort liability onto an insurer in exchange for an insurance premium.[192] All else being equal, liability insurance reduces the cost or burden that a tort obligation would impose on the ordinary duty-bearer, making it easier to justify the tort duty.[193]

Liability insurance does not justify purely compensatory tort duties when the ordinary right-holder pays for the compensatory entitlement via higher prices. As compared to the tort compensation funded by liability insurance, the costs of injury compensation for these right-holders are substantially reduced by other types of insurance mechanisms, such as health insurance.[194] The primary value of liability insurance for tort purposes instead involves the manner in which it reduces the cost of the tort obligation for duty-bearers, including those who then pass such cost savings onto right-holders by reducing prices.

This normative property of liability insurance has been entirely overlooked by those who claim that it has no principled relevance for substantive

189. Abraham & Sharkey, *supra* note 6, at 2169.

190. *See supra* Section II.B.

191. *See* Abraham & Sharkey, *supra* note 6, at 2187–88, 2207–14.

192. *See* J.J. McCall, *Insurance*, *in* THE NEW PALGRAVE: DICTIONARY OF ECONOMICS 6610, 6610 (3d. ed. 2018).

193. *See supra* Section I.B.

194. *See supra* notes 182–185 and accompanying text.

tort law.[195] It helps explain why, during the twentieth century, there was a hydraulic relationship between the increased availability of liability insurance and the expansion of tort liability.[196]

Liability insurance is normatively relevant for another reason: It is another factor that transforms the social currency of monetary damages into commodified money. As the economic sociologist Viviana Zelizer has found in her studies about money's contemporary social meaning, "Of course, quantity makes a difference; people care about how much money is involved in their transactions. But *what kind* of money it is and *whose* money also matter greatly."[197] Consistent with these findings, Tom Baker interviewed personal-injury lawyers in Connecticut and found that they often distinguish "insurance money" from "blood money" that defendants pay "out of their own pockets. As their term reflects, *blood money* hurts defendants in a way that money paid on behalf of a defendant by a liability insurance company cannot."[198]

By creating a form of injury compensation normatively different from blood money, liability insurance alters the social meaning of monetary damages, thereby implicating tort law theories that make liability dependent on culpability. For example, John Goldberg and Benjamin Zipursky argue that "the point of tort law is to define and prohibit certain forms of mistreatment, and to provide victims of such mistreatment with the ability to use civil litigation to obtain redress from those who have mistreated them."[199] In their view, the purely compensatory rule of strict liability for abnormally dangerous activities does not involve any such mistreatment, making this form of liability "so distinctive as to locate it at or beyond tort law's conceptual boundaries."[200] However, liability insurance and a host of other developments render implausible the claim that tort liability is necessarily limited to redress for mistreatment.

If the point of modern tort law is to empower plaintiffs to seek interpersonal redress for prohibited forms of mistreatment, why can the defendant fairly satisfy that obligation with insurance money that a third party has supplied? Liability insurance cannot satisfy the interpersonal remedy of apology,

195. For example, in the leading critique concluding that liability insurance is irrelevant as a matter of principle, Ernest Weinrib only focuses on the insured status of an individual defendant. *See* Weinrib, *supra* note 9, at 683 ("The status of one of the parties as an insured assumes paramount importance, and insurance becomes the lens through which the relationship between the litigants is [unjustly] refracted.").

196. *See* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, AT 171–97 (2008).

197. ZELIZER, *supra* note 49, at 200.

198. Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC'Y REV. 275, 276 (2001).

199. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 266 (2020).

200. *Id.* at 191.

nor can it do so for the criminal penalties that apply to legally prohibited behaviors. Why is the interpersonal civil recourse for prohibited forms of mistreatment fundamentally different?[201]

As these questions suggest, liability insurance fits awkwardly—at best—within a tort system designed to deliver interpersonal redress for prohibited forms of culpable mistreatment. Blood money would seem to be the normatively necessary compensatory currency, thereby ruling out liability insurance as a defensible source of injury compensation.

By contrast, liability insurance comfortably fits within a compensatory tort system. As was true for the customary practices that first informed the early common law, an injurer's failure to compensate the victim's injury can be a culpable form of disrespect or mistreatment, regardless of whether the injury was otherwise due to faulty behavior—the "value of an eye for an eye."[202] Over time, this compensatory practice evolved into the important rules comprising modern tort law, including the rule of strict liability for abnormally dangerous activities. For these and related nonculpable forms of injury-causing behavior, the defendant's payment of compensatory damages fully satisfies the normative obligation, eliminating any normative concern about using liability insurance as a funding mechanism.

Moreover, the extent to which tort damages can effectively function as "blood money" has been largely eliminated by modern bankruptcy law. Rather than paying substantial money out of pocket, individual tortfeasors can file for bankruptcy.[203] The Supreme Court recently ended the practice of extending such protection to third parties who have not declared bankruptcy.[204] This decision, which overturned a bankruptcy plan immunizing the Sackler family from any further opioid-related personal liabilities, was lauded by the attorney general of Connecticut: "The U.S. Supreme Court got it right—billionaire wrongdoers should not be allowed to shield blood money in bankruptcy court."[205]

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201. This particular critique is drawn from Geistfeld, *supra* note 183 (reviewing GOLDBERG & ZIPURSKY, *supra* note 199), which provides more extensive discussion of why the history of tort law is hard to square with the claim that tort liability conceptually depends on culpable forms of interpersonal mistreatment.

