Coase-Sandor Working Paper Series in Law and Economics

Working Papers

2023

Distributing Deterrence Fairly: A New Rationale for Decoupling Tort Liability

H. Javier Kordi

Distributing Deterrence Fairly: A New Rationale for Decoupling Tort Liability

H. Javier Kordi[*]

Draft: June 12, 2023

Abstract

Tort law faces a dilemma: how to adhere to a principle of make-whole compensation without entrenching social inequities. High-earning people receive greater compensation awards, resulting in an unequal distribution of deterrence. The deterrence disparity arises because injurers would rationally direct risky activity towards poorer victims to reduce liability costs; it persists even if race and gender classifications are barred from compensation. This Article offers a novel solution to the dilemma. It develops a decoupled liability regime under which injurers pay damages and are subject to standards of care that are invariant across individual victims, thus equalizing the distribution of deterrence. At the same time, victims receive compensatory awards that do vary, reflecting the "make whole" principle. The article demonstrates how to design this regime in a balanced-budget, incentive-compatible, manner.

Table of Contents

Introduction

At the turn of the twentieth century, a judge presiding over tort litigation caused by a steamship accident decided to adjust the compensation awarded to six black plaintiffs, including an infant, citing the statistically lower life expectancy and earning capacity of "colored persons."[1] One hundred years later, a special master rejected race and gender based statistics when deciding how to compensate a girl injured by a vaccine.[2] Yet, he still sought to predict the girl's "likely educational attainment" based on her parent's educations and occupations, in order to calculate her "lost earnings" and work-life expectancy.[3] Both cases share a legal principle: estimating compensation based on averages within social demographic groups. To achieve what they regard as "accurate" compensation, both would set a higher magnitude of liability for injuring members of wealthier groups.

Many articles address how tort compensation reflects and reproduces pre-existing inequities.[4] But tort law does far more than compensate victims. Tort law primarily deters: it regulates the risks we face when we navigate public roads, when we consume products, undergo medical care, and live in our homes.[5] It establishes the "distribution of risks of harm and obligations of repair within society."[6] Over the past two decades, there has been growing concern that compensatory disparities result in tortfeasors facing different incentives to take precautions against injuring "low cost" victims compared to "high cost" victims. In particular, sophisticated repeat-players would divert their dangerous activities to locations where poor people live and where accidents, if and when they occur, will be cheaper.[7]

---

[1] *In re Clyde S.S. Co.*, 134 F 95 (S.D.N.Y. 1904) (findings of liability); *The Saginaw*, 139 F 906, 913–16 (S.D.N.Y. 1905) ("This table shows the expectation of life at ten selected ages for both races, in representative southern cities, bringing out in a forcible way the difference in the vitality of the two races.").

[2] *B.A. v. Sec'y of Health & Hum. Servs.*, No. 11-51V, 2021 WL 4737437, at *14 (Fed. Cl. Sept. 7, 2021)

[3] *Id.* ("I find it more likely than not that but for the vaccine injury, B.A. would have graduated from high school and obtained a bachelor's degree. These findings inform the evaluation of likely work-life expectancy but for the vaccine injury.")

[4] *See* notes 33 through 44 and accompanying text.

[5] *See* Mark Geistfeld, *The Tort Entitlement to Physical Security as the Distributive Basis for Environmental, Health, and Safety Regulations*, 15 Theoretical Inq. L. 387, 388 (2014). *Cf.* W. Kip Viscusi, *Pricing Lives: Guideposts for a Safer Society* 216 (Princeton Univ. Press 2018) ("it is important to recall that the entire burden of promoting safety does not rest with the courts").

[6] Peter Cane, *Distributive Justice and Tort Law*, 2001 New Zealand L. Rev 401 (2001).

[7] *See* Part I.B. *See also, e.g.,* Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L J 661 (2017); Kimberly A. Yuracko and Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CAL. L. REV. 325, 327 (2018); Ariel Porat, *Misalignments*

Eliminating racial and gender classifications from compensatory calculations—though clearly warranted[8]—will not address this deterrence disparity, which is rooted in tort law's "cardinal" make-whole principle that dictates individualized valuations of injury. Paradoxically, improving compensatory "accuracy" might worsen the deterrence disparity, as more personalized compensation will better identify and predict a victim's socioeconomic position. Does a normative commitment to racial, gender, or economic equity mean make-whole should be renounced (as some proposals suggest), or do we accept make-whole compensation will inevitably inflict an unintended distributive effect through deterrence?

The article develops a mechanism of "decoupled liability" to address the deterrence disparity without renouncing make-whole compensation. In decoupled liability, tortfeasors' standards of due care and compensatory obligations are based on an objective valuation of harm that does not vary across victims: from a tortfeasor's perspective, liability is "plaintiff-agnostic." But plaintiffs can continue to get individualized awards measured by their specific losses because decoupling allows a plaintiff to get something other than what a defendant pays. The result is to render tortfeasors indifferent to variance in expected losses across victims from different socioeconomic classes, while preserving the maxim that each victim is compensated for their loss.

Decoupled liability departs from prior interventions. Some proposals seek to dually address the compensatory and deterrence disparities through uniform compensation, effectively diluting the make-whole principle.[9] This approach incurs over- and under-compensation as the "price" of equitable deterrence.[10] Decoupled liability, as presented here, avoids this cost by preserving the make-whole principle in relation to plaintiffs. Another proposal suggests using the uniform compensation measure to only determine the standard of care, and reverts to "standard approaches in setting compensatory damages."[11] The problem is that sophisticated tortfeasors will see through this uniformity. As long as there are some failures to take due care, tortfeasors expect some liability and will be affected by differences in the amounts

---

in Tort Law, 121 Yale L. J. 82, 86 (2011); Martha Chamallas, *Civil Rights in Ordinary Tort Cases*, 38 Loy. L.A. L. Rev 1434, 1441 (2005).

[8] Fortunately, progress is being made on these fronts. *See* notes 37 through 39 for a survey of scholarship, judicial decisions, and legislative action aimed at making compensation more equitable.

[9] Compensation would be based on the value of a statistical life ("VSL"), which estimates what people would accept to incur increases in risk. Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL Into Tort Damages*, 96 Notre Dame L. Rev. 1479, 1492 (2021).

[10] "Placing the thumb on the deterrence side of the scale," in Sharkey's view, is justified to ensure "defendants respect the same uniform duty of care." *Id*. at 1492–93.

[11] W. Kip Viscusi, *Pricing Lives: Guideposts for a Safer Society* 216 (Princeton 2018). Viscusi suggests using uniform VSL to set *punitive* damages in cases where there is "a substantial shortfall in safety." *Id*.

of damages awarded in cases of injury.[12] Using the same objective valuation to set a tortfeasors level of care *and* liability payment addresses this gap—and decoupled liability permits such an alignment on the tortfeasor's side.

The article proceeds in the following order. Parts I outlines the deterrence disparity, or differential risk exposure, that results from the make-whole principle of compensation. I briefly discuss the ongoing debates on inequitable compensation, and explain why reforms in that space, though warranted, will not be enough to address deterrence disparities. Part II outlines a conception of *ex ante* equality—the normative building block needed to replace the tort system's present deterrence disparity that results from individual valuations of injury.

Part III is the heart of the article. It presents the architecture and operation of decoupled liability as a system to achieve *ex ante* equality in risk exposure. This system will deploy an objective valuation of harm to unilaterally set the defendant's level of care and calculate the damages they owe in the event of injury. At the same time, plaintiffs receive compensatory awards under the individualized make-whole principal. There will thus be divergence between what defendants pay and what plaintiffs get. The key to paying make whole compensation is balancing pay-ins and pay-outs. This, I show, can be achieved through an intermediary "Fund" with either a balanced budget or an external subsidy. Part III also discusses how decoupling can correct for *ex post* regressiveness in settlements. It explores at length the problems and limitations of decoupling.

Part IV evaluates whether decoupled liability departs from corrective justice in permitting variance between what defendants pay and what plaintiff get and by using an intermediary Fund. I argue that variance and intermediation largely adhere to the principles of corrective justice.

