ARTICLES

Negligence Without Harm

YEHUDA ADAR* & RONEN PERRY**

TABLE OF CONTENTS

* Associate Professor of Law, University of Haifa.

** Professor of Law and Director, Aptowitzer Center for the Study of Risk, Liability, and Insurance, University of Haifa. The authors are grateful to participants in the Hebrew University Private Law Workshop and the editors of *The Georgetown Law Journal* for valuable comments on earlier drafts.

INTRODUCTION

The harm requirement is one of the most fundamental tenets of negligence law: the tort is incomplete and there can be no legal redress without proof of actual damage.[1] Mere exposure to risk, even when it is foreseeable and unreasonable, is not actionable. This Article dares to challenge this time-honored, deep-rooted, and highly impactful legal axiom.

---

1. *See infra* Section I.A. Courts and scholars often state that the harm requirement is a general characteristic of tort law. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 198 (1992) ("At the core of tort law is a certain practice of holding people liable for . . . wrongful losses . . . ."); Martin Stone, *The Significance of Doing and Suffering* ("In tort, the plaintiff complains that she has been injured by the defendant's wrongdoing."), *in* PHILOSOPHY AND THE LAW OF TORTS 131, 134 (Gerald J. Postema ed., 2001); Kenneth S. Abraham, Essay, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 177 (1992) ("[T]ort liability is imposed only when the defendant's actions have caused physical harm to the plaintiff . . . ."); Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003) ("In tort, there can be no damages if no one has been harmed . . . ."); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516 (2003) ("[T]ort . . . provide[s] redress for[] injurious wrongs . . . ."). To the extent that the term "tort" is used in its general sense, rather than as a synonym for negligence, these are inaccurate generalizations. *See infra* Section II.B.2.

To instantly understand the Article's revolutionary contribution to legal theory and practice, consider the famous case of Michael Buckley, a railroad pipe fitter who was negligently exposed to asbestos for three years while working for a railway company.[2] Undoubtedly, had Buckley developed cancer, he would have been entitled to compensation; but he had shown no signs of illness and sued his employer for negligent infliction of emotional distress (NIED) based on the fear of developing cancer, and for the cost of medical monitoring.[3] The Supreme Court rejected Buckley's claims, holding that he did not meet the physical impact requirement for liability for NIED[4] and that medical monitoring costs are irrecoverable when the plaintiff has no symptoms.[5] Under existing negligence doctrine, Buckley could not pursue an injunction to stop his admittedly negligent exposure to asbestos at any time. Similarly, he could not seek any monetary award to vindicate his right to a reasonable level of physical security, incentivize the employer to take reasonable precautions, prevent the employer's unjust enrichment, or punish the employer for allegedly reckless conduct. Such claims would be doomed to fail, simply because negligence is not actionable without harm.

This Article suggests thinking the heretofore unthinkable: abolishing the harm requirement and making the creation of foreseeable unreasonable risk actionable per se. It launches a three-pronged attack on the traditional structure of the tort of negligence. To begin, it shows that the harm requirement creates an internal inconsistency in tort doctrine. Although the elements of duty and unreasonable conduct (referred to as "breach of duty") indicate that negligent conduct should be actionable in itself, the harm requirement suggests otherwise. This incoherence can be overcome by abolishing the harm requirement.

Next, the Article argues that negligent conduct, defined as exposing another person to foreseeable unreasonable risk, is an interpersonal moral wrong irrespective of its consequences. Even so, unless such a risk materializes, current doctrine denies the wronged party a cause of action against the wrongdoer. The wronged has no redress beyond praying that the risk does not materialize, and the wrongdoer is not reprimanded for an apparent wrong. This legal reality is bluntly unfair (or unjust) as between the two.

Finally, this Article contends that the harm requirement cannot be defended in terms of efficiency (an economic-analysis-of-law perspective). To the extent that tort law aims to prevent inefficient conduct, it does not have to await harm and use the indirect, complicated, and seemingly flawed method of ordering some people to pay compensatory damages ex post in order to ensure internalization by others ex ante. Allowing those exposed to unreasonable risks to seek pre-injury preventive remedies, such as injunctions, punitive damages, or risk-based damages, is a direct, straightforward, and effective way of achieving the same desirable outcome.

2. Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 426–27 (1997).
3. *See id.* at 427.
4. *Id.*
5. *See id.* at 438–44.

These three lines of argument have hitherto escaped rigorous scrutiny in tort scholarship. The problem of exposure to risk has troubled practitioners and scholars in a variety of contexts. Yet the standard approach to dealing with unmaterialized risks has been to ask whether and under what circumstances the creation of risk of a particular injury (1) may have caused a different kind of recognized harm (the *Buckley* path) or (2) constitutes independently compensable harm (the risk-as-harm path). This Article's goal is distinctively different and more ambitious. Rather than attempting to associate an unmaterialized risk with a compensable harm to meet the traditional requirement, blurring the conceptual distinction between risks and harms, it calls for making the creation of foreseeable unreasonable risk in itself actionable. This Article explores some of the practical implications of the dramatic change it advocates, thereby demonstrating the innovative nature of this path.

The analysis unfolds as follows. Part I restates the traditional quadripartite structure of the tort of negligence, highlights the implications of the harm requirement, and briefly reviews and characterizes past attempts to circumvent it. Part II uncovers the analytical and normative incoherence of extant negligence doctrine and offers "negligence without harm" as a coherent alternative. Part III provides a fairness-based case for the proposed reform. It fosters the idea that negligence is a moral wrong between the risk-creator and the risk-bearer, irrespective of harm, and argues that moral tort theory and legal jargon implicitly uphold this view. It then fends off several counterarguments. Part IV presents an economic case for abolishing the harm requirement. It argues that insofar as tort law aims to prevent the creation of inefficient or otherwise unacceptable risks, it should take steps to motivate the necessary behavioral changes before such risks materialize. The fear of excessive liability and overdeterrence, as well as relevant concerns about the ensuing loss allocation and the administrative costs of a negligence-without-harm regime, are subsequently addressed. Part V supplements the theoretical analysis with a tentative scheme of legal remedies for negligence without harm.

I. THE LEGAL FRAMEWORK

Any criticism of existing doctrine must begin with an accurate account thereof. This Part thus explains the origins, centrality, and possible implications of the harm requirement in the law of negligence. It then shows that even when courts and scholars felt compelled to respond to unmaterialized risks, they endeavored to do so without undermining the harm requirement. Their argument would usually be that even though the primary risk of a particular injury did not materialize, the very creation of that risk (1) caused a different kind of recognized harm (usually economic loss or emotional distress) or (2) constituted an independent type of harm (such as loss of a chance).

A. THE HARM REQUIREMENT

From its very naissance, the common law tort of negligence was harm based.[6] In England, early nineteenth-century law reports reveal the first manifestations of an independent tort of negligence.[7] These reports describe cases in which "the defendant so negligently, carelessly, unskillfully, and improperly did something . . . that harm ensued to the plaintiff."[8] In all these cases, negligence "resulted in damage to another."[9] Gradually, a clear conception of the tort crystallized: it consisted of a breach of a duty of "advertence," through failure to meet the standard of "a reasonable man," that caused harm to another.[10] This model has generally prevailed, with subsequent bifurcation of the causation component into a factual *causa sine qua non* test and a legal scope-of-liability ("remoteness" or "cause-in-law") constraint.[11] Negligence, then, is a damage-dependent tort.[12]

In the United States, negligence is similarly considered a harm-based tort. As early as 1903, the Supreme Court stated that "[c]ausing harm by negligence is a tort,"[13] relying on a seminal English treatise.[14] The tort is usually said to consist of four elements: (1) a duty of care owed by the defendant to the plaintiff; (2) breach of that duty through the defendant's negligent conduct; (3) harm; and (4) a causal link between the negligent conduct and the harm.[15] This formulation has become an unchallenged orthodoxy; it has been endorsed by most states[16] and presented in leading treatises and hornbooks.[17] The first two editions of the

---

6. *See* David Ibbetson, *How the Romans Did for Us: Ancient Roots of the Tort of Negligence*, 26 U.N.S.W. L.J. 475, 478, 487–88 (2003).

7. *See* Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 LAW Q. REV. 184, 195–96, 199 (1926) (explaining that the development of an independent tort occurred in the nineteenth century); *see also* JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 47 (4th ed. 2016) (claiming that an independent tort that "invoke[d] the term *negligence*" emerged between 1825 and 1875).

8. Winfield, *supra* note 13, at 196.

9. *Id.*

10. *See id.*; *see also* P.H. WINFIELD, A TEXT-BOOK OF THE LAW OF TORT 427 (1937) ("Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff." (italics omitted)).

11. *See* CLERK & LINDSELL ON TORTS 431 (Michael A. Jones et al. eds., Thomson Reuters 22d ed. 2018); JENNY STEELE, TORT LAW: TEXT, CASES AND MATERIALS 116, 173–92 (3d ed. 2014).

12. *See* CLERK & LINDSELL ON TORTS, *supra* note 11, at 431; STEELE, *supra* note 11, at 116.

13. Bigby v. United States, 188 U.S. 400, 408 (1903); *see also* Drum v. Miller, 47 S.E. 421, 423 (N.C. 1904) (stating that tort is related to harm); Galveston, Harrisburg & San Antonio Ry. Co. v. Hennigan, 76 S.W. 452, 453 (Tex. Civ. App. 1903) (same).

14. FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW: TO WHICH IS ADDED THE DRAFT OF A CODE OF CIVIL WRONGS PREPARED FOR THE GOVERNMENT OF INDIA 1, 19–20 (London, Stevens & Sons Ltd. 4th ed. 1895).

15. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 658 (2001).

16. *See id.* at 1 & n.1 (collecting cases from every state).

17. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS 269 (2000); RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 143–44 (12th ed. 2020); GOLDBERG ET AL., *supra* note 7, at 47–48; W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984).

Restatement of Torts proffered a "semantic variation" of the quadripartite structure,[18] and although the third edition seems to downplay the role of the duty of care, the harm requirement has remained unshaken.[19]

Materialization of the risk is therefore central to an action in negligence.[20] Accordingly, courts are staunchly reluctant to grant relief when plaintiffs bring such actions for the mere creation or enhancement of risk. For instance, when a smoker sued a tobacco company in negligence, alleging that her accumulated exposure to cigarette smoke had increased her risk of contracting lung cancer, the claim was dismissed.[21] The Supreme Court of Oregon held that "a plaintiff's cause of action does not accrue . . . until the plaintiff has suffered an 'actual loss'"[22] and that "the threat of future physical harm that plaintiff has alleged is not sufficient to give rise to a negligence claim."[23] Similarly, medical malpractice is not actionable unless and until it harms a patient's life, limb, or health;[24] careless driving is not actionable unless a pedestrian, a passenger, or another driver is injured;[25] and so forth.

Even in civil law jurisdictions, where fault-based liability principles are structured quite differently, harm constitutes a key element.[26] Admittedly, a primary justification for the proposed reform derives from the unique structure of the common-law tort of negligence and does not directly apply to civil law liability principles.[27] But other theoretical arguments set forth below can undermine the harm

18. Goldberg & Zipursky, *supra* note 15, at 673–74 (explaining that the first two editions offered a semantic, not a substantive variation of the model); *see* RESTATEMENT (FIRST) OF TORTS § 281 (AM. L. INST. 1934); RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965).

19. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmts. b, f, § 7 cmts. a, d (AM. L. INST. 2010); Goldberg & Zipursky, *supra* note 15, at 659–61 (discussing the draft of the Restatement (Third) of Torts).

20. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort."); Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997) ("There is no tort without injury."); GOLDBERG ET AL., *supra* note 7, at 48–49 (explaining that an injury is the "most basic condition" for a viable claim in negligence); ERNEST J. WEINRIB, TORT LAW: CASES & MATERIALS 225 (2d ed. 2003) ("Injury is essential to liability for negligence . . . . [W]ithout the materialization of risk into injury, no liability can arise."); Donal Nolan & John Davies, *Torts and Equitable Wrongs* ("Negligence is only actionable if it causes damage."), *in* ENGLISH PRIVATE LAW 927, 945 (Andrew Burrows ed., 3d ed. 2013); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1634, 1636, 1638 (2002) (stating that materialization of risk is central to tort law).

21. *See* Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 187 (Or. 2008).

22. *Id.* at 184 (quoting Bollam v. Fireman's Fund Ins., 730 P.2d 542, 544 (Or. 1986)).

23. *Id.* at 185.

24. *See* Rozenfeld v. Med. Protective Co., 73 F.3d 154, 155 (7th Cir. 1996) (holding that a doctor's negligence does not give rise to a cause of action until an injury is caused); *see also* Budd v. Nixen, 491 P.2d 433, 435 (Cal. 1971) (holding that there is no cause of action for legal malpractice without harm).

25. *See Janmark*, 132 F.3d at 1202 ("[S]peeding is wrongful, but not tortious, if no one is injured."); Fogel v. Zell, 221 F.3d 955, 960 (7th Cir. 2000) ("Does a pedestrian have a contingent claim against the driver of every automobile that might hit him? . . . [T]he answer to these questions is 'no.'"); GOLDBERG ET AL., *supra* note 7, at 49 (explaining that careless driving that does not cause harm cannot underlie a tort claim); Goldberg & Zipursky, *supra* note 20, at 1638 (same).

26. Code civil [C. civ.] [Civil Code] arts. 1240–41 (Fr.); Bürgerliches Gesetzbuch [BGB] [Civil Code], § 823, para. 1, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3489 [https://perma.cc/87FF-AP8Z] (Ger.).

27. *See infra* Part II.

requirement in civil law fault-based liability regimes. Thus, this Article effectively challenges an almost universal convention.

B. CIRCUMVENTION TACTICS

In the last few decades, scientific and technological advances and increased public awareness have put courts under growing pressure to grant relief for exposure to unreasonable risks of physical injury, illness, or death. Courts have vehemently adhered to the harm requirement yet shown willingness to implement creative doctrinal solutions that offer some relief without undermining the traditional structure of the tort of negligence. The common thread running through most of these techniques is that even if the unreasonable risk of physical injury has not materialized, another independently compensable kind of harm can be attributed to the wrongful conduct. The creation of risk of physical injury either *caused* or *is* that other type of harm.[28] This Section discusses the two options in turn.

The first and relatively common argument is that an increased risk of physical injury is actionable because it *caused* another—already realized—harm, typically emotional or economic.[29] As regards emotional harm, exposure to unreasonable risk of physical injury, illness, or death might trigger anxiety for as long as the risk exists.[30] Any violation of one's rights and disrespect for one's interests can also cause anger and frustration that outlast the risk itself.[31] Of course, an action for NIED must meet relatively rigid doctrinal requirements, which vary across jurisdictions. A restrictive approach allows recovery only if the plaintiff also suffered physical injury (the physical impact doctrine).[32] A more common view allows recovery for NIED if the plaintiff was physically endangered though not physically injured by the defendant's misconduct (the zone-of-danger doctrine).[33] The most liberal approach bases recovery on the foreseeability of emotional

28. *See* Goldberg & Zipursky, *supra* note 20, at 1629–30 (discussing the two tactics).

29. *See id.* at 1630, 1650. At least one jurisdiction also recognized "infringement of autonomy" as an independent harm that can be recoverable in cases of negligent denial of informed decision that did not cause any other type of harm. *See* CivA 2781/93 Daaka v. Carmel Hosp., 53(4) PD 526 (1999) (Isr.). However, it was later reduced to a subset of emotional harm. *See* CivA 2278/16 Doe v. State of Israel para. 23, Nevo Legal Database (Mar. 12, 2018) (Isr.).

30. *See* Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 157 (2003) (allowing such recovery); John & Jane Roes, 1–100 v. FHP, Inc., 985 P.2d 661, 666 (Haw. 1999) (same); Bramer v. Dotson, 437 S.E.2d 773, 774–75 (W. Va. 1993) (same); Finkelstein, *supra* note 1, at 977 (discussing possible liability for emotional harms); Goldberg & Zipursky, *supra* note 20, at 1630, 1664–67 (same); Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J. L. & PUB. POL'Y 681, 724 (2012) (same).

31. *See* Scheuerman, *supra* note 30, at 723 (discussing the "ex post decline in emotional well-being").

32. *See, e.g.*, Lee v. State Farm Mut. Ins. Co., 533 S.E.2d 82, 85–86 (Ga. 2000); Kraszewski v. Baptist Med. Ctr. of Okla., Inc., 916 P.2d 241, 245 (Okla. 1996).