202. *See, e.g.*, ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 104 (D.D. Raphael & A.L. Macfie eds., 6th ed. 1976) (1790) (observing that an injurer with "any sensibility . . . necessarily desires to compensate the damage," for to "offer no atonement, is regarded as the highest brutality"); Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U.L. REV. 227, 234 (2011) ("A further difficulty for Goldberg and Zipursky is that if resentment of a blameless injurer is defensible at all, it should be equally defensible when legal liability is strict rather than fault-based. In either case, what triggers resentment is not the injurer's initial conduct toward the victim (which does not invite blame), but the injurer's failure to suffer its consequences.").

203. *See generally* Gilles, *supra* note 129 (discussing the varied ways in which bankruptcy protection effectively enables tortfeasors to avoid liability).

204. Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2088 (2024).

205. Jan Hoffman, *Purdue Opioid Settlement on Verge of Collapse After Supreme Court Ruling*, N.Y. TIMES. (June 27, 2024), https://nytimes.com/2024/06/27/health/purdue-pharma-sackler-opioid-supreme-court.html [perma.cc/BPM6-A43X].

Of course, billionaire wrongdoers can also seek bankruptcy protection, but their abundant personal financial assets will still be largely depleted to compensate their tort victims. Blood money is available in exceptional cases like these and partially offsets the diminished retributive role of punitive damages. After all, a tortfeasor who is unable to pay off outstanding compensatory liabilities suffers no punishment by incurring the further (judgment-proof) extra compensatory liabilities of punitive damages. The only meaningful source of tort retribution resides in the blood-money-funded liabilities of the bankrupt tortfeasor's personal assets.

In the ordinary case, however, individual defendants can avoid satisfying their tort obligations by shielding most of their assets through bankruptcy.[206] Bankruptcy does not shield corporate defendants' assets in the same way, but bankruptcy predictably results in tort plaintiffs receiving pennies on the dollar for their tort judgments.[207] Recognizing as much, tort plaintiffs regularly settle their claims for amounts within the policy limits of the defendant's liability insurance.[208] Liability insurance and bankruptcy are now so entangled that modern tort liability largely involves insurance money, not blood money.[209]

F. *The Normative Relevance of Bankruptcy*

Like liability insurance, modern bankruptcy law has altered the normative calculus of tort law by reducing the burden of the duty. The combination of liability insurance and bankruptcy protection produced an expansionary effect on tort law that, over the course of the twentieth century, helped to cement negligence as the baseline liability rule.

Bankruptcy law is grounded in the United States Constitution, which vests Congress with the authority to establish "uniform Laws on the subject of Bankruptcies."[210] Although there are only a "few aspects of commercial life . . . addressed in the Constitution," it "provides that there shall be a uniform law

206. *See* Gilles, *supra* note 129, at 606 ("In the absence of liability insurance, plaintiffs are effectively barred from bringing suit unless the tortfeasor is an asset-rich corporation or an affluent individual who neglects to take elementary precautions to protect his or her assets from tort liability.").

207. *See supra* notes 1–4 and accompanying text.

208. For example, even though physicians often make a substantial amount of money than others, they can use the threat of bankruptcy to effectively shield their personal assets from tort plaintiffs. Consequently, claims for medical malpractice routinely settle within the limits of the physician defendant's liability insurance policy. *See* Charles Silver, David A. Hyman, Bernard S. Black & Myungho Paik, *Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance*, 5 U.C. IRVINE L. REV. 559, 561–62, 580–82 (2015) (reporting results of empirical study finding that for medical malpractice cases in Texas, "98.5% of claims were resolved with payments at or below the primary malpractice policy limits").

209. *See* Abraham & Sharkey, *supra* note 6, at 2181 ("Liability insurers pay virtually all of the billions of dollars of tort liabilities that individuals incur each year, and the majority of liabilities incurred by commercial and other entities.").

210. U.S. CONST. art. I, § 8, cl. 4.

of bankruptcy" because "failure was seen as a big problem."[211] This big problem stems from social practices originating in the state of nature that deemed insolvency to be the debtor's moral failure, meriting bondage and imprisonment.[212] At the Founding, this punitive practice was at odds with the ethos of market competition for which the risk of commercial failure is an ordinary cost of doing business. The transformation of monetary debt from a normatively imbued social currency into its commodified counterpart was a long-running struggle. It was not decisively resolved until Congress enacted the Bankruptcy Act of 1898,[213] which "ushered in the modern era of liberal debtor treatment in United States bankruptcy laws."[214]

Modern bankruptcy law (coupled with limits on shareholder liabilities for corporate wrongdoing) often prevents individual tort claimants from receiving the full amount of their compensatory damage awards. This feature of bankruptcy reduces the availability of compensatory resources in individual cases and largely turns tort compensation into insurance money. Aside from this important consequence for the compensatory properties of tort law, modern bankruptcy has made it easier for courts to justify tort duties.

During the era when insolvent tort defendants faced imprisonment, any formulation of a tort duty that would involve a considerable risk of insolvency necessarily implicated debtor's prison—a severe deprivation of liberty for those subject to the tort duty. Insolvency further threatened premature death in the unforgiving conditions of debtor's prison. All else being equal, this normative burden made it harder to justify tort duties.[215]

Modern bankruptcy law substantially reduces the burden of insolvency for duty-bearers. Declaring bankruptcy is costly for sure but much less so than going to debtor's prison. The reduced burden makes it easier to justify the tort duty.

These bankruptcy reforms combined with liability insurance's increased availability significantly reduced the burden of a tort duty throughout the twentieth century. These developments, coupled with increasing social wealth, made it possible for tort law to normatively distinguish between a right-holder's interest in physical security and the duty-bearer's conflicting liberty and economic interests.[216]

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211. Elizabeth Warren, *Why Have a Federal Bankruptcy System?*, 77 CORNELL L. REV. 1093, 1095 (1992).