The value of decoupled liability has not gone unnoticed. Past scholars have suggested decoupling as an alternative to trebled antitrust damages,[13] as a mechanism to achieve a level of deterrence at low-cost,[14] as a device to streamline class actions,[15] as a way to facilitate "just compensation" for takings,[16] and as a

---

[12] But see *id*. ("if their safety decisions reflect a sufficient disregard for safety, they will be subject to punitive damages"); Mark Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 Yale L. J. 142, 145–46 (2011) (same).

[13] A. Mitchell Polinsky, *Detrebling Versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 GEO. L. J. 1231, 1231 (1986).

[14] Mitchell Polinsky and Yeon-Koo Chee, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 THE RAND J. OF ECON. 562 (1991).

[15] David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002).

[16] Michael Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 Harvard L. Rev., 997, 1999 (1999).

method to optimally deter "non-compensable harms."[17] These prior applications all used decoupled liability to advance efficiency objectives. This Article is the first to explore how decoupled liability can advance distributive fairness goals in private law.

I. The Problem: Exposing the Poor to Greater Risks

Tort law compensates accident victims and regulates risks. But these dual functions benefit some more than others: the rich get higher compensatory awards as compared to the poor, and tort law deters accidents more stringently in relation to richer prospective victims. This section draws out both disparities and how the former feeds into the latter.

A. The Make-Whole Principle and the Valuation of Injury

Today, "the cardinal principle of damages" in Anglo-American law is make-whole compensation, requiring tortfeasors to repair injuries "as nearly as that may be done by an award of money."[18] Early articulations of the make-whole principle appeared in 19th century cases in American state courts.[19] Over the two centuries that followed, compensation keyed to the "full and perfect equivalent"[20] of the loss became the default rule in American law.[21] While the aspirations of make-whole are not always achievable,[22] the principle's inevitability is rarely questioned.[23] But despite its implied promise, the make-whole principle gives no

---

[17] Steven Shavell, *Economic Analysis of Accident Law* 232–233 (Harvard 1987).

[18] Fowler V. Harper, et al., The Law of Torts § 25.1, at 490, 493 (2d ed. 1986). Prior centuries saw talonic revenge, then a system of fixed "compositions," and finally, "a sum of money which the tribunal, having regarded the facts of the particular case, will assess as a proper compensation for the wrong" the victim suffered." Sir Frederick Pollock and Frederic Maitland, *The History of English Law Vol. I* at 33, 48, 522–523 (Cambridge 1895). *See also* Mark Geistfeld, *Tort Law: The Essentials* 3 (Aspen Pub. 2008).

[19] *Coffin. Rockwood v. Allen,* 5 Mass. (1 Tyng) 255 (1811) (remedies "shall be commensurate to the injury sustained")

[20] *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893).

[21] *E.g.*, *Creation Supply, Inc. v. Hahn,* 2022 WL 2291225, at *13 (N.D. Ill. June 24, 2022) ("Under the make-whole principle of compensatory damages, '[t]he law aims to put an injured plaintiff in the same financial position that it would have been in if the defendant had not breached its duty.'"); *McCombs v. Ohio Dep't of Dev. Disabilities*, 187 N.E.3d 610, 623 (Ohio App. Ct. 2022) ("Compensatory damages are intended to make whole the plaintiff for the wrong done to him or her by the defendant.").

[22] *See, e.g.,* Hershovitz, *Tort as a Substitute for Revenge* 88 ("compensatory damages are not so nearly tied to the extent of the plaintiff's injury as the name might suggest … they often run beyond or fall short …, making it hard, some say, to take seriously tort's talk about making plaintiffs whole.").

[23] *See* Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DePaul L. Rev. 432, 452 (2011) (questioning whether uniform awards are viable in light of the "impregnable fortress of make-whole, case-by-case decision making."). *But see* John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full*

numbers, no valuations. What constitutes "wholeness" falls to the judgement of the institution tasked with deciding what it means to return the plaintiff to a pre-injury state.

Often, that role falls to the courts. Compensatory awards in tort litigation are largely "targeted to address what has been lost as a result of the injury, usually including the present value of the financial harm."[24] One of the largest categories of compensable loss is the present value of a victim's expected lifetime income— a value that often correspondents to a victim's preexisting socioeconomic status, education, and workforce opportunities.[25] The compensatory award may also encompass "hospital and other medical expenses immediately resulting from the injury, or loss of time or money from the injury, loss due to the permanency of the injuries, disabilities or disfigurement, and physical and mental pain and suffering."[26] These primary figures for economic and noneconomic loss are then multiplied to reflect life expectancy[27] and work-life expectancy.[28]

The process is fact-intensive.[29] To arrive at the valuation of harm, both parties in tort suits generally employ forensic economists to offer estimates of the

---

Compensation, 55 DePaul L. Rev. 435, 436 (2006) (make whole "seems to provide a plausible description of the proper measure of tort damages, yet in the end fails to do so"); *Migdal Insurance v. Rim Abu Hanna*, CA 10064/02, at *49 (Israel 2005), archived at http://perma.cc/5BJL-5XFL. (holding that compensation should reflect a "just, fair and moral" outcome—even if that means departing from pre-injury pecuniary expectations to implement a future-looking conception of human wholeness)

[24] W. Kip Viscusi, *Efficient Ethical Principles for Making Fatal Choices,* 96 Notre Dame L. Rev. 1461, 1462 (2021).

[25] Ariel Porat and Avraham Tabbach*, Willingness to Pay, Death, Wealth, and Damages,* 13 Am. L. & Econ. Rev. 45, 77 (2011) ("[L]ost income is a central factor in awarding damages for bodily injury and for deprivation of life."); W. Kip Viscusi, *Efficient Ethical Principles for Making Fatal Choices,* 96 Notre Dame L. Rev. 1461, 1462 (2021) (damages for lost income "steadily increas[e] with income levels").

[26] *See Fantozzi v. Sandusky Cement Prods. Co*., 597 N.E.2d 474, 482 (Ohio 1992); Robert J. Thornton and Frank Slesnick, *New Estimates of Life Expectancies for Persons with Medical Risks*, 10 J. Forensic Econ 285, 285 (1997).

[27] "Life expectancy" predicts the remaining number of years a person is expected to live at any given age. *See* Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 670–72 (2017). For sample life expectancy tables, *see* Center for Disease Control, *United States Life Tables*, *2018,* 70.1 National Vital Statistics Reports at *3 (2021), online at cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-1-508.pdf.

[28] "Work-life expectancy" predicts the remaining number of years that a person is expected to work and generate wages. These statistics are collected in United States Department of Labor, Bureau of Labor Statistics, *Worklife Estimates: Effects of Race and Education*, Bulletin 2254 (1986), archived at http://perma.cc/HEP9-YRYV. Although these tables are greatly outdated, courts have continued to permit their use. *See, e.g*., *Rhoades v. Walsh*, 2009 WL 2600094 at *11 n 24 (D. Me Aug 19, 2009).

[29] Eric Posner & Cass R. Sunstein, Dollars and Death, 72 U.C.L.R. 537, 593 (2005) (the "valuation of human lives in the tort context is information-rich").

victim's pre-injury expectation interests and post-injury losses.[30] If the victim had an established job, for example, their pre-injury wage will inform compensation for expected future wages.[31] If wages are uncertain (*e.g.*, a child), experts may utilize predictive tools like the US Wage Tables to provide a best-guess estimate.[32]

The use of predictive tools to calculate damages has come under increased scrutiny.[33] Commentators point out that predicting lost wages using the US Wage Tables—which contain historical data segregated by occupation and sex—may justify giving identically injured male and female victims different awards. Similarly, the Worklife Expectancy Tables, which capture historical workforce participation rates of different racial groups, may justify applying a different multiplier onto the annualized wages of identically injured white and black victims.[34]

---

[30] See Thomas R. Ireland, *The Role of a Forensic Economist in a Damage Assessment for Personal Injuries*, in *Measuring Loss in Catastrophic Injury Cases*, 15, 16 (Kevin S. Marshall and Thomas R. Ireland eds., 2006); Leo M. O'Connor and Robert E. Miller, *The Economist-Statistician: A Source of Expert Guidance in Determining Damages*, 48 N. D. L. Rev. 354, 356 (1972) (explaining the prevailing approach where damages are calculated according to statistical data brought forth by experts, who rely on various plaintiff characteristics, including age, gender, race, socio-economic status and education); Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 670 (2017).