33. *See, e.g.*, Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 547–48, 555–56 (1994); AALAR, Ltd. v. Francis, 716 So.2d 1141, 1146–47 (Ala. 1998); Keck v. Jackson, 593 P.2d 668, 669–70 (Ariz. 1979); Johnson v. District of Columbia, 728 A.2d 70, 77 (D.C. 1999); Rickey v. Chi. Transit Auth., 457 N.E.2d 1, 5 (Ill. 1983); K.A.C. v. Benson, 527 N.W.2d 553, 557–58 (Minn. 1995); Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 599–600 (Mo. 1990) (en banc); Bovsun v. Sanperi, 461 N.E.2d 843,

harm,[34] but in most jurisdictions, the plaintiff must demonstrate that the harm meets a severity threshold, either "seriousness"[35] or physical manifestation.[36] These requirements, among others, limit potential recovery for emotional distress caused by exposure to risk.[37]

Regarding economic loss, those subject to unreasonable but unmaterialized risks of physical injury might invest in preventive measures. For example, people exposed to hazardous materials have sought damages for the costs of medical examination, monitoring, and treatment undergone to reduce the risk of illness.[38] Similarly, in some jurisdictions, consumers or residents may sue for the cost of repairing dangerous products or buildings to avert physical injury, as an exception to the general rule of no liability for pure economic loss.[39] In other jurisdictions, the limits on recovery for economic loss curtail such recovery.[40] We are unaware of other types of cases in which exposure to unmaterialized risk regularly gives rise to liability for economic loss.[41]

847–49 (N.Y. 1984); Muchow v. Lindblad, 435 N.W.2d 918, 921 (N.D. 1989); Hansen v. Sea Ray Boats, Inc., 830 P.2d 236, 239–41 (Utah 1992); Kloepfel v. Bokor, 66 P.3d 630, 634–35 (Wash. 2003).

34. *See* Dillon v. Legg, 441 P.2d 912, 919–21 (Cal. 1968) (en banc).

35. *See, e.g.*, Molien v. Kaiser Found. Hosps., 616 P.2d 813, 819–21 (Cal. 1980) (en banc); *Bovsun*, 461 N.E.2d at 849; *cf.* Hegel v. McMahon, 960 P.2d 424, 430–31 (Wash. 1998) (en banc) (requiring medical verifiability).

36. *See, e.g.*, *Keck*, 593 P.2d at 669–70; *Rickey*, 457 N.E.2d at 5; *K.A.C.*, 527 N.W.2d at 557; *Muchow*, 435 N.W.2d at 921–22; Zell v. Meek, 665 So. 2d 1048, 1054 (Fla. 1995); Swerdlick v. Koch, 721 A.2d 849, 864 (R.I. 1998); Stewart v. State Farm Mut. Auto. Ins. Co., 533 S.E.2d 597, 603 (S.C. Ct. App. 2000).

37. *See, e.g.*, Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 428–39 (1997) (denying recovery for NIED); Ayers v. Twp. of Jackson, 525 A.2d 287, 308 (N.J. 1987) (holding emotional distress irrecoverable under the local Tort Claims Act); Goldberg & Zipursky, *supra* note 20, at 1660–67.

38. *See, e.g.*, *Buckley*, 521 U.S. at 438–44 (holding that monitoring costs may be recoverable but the conditions were not met); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 821–23 (Cal. 1993) (holding the cost of medical monitoring compensable in some circumstances); *Ayers*, 525 A.2d at 304, 308–13 (same); Kenneth S. Abraham, *Liability for Medical Monitoring and the Problem of Limits*, 88 VA. L. REV. 1975, 1976–77 (2002); Mark Geistfeld, Essay, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921, 1948–49 (2002); Goldberg & Zipursky, *supra* note 20, at 1701–02. Goldberg & Zipursky proposed a different analytical perspective on such claims. In their view, liability for the costs of preventing risk materialization may be allowed within a well-known exception to the general rule against affirmative duties. Under this exception, a person who creates a "dangerous condition that renders another in peril and hence in need of affirmative aid" must save the other from the materialization of the risk (or bear the costs). *Id.* at 1710.

39. *See, e.g.*, Lloyd v. Gen. Motors Corp., 916 A.2d 257, 266, 272 (Md. 2007) ("Even when a recovery, based on a defective product, is considered to be for purely economic loss, a plaintiff may still recover in tort if this defect creates a substantial and unreasonable risk of death or personal injury." (quoting U.S. Gypsum Co. v. Mayor of Balt., 647 A.2d 405, 410 (Md. 1994)); CivA 451/66 Kornfeld v. Shmuelov, 21(1) PD 310, 323 (1967) (Isr.) (imposing liability on a contractor for the cost of repairing latent dangerous defects).

40. *See, e.g.*, Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 186–87 (Or. 2008) (denying recovery for monitoring costs under the economic loss doctrine).

41. In some cases, buyers of a certain product claimed damages for decreased value when products of the same kind had been found defective (so the line of products had a risk of failing), even though the specific units they bought were not defective and did not cause harm. However, these actions have generally failed. *See* Scheuerman, *supra* note 30, at 689–707.

A second and starkly different type of argument is that increased risk of physical injury *is* "a cognizable injury in and of itself,"[42] namely in the absence of any other consequent harms (economic, emotional, or other). The risk-as-harm tactic has two versions. The narrower but widely accepted one is the "loss of a chance" doctrine: if the defendant's negligence reduced the plaintiff's chances of recovery, that reduction is an independently compensable harm.[43] The doctrine was originally designed to overcome difficulties in establishing a causal link between the defendant's negligence and the plaintiff's injury by a preponderance of the evidence, where the plaintiff's medical predisposition is a more plausible cause of that injury.[44] The harm is assessed by multiplying the reduction in chance-of-recovery by total damages ordinarily assessed in the corresponding wrongful injury or death action.[45] Although this doctrine was not intended to undercut the harm requirement, it essentially makes exposure to unreasonable risk of physical injury actionable even if it did not cause physical injury in the legal sense. Yet it does so within the traditional framework by creatively redefining harm rather than challenging the harm requirement. At any rate, it applies only to narrowly defined cases.

The more general version of the risk-as-harm tactic, which has not been embraced by the courts, is the theory of liability for increased risk. Under this version, if the defendant's conduct increased the risk to which the plaintiff was already exposed (by nonwrongful causes), then that increase constitutes an independent compensable harm, irrespective of the occurrence of any other harm.[46] Under this theory, damages should equal the increase in the probability of harm multiplied by the extent of the foreseeable harm.[47] Still, the idea that exposing a person to risk can by itself (without any impact) worsen that person's condition and hence constitute harm is highly dubious.[48] In addition, it conflates the requirements of breach of duty and harm so that the creation of unreasonable risk simultaneously satisfies both. This extreme version, which remains a scholarly vision, does not directly challenge the harm requirement and aims to provide a solution within the existing legal framework.

---

42. *See* Goldberg & Zipursky, *supra* note 20, at 1629.

43. According to one view, the loss of a chance doctrine is based on the recognition of a new type of harm. According to an alternative view, the doctrine reflects relaxation of the traditional causation requirement: the defendant is liable for a share of the actual harm that corresponds with the likelihood that the defendant's misconduct caused it. *See* David A. Fischer, *Proportional Liability: Statistical Evidence and the Probability Paradox*, 46 VAND. L. REV. 1201, 1217, 1226 (1993); David A. Fischer, *Tort Recovery for Loss of a Chance*, 36 WAKE FOREST L. REV. 605, 627 (2001); Nils Jansen, *The Idea of a Lost Chance*, 19 OXFORD J. LEGAL STUD. 271, 296 (1999).

44. *See* Goldberg & Zipursky, *supra* note 20, at 1656–60.

45. *See, e.g.*, Roberts v. Ohio Permanente Med. Grp., Inc., 668 N.E.2d 480, 484–85 (Ohio 1996); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467, 476–77 (Okla. 1987).

46. *See* Goldberg & Zipursky, *supra* note 20, at 1629–30, 1651; Finkelstein, *supra* note 1, at 967; Scheuerman, *supra* note 30, at 722.

47. *Cf.* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 461–69 (1990) (discussing the measure of damages for increased risk).

48. *See* Ariel Porat & Alex Stein, *Liability for Future Harm*, *in* PERSPECTIVES ON CAUSATION 221, 233–35 (Richard Goldberg ed., 2011); Scheuerman, *supra* note 30, at 719–20.

II. COHERENCE

Coherence may be defined as a condition of logical consistency and affinity among statements, beliefs, or principles.[49] To value coherence, in general and within the law, is to appreciate clarity, transparency, intelligibility, and consistency in one's beliefs, principles, and arguments.[50] Admiration for coherence within the law is typically attributed to formalists.[51] However, one need not be a formalist to appreciate coherent legal development and reasoning.[52] Any normative system must retain a minimum level of coherence if it seeks to guide human conduct effectively. Indeed, the first challenge for any lawyer is to classify their case "correctly," that is, in a way that coheres with its expected classification by a court of law.[53] And a critical task of any judge is to present their decision as coherent with some existing legal rules or principles.[54]

Incoherence in law may have different forms, but a definitive example would be a doctrinal structure that consists of two (or more) contradictory components.[55]

---

49. *See* Joan S. Stark, *On Defining Coherence and Integrity in the Curriculum*, 24 RSCH. HIGHER EDUC. 433, 434 (1986); *see also* Robert Alexy & Aleksander Peczenik, *The Concept of Coherence and Its Significance for Discursive Rationality*, 3 RATIO JURIS. 130, 130–32 (1990) (defining coherence as a degree of proximity of a given set of statements to a perfect supportive structure); Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 369 (1984) ("Coherence . . . maintain[s] that a proposition is true if it fits sufficiently well with other propositions held to be true."); Julie Dickson, *Interpretation and Coherence in Legal Reasoning,* STAN. ENCYCLOPEDIA PHIL. (Feb. 10, 2010), https://plato.stanford.edu/entries/legal-reas-interpret/ [https://perma.cc/ED2A-H343] (explaining that coherent judicial reasoning entails "more than logical consistency amongst propositions," where legal norms relate to common underlying values or principles).

50. *See* Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 276 (1992) ("What is incoherent is unintelligible, because it is self-contradictory, fragmented, disjointed.").

51. *See, e.g.*, Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988) ("The curiosity of this distinction [of law and politics] makes formalism seem at best a pathetic escape from the functionalism of law, and at worst a vicious camouflage of the realities of power.").

52. *See* Raz, *supra* note 50 ("Coherence conveys a specific good, the value of which is undeniable.").

53. *See* Peter Birks, *The Concept of a Civil Wrong* ("[T]he coherence of the classification is one of the foundations of the law's rationality. Every time a lawyer selects a theory of liability he draws on it . . . ."), *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 29, 33 (David G. Owen ed., 1995).

54. *See* Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 L. & PHIL. 355, 355 (1984) ("[A] necessary condition for a decision to be legally justified . . . is that it coheres with established law."). Coherence plays an important role in Dworkin's theory of interpretive adjudication. *See* RONALD DWORKIN, LAW'S EMPIRE 225–75 (1986); Ronald Dworkin, *Response* ("Integrity requires coherence in moral principle . . . ."), *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 291, 292 (Scott Hershovitz ed., 2006).

55. A second example is the application of two inconsistent doctrines to similar problems within a single branch of law. *See, e.g.*, Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783 *passim* (2013) (exposing the inconsistency between two legal defenses); Giovanni Battista Ratti & Jorge Luis Rodríguez, *On Coherence as a Formal Property of Normative Systems*, 27 REVUS 131, 136 (2015) ("'[N]ormative consistency' denotes the situation where the same set of operative facts is not connected to incompatible normative consequences . . . ."). A third is the application of two doctrines with conflicting goals to a single fact situation. *See* Ronen Perry, *Economic Loss, Punitive Damages, and the* Exxon Valdez *Litigation*, 45 GA. L. REV. 409 *passim* (2011) (discussing the concurrent application of the liability-limiting economic loss doctrine and the liability-enhancing punitive damages doctrine).

The tort of negligence features this kind of contradiction by incorporating a duty element alongside the harm requirement. This Part first exposes and urges courts and scholars to acknowledge the incongruity. It distinguishes between the two dominant understandings of the duty of care in negligence law, the obligational approach and the public duty approach, and shows that the harm requirement is inconsistent with both. The inconsistency can be resolved by abolishing either the duty of care (along with the conceptualization of unreasonable conduct as a breach thereof) or the harm requirement. This Part advocates the latter course, promoting recognition of "negligence without harm."

A. THE STRUCTURAL INCOHERENCE OF NEGLIGENCE

1. The Obligational Approach

The duty of care is a fundamental component of the tort of negligence.[56] It is also considered one of the most complex concepts in tort law.[57] Skeptical writers have expressed doubts as to its usefulness and some propose dispensing with it altogether or at least limiting its use.[58] Nevertheless, duty is still recognized as a cornerstone of Anglo-American negligence law.[59] This persistence is unsurprising. Uprooting duty would deprive courts of a powerful mechanism for restricting liability that the other elements of the tort—unreasonable conduct, harm, and causation—do not offer.[60]

According to tort orthodoxy, the duty of care in negligence is a legal obligation and, as such, it possesses several attributes. First, the duty is not just a moral requirement or a social convention, but rather an enforceable dictate of the legal system.[61] Second, its existence implies an order to do or refrain from doing something.[62] Third, as an obligation, the duty of care is owed to a particular person or a

56. *See* David Owen, *Duty Rules*, 54 VAND. L. REV. 767, 767–69 (2001) ("[D]uty is properly conceived as the primary element of a negligence claim . . . .").

57. *See, e.g.*, ALLAN BEEVER, REDISCOVERING THE LAW OF NEGLIGENCE 115–29 (2007) (discussing the duty of care); JAMES PLUNKETT, THE DUTY OF CARE IN NEGLIGENCE 2 (2018) ("[E]xplaining why a duty is owed in one case and not another has proved to be stubbornly elusive."); Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 FORDHAM L. REV. 1501 *passim* (2006) (offering an economic account of duty); J.A. Smillie, *The Foundation of the Duty of Care in Negligence*, 15 MONASH U. L. REV. 302 *passim* (1989) (providing a British Commonwealth perspective).

58. *See infra* notes 86–87 and accompanying text.

59. *See* Goldberg & Zipursky, *supra* note 15, at 658 n.1 (citing cases from forty-seven states and the District of Columbia); Owen, *supra* note 56, at 767–68 ("Duty is central to the law of torts. . . . [I]n the vast majority of American jurisdictions . . . it is the threshold element of the tort of negligence.").

60. *See, e.g.*, W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 134–38 (17th ed. 2006) (discussing the vital role of "duty" as a policy device); Goldberg & Zipursky, *supra* note 15, *passim* (defending the duty element); Nolan & Davies, *supra* note 20, at 935 ("The duty of care is the main conceptual device for expressing the limits on liability for negligence.").

61. *See* GEORGE W. KEETON, THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE 98 (1930) ("A duty is . . . an act or forbearance compelled by the State in respect of a right vested in another, and the breach of which is a wrong.").

62. *See, e.g.*, CAL. CIV. CODE § 1427 ("An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.").

particular class of persons rather than at society at large.[63] Fourth, as a necessary upshot, the duty creates a correlative right in the person(s) to whom it is owed.[64]

The obligational approach originated in a line of nineteenth-century English cases.[65] In American jurisprudence, it received the clearest formulation in *Palsgraf v. Long Island Railroad Co*.[66] Writing for the majority, Chief Judge Cardozo famously wrote that "[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right."[67] He added that the plaintiff must show "'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial."[68] In other words, tortious negligence is not merely a failure to meet a certain social standard. It is a failure to respect the right of a particular person (*jus in personam*). The right-holder is entitled to demand that the holder of the correlative duty execute the obligation of care. Violating this obligation amounts to a private wrong rather than a public one (committed against society or all of its members).

The obligational approach was further developed a few years later in the renowned U.K. case of *Donoghue v. Stevenson*.[69] There, Lord Atkin introduced the neighbor principle and the foreseeability test,[70] highlighting their role in exposing "some general conception of relations" that, in his view, must undergird duty.[71] In recent decades, leading tort theorists have embraced the obligational approach, viewing it as vital to the internal coherence of negligence law.[72]

Tort theorists are often unclear about the substantive content of the duty of care under the obligational approach. Common statements might convey the impression that the duty is an obligation to avoid or prevent harm or injury, rather than to reduce risk.[73] Other descriptions are ambiguous, mentioning both reduction

63. *See* Goldberg & Zipursky, *supra* note 15, at 709.

64. *See* TIMOTHY MURRAY, 1 CORBIN ON CONTRACTS: FORMATION OF CONTRACTS § 1.2 (Matthew Bender & Co. ed. 2018) (1950) ("If a duty (obligation) exists, it is a duty to some person who has a right against the one subject to the duty. . . . These two correlative terms express a legal relation between the two persons . . . .").

65. *See* Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 49–58 (1934).

66. 162 N.E. 99 (N.Y. 1928).

67. *Id.* at 99.

68. *Id.* at 100.

69. Donoghue v. Stevenson [1932] AC 562 (HL) (appeal taken from Scot.).

70. *Id.* at 580.

71. *Id.*

72. Among modern writers, Weinrib was the first to stress the importance of the duty–right relationship in tort law and private law more generally. *See* Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 512–13 (1989) ("[A]n injurious breach of duty by the actor is also a violation of the sufferer's right. A tort is a wrong . . . not against the world at large but against the injured plaintiff specifically." (footnote omitted)); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918–19 (2010) (making a similar argument). As we show in Section II.A.2, *infra*, rejecting this view does not necessarily undermine our thesis.