212. *See supra* Section III.D; *see also, e.g.*, HOWARD L. OLECK, DEBTOR-CREDITOR LAW 3 (1953) (recognizing that the Bible is a fundamental source of Western law governing relationships between debtors and creditors).

213. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

214. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 24 (1995) ("All prior bankruptcy laws had conditioned discharge upon the consent (or at least failure to object) of a specified percentage of creditors and a minimum dividend payment to creditors. The 1898 Act abolished those restrictions, and also severely limited the number of grounds for denial of discharge.").

215. *See supra* Section III.D.

216. *See supra* Section IV.A.

This dynamic expanded the scope of negligence liability throughout the twentieth century via the abrogation of immunities and other common-law rules that had significantly limited the duty to exercise reasonable care.[217] In each instance, the right-holder's security interest was prioritized over the conflicting liberty and economic interests of the duty-bearer, justifying the imposition of negligence liability to prevent the irreparable injury of physical harm. Today, the obligation to exercise reasonable care is so well established that courts will presume it exists unless the defendant argues otherwise.[218]

Once again, this dynamic is largely missing from conventional accounts that emphasize how bankruptcy prevents tort law from fully compensating and adequately deterring injuries.[219] These problems stem from compensatory resource scarcity. Bankruptcy manages that more fundamental problem in a manner that makes it easier to justify liability in the first instance.

V. SCARCE COMPENSATORY RESOURCES AND THE REQUIREMENT OF PHYSICAL HARM

Having expanded the negligence duty in cases of physical harm, courts then predictably faced the question of whether they should further expand the duty to encompass pure economic losses and stand-alone emotional harms. These foreseeable injuries do not flow from a predicate physical harm the plaintiff suffered, such as a broken bone. Subject to various exceptions, the physical-harm requirement bars plaintiffs from recovering compensatory damages for pure economic losses or stand-alone emotional harms.

"The reasons for this inhibition have not traditionally been clear,"[220] but once these claims are situated in a world of scarce compensatory resources, the rationale for limiting liability becomes more apparent: The ordinary duty-bearer does not have the financial resources to fully compensate all the harms

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217. Rabin, *supra* note 123, at 959 (footnote omitted) (describing the "heyday of negligence" in the twentieth century in terms of a dynamic whereby "the no-liability principles—immunities, privileges, and no-duty considerations imported from other conceptual systems (property, contract, and such)—retreated, like a melting glacier in a hostile environment, before the successive onslaughts of fault and, later, strict liability rules"); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 963 (1981) (arguing that the substantial expansion of tort liability in the mid-twentieth century "can fairly be described as a vindication or unleashing of the negligence principle—the dismantling of obstacles that previously have impeded the achievement of that principle's full potential").

218. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) & cmt. b (A.L.I. 2010) ("A defendant has the procedural obligation to raise the issue of whether a no-duty rule or some other modification of the ordinary duty of reasonable care applies in a particular case.").

219. *See* Gilles, *supra* note 129, at 605–07 (explaining how "standard fare in torts scholarship and torts courses" relies on the compensatory and deterrence functions of tort liability for which "[t]he truth is dramatically different" due to the manner in which bankruptcy and related laws enable tort defendants to "shelter the lion's share of their income and assets from collection by tort plaintiffs").

220. Oscar S. Gray, *Some Thoughts on "The Economic Loss Rule" and Apportionment*, 48 ARIZ. L. REV. 897, 898 (2006).

that negligent misconduct foreseeably causes. This compensatory shortfall makes it necessary for courts to prioritize claims for physical harms by barring claims for economic losses and stand-alone emotional harms—the limitation of liability embodied in the requirement of physical harm.[221]

A. *The Requirement of Physical Harm*

According to the *Restatement (Third) of Torts*, actors ordinarily have a duty to exercise reasonable care to avoid physical harms—bodily injury or damage to real or tangible property.[222] By contrast, as a leading treatise observes, "no equivalent proposition ever has been adopted with respect to emotional harm. Nor, given the ubiquity of emotional harms, is it likely to be."[223] Similarly, the *Restatement (Third) of Torts* recognizes that "[a]n actor has no general duty to avoid the unintentional infliction of economic loss on another."[224] Negligence liability is ordinarily limited to cases of physical harm—a limitation of liability embodied in the physical-harm or physical-injury requirement.

Numerous rationales for this liability-limiting doctrine have been proffered over the years, yet as courts recognize in cases adopting an exception, these reasons for "denying liability are no longer tenable, and it is questionable if they ever were."[225] Courts nevertheless invoke these same rationales in deciding that liability for economic losses or stand-alone emotional harms would be excessive.[226] The question remains: Excessive liability, by definition, ought to be limited, but why is the liability excessive when limited to the foreseeable harms the defendant's negligence proximately caused?

One property of the physical-harm requirement is undeniable. A single bodily injury (wrongful death, for example) can cause a substantially larger number of other individuals to suffer stand-alone emotional harms (those family members, friends, and others who are foreseeably distressed by the

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221. For an earlier, less rigorous version of this argument, see GEISTFELD, *supra* note 20, at 159–67. Having more extensively developed the argument for this Article, I then hived off relevant portions to explain their relevance for the current controversy involving tort claims for medical monitoring. *See* Mark A. Geistfeld, *The Equity of Tort Claims for Medical Monitoring*, 52 SW. L. REV. 493 (2024) [hereinafter *Medical Monitoring*].

222. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (A.L.I. 2010) (defining duty); *id.* § 4 (defining physical harm).

223. DOBBS, HAYDEN & BUBLICK, *supra* note 5, § 390, at 571.

224. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 (A.L.I. 2020).

225. Falzone v. Busch, 214 A.2d 12, 14 (N.J. 1965) (discussing reasons for limiting liability for negligent infliction of emotional distress); *see also, e.g.*, Gammon v. Osteopathic Hosp. of Me, Inc., 534 A.2d 1282, 1283 (Me. 1987) (deciding that "these more or less arbitrary requirements" that limit liability for negligent infliction of emotional distress should not bar plaintiff's "claim for compensation for severe emotional distress").

226. *See, e.g.*, Metro-N. Commuter R. Co. v. Buckley, 521 U.S. 424, 432–33 (1997) (denying claim for stand-alone emotional distress under Federal Employers' Liability Act, which relies on common-law principles, because "common-law precedent does not favor the plaintiff" and "the general policy reasons" for restricting recovery "militate" against recovery).

premature death), in addition to those who incur foreseeable economic losses (individuals who financially benefit from the physical well-being of the decedent). The scope of liability for physical harms is ordinarily much more limited than it is for these other types of harms, providing an important empirical difference that might justify the physical-harm requirement.

Consider a recent study estimating that for each COVID-related death in the United States, approximately nine close family members are left grieving.[227] If the tort duty encompassed all individuals who would be foreseeably distressed by a loved one's wrongful death or irreparable bodily injury, a negligent tortfeasor would face claims from both the physically harmed victim and the substantially larger number of others seeking recovery for their consequential emotional distress. The number of potential claimants would be even further expanded by including those who suffer foreseeable economic losses. On average, for each physically harmed victim, the number of total claimants seeking recovery from a negligent defendant would routinely increase by at least a factor of ten.

This considerable expansion of liability explains why courts have historically invoked the concern "about opening the proverbial floodgates of litigation" to limit negligence liability.[228] At the turn of the twentieth century, individuals who were rendered insolvent by tort judgments still faced jailtime because of the debt.[229] Forms of tort liability that regularly threatened insolvency, therefore, implicated the ordinary duty-bearer's interest in avoiding prison. An accident victim's interest in economic security or emotional tranquility, though important and worthy of legal protection in the appropriate cases, could not justify sending someone to prison for their inability to pay off these tort debts. Such a severe deprivation of a negligent injurer's liberty is normatively more burdensome than the accident victim's financial loss or emotional distress. The problem of insolvency and the looming threat of debtor's prison explain why courts of this era barred claims for pure economic loss and stand-alone emotional distress on the ground that duty-bearers would otherwise "face liabilities that are indeterminate and out of proportion to their culpability."[230]

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227. Ashton M. Verdery, Emily Smith-Greenaway, Rachel Margolis & Jonathan Daw, *Tracking the Reach of COVID-19 Kin Loss with a Bereavement Multiplier Applied to the United States*, 117 PROC. NAT'L ACAD. SCIS. 17695 (2020), https://doi.org/10.1073/pnas.2007476117; *see also* Heidi M. Zinzow, Alyssa A. Rheingold, Alesia O. Hawkins, Benjamin E. Saunders & Dean G. Kilpatrick, *Losing a Loved One to Homicide: Prevalence and Mental Health Correlates in a National Sample of Young Adults*, 22 J. TRAUMATIC STRESS 20, 20 (2009) (finding that in 2007, "[e]ach murder leaves behind 7 to 10 close relatives, in addition to friends, neighbors, and coworkers").

228. Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1198 (2009).

229. *See supra* notes 114–115 and accompanying text.

230. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. c (A.L.I. 2020) (discussing economic loss); *see also* RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (A.L.I. 1965) (identifying three reasons why courts limit negligence liability for stand-alone emotional harms, one of which is that "is that where the defendant has been merely negligent, without any

"The focal point of the fairness consideration expressed in the disproportionality constraint is on the *injurers'* perspective, taking account of the elementary moral principle that the punishment should fit the crime."[231] Negligent misconduct is not ordinarily a crime, but the otherwise puzzling invocation of the proportionality principle applicable to criminal punishment becomes defensible once one accounts for the associated problems of insolvency and debtor's prison: Sending someone to prison for failing to satisfy a tort debt involving economic loss or stand-alone emotional harm would be disproportionate punishment for ordinary, noncriminal negligence.

Modern bankruptcy law has eliminated this retributive implication of extensive liability, making it easier to justify the tort duty. Culpability and the proportionality principle of criminal law no longer justify limiting negligence liability with the physical-harm requirement, returning us to the question of why courts continue to express concern about excessive liability.

The problem of excessive liability continues to stem from the scarcity of compensatory resources, which is not solved by either eliminating debtor's prison or making liability insurance more widely available. Rather than focus on how liability these days might be excessive for duty-bearers—a questionable concern since the injuries in question are a proximate cause of a defendant's negligence—the inquiry can instead look at the extent of liability from the perspective of right-holders. The total amount of the ordinary duty-bearer's compensatory resources will often not be sufficient to cover the claims of each physically harmed victim and the ten or more others who, as a foreseeable consequence, are emotionally distressed or have incurred pure economic loss. In that event, liability would be excessive for exhausting the negligent defendant's financial resources and preventing the physically harmed victims from being fully compensated.