[31] Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 675–76 (2017). Courts do not merely grant injured parties the entire lifetime value of earnings. Rather, the *present value* of lost future wages is derived. Michael I. Krauss and Robert A. Levy, *Calculating Tort Damages for Lost Future Earnings: The Puzzles of Tax, Inflation and Risk*, 31 Gonz. L. Rev. 325, 328-29 (1995) (describing adjustments for assumed growth rates, foregone personal consumption, and discounting at a risk-free rate of interest).

[32] *See* Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 675–76 (2017); U.S. Dept. of Labor, Bureau of Labor Statistics, *Median Weekly Earnings of Full-time Wage and Salary Workers by Detailed Occupation and Sex* (2017) archived at http://perma.cc/U24R-4S76. See also Yuracko and Avraham, 106 CAL. L. REV. at 331 (describing government-provided tables); Loren D. Goodman, Note, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 VAND. L. REV. 1353, 1363 (2017) (describing privately produced tables)

[33] *See* Elizabeth Adjin-Tetty, *Contemporary Approaches to Compensating Female Tort Victims for Incapacity to Work* 38 Alta. L. Rev. 504 (2000); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument* 63 Ford. L. Rev. 73. (1994); Sherri R. Lamb, *Toward Gender Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective* 72 CHICAGO-KENT L. REV. 299, 311 (1996); Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 671–675 (2017); W. Kip Viscusi, *Pricing Lives: Guideposts for a Safer Society* 217 (Princeton Univ. Press 2018) ("those with more substantial financial resources receive preferential treatment based on the structure of the damages formulas").

[34] See Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 675 (2017) ("According to the most recent BLS statistics, a white boy and a black girl with the same projected educational levels who were injured identically

Life Expectancy Tables raise similar problems, as they reflect demographic variations in life expectancies across races, genders, occupations, and even residents of different zip codes.[35] Adjusting awards to align with historical life expectancy "not only perpetuates race and gender discrimination by relying on historical data, but also pushes discrimination into the future."[36] As the statistical accuracy and actuarial fairness of these compensatory practices received more scrutiny, reforms are gaining traction in the academy,[37] courts,[38] and legislatures.[39]

Reducing victims to suspect demographic traits and then assigning valuations and predictions based on those traits is problematic. The process deprives victims of their individuality and treads on constititional rights. But eliminating race, gender, disability, education, and the like, from compensatory calculations may have a limited impact on the overall social inequities perpetuated

at age sixteen would receive monumentally different damage awards. Assuming each earned an averaged annual income of $25,000, the white male would receive $302,500 more in future loss of earning capacity than the black woman.")

[35] For example, in Chicago, life expectancies vary by *30* years between the Metro Redline's northern-most and southern-most stops, located in racially segregated zip codes 23 miles apart. *A Ride Along Chicago's Red Line*, (Economist, Oct. 10, 2019) archived at https://perma.cc/VA95-TNFV.

[36] Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 717 (2017).

[37] *See, e.g.*, Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 725 (suggesting that courts "adopt one blended work life table, one blended mortality table, and one blended wage table for use in damage calculations in tort cases."); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1435 (2005) (suggesting using "blended, gender and race neutral tables" to achieve greater parity in awards).

[38] Federal court have rejected suspect classifications in damages calculations. *E.g., McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008) (equal protection clause bars race-based life expectancy tables to decrease black plaintiff's damage award); *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F Supp 3d 126 (E.D.N.Y. 2015) (barring use of race-based predictions of educational and career outcomes to calculate a Hispanic infant's earning capacity); *U.S. v. Bedonie*, 317 F Supp 2d 1285 (D Utah 2004) (noting "possible constitutional and other problems in relying on race and sex assumptions" to calculate lost earnings).

[39] In 2016, a federal Fair Calculations in Civil Damages Act sought to bar use of race, ethnicity, gender, religion, and sexual orientation in damages. S 3489, HR 6417, 114th Cong. The bill unfortunately did not make it past the committee stage. Kim Soffen, *Congress Could Soon Try to End Racial and Gender Discrimination in Civil Suits*, (Washington Post Dec 1, 2016), archived at http://perma.cc/L4BW-5FLX.

by the tort system. At bottom, make-whole is about restoring economic positions,[40] and "poverty, standing alone, is not a suspect classification."[41]

Paradoxically, moving away from "inaccurate" proxies (*e.g.*, race) in favor of more "accurate" ones might worsen underlying disparities. For example, the make-whole calculation may include factors such as the victim's family's educational status,[42] the victim's lived environment,[43] and a victim's "Relative Mortality Ratio," which reflects the medical odds of a person dying earlier relative to the rest of the population due to health defects or prior injuries.[44] These factors integrate socioeconomic status into the make-whole formula, and despite correlating with race and gender, are unlikely to trigger heightened constitutional scrutiny.

In the near-future, tort law may get better at identifying a plaintiff's current and expected position in a given socioeconomic distribution. Insurance companies already use geospatial data like zip codes to gain predictive insights into the health, safety, education, and socioeconomic status of their insureds to calculate premiums for various products.[45] This is unsurprising, given that zip codes might predict the

---

[40] *See* Ariel Porat, *Misalignments in Tort Law*, 121 Yale L. J. 82, 86 (2011), citing Dan B. Dobbs, *The Law of Torts* 1048 (2000) ("under tort law, high income victims are awarded on average far more damages than low-income victims, implying that the law ascribes a greater value to the lives and limbs of high-income victims than to those of low-income victims."); Lloyd Cohen, *Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action*, 34 Emory L.J. 295, 299-300 (1985) ("states give great weight to the earning capacity of the decedent in calculating damages.").

[41] *Harris v. McRae*, 448 U.S. 297, 322 (1980).

[42] *See G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F Supp 3d 126, 132 (E.D.N.Y. 2015) (plaintiff's expert emphasized the high level of educational achievement among fourteen identifiable members of the boy's family, including "grandparents, aunts and uncles and parents."); *Decedent's income, Ga. Wrongful Death Actions* § 5:5 (4th ed.) ("Facts which are reliable indicators of what the decedent would have earned in his lifetime, had he not met a premature demise, may be age, sex, education of the person, education of the parents if a minor, and profession or career of the decedent or that of the parents, if a minor.").

[43] Stein on Personal Injury Damages 7 *§ 1:13. Elements of proof; life expectancy* (3d ed. 2019).

[44] Loren D. Goodman, Note, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 Vand. L. Rev. 1353, 1362 and n. 40 (2017). Applying this ratio may reinforce existing racial inequities, since minority communities may be disproportionately afflicted by certain health risks and harms due to environmental hazards, substandard medical care, and unsafe living conditions. *See* Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 687–92 (2017).

[45] *See* Consumer Watchdog, *Data Shows Insurance Companies Use Occupation and Education to Segregate and Overcharge Communities of Color and Lower Wage, Less Educated, Blue-Collar California Drivers* (Oct. 01, 2019) archived at https://perma.cc/ZC4S-7LHY; Consumer Federation of America, *Auto Insurers Often*

risk of injury or premature death more accurately than race or gender.[46] It has also become increasingly apparent that zip codes can measure "spatial inequality" much better than other factors for predicting income distribution.[47] Further, the prominence of Big Data and artificial intelligence could soon allow for even more "personalized compensation" that treats victims "as unique specimens, each characterized by dozens (if not more) of characteristics that are correlated with lifetime income."[48]

The methods outlined above are not the exclusive ways to calculate compensation.[49] One of the starkest departures from tort law's compensatory practices is found in the cost-benefit methodologies used by federal agencies. Rather than estimating how to make a person whole after death or disability has occurred, this alternative methodology seeks to estimate how much a person values accident *prevention* by figuring out what they would accept for added increments of risk. For example, if the average worker was willing to accept a wage premium of $300 to incur a 1/10,000 chance of fatality, then we have a "revealed preference" that the "value of a statistical life" can be said to be $3,000,000 (or 300 x 1/10,000).[50] The VSL can also vary based on age, income, and risk-taking

---

Charge Identical Neighbors Considerably Higher Premiums Because of ZIP Code Differences (Oct. 15, 2018) archived at https://perma.cc/3SGL-AYWF.