73. *See, e.g.*, Goldberg & Zipursky, *supra* note 72, at 918 ("The law of torts . . . defines duties to refrain from injuring (or to protect from injury) . . . ."); Weinrib, *supra* note 72, at 512–13 (describing the wrong in negligence as an "injurious breach of duty").

of risk and prevention of injury.[74] This is regrettable. Negligence doctrine has never imposed absolute duties to avoid harm or to avoid creating risks of harm. The only obligation of a duty-holder is to ensure that the risk that they impose on the right-holder does not rise above a socially tolerable (in other words, reasonable) level.[75] To comply, the former must take reasonable precautionary measures to eliminate or reduce the risk to the latter.[76]

Notably, this obligation exists only with respect to foreseeable harms, that is, perceivable risks that one's conduct might occasion if due care is not exercised.[77] Therefore, exercising the duty entails two steps: identifying and considering the foreseeable risks to the right-holder and reasonably responding to those risks.[78] Risking inaccuracy, we shall refer to this twofold obligation as the duty-holder's obligation not to expose another to foreseeable unreasonable risk, or simply, not to act negligently toward another.

Under the obligational approach, the incoherence of negligence doctrine seems clear. The duty of care is a legal obligation that is breached when the duty-holder acts negligently. The correlative right is violated at the very same time. The breach of duty (and violation of right) cannot in any sense depend on the occurrence of harm because, given the formal structure of the tort, breach must precede harm. This means that tort doctrine regards the negligent conduct, which breaches the duty of care, as wrongful per se—that is, irrespective of any ensuing harm.

If a breach of duty is a legal wrong against the right-holder, it must give rise, at once, to legal redress, regardless of any consequent event. However, given the harm requirement, a consequent event is a constitutive element without which tort law remains silent. Analytically, this is equivalent to stating that, absent harm, no duty was breached, and no wrong was committed against the complaining party. In so dictating, the harm requirement is sawing off the branch on which

74. Such ambiguity is present in Lord Atkin's famous paragraph in *Donoghue*, where he mentions, one after the other, a duty "to avoid . . . injury," "not injure your neighbour," and to avoid acts that "would be likely to injure." [1932] AC at 579–80. As we explain next, the only accurate formulation is the third.

75. *See* Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 348 (2002) ("[I]n the case of negligence, the wrong is not the causing of harm, but, rather, the risking of harm. Our duties are not with regard to harms caused, but with regard to harms risked.").

76. What constitutes this socially tolerable level will often be controversial. *See generally* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012) (discussing normative definitions including economic, rights-oriented, and feminist perceptions, alongside positive definitions); *infra* notes 173–80 and accompanying text (discussing the economic definition); Kenneth W. Simons, *Negligence*, 16 SOC. PHIL. & POL'Y, Summer 1999, at 52 *passim* (discussing moral accounts).

77. *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 571 (1972) ("Unforeseeable risks cannot be counted as part of the costs and benefits of the risk; for, after all, they are unforeseeable and therefore unknowable."); Nolan & Davies, *supra* note 20, at 937 ("The first condition for the existence of a duty of care remains that the defendant should be able to foresee that his conduct may cause injury . . . .").

78. This first aspect of the duty of care is rarely addressed in tort scholarship, probably because it is taken for granted. *But see* A.P. Simester, *Can Negligence Be Culpable?* ("Paying attention is necessarily the first step in discharging the duty that underpins liability and blame for negligence . . . ."), *in* OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 85, 97 (Jeremy Horder ed., 2000).

it is sitting: if the negligent breach of duty is not wrongful per se, what makes the harm resulting from such breach wrongful? Is it the mere causation, that is, the fact that the loss is causally linked to an act of the duty-holder, regardless of the act's wrongfulness? This seems utterly impossible under the obligational approach, whereby liability for a plaintiff's injury requires an antecedent breach of duty.

If this simple argument is valid, then negligence doctrine, as it is conventionally presented, practiced, studied, and taught, upholds two inconsistent norms. Under the first (the duty requirement), negligent conduct is a violation of a personal right and therefore an actionable civil wrong in itself; under the other (the harm requirement), it is not. Is there any better example of incoherent legal doctrine?

2. The Public Duty Approach

As entrenched as it may seem, the obligational approach is not the only available perception of the duty of care in negligence. The alternative, sometimes referred to as the public duty approach, is critical of the orthodox obligational view.[79] This approach was briefly presented in Judge Andrews's dissent in *Palsgraf*.[80] Contesting Chief Judge Cardozo's obligational approach, Judge Andrews interpreted the duty of care as being imposed not for the sake of any particular individual, but for the sake of society as a whole.[81] For example, under the public duty approach, reckless driving is "a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large."[82] The practical implication is that liability does not necessitate an interpersonal relationship. It may be imposed for any negligently inflicted injury, so long as the defendant's negligence can be regarded as its proximate cause.[83]

The public duty approach has gained considerable support among American tort scholars.[84] Its proponents have denied the alleged interpersonal nature of the duty of care[85] and many are comfortable proposing the relegation of this

79. This Part does not elaborate on extreme approaches that regard "duty" as an empty shell for unstable political goals. It explores negligence doctrine as articulated by courts and practiced by lawyers. Denying that the most salient components of negligence law have real legal content makes any coherence inquiry redundant.

80. Palsgraf v. Long Island R.R., 162 N.E. 99, 101–05 (N.Y. 1928) (Andrews, J., dissenting).

81. *Id.* at 102 ("Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.").

82. *Id.*

83. *Id.* at 102–04.

84. *See* Goldberg & Zipursky, *supra* note 15, at 661 ("From Holmes to Green to Prosser and now to Perlman and Schwartz, one finds . . . a persistent effort among many academics to downplay, recast, or eliminate [duty's] role in negligence."); John CP Goldberg & Benjamin C Zipursky, *Rights and Responsibility in the Law of Torts* (criticizing the public duty approach), *in* RIGHTS AND PRIVATE LAW 251, 252–53 (Donal Nolan & Andrew Robertson eds., 2012).

85. *See, e.g.*, William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1 *passim* (1953) (criticizing the relational approach of negligence and supporting the minority opinion in *Palsgraf*); Hurd & Moore, *supra* note 75, *passim* (criticizing the interpersonal approach).

"obsolete" concept to special categories of cases (such as economic loss and nervous shock)[86] or even its unqualified elimination.[87]

Negligence law is also incoherent under the public duty approach. The reason is simple: a public duty is still a duty, and a public wrong is still a wrong. Therefore, the harm requirement undermines the duty element, even as a general or abstract concept. Once again, just as under the obligational approach, we are faced with an inconsistency: either breach of duty through negligent conduct is legally wrongful, in which case harm turns out to be inessential for legal action (even though it is necessary for compensatory damages), or harm is essential, in which case no pre-injury conduct, as blameworthy as it might be, can be deemed a legal wrong. The two presumptions cannot logically coexist.

Yet proponents of the public duty approach seem to endorse both. On the one hand, they embrace the harm requirement. On the other hand, they explicitly or implicitly presume that negligence is legally wrongful per se. This was unambiguously stated in Judge Andrews's dissent in *Palsgraf*: "Where there is the unreasonable act . . . there is negligence whether damage does or does not result."[88] The negligent conduct is in itself "a wrong to the public at large."[89] But then again, if negligence is a legal wrong regardless of any ensuing harm to any person, the law should impose a sanction or offer a remedy in response to it, independent of any ensuing harm. One way or another, we are still trapped by the same kind of normative dissonance.

To conclude, under each of the two dominant approaches to the duty of care, breach of duty (obligational or abstract) is legally wrongful.[90] This omnipresent premise cannot logically live alongside the harm requirement, which precludes any redress for breach of duty. Under existing doctrine, the breach is considered legally wrongful but not treated as such.

B. RESTORING COHERENCE

1. Abolishing the Duty of Care

Doing away with the duty element will keep the harm requirement untroubled by a contradictory norm that proscribes negligence irrespective of harm. Under this regime, it will be unnecessary for a plaintiff to show that the defendant breached a legal duty of any kind (private or public) or that the latter wronged the

86. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmts. b, f, § 7 cmts. a, d (AM. L. INST. 2010).

87. *See* W.W. Buckland, *The Duty to Take Care*, 51 LAW Q. REV. 637, 639 (1935) ("[Duty is] an unnecessary fifth wheel on the [negligence] coach . . . ."); Bob Hepple, *Negligence: The Search for Coherence*, 50 CURRENT LEGAL PROBS. 69, 93 (1997) (suggesting the abandonment of the incoherently applied and redundant duty concept); Donal Nolan, *Deconstructing the Duty of Care*, 129 LAW Q. REV. 559, 559 (2013) (proposing to dispose of the obscure duty concept, separate the issues subsumed under it, and reclassify them under other elements).

88. 162 N.E. at 102 (Andrews, J., dissenting).

89. *Id.*

90. ROGERS, *supra* note 60, at 132 ("Negligence as a tort is a breach of a legal duty to take care which results in damage to the claimant." (emphasis omitted)).

former. Any creation of unreasonable risk resulting in harm to any person will now be actionable.

This, however, will not come without a price. First, as noted earlier, disposing of the duty concept would limit the judicial power to restrict liability in light of relevant policy considerations.[91] Second, abolishing the duty of care would radically change the nature of the tort of negligence. Under a new negligence-without-duty regime, people will be legally free to create unreasonable risks and act negligently, subject only to an obligation to pay damages if those risks happen to materialize. People might still sense, from the language used to characterize a negligent defendant's conduct, that such conduct is inconsistent with some moral norms or community standards. However, potential injurers would be reassured that creating unreasonable risk as such is not legally wrongful. Therefore, one can predict that compensatory awards under the new negligence regime would not be conceived as a legal response to proscribed conduct, but as some kind of "price" that must be paid for exercising the freedom to act negligently. Arguably, we are already there: the traditional failure of the common law to back up the "breach of duty" rhetoric with any meaningful sanction until harm is caused makes such an outlook quite plausible even today,[92] but it surely causes discomfort. Thus, restoring coherence by abolishing duty, while theoretically possible, would limit judicial discretion and entail serious symbolic costs.

2. Abolishing the Harm Requirement

An alternative way out of the analytical maze is to recognize "negligence without harm." Rather than eradicating duty, we should simply abolish the harm requirement, making negligence actionable per se. As radical as this reform may sound, it is based on a simple and fairly intuitive idea: the creation of unreasonable risk, when it amounts to a breach of duty, should be considered a civil wrong regardless of any resulting harm. Under the obligational approach, the potential victim of such a tort would be every person to whom the risk-creator owed a duty of care that was negligently breached. Under the public duty approach, a wider spectrum of victims could be contemplated.[93] Either way, the negligent actor will become liable in tort at once, that is, immediately upon creating the foreseeable and unreasonable risk.

Importantly, recognizing such liability does not mean that the negligent actor will now be under a duty to compensate the victim. The ordinary rules governing compensation require actual injury or loss, and embracing negligence without

91. *See supra* note 60 and accompanying text.

92. Still, such an interpretation of extant doctrine is inconsistent with certain practices, such as the willingness to award punitive damages as a punishment for intentional or reckless creation of unreasonable risk. *See, e.g.*, Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1431 (10th Cir. 1990) (per curiam); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 380–81 (Cal. Ct. App. 1981). This practice can only be explained as a punitive response to pre-injury wrongdoing. *See* Nicholas J. McBride, *Duties of Care—Do They Really Exist?*, 24 OXFORD J. LEGAL STUD. 417, 426–27 (2004).

93. For example, any person exposed to the unreasonable risk could be considered a victim of the tort, or alternatively, any reasonably foreseeable risk-bearer.

harm need not affect this entrenched rule. Nonetheless, as Part V elucidates, those exposed to foreseeable unreasonable risk will now have access to other monetary and nonmonetary remedies. Indeed, in terms of coherence, there is nothing more straightforward than distinguishing the primary duty to take reasonable care from any secondary obligation that may result from its breach. Under this simple model, the duty to compensate for actual harm, as important as it is, should be understood as merely one out of several remedial obligations to which any civil wrong, including negligence, can give rise.[94]

Whether such a radical conceptual shift is normatively plausible is a serious question explored in Parts III and IV below. For now, we wish to stress its advantages in terms of *internal* and *external* coherence. *Internal* coherence denotes harmony among the various components of a particular doctrinal structure. From this perspective, a negligence-without-harm regime is superior to existing law. Releasing negligence doctrine from the grip of the harm requirement will eliminate the dissonance embedded in the current structure of the tort, discussed in detail above.

External coherence denotes harmony between a particular doctrine and other substantively related doctrines. From this perspective, the proposed regime will align the tort of negligence with other civil wrongs and with what, arguably, is the typical analytical structure of civil liability. For example, breach of contract is actionable regardless of actual harm.[95] As in tort, ordinary damages are not generally available for breach of contract absent proof of harm, but other remedies (for example, nominal damages, specific performance, and restitution) are.[96] Furthermore, many common law torts (mostly those originating in the ancient writ of trespass) are actionable per se, even in the absence of any harm or loss to the victim (*injuria sine damnum*).[97] Libel, slander, assault, battery, trespass to land or chattels, conversion, false imprisonment, breach of privacy, and tortious interference with contract or business, to name a few, are actionable irrespective of proven material harm.[98] This is also the case with many equitable wrongs (for example, breach of trust, confidence, or any other fiduciary duty), which are analytically equivalent to torts actionable per se.[99] These examples demonstrate that harm is neither an essential element of a civil wrong nor a universal precondition for tort liability (as some writers incorrectly assume[100]). Although some torts do

94. *See* Simons, *supra* note 76, at 54 ("[T]he duty to compensate for harms one has negligently caused is distinctly secondary. Although compensation is ordinarily the only feasible remedy for isolated acts of negligence, this is a contingent fact, not a necessary implication . . . .").

95. This is evident in contract actions because, just as for torts actionable per se, limitation periods begin with the wrongful conduct (breach of contract) rather than the accrual of harm. *See* ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 1322–23 (4th ed. 2021).

96. *See* RESTATEMENT (SECOND) OF CONTRACTS § 345 (AM. L. INST. 1981) (listing six judicial remedies for breach of contract, only one of which is damages).

97. *See* Ibbetson, *supra* note 6, at 487–88.

98. *See, e.g.*, ROGERS, *supra* note 60, at 71 ("[Torts] such as trespass in some, or perhaps all, of its various forms and libel, do not require proof of actual damage.").

99. *See, e.g.*, Birks, *supra* note 53, at 34–35 (stressing the analytical affinity of common law torts and equitable wrongs).

100. *See supra* note 1.

condition liability on harm (for example, deceit[101]), this seems to be the exception rather than the rule.[102] Finally, in criminal law, actual harm is not a general precondition for liability.[103] At least for adherents of the public duty approach, this may suggest that in tort law, too, liability for negligence could be imposed even without harm.

To conclude, in the law of civil wrongs, as in criminal law, wrongful conduct is essential to liability whereas harm is not.[104] Harm is only essential for triggering the secondary obligation to compensate. Unfortunately, the current structure of the tort of negligence clouds the distinction between wrongful and harmful conduct. Restructuring negligence law by making negligence actionable irrespective of harm will remove this conceptual anomaly and ensure internal and external coherence. Such a shift will not reduce the practical importance of the duty to compensate for negligently inflicted harm. However, as explained below, it will open up other remedial options that may be needed in response to negligence that has not (or not yet) occasioned any compensable harm.[105]

III. FAIRNESS

This Part focuses on fairness, defined as the proper conceptualization and regulation of a bilateral relationship between a particular plaintiff and a particular defendant in light of the morally significant characteristics of this relationship.[106] It specifically addresses the relationship between a risk-creator and the person exposed to the risk and only briefly touches on the relationship between the latter and the state, which may be under a duty to provide those exposed to risk a means of recourse against the risk-creator.[107] Section A argues that the creation of foreseeable unreasonable risk is an interpersonal wrong, owing to three of its morally relevant features: it breaches an interpersonal duty, reflects disrespect for the equal freedom of others, and poses a serious threat to highly valued interests, generating morally relevant side effects even without materialization.

---

101. RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977).

102. Arguably, a case can be made for abolishing the harm requirement in other harm-based torts, such as deceit. This proposition, compelling as it may be, lies outside the scope of this Article and, at any rate, cannot be supported by an internal coherence argument.

103. This is evident from the criminalization of attempts, as well as other risk-creating conduct, such as "reckless endangerment." *See, e.g.*, N.Y. PENAL LAW § 120.20 (defining the crime of reckless endangerment).

104. *See* Birks, *supra* note 53, at 38–41 (arguing that harm is a typical but not an essential element of a civil wrong); Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 214 (1994) ("[H]arm is neither an essential element of moral wrongdoing nor of criminal liability. While the category of wrongs may well be dominated by actions that unjustifiably cause harm, it is not exhausted by such actions.").

105. *See infra* Part V.

106. This claim is consistent with the obligational approach. *See supra* Section II.A.1. For other possible meanings of "fairness," see Ronen Perry & Tal Z. Zarsky, *Queues in Law*, 99 IOWA L. REV. 1595, 1598, 1602 (2014) (discussing fairness in the distributive sense).