By the end of 1992, the average net worth of a family in the United States was slightly more than $24,000.[232] In 1992, the median tort award for prevailing plaintiffs in civil jury cases in state courts across the 75 largest counties in the country was $52,000; by 2005, the median award had declined to $28,000.[233] Regardless of the exact relation in any given year, individual defendants do not ordinarily have sufficient assets to cover tort judgments limited to the physically harmed victim(s).

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element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance").

231. Rabin, *supra* note 228, at 1203.

232. https://fred.stlouisfed.org/graph/?g=FBGH *See Survey of Consumer Finances, 1989–2022*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Nov. 2, 2023), https://federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Net_Worth;demographic:all;population:all;units:median [perma.cc/ST9T-DVXK].

233. CAROL J. DEFRANCES, STEVEN K. SMITH, PATRICK A. LANGAN, BRIAN J. OSTROM, DAVID B. ROTTMAN & JOHN A. GOERDT, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 5 tbl. 6 (1995) https://ojp.gov/sites/g/files/xyckuh241/files/media/document/cjcavilc.pdf [perma.cc/HT7F-5FDL]; LYNN LANGSTON & THOMAS H. COHEN, U.S. DEP'T OF JUST., BUREAU OF JUSTICE

Tort defendants are often businesses with much more wealth. The increased size of an enterprise, however, can also increase its potential to cause widespread injuries. The sprawling litigation over tort liabilities for asbestos-containing products that cause fatal cancers provides an extreme example. These liabilities bankrupted numerous corporations, including some of the largest in the country, which then set up trusts to distribute the remaining available assets to tort claimants.[234] For nearly all trusts with assets to distribute, claimants receive anywhere from 1.1% to less than 60% of the full, liquidated value of the tort claim.[235] Many trusts distributed all their assets and can no longer compensate tort claimants for their cancers.[236] Though extreme, the asbestos problem is symptomatic of a more fundamental compensatory problem. In 2022, a study spanning ten industry sectors, ranging from Life Sciences to Chemicals, found the median policy limit for liability insurance was uniformly below the trended liability loss costs, typically around half the total, with the largest discrepancy (Rail–Transportation) involving a median policy limit around four times lower than projected liability costs.[237] Hence, it is unsurprising that, when faced with extensive tort liabilities, corporations often file for bankruptcy.

This data does not show that there currently is too much liability. Today, any significant mismatch between average wealth and average tort verdicts only threatens bankruptcy in the average case, a prospect that enables tortfeasors to offer liability insurance as their only source of injury compensation.[238] Bankruptcy makes it easier to justify more extensive liability, all else being equal, which in this instance can help justify a significant mismatch between average wealth and average tort awards to equitably prevent the irreparable injury of physical harm.

The current mismatch between average wealth and average jury verdicts exists within the limits of the physical-harm requirement; it would be exacerbated if the requirement were eliminated, thereby increasing the total number of tort claimants by at least a factor of ten to account for those victims of the negligent misconduct who foreseeably suffered stand-alone emotional harms

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STATISTICS SPECIAL REPORT: CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 5 tbl. 6 (2008), https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf [perma.cc/9L53-UJKP].

234. *See generally* Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163 (2006) (describing various trust arrangements following bankruptcy stemming from asbestos-related liabilities of more than 70 corporations since 1982).

235. *See* LLOYD DIXON, GEOFFREY MCGOVERN & AMY COOMBE, RAND CORP., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 21, 38 fig. 4.5 (2010) (identifying only one trust that pays above this amount).

236. For example, the Manville Personal Injury Trust "was insolvent just a few years after it was created." *Id.* at 6.

237. CHUBB, LIABILITY LIMIT BENCHMARK & LARGE LOSS PROFILE BY INDUSTRY SECTOR 2023 (2023), https://chubb.com/content/dam/chubb-sites/chubb-com/bm-en/benchmark-report/pdf/chubb_2023benchmarkreport_10_bermuda-web.pdf [perma.cc/ENV2-NSSC].

238. *See supra* notes 206–208 and accompanying text.

or pure economic losses. The total liabilities in these cases would routinely exceed an ordinary defendant's liabilities. If a negligent defendant declares bankruptcy, then each of these claimants—including the physically harmed victim(s)—are unsecured creditors who would not be fully compensated.[239]

Due to the scarcity of compensatory resources, a duty encompassing every foreseeable harm can create conflicts among the interests that different individuals have in their physical security, economic resources, and emotional tranquility—compensation for one or more of these interests can come at the expense of the others. To give the physically harmed victims an adequate opportunity to receive full compensation for their injuries, the tort duty must foreclose recovery for the numerous other individuals who foreseeably suffer economic losses or stand-alone emotional harms. In effect, the physical-harm requirement implements the equitable principle, the "worst should go first."[240]

The basic idea is that physical harm is usually normatively worse than emotional distress or financial loss. Of course, some bodily injuries quickly heal, whereas some emotional harms and financial losses are debilitating. But as a categorical matter—the appropriate analytical frame for duty purposes—bodily injuries are worse than these other harms. Physical harm also encompasses damage to real or tangible property, which raises issues that require a more extended explanation of why these kinds of losses are worse than the others, particularly those involving intangible forms of property (like money). A key difference is that the monetary damages can fully repair pure economic losses (a dollar is a dollar). By contrast, real or tangible personal property (like one's house and the personal items it contains) is not ordinarily a fully fungible commodity with other items in the marketplace and cannot be fully repaired with compensatory damages.[241] Prioritizing physical harms over pure

239. *See supra* note 1 and accompanying text.

240. *Cf.* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992) (invoking this equitable maxim to justify "deferral registries" in asbestos cases that prioritize claims of those with the most serious physical harms over those with less serious physical harms).