[46] Amy Roeder, *Zip Code Better Predictor of Health than Genetic Code*, Harvard School of Public Health News (Aug 4, 2014), archived at http://perma.cc/S8L4-6TC9.

[47] *See* Raj Chetty, et. al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129(4) The Quarterly J. of Econ. 1553–1623 (2014), online at https://www.nber.org/papers/w19843.pdf.

[48] Omri Ben-Shahar and Ariel Porat, *Personalized Law* 98 (Oxford 2021).

[49] For example, state-run worker's compensation systems arose in the 1920's to provide expedient compensation for on-the-job accidents that often left employees and their families destitute. Kenneth S. Abraham and G. Edward White, *Rethinking The Development of Modern Tort Liability*, 101 Boston U. L. Rev. 1289, 1297–1300 (2021). Workers' compensation is an exclusive remedy, preempting and replacing tort liability with a statutorily set-amount of tax free compensation—generally 2/3 of gross earnings during the disability period. W. Kip Viscusi, *Pricing Lives: Guideposts for a Safer Society* 194–195 (Princeton 2018). The Victims Compensation Fund created for September 11th also sought the expeditious resolution of claims, and the special master there ignored race and rejected gender-based statistics "that would have lowered awards for families of female victims." Jennifer B. Wriggins and Martha Chamallas, *The Measure of Injury: Race, Gender, and Tort Law* 156 (NYU Press 2010). For noneconomic losses, such as pain and suffering, the special master decided to "leave behind the tort system's formula" and "apply a uniform formula treating all families the same when it came to noneconomic loss—an award of $250,000 for a 9/11 death and an additional $100,000 for each surviving spouse and dependent." Kenneth R. Feinberg, *Who Gets What: Fair Compensation after Tragedy and Financial Upheaval* 50 (Public Affairs 2012).

[50] Kip Viscusi, *Pricing Lives: International Guideposts for Safety*, 94 Econ. Record 1, 2 (2018); W. Kip Viscusi, *Pricing Lives: Guideposts for a Safer Society* 6 (Princeton 2018); Eric Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. Chi. L. Rev. 537, 551 (2005).

propensities, and policymakers who utilize the VSL must often contend with the decision of whether to use variant VSLs or uniform VSLs.[51] While the VSL's chief architect and proponent asserts that it would be a mistake to utilize the VSL in *ex post* scenarios,[52] some commentators have proposed using the VSL to calculate tort compensation.[53]

As the foregoing discussion shows, how we compensate people matters. But compensation does not exert its broadest effect in individual cases. Instead, compensation exerts its broadest effect by influencing incentives to take care and allocate risk society-wide. I turn to this issue now.

B. Deterrence And Differential Exposure to Risk

Deterrence is the focal point of economic analysis of law: through deterrence, we maximize welfare by minimizing the costs of accidents to the "optimal" level.[54] But optimal does not mean equitable. As this section shows, rational tortfeasors operating under negligence and strict liability rules are incentivized to expose poor people to greater risks than rich people.[55]

1. Deterrence Disparities at the Optimal Level of Care

a. The economic model.

The economic model of accident law seeks to identify the level of care that a rational tortfeasor would adopt under different liability rules. The model predicts that under a rule of "no liability," tortfeasors adopt no precautions and the incentive

---

[51] Kip Viscusi, *Pricing Lives: International Guideposts for Safety*, 94 Econ. Record 1, 4–6 (2018).

[52] W. Kip Viscusi, *Pricing Lives: Guideposts for a Safer Society* 209 (Princeton 2018) ("utilization of the VSL assumes that the objective of the payment is prevention of the risk, not compensation for the loss").

[53] Catherine Sharkey proposes using the uniform VSL in damages calculations to eliminate compensatory disparities and negate the "perverse incentives for defendants to channel their most risk-laden behavior toward minority communities." Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL Into Tort Damages*, 96 Notre Dame L. Rev. 1479, 1492 (2021). Eric Posner and Cass Sunstein similarly suggest using the VSL to calculate a tort victim's hedonic loss. In their view, damages should not be based on lost income, but on the amount "the victim would be willing to pay to avoid the risk that was imposed on him by the tortfeasor's actions, divided by that risk (R/q)." Eric Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. Chi. L. Rev. 537, 587 (2005).

[54] Guido Calabresi, *The Costs of Accidents* 68-75 (Yale 1970).

[55] Recent commentators have used the term "perverse incentives" to describe this phenomenon. *See* Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661 (2017); Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL Into Tort Damages*, 96 Notre Dame L. Rev. 1479, 1492 (2021).

to take care falls entirely on the victim. In contrast, under both negligence and strict liability rules, tortfeasors adopt the "optimal level" of care, defined as the lowest sum of precautions and accident costs given expected losses.[56] Because accident costs are a function of precautions, expenditures on care will correspond to reductions in the magnitude of the loss. The "optimal" level of care is thus reached when a dollar expenditure on care provides less than a dollar reduction in the magnitude of loss.[57]

To illustrate how the model dictates care levels, assume there are only three possible levels of care and that each level corresponds to a different social cost and residual "probability of harm." The marginal cost of care increases linearly, whereas the probability of harm decreases at a decreasing rate (because tortfeasors would adopt the more effective precautions first). Assume expected harm for Victim 1 is $h = \$100$:

Victim 1: $h = \$100$

Level of care	Cost of care x	Probability of harm $p(x)$	Expected social cost $x + p(x)h$
Low	$6	22%	$28
Medium	$16	10%	$26*
High	$26	2%	$28

* Lowest social cost

A tortfeasor interacting with Victim 1 finds the optimal level of care at the Medium level, which leads to the lowest expected social cost of $26.[58] A tortfeasor will adopt the Medium level of care under a strict liability rule, even if taking care does not absolve them of liability for damages. This is because strict liability makes tortfeasors internalize total social cost—which decrease when optimal precautions are taken. A tortfeasor will also adopt the Medium level of care under a negligence rule if the standard of care coincides with the socially optimum level of care.[59]

---

[56] Stated formally, tortfeasors will try to minimize social costs: $x + p(x)(h)$, where x is the cost of care, h is the harm, and $p(x)$ is the "probability of an accident that causes harm h, where p is declining in x." Louis Kaplow and Steven Shavell, *Economic Analysis of Law*, in A.J Auerbach and M. Feldstein, eds., *Handbook of Public Economics* 1668 (Elsevier 2002) ("under both forms of liability, injurers are led to take optimal care.) (hereafter "*Economic Analysis*"); Steven Shavell, *Economic Analysis of Accident Law* 8 (Harvard 1987) (hereafter "*Accident Law*").

[57] Robert Cooter and Thomas Ulen, *Law and Economics 6th Ed.* 201 (Berkeley Law 2016).

[58] The social cost is given by adding the cost of care at a given level (here, $16) to the probability of harm multiplied by the expected harm, or accident costs: $16 + (.10 x $100) = $26, which corresponds to the Medium level in the model. To be sure, there may be infinite levels of care in between and outside of these three possibilities for Low, Medium, and High. The simplification is for illustrative purposes.

[59] *See* Shavell, *Accident Law* 19 (observing courts' "weighing of the magnitude of risk against the disutility or cost of more careful conduct" suggests that "due care is in

Adopting the optimal level of care minimizes exposure under a negligence rule: with any lesser care the tortfeasor risks being liable for *both* the cost of care and accidents, with any more care the tortfeasor incurs unnecessary costs to avoid liability. Thus, the optimal care will always be taken.

The model set forth above assumes the tortfeasor alone can reduce accident risks; the victims' care has no role in the model.[60] In many situations, a potential victim and tortfeasor might jointly reduce risk, such as a car and pedestrian each looking both ways. For simplicity, the model here presumes unilateral care where "injurers alone can reduce risk by choosing a level of care."[61]

b. Differential losses under the deterrence model.

Assuming tortfeasors will adopt the optimal level of care in all instances under both strict liability and negligence rules, I now consider how the optimal level of care differs when different victims have different expected losses (*i.e.*, are "rich" or "poor" under make-whole principle).