107. This idea has been embraced and developed by "civil recourse" and "redress" theories of tort law. *See infra* note 131.

In the absence of a rigorous academic debate on negligence without harm, counterarguments to our thesis have yet to be made.[108] Indeed, it is quite difficult to formulate such arguments. To flatly deny that there could or should be any right of redress for exposure to foreseeable unreasonable risk comes close to the morally objectionable idea that people are free to breach legal duties, subject only to the contingent obligation to pay compensatory damages if harm ensues.[109] Consequently, the few theoretical arguments that can be leveled against the notion that negligent conduct is itself an interpersonal wrong are mostly sophisticated conceptual contentions rather than substantive normative objections. Section B examines two of those arguments, namely the argument that correlativity hinges on the causation of harm and the argument that it is impossible to wrong without harming. In addition, it discusses and rejects a possible objection from freedom.

A. NEGLIGENT CONDUCT AS AN INTERPERSONAL WRONG

1. The Morally Relevant Features of Negligent Conduct

The fundamental question is whether a person who acts negligently, that is, exposes another to foreseeable unreasonable risk, commits a wrong against that other person even if the risk does not culminate in actual damage. Interestingly, this philosophical question has seldom been addressed directly in the vast literature on the moral foundations of tort law.[110] Yet the notion that negligence is itself morally wrong is far from alien to tort practice and theory.

A first intimation that negligence is morally wrong even absent harm comes from legal parlance. The terms "negligence" and "breach," which refer to defendants' pre-injury conduct, have an obvious moral tenor. Rooted in the first is a deep sense of moral and social denunciation of the defendant's conduct, character, or both.[111] Embedded in the second is an allusion that the defendant not only did something unacceptable but also wronged the specific plaintiff, an aspect emphasized by Chief Judge Cardozo in *Palsgraf*.[112] Arguably, the persistent use of these terms by courts and lawyers for more than a century can be attributed to an underlying conviction that the creation of foreseeable unreasonable risk is

108. The few we managed to trace have not directly targeted our proposal but are nonetheless applicable to it. Claims of more narrow applicability (for example, specific objections to risk-based damages or to conceiving of risk as harm) are not addressed for want of space and because of their limited impact on the general case for negligence without harm.

109. *See supra* Section II.B.1; *see also infra* Section III.A.1.

110. For a rare exception, see John Oberdiek, *The Moral Significance of Risking*, 18 LEGAL THEORY 339, 340 (2012) ("[T]he moral significance of risking is usually overlooked and certainly undertheorized.").

111. *See* Donoghue v. Stevenson [1932] AC 562 (HL) 580 (appeal taken from Scot.) ("[L]iability for negligence . . . is no doubt based upon a general public sentiment of moral wrongdoing . . . ."); TONY HONORÉ, RESPONSIBILITY AND FAULT 18 (1999) ("Historically negligence . . . has been regarded as a species of fault. Nearly all writers continue so to regard it . . . ."); Simester, *supra* note 78, at 87 ("[S]ubstantive law depends upon the proposition that a defendant's negligent conduct is something for which she may legitimately be blamed.").

112. *See supra* notes 66–68 and accompanying text.

both legally and morally wrong.[113] In what follows, we track the origins of this subtle moral conviction.

Exposing another person to a foreseeable and substantial risk seems morally wrong as between the risk-creator and the risk-bearer.[114] An educated conjecture, which cannot be empirically tested here, is that most people would endorse this view.[115] The presumed sense of reproach toward those who unreasonably imperil others can be validated by three cumulative, morally relevant features of the interaction: (1) negligence is a breach of an interpersonal duty; (2) negligence reflects disrespect for the equal freedom of others; and (3) negligence poses a serious threat to highly valued interests. Part II has already elaborated on the first aspect. In a nutshell, if A owes B a duty of care and breaches that duty, A commits a wrong against B, and the law must allow B to vindicate the violated correlative right.

Next, acts of negligence express disrespect or at least lack of sufficient respect for the equal moral standing of another. Liberal rights-based tort theories share the common normative presumption that every person is entitled to equal liberty (freedom of action) on the one hand and equal safety (protection of valued interests such as life, bodily integrity, property, and reputation) on the other.[116] Negligent conduct thwarts this ideal. By exposing another person to a risk that is unacceptable according to some social or moral standard, the negligent actor disrupts the presumed equality. The unreasonable risk-creator assumes more freedom than allowed and undermines the level of safety that the other deserves.[117] Any act of negligence, by definition, reflects the agent's choice to act in a way that destabilizes equality, making the act patently unfair.[118] Importantly, this normative message does not require a subjective mental state of conscious disregard. Disrespect is exhibited even when the actor is unaware that the conduct fails to

113. *But see* Finkelstein, *supra* note 1 ("[T]he duties in question need not be moral in nature . . . .").

114. Exposure to trivial risk would rarely, if ever, trigger liability for negligence. In any event, the normative claim here is limited to substantial risks.

115. *See* Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473, 483–84 (1974) ("[W]e feel outrage at the drunken and the reckless drivers . . . even in those cases in which neither of them is at fault in causing harm . . . .").

116. *See, e.g.*, ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 49 (1999) ("[T]he boundaries between persons are given by a concern for equal liberty and security for all."); David G. Owen, *Philosophical Foundations of Fault in Tort Law* ("[A]n actor moving about in a crowded world must show equal respect for the security interests of others in remaining free from accidental harm."), *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 53, at 201, 219 ; Christopher H. Schroeder, *Causation, Compensation, and Moral Responsibility* ("A theory of moral responsibility . . . . begins with a principle of equality . . . every human being is entitled to be treated with equal dignity and respect."), *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 53, at 347, 360.

117. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 152 (1995) ("To refuse to mitigate the risk of one's activity is to treat the world as a dumping ground for one's harmful effects . . . .").

118. *See* Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 430 (1987) ("[I]n acting negligently the defendant treats and the plaintiff is treated unequally.").

meet the applicable standard of care because the law presumes their capacity to act reasonably and avoid acting wrongfully.[119]

Lastly, negligence doctrine disallows types of conduct that endanger people's most valuable protected interests: life, bodily integrity, health, property, freedom of movement, and—to some extent—financial stability and emotional well-being. Unlike other tortious invasions (like trespass) that can be wrongful even if they do not impose substantial risk, acts of negligence always involve a real threat to the right-holder's security, autonomy, or other aspects of welfare. The typical side effects of such risks, before and even without materialization, make their creation morally wrong and underlie a fairness case for legal response.

At least five possible side effects come to mind. First, negligent conduct can be the proverbial last straw when it marginally increases an existing and sufficiently high risk that ultimately materializes (as in "loss of a chance" settings).[120] In such circumstances, the negligent conduct falls short of causing harm in the legal sense, but its modest contribution to the aggregate risk may make the difference between no harm and harm.[121] Second, when people become aware of imminent risks, especially to their person, this awareness can cause inconvenience and frustration, or even instill fear and emotional distress.[122] Third, those exposed may take costly precautions to avert the risk or to monitor the status of an endangered resource (for example, health or property).[123] Fourth, an ongoing unmaterialized risk (such as the risk to health associated with pollution) can sometimes reduce the market value of property or increase insurance premiums for risk bearers.[124] Fifth, regardless of any material harm (pecuniary or nonpecuniary), exposure to risk can deprive people of certain opportunities and choices, thus impinging upon their autonomy and intangibly reducing their overall welfare.[125] For example, if people participating in certain activities, such as public gatherings or air travel, fail to wear face masks during a respiratory pathogen pandemic, the consequent

119. The notion of "avoidability" (which presupposes an actor's capacity to foresee harm and react to it) is discussed in Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS, *supra* note 1, at 72, 91–97. The distinction between general and particular capacity is, for some, the factor distinguishing between negligence and strict liability. *See* HONORÉ, *supra* note 111, at 15.

120. *See supra* notes 43–45 and accompanying text.

121. For example, assume that the base risk of harm is 49% and that the negligence increases it to 51%. It is more likely that the harm was caused by the base risk of 49%, not by the negligent increase of the risk by 2%, but this small increase turned an event that was more likely not to occur (49%) into one that is more likely to occur (51%).

122. Some courts and authors consider these feelings compensable harm. *See supra* notes 30–37 and accompanying text; Christopher P. Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713 *passim* (2004).

123. These costs may also be recoverable to a limited extent in some jurisdictions. *See supra* notes 38–41 and accompanying text; John G Fleming, *Preventive Damages*, *in* TORTS IN THE NINETIES 56, 56 (Nicholas J Mullany ed., 1997); Donal Nolan, *Preventive Damages*, 132 LAW Q. REV. 68 *passim* (2016).

124. *See, e.g.*, RIPSTEIN, *supra* note 116, at 76; JENNY STEELE, RISKS AND LEGAL THEORY 116–18 (John Gardner ed., 2004).

125. *See* Oberdiek, *supra* note 110, at 350–56 (explaining that risk creation can be seen as an infringement of, or nonmaterial harm to, one's autonomy and life destiny); Owen, *supra* note 116, at 227 ("[E]very choice to act or refrain from acting causes 'harm', at least theoretically and potentially, to other persons who commensurately are deprived of related opportunities."); *see also supra* note 29.

risks to others might limit their ability to participate in the same activities. These adverse effects highlight the moral significance of the very creation of unreasonable risk, regardless of whether any of them constitutes independently compensable harm.[126]

Negligent conduct is not less infringing, disrespectful, or threatening if the risk does not materialize. It is, therefore, morally wrong per se. Each of the morally significant aspects of negligent conduct is sufficient to support the case for recognizing negligence without harm. Thus, even if the creation of unreasonable risk does not have any of the side effects mentioned above, it may be morally wrong as a breach of duty or violation of basic equality. Imagine a person who is entirely unaware of being exposed to unreasonable risk by another. The former's lack of awareness does not make the latter's conduct any less wrongful.[127]

The preceding analysis does not imply that causing and suffering actual harm have no moral significance. According to some theorists, causation of harm can be deemed morally wrong even in the absence of fault.[128] Additionally, when negligent conduct culminates in actual harm, the victim has a legitimate moral claim for reparation. Hence, a passerby whose nose was broken by a tile falling off the roof at a construction site may have a distinct moral claim against the negligent contractor that others who were exposed to the same risk but suffered no injury do not have.[129] The point is, instead, that sustaining harm is not indispensable for a risk-bearer's moral claim against a negligent risk-creator.

Now, if exposing others to unreasonable risks is an interpersonal wrong, those exposed should be able to protest, confront the perpetrators, and seek appropriate remedies (such as injunctions).[130] Claims against wrongdoers should be heard, fairly adjudicated, and, if found valid, vindicated by an impartial social institution.[131] Arguably, the case for redress is even more pressing when an alleged

126. *See supra* Section I.B.

127. *See* Oberdiek, *supra* note 110, at 342 (noting that drunk driving is morally wrong, and not merely culpable, even if no one is aware that the driver is drunk).

128. *See, e.g.*, Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 *passim* (1973). For a moral perspective, see BERNARD WILLIAMS, *Moral Luck* (discussing the moral phenomenon of "agent-regret" for blameless harm-causing), *in* MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 20, 28–30 (1981).

129. *See generally* Judith Jarvis Thomson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFFS. 101 (1984) (discussing the moral underpinnings of this claim).

130. *See infra* Part V.

131. *See* WEINRIB, *supra* note 117, at 105, 107 ("The first function of public law is to provide an authoritative external interpretation of the relationship between the two parties. Recourse is therefore had to a third person, [an impartial and disinterested] judge . . . . [T]he vindication of right includes the prevention or reversal of violations of right . . . . [T]he public significance of wrong can be signaled only by the availability of a coercion . . . ."). Civil recourse is a central theme in the works of Goldberg and Zipursky, culminating in JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 30–37 (2020). For a critical appraisal of civil recourse theory, see generally ARTHUR RIPSTEIN, PRIVATE WRONGS 263–87 (2016). *See also* ANDREW S. GOLD, THE RIGHT OF REDRESS 110, 110–12 (2020) (offering "redressive justice" as an alternative to both corrective justice and civil recourse theories).

wrong has already been recognized by the legal system as a breach of interpersonal duty owed by the defendant to the plaintiff.[132]

Alas, by adhering to the harm requirement, the legal system ignores the legitimate claims of the wronged against the wrongdoer. By insisting on the suffering of actual harm, it deprives right-holders of the power to confront negligent actors whose conduct has risked—or is still risking—their protected interests. In doing so, the state is violating its moral (and arguably constitutional) duty to offer some form of redress for wrongdoing.[133] The traditional position conveys the problematic normative message that people are free to negligently endanger the protected interests of others, as long as no injury is caused. Apart from being unjust on the interpersonal level (and conceptually incoherent[134]), it is unfair as between the state and the wronged.

2. Implicit Support from Moral Tort Theory

The literature on the moral foundations of tort law is vast. In recent decades, it has offered profound accounts of the law, in which ideas of responsibility for the materialization of risks play an important role.[135] In contrast, leading moral theories of tort law lack a rigorous analysis of legal responsibility for risk creation.[136] Despite this unfortunate oversight, some of the existing scholarship implicitly supports the case for recognizing negligence without harm.

To begin with, influential corrective justice and other nonutilitarian accounts of negligence law have gone to great lengths to demonstrate that negligent conduct is morally wrong as between the parties. For example, negligence has been described as an imposition of a nonreciprocal risk on another,[137] an unjust interference with the equal freedom of another,[138] a deviation from a set of "fair terms of interaction" between individuals,[139] or a moral failure to eliminate or reduce a

132. *See supra* Part II.

133. *See* Tony Honoré, *The Morality of Tort Law—Questions and Answers* ("In all societies some people behave disruptively . . . . The state must have the right and duty to minimize the risks and remedy the disruption."), *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 53, at 73, 77; *see also* GOLDBERG & ZIPURSKY, *supra* note 131, *passim* (discussing the constitutional aspect of redress).

134. *See supra* Part II.

135. *See generally* STEELE, *supra* note 124 (discussing the concept of risk in legal theory); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990) (offering an institutional perspective on legal risk management).

136. This is not the place to inquire into the reasons for this academic void. But several reasons immediately come to mind. First, liability in negligence has, for ages, been triggered by the suffering of harm. S*ee supra* Section I.A. Second, due to its open nature, negligence emerged as the main arena for tort litigation, downplaying no-harm torts and enhancing the centrality of harm and causation. Third, in the history of tort law, the damages remedy has traditionally taken precedence over preventive remedies like injunctions, spotlighting materialized risks. *See infra* Part V. Fourth, the accumulation of scholarship that views tort law as a mechanism for rectifying harm is becoming more difficult to evade. Fifth, being committed to noninstrumental justifications, moral tort theorists have naturally neglected the significant forward-looking aspects of tort remedies.

137. *See* Fletcher, *supra* note 77, at 542, 545; Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 317 (1996).

138. *See* WEINRIB, *supra* note 117, at 147–52; Weinrib, *supra* note 118, at 428–29.

139. RIPSTEIN, *supra* note 116, at 9–12, 53–58.

foreseeable and avoidable risk of harm to another when the risk-creator is under a duty toward that other.[140] None of these theories advocated recognizing negligence without harm. All sought to explain or justify liability for negligently inflicted harm by reference to the defendant's pre-injury conduct. However, the notion that such conduct is morally wrong in one sense or another permeates all of them.[141]

Another thread of implicit support comes from the ever-growing body of risk-as-harm scholarship. This body of literature studies the possible conceptualization of exposure to certain risks (mainly to life, bodily integrity, and health) as independently compensable harm.[142] Examining risk-as-harm theories is beyond the scope of this Article, primarily because they build on a fundamental assumption that we respectfully reject. Any attempt to conceptualize risk as harm is rooted in a deep commitment to the view that negligence cannot be actionable without harm. We do not share this allegiance to the harm requirement and therefore do not need to artificially blur the conceptual distinction between risks (possibilities) and outcomes (actualities).[143]

Furthermore, the goal of risk-as-harm theories has been to provide a legal basis for extracting compensation from the creators of unmaterialized risks. The remedial regime that this Article envisions and underlies is starkly different and, indeed, much more comprehensive.[144] Nonetheless, the immense scholarly pressure on the court system to make exposure to unreasonable risk actionable by reconceptualizing risk as harm offers subtle support to our claim that negligence itself is morally troubling to an extent that cannot be ignored.

---

140. *See* Perry, *supra* note 119, at 111–15 (discussing the meaning of due care and the conditions under which a faulty creation of risk will be considered a "unilateral imposition of risk on the plaintiff").