241. *See generally* Janice Nadler, *The Social Psychology of Property: Looking Beyond Market Exchange*, 14 ANN. REV. L. & SOC. SCI. 367 (2018) (providing empirical evidence and discussing various social and moral influences that explain why market prices do not fully capture individual valuations of tangible and real property); *see also, e.g.*, Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (arguing that tangible forms of property "are part of the way we constitute ourselves as continuing personal entities in the world"); O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("A thing which you have enjoyed and used as your own for a long time . . . takes root in your being and cannot be torn away . . . . The law can ask for no better justification than the deepest instincts of man.") (discussing adverse possession). Commercial property requires different analysis. Businesses do not own their employees and are not entitled to compensatory damages when someone negligently injures an employee. *See, e.g.*, Cont'l Cas. Co. v. P.D.C., Inc., 931 F.2d 1429, 1431 (10th Cir. 1991) (denying such recovery in part on the ground that "a majority of jurisdictions . . . have refused to do so in similar situations"). Consequently, if the economic loss rule barred tort recovery for all forms of commercial property damage on the ground that these properties are fungible commodities like money, then the tort duty to exercise reasonable care would effectively be negated as applied to commercial enterprises.

economic losses and stand-alone emotional distress is a normatively defensible position.

To test whether the physical-harm requirement implements such a "worst goes first" equitable maxim, we can consider its established exceptions. As courts have recognized, the "physical injury rule is not a shibboleth to be honored without understanding its purpose and origin . . . . In applying the physical injury rule, it is important to consider why the rule exists and whether these purposes are at work in this case."[242] Consequently, when the purposes or rationales for the physical-harm requirement "are weak or absent," the *Restatement (Third) of Torts* observes that courts are willing to "recognize duties of care" in cases of pure economic loss and stand-alone emotional harm.[243] The question, then, is whether courts depart from the requirement of physical harm when doing so would not violate the equitable principle, "the worst should go first." If so, this basic limitation of negligence liability provides another important example of how compensatory resource scarcity factors into substantive tort law as a matter of principle.

B. *Negligent Infliction of Emotional Distress*

The "original rule" altogether barred recovery for claims of negligent infliction of emotional distress.[244] The total bar to recovery follows from how extensive liabilities regularly threatened debtor's prison in this era, a criminal punishment disproportionate to the tortious wrongdoing.

After bankruptcy law displaced debtor's prison at the turn of the twentieth century, courts in the ensuing decades started to recognize emotional distress claims in limited contexts while remaining "deeply concerned to impose limitations."[245] The modest expansion of liability can be explained by the reduced burden of insolvency coupled with increases in per capita wealth and the spread of liability insurance.

In most jurisdictions, the ordinary duty now permits recovery for stand-alone emotional distress when the negligent act "places the other in danger of immediate bodily harm and the emotional harm results from the danger."[246] This particular duty encompasses everyone in the so-called "zone of danger," including physically harmed victims. The slightly expanded duty is still circumscribed to a set of claimants the ordinary duty-bearer can adequately compensate in most cases.

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242. *Sullivan v. Saint-Gobain Performance Plastics Corp.*, 431 F. Supp. 3d. 448, 452–53 (D. Vt. 2019).

243. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 cmt. d (A.L.I. 2020) (discussing pure economic loss); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 (A.L.I. 2012).

244. DOBBS, HAYDEN & BUBLICK, *supra* note 5, § 390, at 571.

245. *Id.*

246. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47(a) (A.L.I. 2012).

Courts will expand the duty beyond the zone of danger to encompass stand-alone emotional distress in only very limited circumstances. "Specifically, courts have imposed liability on hospitals and funeral homes for negligently mishandling a corpse and on telegraph companies for negligently mistranscribing or misdirecting a telegram that informs the recipient, erroneously, about the death of a loved one."[247] But "[o]utside these categories, courts may entirely preclude distress claims."[248]

Although anyone would understandably be upset by such unreasonable misconduct, no one is directly threatened with bodily injury when a corpse is mishandled or a telegram is not properly transcribed. The absence of any foreseeable physical harms within the duty eliminates the equitable concern about limiting the duty so that the "worst go first," justifying an expansion of the duty to encompass these emotional harms. These limited exceptions permitting recovery for stand-alone emotional distress confirm that the physical-harm requirement in other cases bars such recovery to increase the amount of scarce resources for compensating physically harmed right-holders.

C. *Tort Recovery for Pure Economic Loss*

For tort purposes, there are two normatively different types of pure economic losses not proximately caused by a predicate physical harm. The first involves financial harms that arise within contractual settings, such as the cost a consumer incurs to repair a defective product. Subject to certain exceptions, the contractually based economic loss rule bars tort recovery for these injuries.[249] These tort rules are justified by the need to maintain the integrity of the tort-contract boundary; they turn on the ability of right-holders to adequately protect their interests by contracting and are not relevant for our purposes.[250] The second type of pure economic loss occurs outside of contractual settings. As is true for the contractually based economic-loss rule, this one also bars recovery for pure economic losses subject to certain exceptions. The rationale for limiting the tort duty for these economic losses implicates the same concerns about excessive liability applicable to claims for stand-alone emotional distress.

In a recent state-of-the-art opinion dismissing plaintiffs' tort claims for this type of economic loss, the California Supreme Court discussed a prior case in which it had explained why the tort duty does not encompass these foreseeable injuries:

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247. *Id.* § 47 cmt. b.