Assume the same level of care, costs, and probabilities of harm as Victim 1's scenario. But now, Victim 2 is poor with low wages, for an expected harm, $h = \$20$, whereas Victim 3 is a rich high-earner, for expected harm, $h = \$500$. The optimal level of care differs:

Victim 2: *h* = \$20

Level of care	Cost of care	Probability of harm	Expected social cost
Low	$6	22%	**$10.4***
Medium	$16	10%	$18
High	$26	2%	$26.4

* Lowest social cost

Victim 3: *h* = \$500

Level of care	Cost of care	Probability of harm	Expected social cost
Low	$6	22%	$116
Medium	$16	10%	$66
High	$26	2%	**$36***

* Lowest social cost

---

fact found by a process that operates *as if* it were designed to identify behavior that minimizes total accident costs"). *See also* Mark Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 Yale L. J. 142 (2011) ("the proportional standard clearly shows that the standard of reasonable care is necessarily related to the remedies for breach").

[60] Shavell, *Accident Law* 6. *See also* Robert Cooter and Thomas Ulen, *Law and Economics 6th Ed.* 201 (Berkeley Law 2016).

[61] Kaplow and Shavell, *Economic Analysis* 1668.

For Victim 2, the optimal level of care is Low, which corresponds to the minimum expected social costs of $10.4. For Victim 3, the optimal level of care is High, which corresponds to the minimum expected social cost of $36. In both cases, the "socially optimal" level of care is observed, but the level of protection and the residual risk probability borne by the victims differs.[62]

The Low level of care leaves Victim 2 bearing a residual probability of harm of 22%, whereas the High level leaves Victim 3 bearing a residual probability of harm of 2%. Under strict liability, both Victims are entitled to compensation for injuries that result from these residual risks. But Victim 2 gets no compensation for being subjected to a higher risk relative to Victim 3. Only when the risk matures into causal harm will the compensatory obligation apply.

The negligence rule creates a more acute inequity. Under the negligence rule, the right to *ex post* compensation is defeasible through the defendant's *ex ante* care: complying with the standard of care (here, optimal care) will "fully satisf[y] the demands of a compensatory rightholder," thereby extinguishing any claim to compensation for injury.[63] As observed with Victims 2 and 3, the level of care that extinguishes the compensatory obligation leaves the poorer victim facing greater residual risks than the rich victim, without any *ex post* compensatory offset.

The different optimal levels of care also imply an allocative element. Imagine two potential routes for a truck to carry goods to port: the eastern route is inhabited by Victim 2 ($h = \$20$), while the western route is inhabited by Victim 3 ($h = \$500$). Under both strict liability and negligence rules, the rational tortfeasor will opt to go east and expose the "cheaper" victim to risk.[64] Victim 3 accordingly bears no risk *at all*.

---

[62] That notion that tortfeasors will observe different levels of care might seem inconsistent with Ariel Porat's assertion that courts apply the "same standard of care" regardless of the victim's loss. Ariel Porat, *Misalignments in Tort Law*, 121 Yale L. J. 82, 86 (2011) ("I could not find a single court decision suggesting that a different standard of care applies to driving in rich and poor neighborhoods (or that a doctor would be required under negligence law to take better care of a high-income patient than a low-income patient"). One explanation for the lack of case law is that the standard of care is fact-specific, so a court need not consider counterfactuals when deciding whether the standard was met: it need only consider what is optimal given the circumstances. In doing so, the "optimal level of care" is merely an instantiation of the same uniform standard care—which dictates taking cost-justified precautions under the circumstances.

[63] Mark Geistfeld, *Compensation as a Tort Norm,* in John Oberdeik, ed., *Philosophical Foundations of the Law of Torts* 66 (Oxford 2014) (describing compliance with the standard of care as *ex ante* compensation that negates "any obligation to pay compensatory damages in a wide range of cases.").

[64] *See* Kimberly A. Yuracko and Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 Cal. L. Rev. 325, 327 (2018) (describing the economic rationale of "disproportionately allocating risks to minority communities in order to minimize

Now expand the model to include multiple victims with similar accident-cost profiles (as is the case in economically segregated cities). Assume the eastern route is inhabited by *six* victims: Victims 2.1, 2.2, 2.3, etc. (h = $20 x 6), while the western route is inhabited by two victims: Victims 3.1 and 3.2 (h = $500 x 2). Here, the aggregate expected social cost of going east with Low care, affecting six people, is $62.4, while the aggregate expected social cost of going west with High care, affecting *only two* people, is $72. Nothing in torts law or the economic model tells the tortfeasor go west, even if doing so would only expose *two* people to residual risks of 2% instead of *six* people to residual risks of 22%. The economic model implies it can be optimal to *expose more people to greater risks than to expose less people to smaller risks.*

One potential objection to this model is that emphasizing residual risk probabilities is misguided—that the proper metric is *expected losses* borne by the victims at the optimal levels of care. Thus, Victim 2's 22% risk probability at h = $20 translates to an expected loss of $4.4, whereas Victim 3's 2% risk probability at h = $500 translates to $10, so Victim 2 appears better off than Victim 3 (V1's $4.4 < V3's $10). This comparative approach fails to account for the fact that $4.4 is worth more in the hands of a poor person than a rich person.[65] A person with $500 facing the prospect of losing $10 suffers less disutility than a person with $20 facing the prospect of losing $4.4. Emphasizing probabilistic risk percentages captures this marginal utility principle.

Another objection would question my emphasis on risk itself: "Risk rarely impairs the ability to pursue a conception of the good over the course of a complete life; it is harm—physical injury and death—that wreaks havoc with people's lives."[66] Many commentators would disagree that risk is without harm. First, "a modest contribution to the aggregate risk may make the difference between no-

potential tort damages in the future."); Martha Chamallas, *Civil Rights in Ordinary Tort Cases*, 38 Loy. L.A. L. Rev 1434, 1441 (2005) ("[B]ecause it is cheaper to injure poor minority children, there is less incentive for defendants to take measures to clean up toxic hazards in the neighborhoods most affected by lead paint."); Michael I Meyerson & William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 PEPP. L. REV. 771, 808 (2010) ("[W]hen damages for injuring members of minority groups are lowered, the legal regimen [has] the perverse result of encouraging torts against them."); Elizabeth Adjin-Tettey*, Replicating and perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies*, 49 MCGILL L.J. 309, 344 (2004) ("The current system creates and reinforces the relative worth of human life and potential. It gives the impression that persons with favorable personal traits and/or socio-economic backgrounds are worth more than others, making it cheaper to injure persons in the latter category.").

[65] *See* Daniel Hemel, *Regulation and Redistribution with Lives in the Balance,* 89 U. Chi. L. Rev. 649, 679–80 (discussing role marginal utility of income in cost-benefit analysis).

[66] Gregory C. Keating, *A Social Contract Conception of the Tort Law of Accidents*, in Gerald Postema, ed., *Philosophy and the Law of Torts* 34 (Cambridge 2001).

harm and harm" such as in loss-of-chance scenarios where an additional unit of risk sends a person's survival chances over a cliff.[67] Second, becoming aware of imminent risks can instill fear and emotional distress (which might itself be compensable harms).[68] Third, the existence of risk can decrease property values, increase insurance premiums, and decrease earning potential for risk-bearers—which leads directly to reductions in welfare.[69]

c. The implausibility of the no-care hypothesis.

The model presented here, which predicts that optimal care will always be taken, differs from past critiques that rely on the Hand Formula to prophesize that tortfeasors will take *zero* care in some cases. Under the Hand Formula, a court determining whether a tortfeasor was negligent will compare the "burden of adequate precautions" (B) against the probability of harm (P) multiplied by the gravity of expected injury (L).[70] When "the same PL that defines the injurer as negligent … also delineate[s] his liability," the Hand Formula creates incentives to take cost-justified care.[71] Thus, where $B < PL$, a tortfeasor who fails to adopt B breaches the standard of care, and where $B > PL$, no liability arises for the failure to adopt B.

This construction of the Hand Formula seems to imply tortfeasors will have an incentive to take *no care at all* in some negligence cases. Thus, if a poor person has a PL that is lower than a rich person's PL for the same interaction, a tortfeasor might face differential incentives depending on the relative cost of B. If the value of B is somewhere in the middle of the poor and rich persons' PL values, the

---

[67] Yehuda Adar and Ronen Perry, *Negligence Without Harm*, 111 Geo. L. J. 187 (2022).

[68] *Id*.