141. Indeed, this common feature has attracted criticism. *See infra* Section III.B.2.

142. *See, e.g.*, E. Donald Elliott, *The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems*, 25 HOUS. L. REV. 781, 790 (1998); Finkelstein, *supra* note 1, at 963; Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1354 (1981); Andrew R. Klein, *A Model for Enhanced Risk Recovery in Tort*, 56 WASH. & LEE. L. REV. 1173, 1176 (1999); Megan Noonan, *The Doctor Can't See You Yet: Overcoming the "Injury" Barrier to Medical Monitoring Recovery for PFAS Exposure*, 45 VT. L. REV. 287, 306 (2020); Porat & Stein, *supra* note 48, at 225; Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 782–83 (1985); Scheuerman, *supra* note 30, at 716–19; Schroeder, *supra* note 47, at 442; Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?*, 80 BROOK. L. REV. 599, 606 (2015); Benjamin Shmueli, *"I'm Not Half the Man I Used to Be": Exposure to Risk Without Bodily Harm in Anglo-American and Israeli Law*, 27 EMORY INT'L L. REV. 987, 987 (2013); Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113, 113 (1990); Bill Charles Wells, *The Grin Without the Cat: Claims for Damages from Toxic Exposure Without Present Injury*, 18 WM. & MARY J. ENV'T L. 285, 349 (1994); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1813–26 (1985); Note, *Latent Harms and Risk-Based Damages*, 111 HARV. L. REV. 1505, 1505 (1998).

143. For a forceful criticism of the risk-as-harm conception, see Stephen R. Perry, *Risk, Harm, and Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, 321, 330–39 (David G. Owen ed., 1995).

144. *See infra* Part V.

B. POSSIBLE CRITICISM

1. Correlativity Hinges on Harm

Ernest Weinrib, the godfather of correlativity-centered corrective justice theories,[145] developed a well-detailed account of the tort of negligence.[146] Pertinent for our purposes is his insistence that "[w]ithout injury at the actor's hands, there is no sufferer to whom the actor is liable," and that "for the defendant's creation of risk to be actionable, it must result in injury."[147] Defending these statements, Weinrib argued that "the fortuity of [factual] causation" of harm, despite its apparent "moral arbitrariness," is crucial to establishing correlativity.[148] Suffering actual injury is what singles out the plaintiff as a unique victim of the defendant's wrongdoing, compared to other people who were exposed to similar risks but not injured.[149]

This elegantly phrased defense of the harm requirement is unconvincing. Causation of harm is not the only normatively significant feature that can generate a bilateral legal nexus between a risk-creator and a risk-bearer. Arguably, what creates that link under negligence law is, first and foremost, the duty of care. According to the traditional obligational conception, which Weinrib himself advanced,[150] the duty of care already serves this very purpose: it singles out two specific parties from all the people in the world and links them as potential plaintiff and defendant.[151] Limiting the class of potential plaintiffs by requiring that the aggrieved right-holder suffer actual harm is conceptually superfluous. As with other civil wrongs, harm should be a prerequisite for compensation, not for actionability.[152]

2. Risk Creation Cannot Be a "Bad Act"

In an oft-cited article, Heidi Hurd launched an attack on deontological theories of negligence,[153] including those she referred to as "risk-based theories."[154] Hurd argued that leading accounts of negligence are doomed to fail because they share the untenable presumption that risk creation is legally and morally wrongful.[155] Legal liability, both civil and criminal, requires a combination of a culpable state

145. *See, e.g.*, Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 107 (2001). Surveying the scholarship of Coleman, Perry, Ripstein, and Stone, the author concludes that "correlativity has now become more or less thematic in the treatment of tort theory from a corrective justice perspective." *Id.* at 157.

146. *See generally* WEINRIB, *supra* note 117, at 145–70.

147. *Id.* at 153.

148. *Id.* at 155–56, 156 n.23.

149. *See id.* at 155–56; Weinrib, *supra* note 118, at 411–16; *see also* Abraham, *supra* note 1 ("Without an actual-harm requirement, the plaintiff is a mere member of the public toward whom the defendant behaved improperly . . . .").

150. *See supra* note 72.

151. Of course, this does not mean that there is only one person to whom a duty of care is or can be owed, but the person who owes the duty is connected to any person to whom the duty is owed.

152. *See supra* Section II.B.2.

153. *See* Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 251 (1996).

154. *Id.* at 254–65.

155. *See id.* at 262.

of mind and a "bad act."[156] Because "[t]he law understands bad acts in causally complex terms" (that is, in terms of causing harm), exposure to risk that does not cause harm cannot qualify as wrongdoing in the legal sense.[157]

Hurd then responded to the possible argument that risk creation in itself, without causation of harm, can constitute the necessary "bad act."[158] In her view, risks are not "ontological entities" like chairs or tables but rather "epistemic constructs"—"probabilistic calculations about future events."[159] Thus, the creation of risk cannot be considered an external, objective "bad act."[160] Alternatively, one can argue that risk creation is morally culpable, though not wrong, and that a distinct "deontology of culpability" prohibits putting others at risk.[161] Yet if risking is wrong or if there is a deontology of culpability that encompasses risking, then the creation of risk is prohibited; even deontologists must concede that absolute prohibition on risk creation is an excessive limitation on human freedom.[162] This analysis leads Hurd to the conclusion that all risk-grounded theories of traditional negligence must fail.[163] Accepting Hurd's argument that risk creation cannot be wrongful would undermine our thesis, which considers the creation of a foreseeable unreasonable risk a civil wrong.

Although thought-provoking, Hurd's arguments are ultimately unconvincing. The first flaw is the assumption that "bad acts" must involve harm. As emphasized earlier, many civil wrongs, including longstanding torts, breach of contract, and unjust enrichment, as well as criminal offenses, can give rise to liability without harm.[164] Hurd also errs in assuming that unreasonable risk is a purely epistemic phenomenon. Undoubtedly, assessments of negligence incorporate an epistemic element.[165] But adjudicating negligence also involves an objective risk assessment.[166] Indeed, tort law is not intended to protect people from imaginary threats. An unreasonable risk is, before anything else, an objective threat that must be established by sufficient evidence. An imposition of risk is thus a verifiable objective reality. It is the negligent defendant's contribution to this reality that constitutes the "bad act" Hurd was looking for. Finally, Hurd errs even on the purely moral frontier. She rightly presumes that moral tort theorists have often suggested adopting categorical prohibitions on the creations of certain types of risk. However, she is wrong to assume that these prohibitions are anything more

156. *See id.*
157. *Id.*
158. *See id.* at 262–63.
159. *Id.* at 263.
160. *See id.* at 262–64.
161. *See id.* at 263.
162. *See id.* at 264–65.
163. *See id.* at 265 ("[I]f negligence is to be given deontological content, its essential nature must be thought to lie in the materialization of risks, and not in risks themselves.").
164. *See supra* notes 95–103 and accompanying text.
165. The epistemic component involves assessment of the risks that the actor could have perceived and those that a reasonable person in the actor's position could have perceived.
166. *See* Perry, *supra* note 143, at 322–29 (discussing the distinction between epistemic and objective risk assessment).

than flexible formulae, allowing space for balancing competing interests and values in particular instances. In summary, there seems to be nothing in Hurd's claims to deny the theoretical possibility of conceiving the creation of a foreseeable unreasonable risk as a wrong.[167]

3. The Argument from Freedom

In *Unrealized Torts*, John Goldberg and Benjamin Zipursky examined the theoretical plausibility of holding defendants liable for exposing others to a risk of personal injury.[168] Of great interest for our purposes is their suggestion that liability for "unrealized torts" might unduly curtail individual freedom.[169] Negligence law's denial of this possibility creates, in line with a liberal political theory, a "buffer zone for free action" where risk-creators are immune from civil liability.[170] Absent such a buffer, the tort system "would likely be seen and felt as burdensome, if not intolerable."[171]

This is a serious concern. Making negligence without harm actionable will open up new remedial options and expose many more risk-creators to the prospect of being held liable before any harm is realized and, theoretically, even after the risk has elapsed. But we do not agree that this outcome is in any way unfair. The standard of care owed under negligence law already incorporates the morally and socially acceptable balance between risk-creators' freedom of action and risk-bearers' security. The importance of freedom and the proper limits of its protection are already built in. Allowing people to act negligently violates and frustrates this balance. The prima facie presumption of the law should thus be that freedom from exposure to foreseeable unreasonable risk should take priority over the freedom to create such risk.[172] This does not mean that liberal and pragmatic concerns could not justify any exception to or restriction on this general principle. Nevertheless, as a sweeping objection to negligence without harm, the argument from freedom is simply unconvincing.[173]

IV. EFFICIENCY

According to economic theory, negligence law aims to promote efficiency by "minimizing the sum of accident costs and accident avoidance costs."[174] To do

167. *See* Perry, *supra* note 119, at 76–81 (rejecting Hurd's arguments on similar grounds).

168. *See* Goldberg & Zipursky, *supra* note 20.

169. *See id*. at 1654.

170. *See id*. at 1654–55.

171. *Id*. at 1655; *see also* Scheuerman, *supra* note 30, at 738.

172. *Cf*. Weinrib, *supra* note 118, at 413 ("[I]t is hard to make a case that a defendant should be free to act negligently . . . . [F]reedom of action has its limits: one is not free to act wrongly." (internal quotation marks and citation omitted)). This observation is no less valid when causation is absent.

173. Even Goldberg and Zipursky ultimately retract from the rigid position, offering a more nuanced approach that allows some threats to personal injury to be considered harmful enough to warrant liability, either in damages or even in the form of injunctive relief. *See* Goldberg & Zipursky, *supra* note 20, at 1693–1701 (damages); *id*. at 1714–15 (injunctive relief).

174. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 11 (2001).

so, it identifies inefficient conduct and provides incentives to avoid it. Traditionally, the law imposes liability for inefficient conduct after the underlying risk materializes, thereby discouraging others from similar misconduct. This Part contends that tort law does not have to await harm and use the indirect, complicated, and flawed method of ordering some people to pay compensatory damages ex post in order to deter others ex ante. Allowing those exposed to unreasonable risks to seek pre-injury preventive remedies is a direct, straightforward, and effective way of achieving the same outcome. A possible criticism, whereby recognizing negligence without harm might lead to overdeterrence, is also discussed.

Economic theory considers not only the impact of various liability regimes on conduct, but also their administrative costs and the effect of any subsequent loss allocation on aggregate welfare. This Part also considers and rejects possible objections to a negligence-without-harm regime from these two angles.

A. DETERRENCE AND PREVENTION

1. Preventing Inefficient Conduct

Economic theory may provide a straightforward case for recognizing the tort of negligence without harm. From an economic perspective, the purpose of the common law is to maximize aggregate welfare.[175] Negligence law aims to achieve this goal by (1) identifying inefficient conduct and (2) providing incentives to avoid it.[176] As a first step, therefore, economic theory endorses a cost–benefit formulation of the standard of care, whereby a person acts unreasonably if they take "less than the socially optimal level of care."[177] In other words, failing to take efficient precautions is deemed unreasonable, hence negligent. This formulation is commonly traced back to *United States v. Carroll Towing Co.*[178] Judge Hand explained that reasonableness is determined through an analysis of three variables: the ex ante probability of harm associated with the defendant's conduct (P), the severity of the potential harm (L), and the burden of precautions needed to eliminate the risk of harm (B). A person acts unreasonably by failing to take precautions where "B is less than L multiplied by P," that is, $B<PL$.[179]

As explained in academic literature, and at times accepted by the courts, this simple formula should be refined to capture the efficient course of action more accurately. For example, the cost of precautions must be compared to the reduction

175. *See, e.g.*, Ind. Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174, 1181–82 (7th Cir. 1990) (explaining the allocative approach to tort law, in which "the emphasis is on picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively").

176. *See, e.g.*, Goldberg, *supra* note 1, at 544.

177. *See* Miller & Perry, *supra* note 76, at 328.

178. 159 F.2d 169, 173 (2d Cir. 1947).

179. *See id.* Judge Hand repeated this formulation in other cases. *See, e.g.*, Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949); Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940); Gunnarson v. Robert Jacob, Inc., 94 F.2d 170, 172 (2d Cir. 1938).

in (not the elimination of) expected harm;[180] marginal, rather than total, values of B and PL must be considered;[181] levels of activity, not only levels of care, must be taken into account;[182] and the aggregative cost-benefit analysis must include not only the cost of precautions for the potential injurer and the expected harm to the potential victim but all other costs and benefits arising from the particular conduct, including the risk to the potential injurer.[183]

The second step is providing incentives to avoid the inefficient conduct. According to classical economic theory, imposing liability for inefficient conduct ex post, namely once the risk has materialized and harm was caused, leads to internalization of externalized costs by potential injurers ex ante, namely at or before the creation or prolongation of the risk.[184] This provides a general incentive to avoid inefficient conduct. To use Hand's terminology, assuming complete information and perfect enforcement, a potential injurer knows that failing to take precautions at a cost of B where B<PL will necessarily result in liability. Because the probability of harm (caused by inefficient conduct) is now the probability of liability and the extent of harm determines the scope of liability, the risk of harm to another (PL) turns into an equivalent risk of liability for the perpetrator. A potential injurer who needs to decide whether to take precautions at a cost of B or face liability whose expected value is PL will rationally choose the former whenever B<PL.

The crucial point is that economic analysis aims to avoid or stop inefficient conduct ex ante, before the risk generated by such conduct materializes and regardless of whether it ultimately will. Once the risk materializes, it can no longer be eliminated by taking precautions of any kind.[185] Thus, although imposing liability on actual injurers ex post—as traditional negligence doctrine does—may be an effective way to incentivize potential injurers ex ante, there seems to be no prevention-oriented reason to wait for risks to materialize before taking steps to avoid inefficient conduct once identified. If we know that a potential injurer can eliminate a risk of PL at a cost of B and that B<PL, compelling that person to take the available precautions prior to materialization is economically justified. Imposing sufficiently tough monetary sanctions on specific risk-creators—if they have not taken reasonable precautions but can still do so—may induce the necessary behavioral change. Punitive damages, risk-based damages (in the amount of PL), or disgorgement of the benefits of the wrongful choice can achieve this goal.

---

180. *See* Miller & Perry, *supra* note 76, at 332.

181. *Id*. at 332–33.

182. *Id*. at 333.

183. *See, e.g*., Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*, 29 J. LEGAL STUD. 19, 19 (2000).

184. *See, e.g*., Goldberg, *supra* note 1, at 545–46; Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 16 (2000); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998).

185. At times, the parties can take post-materialization measures to prevent the exacerbation of harm.

Alternatively, courts can issue injunctions ordering risk-creators to take reasonable precautions or to avoid unreasonable activities. Part V elaborates on these legal responses to negligence without harm.

The fact that economic theory, as opposed to most corrective justice theories, adopts an ex ante perspective, focusing on the prevention of inefficient conduct rather than on the rectification of subsequent harm, might give the impression that it must readily endorse the concept of negligence without harm. If tort law truly has economic foundations, failing to recognize negligence without harm is a mystery. Nevertheless, law and economics literature has generally overlooked this simple insight. Interestingly, it is briefly mentioned by noneconomic theorists. In defending a model of liability for increasing risk from a corrective justice perspective, Schroeder assumed that economic theory would not pose an obstacle because "the most plausible utilitarian theories judge action only according to their expected ability to produce the most good for the most people."[186] Similarly, in providing a civil recourse explanation of liability for emotional and economic losses arising from exposure to risk, Goldberg and Zipursky wondered "why tort law does not recognize inchoate [harmless] wrongs" if it follows an economic rationale and aims to "sanction socially harmful types of conduct."[187] These dicta lend some external support to our thesis and highlight the surprising gap in law and economics scholarship.

So far, we have argued that liability for negligence without harm is not inferior to traditional negligence in preventing inefficient conduct. Yet allowing claims for negligence without harm may have a categorical economic advantage over post-injury compensatory liability. Imposing liability for negligence is supposed to provide proper incentives for efficient conduct and prevent negligence. In reality, however, negligently caused accidents are common. Ex post liability rules do not fulfill their preventive goal for various reasons, such as information problems, cognitive biases of judges and potential injurers and victims, the impact of insurance, and the problem of judgment-proof defendants.[188] A negligently caused accident involves the destruction of economic value that could and should have been avoided. These costs, arising from the practical imperfections of the traditional negligence rule, can be considerably reduced by allowing preemptive lawsuits, using injunctions to compel, or providing monetary awards to incentivize specific actors to change their behavior at a sufficiently early stage.[189]

---

186. Schroeder, *supra* note 47, at 453.

187. Goldberg & Zipursky, *supra* note 20, at 1641; *see also* Scheuerman, *supra* note 30, at 729 ("Imposing liability for risk-creation arguably would promote deterrence by fully internalizing the risk of harm on the defendant, and thus creating an incentive for the defendant to reduce the risk by taking efficient precautions.").

188. *See* Ronen Perry, *Re-torts*, 59 ALA. L. REV. 987, 997–99, 1007–08 (2008).

189. The reduction in expected costs must always be compared to the administrative costs of the mechanism that enables it. Thus, if the risk is small, a legal mechanism that reduces or eliminates that risk at a considerable administrative cost would not be economically justified. This is as true for preemptive measures as it is for ex-post liability. We discuss administrative costs in Section IV.B, *infra*.