248. DOBBS, HAYDEN & BUBLICK, *supra* note 5, § 390, at 572.

249. *See* E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858 (1986).

250. *See generally* Mark A. Geistfeld, *The Contractually Based Economic Loss Rile in Tort Law: Endangered Consumers and the Error of* East River Steamship, 65 DEPAUL L. REV. 393 (2016) (demonstrating that courts properly limit recovery for pure economic losses in product cases when consumers do not have enough information about product risks and safety to adequately protect their interests by contracting).

> [W]e pointed to a hypothetical scenario similar in many ways to the case now before us. We considered a situation where "a defendant negligently causes an automobile accident that blocks a major traffic artery such as a bridge or tunnel." That defendant would of course be liable for "personal injuries and property damage suffered in such an accident." But would "any court," we continued, "allow recovery by the myriad [other] third parties who might claim [purely] economic losses because the bridge or tunnel" was blocked? Based on concerns about limitless liability and unending litigation, as well as on long-standing legal consensus, we considered that prospect "doubtful."[251]

The court then cited opinions from "across the country" in which other courts had "rejected recovery for purely economic losses stemming from man-made calamity" based on concerns "about line-drawing problems and potentially overwhelming liability."[252] Relying on these cases and explaining why these same concerns applied to the case at hand—a months-long massive leakage of natural gas in a suburb outside Los Angeles—the court dismissed the claims of several small businesses in the area seeking recovery for their lost profits not proximately caused by any damage to their real or tangible property.[253]

As is true for the cases on which it relied, the court did not mention the problem of insolvency and the associated need to prioritize the claims of physically harmed victims. The tort duty encompassed physical harms, just like it did in the hypothetical automobile accident the court discussed in which the "defendant would of course be liable for 'personal injuries and property damage.' " If the duty in these cases were expanded to encompass both the physically harmed victim(s) and those who might suffer foreseeable economic losses, there would be a massive increase in the number of tort claimants, as the California Supreme Court recognized. That liability would be excessive insofar as insolvency would be a predictable consequence, leading to the question of why insolvency provides a principled reason to limit the substantive tort duty.

An exclusive focus on the defendant's interests only implicates the defendant's unreasonable exercise of liberty. The defendant negligently caused all these foreseeable harms, and insolvency would not lead to debtor's prison. An unreasonable liberty interest is not plausibly prioritized over the conflicting interests of foreseeable accident victims, whether those interests involve physical security or economic harms. Like the now outdated concern about culpability, the defendant's interests do not provide a principled justification for substantively limiting the tort duty to fend off bankruptcy.

The principled concern about bankruptcy instead derives from the security interests of right-holders, which have priority over the conflicting economic interests of the other accident victims. This priority—"the worst should

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251. S. Cal. Gas Co. v. Superior Ct. L.A. Cnty. (S. Cal. Gas Leak Cases), 441 P.3d 881, 888 (Cal. 2019) (citations omitted).

252. *Id.* at 889.

253. *Id.* at 888–96.

go first"—provides a normatively defensible reason to limit the duty to those with physical harms. As in the case of stand-alone emotional harms, the physical-harm requirement substantially increases the likelihood that there are enough assets to compensate those with the irreparable injuries of physical harm.

In an asbestos case, the Supreme Court of the United States recognized this equitable problem,[254] and a few other courts have followed suit in the context of a mass tort.[255] Like the asbestos cases, mass torts have become a synonym for bankruptcy within tort adjudication.[256] A focus on the problem of bankruptcy quickly leads to the insight that tort liability must be limited by the physical-harm requirement so that the "worst can go first."

For these same reasons, courts can defensibly permit recovery for economic loss outside contractual settings when the negligence does not threaten any foreseeable physical harms. For example, courts permit recovery for pure economic losses if there is "some special relation between the parties" such as "a telegraph company's negligent transmission of a message," the "negligent failure to perform a gratuitous promise to obtain insurance, and the negligent delay in acting upon an application for insurance."[257] The negligent misconduct in these cases does not threaten any foreseeable physical harm, eliminating the need to limit the duty so that the "worst go first." Courts have also departed from the physical-harm requirement to award damages for the reasonable medical costs of monitoring for future bodily injuries, such as cancer. Like the ordinary duty governing physical harms, the substantive duty encompassing the financial costs of medical monitoring is grounded in the equitable concern to prevent these irreparable bodily injuries from happening.[258]

Like the tort rules recognizing claims for stand-alone emotional harms in exceptional cases, courts permit similar recoveries for pure economic loss when they do not unduly exhaust the ordinary duty-bearer's financial resources for compensating physically harmed victims. These exceptions to the

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254. *See* Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 442 (1997).

255. *See* Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11, 18 (N.Y. 2013) (invoking this equitable concern in a tobacco case); Henry v. Dow Chem. Co., 701 N.W.2d 684, 685, 694 (Mich. 2005) (invoking this equitable concern for a case in which "173 plaintiffs . . . have asked to represent a putative class of thousands in an action against defendant"); Hinton v. Monsanto Co., 813 So. 2d 827, 828, 831 (Ala. 2001) (invoking this equitable concern for a case brought by the plaintiff on "behalf of himself and a putative class of persons similarly situated, . . . asserting that he and others similarly situated have been exposed to polychlorinated biphenyls ('PCBs'), a known hazardous substance, released into the environment in the Anniston area by the defendant").

256. *Cf.* Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 290 (1991) ("The actuality or imminent probability of bankruptcy has increasingly come to dominate most mass tort, or at least mega-mass tort, litigation. Our view is that from the beginning mass torts should be treated similarly to a bankruptcy proceeding.").