[69] *See* Arthur Ripstein, *Equality, Responsibility, and The Law* 76 (1998); Joshua S. Apte, et. al., *Ambient PM2.5 Reduces Global and Regional Life Expectancy*, Environmental Science & Technology Letters (2018); Paul Mohai, et. at. *Air Pollution Around Schools Is Linked to Poorer Student Health and Academic Performance*, 30 Health Affairs 852 (May 2011), online at www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2011.0077; Thomas Jackson, *The Effects of Environmental Contamination on Real Estate: A Literature Review* 9 J. Real Estate Lit. 91 (2001); Rausser Gordon C., *Stigma of Environmental Damage on Residential Property Values*, Environmental Protection Agency, https://perma.cc/HT6E-66F5.

[70] *US v. Carroll Towing Co,* 159 F.2d 169 (2d Cir. 1947). The risk-benefit comparison underlying the "Hand Formula" appears to have been endorsed by courts and *The Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 3 cmt. e (2010). *See Misalignments in Tort Law*, 121 Yale L. J. 82, 84 n. 1 (2011) (collecting citations).

[71] Ariel Porat, *Misalignments in Tort Law*, 121 Yale L. J. 82, 91 (2011). *But see* Mark Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability,* 121 Yale Law Journal 142, 165 (2011) (arguing that the PL at the liability stage may be "based on a higher legal valuation of harm" than the damages that result from breach of the duty of care).

tortfeasor will completely forego *B* in relation to the poor person (and pay the lower *PL,* via damages), but fully incur *B* in relation to the rich person (and avoid the higher *PL,* via no-liability).[72] This implies tortfeasors may completely forego care in favor of paying damages when *B* > *PL*. But this is implausible. When expected liability is a function of expenditures on care, tortfeasors will never "zero-out" *B*— they will adopt the level of *B* that corresponds to the social optimum as discussed above. Further, legal sanctions like punitive damages and criminal negligence liability will likely discourage tortfeasors from making the zero-care decision, even when it would be cheaper to pay damages than take care.[73]

2. The Level and Allocation of Activity

The discussion so far has focused on the level of care a tortfeasor will adopt for a single occurrence of an activity. I now turn briefly to how different expected losses for individual victims affect a tortfeasor's incentive to engage in a particular *level*, or overall incidence, of an activity.

In the conventional economic model, an increase in an injurer's activity results in a proportionate increase in expected accidents.[74] Thus, doubling the amount of miles driven or the number of blocks one walks their dog proportionately doubles the amount of expected car accidents or dog bites.[75] At the same time, increasing activity results in increased utility for the actor—otherwise, they would not engage in additional activity.[76] Thus, the socially optimal level of activity is one where marginal utility offsets additional risks created.[77] The negligence rule fails to achieve social optimally activity levels because once a tortfeasor incurs the costs of precautions, they are no longer liable for accident costs, and will only limit activity when the cost of precautions alone exceeds the utility derived.[78] In contrast,

---

[72] *Id.* at 89 ("If, instead, B > PL, the injurer will not be considered negligent and therefore will not take precautions—again, consistent with the formula's economic goal.")

[73] Mark Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability,* 121 Yale L. J. 142, 145–146 (2011) (asserting the "secondary obligation to pay compensatory damages is not fully interchangeable with the primary obligation to exercise reasonable care")

[74] Shavell, *Accident Law* 21.

[75] Proportionality might not always hold. "[I]t could be that the relationship between activities and the likelihood of harm is nonmonotonic – that the probability of an accident's occurring initially rises as the activity rises from zero, reaches a peak, and then declines as the activity level continues to increase." Nuno Garoupa and Thomas S. Ulen, *The Economics of Activity Levels in Tort Liability and Regulation* at *9, in Thomas J. Miceli and Matthew J. Baker, eds. *Research Handbook on Economic Models of Law* (2014).

[76] Shavell, *Accident Law* 21.

[77] Shavell, *Accident Law* 22.

[78] Shavell, *Accident Law* 23-24; Steven Shavell, *Strict Liability versus Negligence*, 9 J. Legal Stud. 1, 2 (1980) ("[H]e will choose his level of activity in accordance only with the personal benefits so derived.")

tortfeasor are likely to adopt both the optimal level of care *and* the optimal level of activity under a strict liability rule, as they will remain liable for accident losses even if due care is observed.[79]

Due to differentials in expected accident costs, the same insights from the optimal care discussion above apply to activity levels: the socially optimal activity level differs depending on whether victims are rich or poor. This applies to both negligence and strict liability rules. Where the social goal is to maximize "the utility injurers derive from engaging in their activity less total accident costs,"[80] higher expected accident costs under a strict liability rule will deplete a tortfeasor's utility quicker than lower expected accident costs, leading them to choose a lower level of activity for rich victims as compared to poor victims. And under a negligence rule which compels tortfeasors to adopt the optimal level of precaution, tortfeasors will engage in excessive activity overall—but will engage in proportionately greater activity levels in relation to the poor because the liability-discharging level of precaution costs less to obtain.

3. Assumptions Underlying Theory of Differential Exposure

Two key assumptions underlie the model just presented: (1) tortfeasors act rationally to minimize private liability costs and maximize utility; and (2) sufficiently individualized information about prospective victims is available to tortfeasors. The rationality assumption depends on the sophistication of the tortfeasor. It is unlikely that a regular driver will decide their car's speed by conducting a real time comparison of the value of time saved versus the additional units of risk created by speeding.[81] Individual actors in these scenarios are unlikely to make decisions based on prospective tort liability.[82] But rationality may arise

---

[79] Shavell, *Accident Law* 23.

[80] Shavell, *Accident Law* 21.

[81] Similarly, "it is almost impossible to expect a person who strikes his neighbor as a result of a quarrel or a parent who abuses his child to manage risks and be deterred efficiently in tort." Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice* 48 U. Mich. L. Reform 745, 796 (2015). In the vehicle example, the widespread adoption of telematics and usage-based insurance that adjusts premiums in real-time according to a driver's behavior might change the rationality assumption. *See* Corey Bourbonais, et al., *Connected revolution: The future of US auto insurance* (McKinsey & Company, Sept. 15, 2022), online at www.mckinsey.com/industries/financial-services/our-insights/connected-revolution-the-future-of-us-auto-insurance.

[82] *See* Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice* 48 U. Mich. L. Reform 745, 796 (2015). For an empirical study, see W. Jonathan Cardi, Randall D. Penfield, Albert H. Yoon*, Does Tort Law Deter Individuals? A Behavioral Science Study*, 9.3 J. Empirical L. Stud. 567 (2012) (collecting hypothetical risk-taking decisions from 700 first year law students and finding that the threat of potential tort liability did not have a large and statistically significant effect on subject's stated willingness to engage in risky behavior)

when a firm, rather than a natural person, is making decisions. "A large proportion of defendants today are not individuals but large and sophisticated economic, commercial, or governmental entities such as communications providers, state authorities, or insurers, all of whom possess deep pockets and distribute loss."[83] Some of these defendants are serial and or mass tortfeasors which may "routinely calculate the cost-effectiveness of their activities and take into account costs of accidents as a disbursement, like every other disbursement in their operations."[84] The incentive to take optimal care and allocate risk onto the poor is most likely to exist for the activities of a large entities, which play an increasing role in society's economic activities.

Tortfeasors also need granular information to make calculated cost-minimizing decisions. Without such information, firms would likely calibrate care and activity to average expected liability, being unable to differentiable among potential victims. But this would cut into profits. There are thus strong incentives to capture granular information on victim's expected losses to better calibrate care and activities. The insurance industry has long recognized that dividing policyholders into different risk classifications permits insurers to set individualized premiums keyed to policyholder's expected losses, thereby controlling adverse selection and increasing the insurer's profitability.[85] Breakthroughs in big data and artificial intelligence are likely to make these practices more scalable—not only in insurance, but throughout the commercial world.[86] And as insurers increasingly play a quasi-regulatory role with their insureds,[87] the use of granular information to fine-tune precautions is likely to proliferate further into risk allocation practices.

4. Empirical Accounts of Differential Exposure

Two scholars recently tried to find empirical evidence of differential risk exposure in their paper addressing inequities in damage awards for racial

---

[83] *See* Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice* 48 U. Mich. L. Reform 745, 770 (2015).