Recognition of negligence without harm adds individual deterrence and prevention to the general deterrent effect of the traditional negligence rule.[190]

2. Possible Criticism

The main line of criticism that economic theorists may level at our proposal would be based on two cumulative assumptions: (1) the legal response to negligence without harm involves monetary sanctions (such as punitive, disgorgement, or risk-based damages) and (2) the legal response to the creation of unreasonable risk does not prevent an action in negligence upon materialization of the same risk. Critics would then argue that recognizing negligence without harm might lead to excessive liability and overdeterrence.

This criticism may have two versions. According to the first, the fact that a potential victim has already sued the potential injurer for the creation of an unreasonable risk will not prevent the former from receiving full damages in a separate action for harm caused by the subsequent materialization of the risk. For example, if the extent of the risk is PL, and a potential victim can obtain risk-based damages in the amount of PL when the risk is created and full damages when it is materialized, the potential injurer's burden will be PL (for negligence without harm) plus PL (expected liability for actual harm), hence 2PL.[191]

According to the second version, the unreasonable risk should be "absorbed" into the actual loss if materialized. Thus, liability for negligence without harm must be deducted from liability for actual subsequent harm.[192] While this seems to prevent overcompensation of actual victims, the potential injurer's burden still exceeds the expected harm. In the example mentioned above, the potential injurer's burden would be PL (expected liability for actual harm) plus (1-P)PL (risk-based damages for negligence without harm if the risk does not materialize), hence PL(2-P), which is again greater than PL.

Arguably, if proper incentives entail the potential injurer's internalization of the potential victim's expected harm, burdening the former with more than the expected harm might lead to overdeterrence.[193] In *In re Bridgestone/Firestone Tires Products Liability Litigation*, Judge Easterbrook held that adding liability for the creation of risk to liability for actual harm generates a total burden that exceeds the externalities, potentially leading to overdeterrence.[194] This challenge can be approached from three angles.

---

190. Negligence without harm enables prevention of inefficient conduct that might escape the traditional ex post liability model.

191. *See* Finkelstein, *supra* note 1, at 991–92 (discussing this possibility from a different perspective).

192. *See id*. at 993–95, 997, 999.

193. *See* Scheuerman, *supra* note 30, at 729–31 (arguing that liability for exposure to risk is redundant, possibly creating overdeterrence, because liability for resulting harms already generates the necessary incentives).

194. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1017 & n.1 (7th Cir. 2002).

The first possible response rejects the argument that excessive liability would lead to overdeterrence. Under a strict liability regime, like the one discussed by Judge Easterbrook in *Bridgestone/Firestone*, liability in excess of harm truly results in overdeterrence. In contrast, if a negligence standard is applied correctly, the fact that a negligent party must bear a burden that exceeds expected harm will not normally result in overdeterrence.[195] To understand why, assume that the cost of precautions is B, the expected harm is PL, B is lower than PL, and the potential injurer's burden for failing to take precautions exceeds PL. On the one hand, the potential injurer will not take a suboptimal level of care because the personal cost of this choice, be it PL, PL(2-P), or 2PL, is greater than the cost of the alternative, B. On the other hand, the potential injurer will not take a supraoptimal level of care (hence be over-deterred) because the personal cost of supraoptimal precautions is necessarily greater than the cost of a lower (and optimal) level of care, and taking either equally protects the potential injurer from any burden that may be imposed on negligent parties, be it PL, PL(2-P), or 2PL.

Admittedly, however, judicial lack of information, cognitive biases (such as the hindsight bias),[196] judges' or jurors' animosity toward certain types of defendants,[197] and the natural empathy for victims[198] might give rise to false-positive determinations of negligence (finding non-negligent defendants negligent). The prospect of false positives might lead to overdeterrence and imposing a burden in excess of expected harm for negligent conduct exacerbates that problem.[199] If potential injurers believe that they can be found negligent despite taking the optimal level of care and know that the expected burden exceeds expected harm, they might be induced to take supraoptimal precautions. For example, if a potential injurer can prevent a certain loss of $100 by taking precautions that cost $150, failing to take these precautions is not negligent in the economic sense. Even if injurers are consistently (though mistakenly) found negligent for not taking such

195. *See* Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEGAL STUD. 401, 419 (2001) ("[I]ncreases in the level of damages above the net social costs may have relatively little influence. . . . [C]ertain negligence rules make injurers' precaution relatively inelastic with respect to the level of damages.").

196. *See* Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight* (discussing the bias), *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 335, 341 (Daniel Kahneman et al. eds., 1982). In the tort law context, knowledge of the harm caused and the actual causal chain makes the fact finder exaggerate the anticipated risk created by the defendant's conduct. *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1524–25 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1096 (2000); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 591 (1998).

197. *See* Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293, 319–20 (1988).

198. This may be more acute in jury trials. *Cf.* Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 118 (1924) ("A court might emphasize to the jury *ad nauseam* the social value of the act, but the jury would only see one man injured by another.").

199. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 108, 115 (1987) (explaining that if injurers are exposed to liability in excess of harm caused by their activity, they may be led to take more than optimal care due to the likelihood of false positive determinations of negligence).

supraoptimal precautions, they will not take them because the private cost ($150) exceeds the private benefit (saving $100, the expected liability). Yet if the expected burden is double the expected harm (2PL), potential injurers will adopt the inefficient precautions because their cost ($150) is now lower than the expected benefit (saving $200). The prevalence and severity of this phenomenon are probably jurisdiction-specific, and at any rate unknown, so it is impossible to determine whether it can forcefully undermine the economic case for recognizing negligence without harm.[200]

The second response rebuffs the assumption that negligence without harm, if made actionable, would give rise to monetary sanctions. Courts can handle cases of unmaterialized risk by ordering potential injurers to take cost-effective precautions that they have not yet taken. The cost of compliance for the potential injurer will be B, which is lower than PL by definition,[201] and compliance will prevent an additional finding of negligence and any ensuing burden. No excessive burden will be imposed where plaintiffs seek injunctions, rather than monetary awards, or if courts use injunctions as the default remedy in cases of negligence without harm. Of course, this response is limited to cases where the potential injurer can still take cost-effective precautions and does not apply if the creation of unreasonable risk is irreversible (as in past exposure to asbestos) or if the risk expired (as when a careless driver was pulled over).

The third response rejects the assumption that allowing damages for negligence without harm would necessarily generate excessive liability. Expected liability can be kept in line with the expected harm if liability for the creation of unreasonable risk supplants traditional negligence. Schroeder famously proposed a model that does exactly that, although he defended it in terms of corrective justice rather than economic efficiency. Under this scheme, liability is imposed only for the creation of unreasonable risks, not for harms arising from their materialization, and the payments are made to a fund that compensates individuals injured by the same kind of activity.[202] The burden then equals expected harm. This model was criticized by many,[203] but two fundamental flaws are relevant to the current discussion. First, this scheme involves a radical departure from the basic structure of tort law. It is more akin to a system of administrative fines. Second, this model is exceptionally complicated and prohibitively costly to administer.

A less radical solution would maintain the traditional cause of action alongside the newly recognized one and merely preclude double litigation before and after the materialization of an unreasonable risk. The choice between the two paths

200. The fear of false positive determinations of negligence is not controlling, in our view, because of its speculative nature (and the negating effect of possible, equally speculative, false negative determinations of non-negligence), combined with the two additional responses provided below to the general argument concerning overdeterrence.

201. Unless B<PL, failing to take the precautions is not negligent according to the economic definition and cannot underlie an action under any negligence-based regime (with or without harm).

202. *See* Schroeder, *supra* note 47, at 440, 462–69, 473–77; *see also* Porat & Stein, *supra* note 48, at 238 (adopting a similar model).

203. *See, e.g.*, Scheuerman, *supra* note 30, at 732.

will be left in the hands of potential victims. In other words, a person who decides to bring an action for the creation of an unreasonable risk will not be allowed to bring another if the risk materializes. This solution might seem harsh to those suffering real injuries after seeking redress for the creation of the underlying risk. But if it can facilitate recognition of negligence without harm, it would broaden the range of options available to those at risk.

B. ADMINISTRATIVE COSTS

Economic theory considers not only the impact of various liability regimes on conduct but also their administrative costs, namely the costs of litigation and out-of-court negotiations.[204] For example, if a particular rule can induce a potential injurer to take precautions for $50 to reduce the potential victim's expected harm by $100, the rule can be said to incentivize efficient conduct (the net benefit is $50); but if the expected cost of litigating a dispute over the implementation of the rule is $60, the rule is not efficient because the administrative cost ($60) outweighs the benefit in terms of deterrence ($50). Making negligence without harm actionable may raise several problems in this regard.

To begin with, the rule of liability for harm caused by unreasonable conduct already provides adequate incentives for efficient conduct (assuming complete information and perfect enforcement).[205] Therefore, it is unnecessary to allow claims for negligence without harm to ensure efficient deterrence.[206] If a potential victim who subsequently becomes an actual victim can initiate two separate legal processes—one for the creation of the risk and another for its materialization—the duplication is a waste of resources.[207] It involves additional administrative costs and no additional benefit in terms of deterrence. This problem can be solved by structuring the law of negligence without harm to allow each person exposed to unreasonable risk to initiate only one process upon either exposure to or materialization of that risk.

A stronger criticism of our thesis may point to the fact that where negligence without harm is actionable, potential claimants considerably outnumber traditional victims. If, for example, creating a risk of one percent is deemed negligent, only one in a hundred people exposed to the risk will actually incur harm. For every traditional action for harm-based negligence, there are a hundred possible actions for negligent conduct.[208] This might open the floodgates of litigation,

204. *See* SHAVELL, *supra* note 199, at 265.

205. *See supra* Section IV.A.1.

206. This assumes that there are no failures in the ex post liability mechanism (possible failures were mentioned in Section IV.A.1, *supra*).

207. *See* Goldberg & Zipursky, *supra* note 20, at 1653 (explaining the prospect of double litigation when people sue for unrealized risks and subsequently for the realized risks).

208. *See id.* ("The volume of litigation would presumably increase substantially simply because many more persons are exposed to risk than suffer a realized risk of harm."); Schroeder, *supra* note 47, at 474–75 ("[L]iability events become . . . potentially much more numerous than compensable events . . . . The cause-based system, by generating fewer liability events, promises to be less costly to implement.").

overburdening the courts and generating enormous costs for the system.[209] In a sense, the effect of making negligence without harm actionable is analogous to that of allowing recovery for relational economic and emotional losses—turning every traditional claim into multiple nontraditional ones.[210] Courts and scholars have already warned of such proliferation and its economic consequences in these comparable contexts.[211] Thus, from an administrative costs perspective, a purely harm-based system seems to be a more manageable and less costly way to achieve the same economic goals (most notably efficient deterrence).

According to conventional wisdom, a shift from a fault-based to a strict liability regime brings about additional claims (because victims can recover even in the absence of fault or if fault is difficult to prove), but at the same time, reduces the average administrative cost of an individual claim (because settlement is more probable and the cost of a trial is lower with no disputes over the standard of due care and the defendants' deviation therefrom).[212] A shift from harm-based negligence to negligence without harm does not have a similar cost-neutralizing effect. The significant increase in the number of potential claims is not canceled out by a lower administrative cost of each claim. In fact, an action for negligent conduct without harm may be more complex and costly than an action for traditional negligence. Until harm is caused, decisionmakers often have poor data about the risks at hand, so it is difficult to determine whether the defendant was negligent at all.[213] The existence and scope of harm are important pieces of information that can reduce the cost of establishing the ex ante level of risk (expected harm).[214] Moreover, to the extent that risk-based damages may be awarded in an action for negligence without harm,[215] their assessment will be much more burdensome and costly than that of compensatory damages in an action for conventional negligence due to the unavailability of a clear benchmark (that is, actual harm).

We argue that any increase in litigation will be limited or manageable. Admittedly, the number of people exposed to a one percent risk is greater than the number of actual victims by a factor of a hundred. However, in most contexts, the number of actual claims for exposure to unreasonable risk will be much lower

209. *See* Schroeder, *supra* note 47, at 474 ("[T]he administrative costs of the system ought to be substantially more than the present system's.").

210. *See, e.g.*, Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711, 753, 762 (2004).

211. *See, e.g.*, Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 55 (1st Cir. 1985) ("[T]hese considerations . . . reflect a fear of creating victim compensation costs that, from an administrative point of view, are unnecessarily high."); SHAVELL, *supra* note 199, at 138 ("[T]he routine award of economic losses could also raise administrative costs by adding to the volume of litigation, since the number of parties who could claim such losses is presumably large.").

212. *See* SHAVELL, *supra* note 199, at 264 ("The total number of claims is likely to be larger under strict liability than under the negligence rule[,] . . . [but] the average administrative cost per claim should be higher under the negligence rule.").

213. *See* Goldberg & Zipursky, *supra* note 20, at 1653.

214. It can also reduce the probability of judicial error that might distort the incentive structure.

215. *See infra* Section V.B.5.

than the number of those exposed. First, although harm is tangible, exposure to risk is not, so many people are unaware of being exposed to unreasonable risks before their materialization. Pedestrians rarely know when drivers of passing cars are negligent, patients seldom know when their doctors fail to follow professional protocols or common practice, and consumers cannot discern negligent manufacturing of the products they are using, unless these instances of negligent conduct result in injury. Second, many of those aware of their exposure to unreasonable risk may not consider it sufficiently troubling to warrant the costs and hassles of legal action before harm ensues. People with no harm simply have a much weaker incentive to sue.[216] This could result in underdeterrence if a negligence-without-harm regime supplanted the traditional negligence regime. But if the two coexist, subject to the victim's inability to initiate two actions for the same risk, the outcome will be an unintimidating number of claims for exposure to risk.

In the relatively rare cases where many people are aware of and sufficiently troubled by similar risks, as in cases of faulty infrastructure or mass exposure to hazardous materials, administrative costs may be considerably reduced through existing procedural instruments such as consolidation of actions, joinder of parties, and class actions.[217] Potential victims often have sufficiently strong incentives to use these tools to reduce their own costs. Assuming that potential claims for exposure to risk are similar in terms of the foreseeability, extent, and probable patterns of materialization of the risk, the administrative cost of a single unified process will not significantly surpass the administrative cost of an individual claim. Furthermore, if many people seek to prevent or stop unreasonable conduct that puts them all at risk through an injunction, a single action by a single plaintiff will adequately serve all. Theoretical administrative problems can thus be alleviated by utilizing existing procedural tools.

If there remain any settings in which the number of claims is neither restrained by potential plaintiffs' information and litigation costs nor sufficiently controlled through existing procedural tools, the law can impose additional constraints to ensure practicability. First, courts can mandate unified procedures where the defendant exposed many people to similar risks simultaneously or sequentially. Second, courts can limit the available remedies. For example, if only injunctions are allowed, unreasonable conduct or practice that exposes many people to similar risks can be stopped through a single lawsuit. Alternatively, if courts award uniform amounts of symbolic or nominal damages to all those exposed to risk, they will minimize the legal variance among different claims and thereby reduce the number and complexity of legal processes. Third, courts can set a higher

216. *See* Scheuerman, *supra* note 30, at 735.

217. *See, e.g.*, 28 U.S.C. §§ 1404, 1407; FED. R. CIV. P. 20; William Bishop, *Economic Loss: Economic Theory and Emerging Doctrine*, *in* THE LAW OF TORT: POLICIES AND TRENDS IN LIABILITY FOR DAMAGE TO PROPERTY AND ECONOMIC LOSS 73, 76 (Michael Furmston ed., 1986).

evidentiary threshold for those seeking damages for exposure to unreasonable risk.[218]

C. LOSS ALLOCATION

1. Compensation

Liability for negligently caused harm simultaneously serves two purposes: deterrence of potential injurers and compensation to actual victims.[219] Compensation has economic value insofar as it facilitates the victim's recovery and rehabilitation and prevents deterioration (an additional loss). This value should be added to the deterrent effect when comparing the benefits of a particular liability regime to its administrative costs. At first sight, liability for negligence without harm does not offer a similar benefit, and its administrative cost (discussed above) seems to be spent solely on risk reduction. However, if the potential injurer is compelled or induced to take measures to reduce or eliminate the risk before its materialization, the need to compensate and the corresponding cost of failing to compensate (the additional loss) will be reduced or eliminated. In other words, a successful action for the creation of risk will have the same effect as liability for harm. Needless to say, this argument does not apply if the unreasonable risk can no longer materialize, because at that stage there can be no initial harm and no possible deterioration.

2. Loss Spreading

Assuming that the individual marginal utility of wealth is decreasing (so that private utility functions are concave),[220] people are risk-averse; consequently, the allocation of accident costs, as opposed to minimizing them, may by itself influence aggregate welfare.[221] If A caused harm to B and B is more risk-averse than A, shifting the loss from B to A would increase aggregate welfare regardless of any effect on people's conduct.[222] More importantly, transferring a certain economic burden from a risk-averse person to numerous risk-averse people ("spreading" the cost) would usually increase aggregate welfare, whereas transferring small individual costs from numerous people to a single person would normally have the opposite effect.[223]

Despite some pushback, the idea of loss spreading has already been used to explain and even justify several features of modern tort law. An excellent

218. This solution is not unheard of. In some jurisdictions, plaintiffs are required to satisfy a higher standard of proof to obtain punitive damages. *See* Lynda A. Sloane, Note, *The Split Award Statute: A Move Toward Effectuating the True Purpose of Punitive Damages*, 28 VAL. UNIV. L. REV. 473, 483 (1993). In many, a higher standard of proof underlies John Doe processes. *See* Ronen Perry & Tal Z Zarsky, *Liability for Online Anonymous Speech: Comparative and Economic Analyses*, 5 J. EUR. TORT L. 205, 215–16 (2014).