257. Union Oil Co. v. Oppen, 501 F.2d 558, 565 (9th Cir. 1974) (citation and internal quotes omitted).

258. *See generally* Geistfeld, *supra* note 221 (arguing that the equitable maxim of the "worst goes first" does not defensibly limit the medical-monitoring cause of action).

physical-harm requirement further demonstrate why and how substantive tort rules are shaped by the availability of compensatory resources.

D. *The Limits of Procedure*

The "worst goes first" equitable rationale for the physical-harm requirement might seem to be an implausibly blunt legal instrument for managing the problem of insolvency. Perhaps the appropriate set of procedural rules would provide a much more sensible way to fairly distribute a defendant's limited pool of assets across multiple tort claimants.[259] Such a procedural solution would make limiting the substantive duty unnecessary to give the physically harmed victims a reasonable opportunity to obtain full recovery.

Although a legislature could enact such a procedural scheme, a common-law court does not have that kind of power. The common law developed in the writ system, a highly individualized form of adjudication. A *single* claimant could bring only a *single* claim for relief by way of a *single* writ.[260] The prevailing tort plaintiff in each individual case would have a debt claim against the defendant for the full amount of compensatory damages. Multiple plaintiffs would have multiple debt claims against the same defendant. To equitably distribute an insolvent defendant's assets across all these claims, a court would have to reduce the defendant's debt owed to some or all the individual plaintiffs. Within the United States, common-law courts did not have such power.[261]

These constraints on judicial power are not limited to the now discarded writ system. The modern procedural alternative, a limited-fund class action, cannot equitably distribute a tort defendant's limited assets to provide full recovery for physically harmed victims and less than full recovery for any remaining tort claimants.[262] By contrast, the federal bankruptcy statute supplies the type of jurisdictional power a court would need to fairly distribute the assets of an insolvent tort defendant across multiple tort claimants. Bankruptcy

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259. *Cf.* DOBBS, HAYDEN & BUBLICK, *supra* note 5, § 383, at 540 n.7 (suggesting that "it would be possible to expand interpleader or otherwise provide for common distribution system when claims exceed assets").

260. *See* SIR JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 63 (5th ed. 2019) ("The choice of original writ governed the whole course of litigation from beginning to end, since the procedures and methods of trial available in an action commenced by one kind of writ were not necessarily available in another.").

261. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (holding that it is unconstitutional for states to discharge preexisting debts); *see also* Ogden v. Saunders, 2 U.S. (12 Wheat.) 213 (1827) (holding that it is unconstitutional for states to discharge the debts owing to a citizen of another state).

262. "[W]hen the limited fund is the company itself . . . [t]here is no basis . . . for allowing only one group of creditors," such as physically harmed tort claimants, "to pursue the fund" and leave "others with no recovery, or for making only one group of creditors accept less than full payment while reserving sufficient assets to pay everyone else in full." S. ELIZABETH GIBSON, *CASE STUDIES* OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 28 (2000), https://uscourts.gov/sites/default/files/masstort_1.pdf [perma.cc/W4SJ-CRE7].

courts "are the only courts that . . . have the power to commandeer both state and federal litigants into a single forum and halt all other civil litigation, no matter what court it is in."[263]

Within the Bankruptcy Code, "a significant part of its distributional scheme is oriented toward establishing priorities among creditors."[264] Secured creditors are prioritized over unsecured creditors, and all tort claimants are lumped together as unsecured creditors.[265] Outside bankruptcy—that is, within the common law of torts—the only way for courts to prioritize among tort claimants is by substantively limiting the tort duty to effectively implement the equitable principle, the "worst should go first." This substantive solution to managing the problem of insolvency is crude compared to an idealized procedural alternative, but it is the only one that has been and continues to be available to courts in tort cases.

CONCLUSION

The characteristic tort remedy for both compensatory and punitive purposes is a monetary damages award, which on one view is a defining attribute of tort law: "[N]o civil injury is to be classed as a tort unless the appropriate remedy for it is an action for damages. Such an action is an essential characteristic of every true tort."[266] The tort remedy depends on the scarce resource of money, yet no one has comprehensively analyzed how the associated scarcity of compensatory resources affects substantive tort law.

Aside from this Article, to my knowledge, the only other extended analysis of this question asks how courts should formulate tort rules in an "age of austerity."[267] An interesting question for sure. If a future wracked by climate change is one of increased scarcity, courts will "have to make choices as to which violations of someone's basic rights should be remedied by the state."[268] Rather than doing so by a "ranking order of basic wrongs,"[269] courts, for reasons of principle, should rely on the same normative calculus which has shaped tort law from its origins in the customary practices in the state of nature up to its current incarnation. For principled reasons, a substantial reduction in compensatory resources will substantially contract substantive duties, significantly limiting liability in a manner akin to what tort law looked like in the earlier stages of industrialization. The contraction will not be that severe—fortunately, there is no debtor's prison this time around. But substantive tort

263. Gluck, Burch & Zimmerman, *supra* note 1, at 528.

264. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 785–86 (1987).

265. Sperduto, *supra* note 1, at 129–30.

266. SIR JOHN W. SALMOND, THE LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 2 (6th ed. 1924).

267. Nicholas J. McBride, *Tort Law and Criminal Law in an Age of Austerity*, *in* UNRAVELLING TORT AND CRIME 58 (Matthew Dyson ed., 2014).

268. *Id.* at 70.

269. *Id.* at 71.

law depends on the availability of compensatory resources for myriad reasons that will remain normatively relevant for the foreseeable future.