[84] *See* Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice* 48 U. Mich. L. Reform 745, 770 (2015).

[85] George Dionne, *Risk Classification in Insurance Contracting* (2012), available at https://www.researchgate.net/publication/228233488_Risk_ Classification_in_Insurance _Contracting ("Market forces push competitive insurers towards employing risk classification whenever it is legal (and permissible according to social norms) to do so.").

[86] *See generally* Omri Ben-Shahar and Ariel Porat, *Personalized Law: Different Rules for Different People* 98 (Oxford 2021); Rick Swedloff, *Risk Classification's Big Data (R)evolution*, 21 Conn. Ins. L. J. 339 (2014) (examining the discriminatory implications of using Big Data for classification schemes).

[87] *See* Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1420–22 (2013) (discussing regulation of insured through risk-based pricing, underwriting, contract design, claims management, and loss prevention services).

minorities.[88] While finding a definitive "smoking gun" of intentional targeting proved difficult, the paper identified several instances of differential risk exposure that could be explained by differential incentives to take care or allocate activities to groups that have "the lowest potential private liability costs."[89]

For example, the paper observed "low-income, minority families are more likely to occupy older homes with lead-based paint," and as a result, "investors who buy an old property have diluted incentives to renovate the apartments in a way that will encapsulate the lead paint."[90] The case of *Hernandez-Adams v. Kimpson* in 2015 involved precisely such a scenario.[91] There, a Hispanic mother sued her landlord for lead-paint based injuries sustained by her son.[92] The defendant pushed to reduce damages on the grounds that it was statistically "improbable" the hispanic baby boy would obtain a higher education and "any corresponding elevated income."[93] The court rejected the approach: "[W]hen damages for injuring members of minority groups are lowered, the legal regimen [has] the perverse result of encouraging torts against them."[94]

Substandard medical care received by socioeconomically disadvantaged patients might also provide evidence of differential risk exposure.[95] "Whereas the reason for this disparity is not understood fully … it could be related to the lower liability risks that minorities present. In the event of a medical malpractice suit involving a minority or female plaintiff, healthcare providers would be required to pay lower damages than they would have been had a white male plaintiff brought the suit."[96] Another potential example of targeting is the tendency of environmental hazard sites to end up in poor and minority communities.[97] While some literature

---

[88] Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661 (2017).

[89] *See* Kimberly A. Yuracko and Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CAL. L. REV. 325, 327 (2018).

[90] Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 687 (2017).

[91] 116 F Supp 3d 126 (E.D.N.Y. 2015).

[92] 116 F Supp 3d at 129.

[93] *Id*.

[94] *Id*. at 141, quoting Michael I. Meyerson & William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 Pepp. L. Rev. 771, 808 (2010).

[95] Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio St. L J 661, 688-89 n. 139 (2017) (collecting sources on the substandard medical care provided to minorities and poor people).

[96] Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 689 (2017)

[97] Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 690 (2017). *See also* Allan Kanner, *Equity in Toxic Tort Litigation: Unjust Enrichment and the Poor*, 26 LAW & POL'Y 209, 210–211 (2004) (suggesting damages

posits the correlation is "attributable to disadvantaged groups' choices to live near industries due to the other benefits they receive, such as lower property prices and proximity to work," it remains an open question whether this fully explains the phenomenon.[98]

In sum, both theory and limited empirical accounts suggest differential risk exposure occurs and is driven in part by the individualized make-whole nature of compensation. I will soon turn to a reform proposal that seeks to decouple individualized compensation from the distribution of deterrence. The next section provides the normative building block of *ex ante* equality to justify why deterrence distribution should be decoupled from people's pre-existing socioeconomic status.

II. The Normative Basis of *Ex Ante* Equality

The prior section theorized the tort system will expose the poor to greater risks when deterrence is driven by expected individualized liability. Here, I present a normative argument for why deterrence should be distributed equally *ex ante* instead of distributed differentially based on income or wealth.[99] The normative claim is inspired by Ronald Dworkin's egalitarian theory, which posits that equality is best achieved by granting everyone an equal bundle of initial entitlements and permitting subsequent market exchanges to deviate from the initial distribution.[100] What matters to Dworkin is the *ex ante* perspective: "people should be made equal, so far as this is possible, in their prospects not in their outcomes."[101]

To demonstrate how *ex ante* equality of resources may be achieved, Dworkin imagines immigrants arriving on an island where no one has preexisting claims to the island's resources.[102] Rather than dividing all the resources into

---

without injunctions "gives polluters incentives to concentrate their polluting operations against landowners whose land is of little value, most often the poorest and most disenfranchised members of society.").

[98] Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio State L. J. 661, 690 (2017).

[99] *Compare* Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty: Theory and Legal Applications*, 155 Univ. Penn. L. Rev. 279, 334-350 (2006) (arguing that an equity-regarding social welfare function, if adopted, should be applied an *ex post* rather than *ex ante*).

[100] Dworkin adopts a broad definition of resources which encapsulates not only tangible items but also social and economic assets that function as an individual's "means to achieving her goals." Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 8 (Oxford 2 ed. 2002).

[101] Richard Arneson, *Dworkin and Luck Egalitarianism: A Comparison*, in *Oxford Handbook of Distributive Justice*, Serena Olsaretti, ed., (Oxford 2018), page *8 of online version at philosophyfaculty.ucsd.edu/faculty/rarneson/ documents/writings/dworkin-and-luck-egalitarianism.pdf.

[102] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 66–67 (Harvard 2000).

identical bundles, Dworkin envisions an auction: each person receives an equal number of "clamshells, which are sufficiently numerous and in themselves valued by no one" to bid on the island's resources.[103] Everyone bids, and the auction ends when no "immigrant would prefer someone else's bundle of resources to his own bundle."[104] The auction starts with *ex ante* equality, and when it ends, people may utilize their variant ambitions to achieve differential life outcomes *ex post*.[105]

Resource equality does not mean everyone "ends up" with identical resources. Rather, everyone starts with the same amount of convertible "currency" which can be used to secure one's preferred resource bundle. Dworkin posits *ex ante* equality has a comparative advantage over *ex post* redistribution: "if there were greater equality in people's *ex ante* endowments—i.e., in their capacity to invest in productive assets or in developing their own skills and talent—there would be less need for *ex post* redistribution, since there would be fewer involuntary inequalities in market income to correct after the fact."[106] Of course, Dworkin's theory is far more complex than my oversimplification suggests.[107] But these superficial features provide a useful normative framework for how we might think about the *ex ante* distribution of deterrence in tort law.

---

[103] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 68 (Harvard 2000)

[104] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 67 (Harvard 2000).

[105] *Ronald Dworkin, What is Equality? Part 2: Equality of Resources*, 10 Phil. and Pub. Affairs 283, 311 (1981).

[106] Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 82 (Oxford 2 ed. 2002)

[107] Dworkin overarching project is to set forth an "endowment-insensitive" and "ambition-sensitive" distributive scheme. *Ronald Dworkin, What is Equality? Part 2: Equality of Resources*, 10 Phil. and Pub. Affairs 283, 311 (1981). The auction is only part of this scheme. The scheme must also address the fact that some people are born with natural talents and others are born with disabilities, making the distribution of post-auction resources inegalitarian if there is not a mechanism to address the brute luck of "natural" endowments. Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 76 (Oxford 2002) ("the "handicapped person faced extra burdens in leading a good life," burdens that cut into her 100 "clamshells."). To address this issue, Dworkin proposes a hypothetical insurance mechanism. Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 73–83 (Harvard 2000). This insurance mechanism contemplates a "modified veil of ignorance" where people "do not know their place in the distribution of natural talents, and are to assume that they are equally susceptible to the various natural disadvantages which might arise." Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 77 (Oxford 2 ed. 2002). After allocating the equal share of clamshells, we "ask them how much of their share they are willing to spend on insurance against being handicapped, or otherwise disadvantaged in the distribution of natural talents." Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 77 (Oxford 2 ed. 2002). These sums then constitute pay-ins into a hypothetical insurance pool.