219. Goldberg, *supra* note 1, at 521–37 (discussing tort theories focusing on these twin goals).

220. *See* SHAVELL, *supra* note 199, at 186; Perry, *supra* note 210, at 758.

221. *See* Perry, *supra* note 210, at 759.

222. *See id*.

223. *See id*. at 759–60.

example is the rule of no liability for relational economic losses.[224] One of its common justifications is that the number of relational economic victims is potentially very large, so leaving the small widely dispersed individual losses where they fall is preferable to saddling a single injurer with the aggregated cost.[225] A similar argument might be made against liability for negligence without harm. If a wrongdoer exposes each of a thousand people to an unreasonable 0.1% risk of harm, allowing all those people to bring an action for the creation of the risk might transform many relatively small individual claims into one sizeable burden which will add to the wrongdoer's liability for actual harm (assuming negligence without harm coexists with and does not supplant traditional negligence). In some cases, "doing business would be so burdensome and so expensive that suppliers, manufacturers, and most consumers would suffer greatly."[226]

A related argument is that if many people choose to sue for their exposure to unreasonable risk before materialization, and the common defendant is required to pay damages to all, the same defendant might have insufficient resources remaining to compensate those eventually injured (assuming, again, that traditional liability for negligence survives the reform). Thus, if mass exposure to physical injury is involved, those exposed to risk will be prioritized over the few ultimate victims.[227] In the absence of coordination among potential victims, they will compete for the wrongdoer's limited resources, draining them quickly and leaving traditional victims without redress.[228] As explained above, failing to compensate for actual harm might have a cost (deterioration and aggravation of the initial loss) that must be taken into account.

Nevertheless, these arguments do not provide a compelling reason to deny claims for negligence without harm. First, they only apply to mass exposure to risk, be it serial, as in the case of a recurrently negligent hospital, or parallel, as in the case of emission of carcinogenic substances near a residential area. One-off negligence cases do not raise similar concerns. Second, even in cases of mass exposure, any concerns associated with the aggregation of monetary awards will not arise if the remedies attached to negligence without harm are carefully selected. For example, issuing injunctions against negligently operating hospitals or factories when reasonable precautions are still available will subject them only to the costs of compliance, which is by definition efficient, hence desirable. Alternatively, awarding a modest amount of punitive damages to one claimant upon mass exposure to risk that can still be reduced may incentivize a behavioral change that prevents the occurrence of actionable harms and avoids cost aggregation and resource dilution.

---

224. *See id*. at 725–26.

225. *See id*. at 761–63.

226. Lee v. Gen. Motors Corp., 950 F. Supp. 170, 175 (S.D. Miss. 1996).

227. *See* Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 435–36 (1997); Goldberg & Zipursky, *supra* note 20, at 1654.

228. *See* Porat & Stein, *supra* note 48, at 223.

V. REMEDIES

So far, we have endeavored to defend the idea that negligent conduct should be actionable even without harm. This Part supplements the theoretical analysis by showing what a legal response to negligence without harm may look like. The primary remedy in contemporary tort practice is compensatory damages. However, compensatory damages are awarded for the harm caused by the wrongful conduct. Conceptually, there can be no compensation in the absence of harm. The legal response to negligence without harm must therefore involve less common and possibly new types of remedies. This Part begins with the possible use of injunctions against defendants whose ongoing acts (or omissions) unreasonably endanger the bodily integrity, health, property, or any other protected interest of a person to whom they owe a duty of care. It then discusses various noncompensatory forms of monetary damages. Nominal, punitive, and disgorgement damages are already recognized and can be easily adapted to the proposed cause of action. Courts can also develop new forms of pre-injury monetary awards, such as risk-based damages.

A. INJUNCTIONS

Injunctive relief is the most powerful tort remedy.[229] Rather than seeking to repair harm ex post, a typical injunction strives to prevent or stop the wrongful conduct and any subsequent harm ex ante.[230] This is carried out through a judicial order directing a defendant to act or refrain from acting in a specified way, on pain of being held in contempt of court.[231]

Throughout the history of the common law,[232] injunctions have been frequently issued in cases of trespass, particularly (and historically, exclusively) those involving invasions of property rights, where the remedy was, and to an extent still is, liberally administered.[233] Subsequently, courts have expanded the reach of injunctive relief to protect nonproprietary interests, such as reputation, privacy, and various commercial interests.[234]

Surprisingly, however, injunctions have not traditionally been used to protect people's most important interests, namely life, health, and physical safety. Arguably, this apparent anomaly exists because the most important tort designed

---

229. *See* STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING 179 (2003) (explaining that injunctions "have an immediate and drastic impact, demanding . . . immediate obedience on pain of imprisonment").

230. *See* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 235 (3d ed. 2002).

231. *Id.*

232. *See* Frederick W. Stevens, *Proper Use of the Writ of Injunction—From the Standpoint of Legal History*, 8 COLUM. L. REV. 561, 564 (1908) (providing a historical perspective).

233. *See* ROBERT J. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE ¶¶ 4.10–4.690 (2d ed. 1992) (discussing protection of property through injunctions).

234. *See* DAN B. DOBBS, 1 LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION § 6.8(3), at 177 (2d ed. 1993) (addressing commercial interests); SHARPE, *supra* note 233, ¶¶ 5.10–5.540; Donald Zeman, Note, *Equity—Injunctions Against Torts—Protection of Personal Interests as Distinguished from Property Rights*, 27 B.U. L. REV. 241 *passim* (1947).

to protect these vital interests—negligence[235] —is incapable of doing so. The reason should by now be obvious: negligence traditionally requires actual harm. The immediate implication is that no legal remedy could be awarded to restrain negligence before an unreasonable risk to the person has materialized in compensable harm. Theoretically, the *quia timet* doctrine could be relied upon to prevent the completion of the tort.[236] However, such an injunction can only be requested if there is a high probability that harm will occur. This condition is rarely satisfied, a fact that is reflected in the absence of cases applying *quia timet* injunctions in negligence claims.[237]

Even after an unreasonable risk materializes in actual injury, a preventive injunction cannot be issued. This is obviously so when the initial materialization exhausts the risk to the plaintiff, either because the risk has ceased to exist or because the plaintiff (as opposed to others) is no longer exposed to it. In such cases, it would be pointless to issue an injunction, and no court could be expected to issue futile orders. However, under existing negligence law, an injunction could not be granted even if the exposure to risk persists after initial harm is suffered (for example, because the defendant continues to act negligently, regenerating the same unreasonable risk that had already materialized). In such cases, injunctive relief could be effective; however, once again, the harm requirement bars this remedial option. Its rigidity excludes any distinction between, on the one hand, unreasonable risks that have dissipated and, on the other hand, continuous or recurring acts of negligence that pose an ongoing threat to a right-holder's personal safety (or any other protected interest).

This can explain why the vast literature on negligence has rarely, if ever, mentioned injunctions as a remedial option,[238] and why sources dealing extensively with injunctive relief do not mention negligence.[239] The harm requirement has made the two concepts so remote that bringing them together has probably become wholly inconceivable for common law jurists.[240] Injunctions are simply

235. Assault and battery also protect the person but only from a direct invasion, a feature that makes injunctions irrelevant.

236. *Quia timet* "allows a person to seek equitable relief from future probable harm to a specific right or interest." *Quia Timet*, BLACK'S LAW DICTIONARY (11th ed. 2019).

237. The conservative approach to *quia timet* injunctions and the prematurity problem are discussed without reference to negligence in SHARPE, *supra* note 233, at ¶ 1.660. *But see* Annabelle Mooney, *Restoring Trust: Plachimada, the Human Trust and Anticipatory Negligence as Restorative Justice*, 27 INT'L J. SEMIOTICS L. 243, 256–58 (2014) (offering the idea of "anticipatory negligence" as a legal strategy to enjoin environmental hazards).

238. In contrast, injunctions have attracted great interest in public law scholarship. *See, e.g.*, Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 921 (2020); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 302 (2004).

239. Negligence is not mentioned in the discussion of injunctions in prominent treatises and monographs, including DAVID BEAN, ANDREW BURNS & ISABEL PARRY, INJUNCTIONS (13th ed. 2018); DOBBS, *supra* note 234; DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991); SHARPE, *supra* note 233.

240. We could not find an American law review article discussing injunctions in the context of negligence claims.

not granted under the tort of negligence, not even to reduce serious risks to life and limb.[241]

This reality is unacceptable. Life, health, and bodily integrity are no less important than any proprietary interest, and protection against indirect but serious threats is no less warranted than against direct infringements such as assault, defamation, nuisance, and conversion. The harm requirement has crippled the tort of negligence, denying a meaningful redress against unreasonable risks to one's most cherished interests. This is nonsensical and must be changed. People should be allowed to request protection from foreseeable unreasonable risks, especially to their life and limb; courts should be allowed to force risk-creators to comply with their legal obligation to take reasonable precautions when they fail to do so.[242] Such enforcement *in specie* would give visible and concrete meaning to the theoretical duty of care and to the abstract rights that were violated by the defendant's negligence.[243]

Recognizing negligence without harm as an independent cause of action in tort is the most straightforward way to bring about the needed change. Such a drastic reform must be carefully considered before it can be implemented. Some of the challenges, introduced in Part IV, involve efficiency concerns, such as the fear of overdeterrence and enhanced administrative and supervision costs. A different concern, addressed in Part III, is the moral apprehension that the very prospect of an injunction being issued for almost every act of negligence might excessively encroach on people's sense of freedom and autonomy.[244]

These are all legitimate concerns. Yet none seem strong enough to justify a complete ban on the use of injunctive relief against defendants whose ongoing acts (or omissions) unreasonably endanger the bodily integrity, health, property, or any other protected interest of a person to whom they owe a duty of care. Rather, courts should be allowed to exercise their broad equitable jurisdiction to decide, balancing the interests of the parties and considering other judicial policies, if an injunction would be an appropriate remedy under the circumstances.

As always in equity, a precondition for granting any injunctive relief is the inadequacy of damages as a response to the violation of the plaintiff's rights.[245] Arguably, this traditional requirement will most often be met where the defendant's ongoing negligence exposes the plaintiff to a substantial risk of suffering serious personal injury. In such cases, the famous adage, "an ounce of prevention is

241. *See* PETER CANE, THE ANATOMY OF TORT LAW 131 (1997) ("[T]he only remedy for personal injuries is compensatory damages. Injunctions are assumed not to be available to restrain negligence.").

242. *See* John Murphy, *Rethinking Injunctions in Tort Law*, 27 OXFORD J. LEGAL STUD. 509 *passim* (2007) (supporting this approach); Willem H. van Boom, *Comparative Notes on Injunction and Wrongful Risk-Taking*, 17 MAASTRICHT J. EUR. & COMPAR. L. 10 *passim* (2010) (same).

243. *See* Thomas, *supra* note 238, at 311 ("[P]rophylactic measures are able to provide tangible meaning to otherwise abstract rights . . . .").

244. *See supra* Section III.B.3.

245. *See* DOBBS, *supra* note 234, at 228 ("[T]he traditional rule denied injunctive relief unless, without it, the plaintiff would suffer irreparable harm.").

worth a pound of cure" could not be any truer.[246] Where personal safety is at stake, and the risk of judicial error in applying the standard of care is small (where simple and effective precautions are available to the defendant), there should be a prima facie presumption in favor of granting an injunction.[247] If wisely applied, negligence without harm can make this vision possible. This would make negligence doctrine, and with it the whole of tort law, a more effective social institution.

B. DAMAGES

1. The Noncompensatory Menu

Damages are a sum of money awarded to a person whose legally protected interests were infringed by a tort.[248] The most common and least controversial form of damages is, unsurprisingly, compensatory damages, namely those aimed to restore victims to their pre-tort positions.[249] In some cases, victims may receive compensatory damages without indicating or proving a specific harm because the law assumes that harm was caused,[250] but there can be no compensatory damages in the absence of a real detriment. Thus, this form of remedy is conceptually unsuitable as a remedy for negligence without harm.

However, monetary awards can serve other goals, such as symbolic vindication of rights, prevention of wrongdoing and unjust enrichment, or retribution, and different types of noncompensatory damages have been designed to do exactly that.[251] Nominal, punitive, and disgorgement damages are the prime examples. Though uncommon or unavailable in traditional negligence cases, these remedies are not revolutionary and may be readily adapted to the proposed cause of action. In addition, novel forms of noncompensatory damages, such as risk-based damages, can be devised. This Section discusses the possible use of these forms of noncompensatory damages in response to negligence without harm.

2. Nominal Damages

If the plaintiff can establish a cause of action but did not suffer (or cannot prove) any harm, courts may award a trivial sum of money as nominal damages.[252] Such damages can serve two goals. First, they may provide a form of prospective declaratory relief, vindicating the plaintiff's rights before any harm is

246. *See, e.g.*, LAYCOCK, *supra* note 239, at 4 ("Remedies that prevent harm altogether are often better for plaintiffs."); John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U. L. REV. 43, 51 n.27 (2011) (stressing that preventive remedies are superior to reparative ones); Charles Alan Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 381 (1955) ("Preventive relief is the most desirable kind of relief . . . .").

247. *See* CANE, *supra* note 241, at 132 ("There is no obvious reason why an injunction should not be available . . . with a view to removing foreseeable risks of injury . . . .").

248. RESTATEMENT (SECOND) OF TORTS § 902 & cmt. a (AM. L. INST. 1979).

249. *Id.* § 903 & cmt. a.

250. *Id.* §§ 904–05.

251. *Id.* § 902 cmt. a.

252. *Id.* § 907 & cmt. a.

caused, thereby protecting them against continuing or future threats.[253] For example, a nominal award can be used to avert the creation of an adverse property right due to uncontested (harmless) trespass over a period of time.[254] Second, nominal damages can provide retrospective relief under the assumption that every violation of right, even if actionable per se, "imports damage."[255] In other words, they can be awarded "by default [unless] the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages."[256] As a retrospective relief, nominal damages also offer the symbolic and empowering benefit of institutional acknowledgement of the commission of a wrong by the defendant against the plaintiff.[257]

This remedy has been used in many cases involving non-harm-based torts, such as trespass to the person (battery, assault, and false imprisonment), trespass to land, and defamation.[258] Recently, in *Uzuegbunam v. Preczewski*, the Supreme Court held that violation of a constitutional right (in that case, the freedom of speech) may also entitle the victim to nominal damages.[259] In line with these examples, nominal damages can be awarded when the right not to be exposed to foreseeable unreasonable risk has been violated. They can be used as a prospective remedy (if the risk persists) or as a retrospective one (if the risk expired),[260] in addition to other remedies or as a stand-alone relief. Of course, the caveats outlined above with respect to monetary awards for negligence without harm apply. For example, in cases of mass exposure, only an injunction (or a single award of punitive damages) may be allowed, precluding many individual monetary awards.[261]

3. Punitive Damages

If the defendant's conduct is outrageous, because of their "evil motive or . . . reckless indifference to the rights of others," the plaintiff may obtain punitive damages.[262] Historically, punitive damages may have "operated to compensate for intangible injuries" when compensatory damages for such injuries were unavailable.[263] However, this view has become obsolete with the expansion of

253. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 798 (2021).

254. *See id.*

255. *Id.* at 799–800 (citation omitted).

256. *Id.* at 800.

257. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 620 cmt. a (AM. L. INST. 1977) (discussing vindication of the plaintiff's character in the context of defamation).

258. *Id.* §§ 620, 907 cmt. b.

259. *Uzuegbunam*, 141 S. Ct. at 797–802.

260. *Id.* at 801–02 (explaining that the availability of nominal damages satisfies the redressability requirement for standing even if the defendant discontinues the unconstitutional practice, thereby rendering the victim's request for injunctive relief moot).

261. *See supra* Section IV.B.

262. RESTATEMENT (SECOND) OF TORTS § 908 & cmt. b (AM. L. INST. 1979).

263. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437–38 n.11 (2001). *But see* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 164, 204–05 (2003) ("[P]unitive damages have never served [a] compensatory function.").

compensatory damages for intangible harms.[264]

The contemporary view is that the purposes of punitive damages are to punish (in the retributive sense) and deter wrongful conduct,[265] however defined.[266] According to economic theory, which has a "relatively weak descriptive power,"[267] punitive damages overcome underenforcement problems or cancel out illicit gains of wrongful activities, thereby ensuring efficient deterrence.[268] Existing doctrine and legal practice more neatly fit the retributive notion that a wrongdoer deserves to be punished on account of committing a wrong and that the punishment must be fair (that is, proportionate to the gravity of the wrong) regardless of the consequences of the punishment.[269] Under either theory, punitive damages—like criminal punishment—are a legal response to wrongful conduct, not to specific consequences.

Allowing punitive damages for negligence without harm in exceptional cases does not entail dramatic legal changes. For starters, while punitive damages were originally limited to cases of malicious and mean-spirited conduct,[270] they were extended, at least in some jurisdictions, to cases of recklessness[271] or even gross negligence.[272] Mere negligence is undeniably insufficient for the imposition of

264. *See* Sloane, *supra* note 218, at 481–82 ("[T]he need for this function has waned with the onset of the award of damages for pain and suffering, mental distress, and . . . hedonic damages." (internal citations omitted)).

265. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–67 (1981); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); RESTATEMENT (SECOND) OF TORTS § 908(1) & cmt. a (AM. L. INST. 1979); Ronen Perry & Elena Kantorowicz-Reznichenko, *Income-Dependent Punitive Damages*, 95 WASH. U. L. REV. 835, 843–54 (2018).

266. While wrongful conduct may be defined in cost–benefit terms, this is not crucial for using punitive damages to achieve deterrence and retribution. *See Cooper Indus., Inc.*, 532 U.S. at 439–40 ("[C]itizens and legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter . . . morally offensive conduct, albeit cost-beneficial morally offensive conduct . . . .") (quoting Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1450 (1993)); Perry & Kantorowicz-Reznichenko, *supra* note 265, at 845, 850.

267. Perry & Kantorowicz-Reznichenko, *supra* note 265, at 847–48.

268. *Id.* at 845–50.

269. *Id.* at 850–54.

270. Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007–08 (1999).

271. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 20 (1982); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1305–07 (1993); RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. L. INST. 1979) (providing that punitive damages may be awarded for "reckless indifference to the rights of others").

272. *See, e.g.*, TXO Prod. Corp. v. All. Res. Corp., 419 S.E.2d 870, 887 (W. Va. 1992) ("[T]he punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm."); Rustad & Koenig, *supra* note 271, at 1305–07 (discussing this development).

this unique sanction, but if a defendant's unreasonable conduct is also outrageous, it can meet the doctrinal threshold.[273]

More importantly, harm is not essential for an award of punitive damages. Admittedly, such damages usually accompany compensatory damages, which presuppose the existence of harm. Furthermore, the extent of the plaintiff's harm not only determines the amount of compensatory damages but also affects the punitive award.[274] In *BMW of North America, Inc. v. Gore*, the Supreme Court held that courts must consider three guideposts in reviewing awards of punitive damages under the Due Process Clause.[275] One of these guideposts is the disparity between the plaintiff's harm, as measured by compensatory damages, and the punitive award.[276] In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court held that a single-digit ratio between punitive and compensatory damages was more likely to accord with due process.[277]

However, punitive damages were originally allowed where the plaintiffs suffered no substantial harm,[278] and while some jurisdictions do not currently allow punitive damages in the absence of compensable harm,[279] this prerequisite is not universal.[280] Even *BMW* and *Campbell*, meticulously read, insisted on proper relation between "harm[] or potential harm" (rather than actual harm) and the punitive award.[281] Thus, if negligence without harm becomes actionable, punitive damages should remain on the remedial menu, provided that the defendant's conduct was not only unreasonable but also outrageous. In these cases, nominal and punitive damages can be awarded in tandem.[282]

---

273. *See* CANE, *supra* note 241, at 133 ("If [a certain] conduct is thought to be a proper trigger of punitive . . . damages, it should make no difference under what head of tort liability the plaintiff seeks a remedy for such conduct.").

274. RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (AM. L. INST. 1979).

275. 517 U.S. 559, 574–75 (1996).

276. *See id.* at 580–83.

277. 538 U.S. 408, 425 (2003).

278. RESTATEMENT (SECOND) OF TORTS § 908 cmts. b-c (AM. L. INST. 1979).

279. *See, e.g.*, Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 409 (Tex. 1934) ("There can be no recovery of exemplary damages in the absence of a recovery of actual damages. A verdict of *nominal* actual damages is not sufficient.").

280. *See, e.g.*, Cush-Crawford v. Adchem Corp., 271 F.3d 352, 357 (2d Cir. 2001) ("An award of actual or nominal damages is not a prerequisite for an award of punitive damages in Title VII cases."); Alexander v. Riga, 208 F.3d 419, 430 (3d Cir. 2000) ("[P]unitive damages can be awarded . . . even [without] compensatory or nominal damages."), *cert. denied*, 531 U.S. 1069 (2001); Sole Energy Co. v. Petrominerals Corp., 26 Cal. Rptr. 3d 798, 818 (Cal. Ct. App. 2005) ("An award of actual damages, even if nominal, is required to recover punitive damages."); Underwriters' Lab'ys., Inc. v. Smith, 246 N.Y.S.2d 436, 437 (Sup. Ct. 1964) ("[T]he fact that only nominal damages are awarded . . . [does not preclude] exemplary damages . . . ."); Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 161 (Wis. 1997) ("[N]ominal damages may support a punitive damage award . . . ."); RESTATEMENT (SECOND) OF TORTS § 908 cmts. b-c (AM. L. INST. 1979).

281. *State Farm*, 538 U.S. at 424; *BMW*, 517 U.S. at 575, 582; *see also* TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 460 (1993) (explaining that in assessing punitive damages, courts must consider "the potential harm that might result from the defendant's conduct").

282. RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (AM. L. INST. 1979).

4. Disgorgement Damages

The term disgorgement is commonly used to describe any type of monetary remedy that, in the wake of a legal wrong, seeks to transfer the gains reaped by the wrongdoer to the wronged person.[283] While its doctrinal foundations are considered complex and controversial,[284] disgorgement has been justified on both non-instrumental grounds, such as the reversal of wrongful enrichment,[285] and instrumental ones, like the need to deter wrongdoing and discourage unilateral transfers of wealth.[286]

Originating in the law of equity,[287] the idea of disgorgement has gradually infiltrated the common law of torts, under the guise of the now outdated "waiver of tort" doctrine. That doctrine allowed a victim of a tort (typically of a proprietary nature) to claim the profit reaped by the tortfeasor instead of seeking tort damages.[288] While originally limited to proprietary torts, the disgorgement principle has been extended to other torts (for example, fraud, misrepresentation, and tortious interference),[289] and has recently obtained the status of a general private law doctrine, potentially applicable to any type of civil wrong that was committed consciously.[290]

Disgorgement may also be used in cases of negligence without harm.[291] If the defendant's breach of the duty of care allowed them to make a measurable gain that could not have been reaped otherwise, that gain could be transferred to the

283. *See* Liu v. SEC, 140 S. Ct. 1936, 1942 (2020) (stating disgorgement "deprive[s] wrongdoers of their net profits from unlawful activity").

284. *See, e.g.*, Albert Ruda-González, *Comparative Perspectives on Disgorgement of Profits in Tort and Contract*, *in* EU PRIVATE LAW AND THE CISG: THE EFFECTS FOR NATIONAL LAW ch. 7 (Zvonimir Slakoper & Ivan Tot eds., 2022).

285. *See Liu*, 140 S. Ct. at 1943 ("[I]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong." (alterations in original) (quoting Root v. Ry. Co., 105 U.S. 189, 207 (1882)); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (AM. L. INST. 2011) ("A person is not permitted to profit by his own wrong.").

286. *See* Taylor v. Meirick, 712 F.2d 1112, 1120 (7th Cir. 1983) ("[P]reventing infringers from obtaining any net profit . . . makes any would-be infringer negotiate directly with the owner . . . rather than bypass the market by stealing . . . .").

287. *See Liu*, 140 S. Ct. at 1942 ("Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity . . . .").

288. *See* Arthur L. Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 YALE L.J. 221, 231 (1910); William A. Keener, *Waiver of Tort*, 6 HARV. L. REV. 223, 224 (1893).

289. *See* Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 507–08, & *passim* (1980).

290. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44(1)–(2) (AM. L. INST. 2011) ("A person who obtains a benefit by conscious interference with a claimant's legally protected interest[] . . . is liable in restitution as necessary to prevent unjust enrichment . . . . [Interference] includes conduct that is tortious, or that violates another legal duty . . . ."); *see also* James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 67–70 (2007) (distinguishing restitution for wrongs from restitution for torts).

291. *See* John D. McCamus, *Waiver of Tort: Is There a Limiting Principle*, 55 CAN. BUS. L.J. 333, 352 (2014) ("[N]o category of tortious misconduct ought to be automatically excluded from the provision of disgorgement relief.").

aggrieved right-holder regardless of whether they suffered actual harm.[292] Disgorgement damages will normally be assessed on the defendant's saved expenses on untaken precautions but can theoretically exceed that measure when the wrongdoing generates additional gains. Whether and when this remedy could secure efficient deterrence is debatable.[293] Awarding disgorgement damages to victims of negligence (with or without harm) may involve administrative and distributive concerns, due to the potential multiplicity of claims against a single defendant.[294] From an interpersonal fairness perspective, though, disgorgement of measurable gains may be warranted, at least where the defendant knowingly failed to take precautions in order to save money.[295]

5. Risk-Based Damages

So far, we have discussed the possible use of existing remedies in cases of negligence without harm. In addition, new remedies may develop in view of the unique features of the case in hand. One such remedy, which may be termed "risk-based damages," is a monetary award that roughly corresponds to the extent of the risk created by the defendant (the expected harm). This assessment method was famously proposed by Schroeder, not as a measure of individual damages awards but as part of a radical "liability for risk" scheme, whereby risk-based amounts are transferred to a fund that compensates victims of materialized risk.[296] The purpose of risk-based damages is neither compensatory (in the absence of harm) nor retributive (in the absence of any relation between the gravity of the wrong and the extent of damages). Their main purpose would be efficient deterrence, as explained in Part IV: whenever expected harm is greater than the cost of eliminating the risk, damages in the amount of expected harm would induce risk-creators to take the efficient precautions.

Such a remedy should nonetheless be cautiously considered for reasons specified above. To summarize, liability for harm caused may provide sufficient incentives for efficient conduct, making pre-materialization risk-based damages redundant. Assessing damages in an action for negligence without harm is also more complex and costly than an action for conventional negligence because of the lack of clear evidence about the extent of the harm. Moreover, in cases of

292. *See* Mitchell McInnes, *Interceptive Subtraction, Unjust Enrichment and Wrongs—A Reply to Professor Birks*, 62 CAMBRIDGE L.J. 697, 705–06 (2003) (arguing that the plaintiff's "windfall" may be justified by the fact that the plaintiff suffered the profit-generating wrong, and the possibility of such a windfall motivates him to sue).

293. *See* Robert Cooter & Ariel Porat, *Disgorgement Damages for Accidents*, 44 J. LEGAL STUD. 249, 254 (2015) (claiming that disgorgement of defendant's saved costs is superior to compensation when information about the costs of precaution is easier to obtain than information about losses); Edward M Iacobucci & Michael J Trebilcock, *An Economic Analysis of Waiver of Tort in Negligence Actions*, 66 U. TORONTO L.J. 173, 173 (2016) (arguing that disgorgement is generally inefficient in products liability and negligence cases).

294. These concerns should be addressed along the same lines proposed in Section IV.B, *supra*.

295. *See* CANE, *supra* note 241, at 132 ("[D]isgorgement damages are not, it seems, available in a negligence action . . . . In theory, however, is there any reason why, if this difficulty [proof and quantification of profit] could be overcome, [they] should not be available in personal injury cases?").

296. Schroeder, *supra* note 47, at 440, 462–69, 473–77.

mass exposure, awarding risk-based damages to every person exposed to risk might overburden the courts with numerous and diverse claims. Administrative complexity and costs may underlie a judicial preference for other remedies—most notably injunctions and awards of punitive damages to select plaintiffs.

CONCLUSION

This Article lays the foundations for a dramatic transformation in tort doctrine. Its aim has been twofold: to provide a critical appraisal of the harm requirement in negligence law and to establish a prima facie case for the negligence-without-harm doctrine. Part I discussed the origins and implications of the harm requirement in contemporary law. Part II exposed a hitherto unnoticed structural incoherence in the tort of negligence and concluded that the cause of this incoherence, the harm requirement, should be abolished. Part III defended this position in terms of interpersonal fairness, and Part IV did the same from an efficiency perspective. Part V provided a preliminary scheme of remedies and sanctions to back up the tort of negligence without harm.

Nonetheless, in establishing a prima facie case for the doctrinal reform, the Article intended to trigger, not to conclude, a much called for debate. Some theoretical questions are left for future analysis and research. First, this Article did not discuss all conceivable objections to or doubts about the normative underpinnings of the proposed reform. *Inter alia*, it did not examine whether and to what extent public law should have precedence over private law with respect to risk regulation. Second, this Article did not consider all adjustments and qualifications that may be mandated by the theoretical framework or its weaknesses. For example, it did not explore whether any of the theoretical arguments may require a more limited application of the new doctrine to certain types of risk (such as risks to the person), levels of risk, or risks created with a high degree of culpability (such as recklessness). Third, this Article put forward three distinct lines of argument, but did not offer a mechanism for resolving potential clashes among them. Each of the three represents a different mode of thinking about legal problems and involves different concepts, assumptions, concerns, goals, and implications. When concrete questions of implementation arise, clashes are inevitable. For instance, while a particular remedial response to the creation of risk may be fair, its administrative cost might be prohibitive.

In addition, the proposed reform will have many practical implications that a single article cannot reasonably cover. For instance, under the law of limitations, a cause of action may be barred for a certain period after it accrued.[297] A cause of action for traditional harm-based negligence accrues only when harm is caused.[298] Presumably, the limitation period for negligence without harm will

297. RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (AM. L. INST. 1979).

298. *Id.*; *see also* Khan v. BDO Seidman, LLP, 948 N.E.2d 132, 165 (Ill. App. Ct. 2011) (explaining that negligence without harm does not constitute a cause of action for limitation purposes); Queensway Fin. Holdings Ltd. v. Cotton & Allen, P.S.C., 237 S.W.3d 141, 148 (Ky. 2007) ("[M]ere knowledge of some elements of a tort claim, such as negligence without harm, is insufficient to begin running the

start running immediately upon the commission of the wrongful conduct.[299] This may raise practical legal questions when risks materialize long after their creation.[300] Similarly, in bankruptcy law, a creditor is any entity whose claim against the debtor "arose at the time of or before the order for relief concerning the debtor."[301] Traditionally, the creation of unreasonable risk could not underlie a claim in bankruptcy unless it caused harm before the order,[302] but recognition of negligence without harm may change that. Finally, retracting the cause of action in negligence from the moment of harm to the time of the negligent conduct might affect the application of the avoidable consequences doctrine. Assuming that the plaintiff's awareness of their cause of action is what triggers the "duty to mitigate,"[303] that duty may now become operative before any harm is suffered. This will enable the plaintiff to seek reimbursement for the costs of any reasonable pre-injury preventive measures but deprive them of any damages for harm that taking such measures could have avoided.[304]

Regardless of its imperfections, we believe that the prima facie case for negligence without harm is now sufficiently compelling to warrant serious attention. Reforming negligence law to make room for redress for exposure to foreseeable unreasonable risks no doubt runs counter to an entrenched axiom. This, however, should never be considered an adequate excuse for blindly following established doctrine.[305] The proposed reform can strengthen the internal coherence, moral force, and economic efficiency of the common law of torts.

limitations period where the cause of action does not yet exist."); Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 184 (Or. 2008) ("[A] plaintiff's cause of action does not accrue, and the statute of limitations . . . does not begin to run, until the plaintiff has suffered an 'actual loss.'" (citation omitted)); Nolan, *supra* note 87, at 561 (stating that the limitations period begins to run from the moment of harm).

299. *See* ZUCKERMAN, *supra* note 95, at 1322–23 ("[I]n torts that are actionable per se . . . the limitation period starts to run when the wrongful act was committed, not when the harm occurred.").

300. In some risk-exposure cases, courts explained that the limitations period starts upon exposure. *See* Schmidt v. Merchs. Despatch Transp. Co., 200 N.E. 824, 827 (N.Y. 1936); Schwartz v. Heyden Newport Chem. Corp., 188 N.E.2d 142, 1144 (N.Y. 1963). However, if a risk was created and harm was not caused, courts can toll the limitation period until discovery of harm. *See* Finkelstein, *supra* note 1, at 984.

301. 11 U.S.C. § 101(10)(A).

302. *See, e.g.*, Fogel v. Zell, 221 F.3d 955, 960 (7th Cir. 2000).

303. *See* Adar, *supra* note 55, at 799–801 (discussing the temporal borderline between the avoidable consequences doctrine and the comparative fault defense).

304. *Id.* at 788–810 (discussing the differences between mitigation rules and comparative negligence rules).

305. *See* Robert E. Keeton, *Is There a Place for Negligence in Modern Tort Law?*, 53 VA. L. REV. 886, 887 (1967) (noting that prevalent attitudes, rather than truly reflecting a deep-seated ethical commitment to principles, might merely reflect the principles' time-honored presence in existing law).