Under current practice, tort law does now endow people will "equality of resources" when they vie for protection. Instead, tort law takes the market distribution for granted and patterns the allocation of risk and deterrence on the preexisting distribution of material resources: individualized expected losses are the "currency" used to bid on deterrence. Because the rich have "more" of this currency, they will often obtain a higher level of deterrence. The egalitarian principle driving Dworkin's egalitarianism would equalize the "currency of deterrence" to permit people to obtain the same level of protection irrespective of their actual expected losses. This would mean, in effect, prescribing the *same expected losses for everyone*, such that the same residual risks are borne by all people whether they are rich or poor. Such an approach could find justification on the ground that it mitigates the role of natural and social endowments in allocating state-backed protection.[108] Material inequality is pervasive and intergenerational.[109] Distributing risk based on socioeconomic factors outside of people's control denies them equal standing to achieve their ambitions and compounds existing material inequality over time.[110]

The present distribution of deterrence is incompatible with *ex ante* equality of prospects. To have equal prospects, one must have "a range of acceptable options … large enough to permit one to be the author of one's own life."[111] Risk impositions interfere with these autonomous prospects, and therefore, *ex ante* equality: "if I pose risks of physical injury to you by laying mines in a field where you habitually walk, I have interfered with your autonomy by removing a certain number of *safe* options from your range of otherwise available options … whether or not you ever step on a mine, and even if you are not aware of the mines. Imposing pure risks is [like laying traps] if you set enough … you can 'utterly annihilate.'"[112] Thus, even if we accept that risk is an inevitable byproduct of productive economic activity and that risk-reduction should be constrained by the cost-minimization principle, it does not follow that some people must bear greater risks than others

---

[108] Such an approach would aim to implement Dworkin's goal of an endowment-insensitivity, where people's fates "depend on their ambitions (in the broad sense of goals and projects about life)," but not "on their natural and social endowment (the circumstances in which they pursue their ambitions)." Will Kymlicka, *Contemporary Political Philosophy: An Introduction* 74 (Oxford 2 ed. 2002).

[109] *See* Jaehyun Nam, *Does Economic Inequality Constrain Intergenerational Economic Mobility? The Association Between Income Inequality During Childhood and Intergenerational Income Persistence in the United States*, 154 Social Indicators Research 469 (2021) (evaluating evidence that income inequality hinders the equal opportunity to succeed, especially for children from low-income families).

[110] See note 69 and accompanying test (discussing how risk reduces welfare).

[111] Stephen Perry, *Torts, Rights, and Risk*, in *Philosophical Foundations of the Law of Torts* 58, John Oberdeik, ed. (Oxford 2014). Perry attributes this conception of autonomy to Joseph Raz, *The Morality of Freedom* 369–70 (Oxford: Claredon Press, 1986).

[112] *Id*., quoting John Oberdeik, *The Moral Significance of Risking*, 18:(3) Legal Theory 339, 352 (2012).

due to their lower expected losses. There should be a place for *ex ante* equality. I now examine how to implement this normative principle.

III. A Solution: Decoupled Liability

Liability is generally coupled: plaintiffs get what defendants pay.[113] To address the deterrence disparities discussed above, this section departs from this default to develop a decoupled liability regime[114] where defendants pay damages and adhere to standards of care that are invariant across individual victims, while plaintiffs receive individualized compensatory awards reflecting the "make whole" principle. This section demonstrates how design this regime in a balanced-budget, incentive-compatible, manner, as well as challenges and limitations.

A. The Mechanism of Decoupled Liability

Three components define the mechanism of decoupled liability. The first is what the *defendant pays*, or expects to pay, as compensation. The second is what the *plaintiff gets*, or expects to get, as compensation. The third is the intermediation between these two components—namely, what happens when the defendant's payment inevitably differs from what the plaintiff gets.

1. What the Defendant Pays.

The defendant's liability payment would not respond to differences in actual individualized losses but instead reflects an objective plaintiff-agnostic valuation of injury.[115] This same metric will be used to fix the proper level of care under the negligence determination (rather than using plaintiff-specific expected losses). Because victim's individualized damages would no longer influence level of care, activity, or expected damages, tortfeasors would become plaintiff-agnostic.

2. What the Plaintiff Gets.

---

[113] There are some exceptions, such as split-recovery cases where punitive damages go to a third party. For example, in *Dardinger v Anthem Blue Cross & Blue Shield*, the Ohio Supreme Court permitted a punitive damage award of $30 million to be imposed on an insurer, with the plaintiff receiving only $10 million and the remainder going to a judicially created cancer-research fund. 781 NE 2d 121, 124 (Ohio 2002). For a robust discussion of punitive damages, *see* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L. J. 347, 365 (2003).

[114] The earliest formulation of decoupled liability appears in A. Mitchell Polinsky, *Detrebling Versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 Geo. L. J. 1231, 1231 (1986).

[115] In the parlance of contemporary tort theory discourse, decoupled liability contemplates (1) an *alignment* between the objective valuation of harm used to set the standard of care and to calculate the defendant's damages, and (2) a *misalignment* between the valuation of harm used to calculate the defendant's damages and the valuation of harm used to calculate the plaintiff's award.

The make-whole principle will still determine the plaintiffs' compensation. Such an approach will permit tailoring between individual victims who experience differential losses. This is not to say that the status quo for determining plaintiff's compensatory awards should go unchanged. Impermissible biases should be addressed.[116] But assuming constitutionally suspect classifications are put aside, I posit the make-whole principle offers the most workable framework of compensation for accident victims and remains consistent with *ex ante* equality.

3. Intermediation and the Fund

Decoupled liability results in variance between what the defendant pays and what the plaintiff gets, such that (i) a surplus arises when the defendant pays more than what the plaintiff gets, and (ii) a deficit arises when the defendant pays less than what the plaintiff gets. In the long run, these aggregate "credits" and "debits" may net out by using an intermediary tasked with satisfying individual compensatory awards (*i.e.*, a "Fund"). Surpluses will remain with the Fund pending the need for disbursement in the "deficit" cases. The degree to which the Fund's budget remains balanced over time depends on equal access to justice and an even distribution of individualizes losses in relation to the objective measure. I discuss the implausibility of these two conditions, and why an external subsidy will likley be needed, in Part III.C

B. How Decoupled Liability Addresses Inequities

When decoupled liability works as intended, the incentive to take differential levels of care and activity based on victim's individualized losses yields to *ex ante* agnosticism between rich and poor victims. Further, subjecting tortfeasors to objective measures of damages might enable poor plaintiffs to get more favorable settlement awards *ex post*. I will discuss this effect on settlement and its downsides after examining the *ex ante* effect of equalized deterrence.

1. *Ex Ante* Effect: Equalized Deterrence.

Adopting an objective measure of harm will lead tortfeasors to adopt a level of care that is agnostic to victim's individualized losses. Extending the same objective measure of harm to the damages payment will negate any residual incentive tortfeasors might have to forego taking care in favor of paying make-whole compensatory damages—damages which might value plaintiff's individual harms lower than the objective measure. An equalizing effect is thus achieved: the same level of care and activity will be observed in relation to all potential victims, thereby allocating the same residual risk probabilities across the population.

The equalizing effect will entail a departure from the socially optimal level of care prescribed by an individualized-losses deterrence model. Depending on

---

[116] *See* notes 33 through 39 and accompanying text.

where the objective measure of harm falls relative to the socioeconomic distribution of potential victims, the rich may face greater risks and the poor may face lesser risks than they would under the current model. On its face, this equalization effect appears to raise a distortion.

For example, compare the socially optimal level of care for Victim 2, with *individualized h* = $20, against the socially optimal level prescribed with an *objective h* = $300:

Victim 2: *individualized h* = $20; *objective h* = $300

Level of care	Cost of care	Probability of harm	Expected social cost, individual h	Expected social cost, objective h
Low	$6	22%	**$10.4***	$39
Medium	$16	10%	$18	**$31***
High	$26	2%	$26.4	$32

* Lowest social cost

The objective valuation of harm, *objective h* = $300, would compel the tortfeasor to adopt a Medium level of care, which corresponds to the lowest expected social cost of $31 (far right column). If the tortfeasor were to adopt this Medium level of care for Victim 2 under the *individualized h* model, which prescribes Low care, the expected social cost would increase from $10.4 to $18 (second column from the right). This increase of $7.6 could be said to represent "distortion." Victim 3 is similar:

Victim 3: *individualized h* = $500; *objective h* = $300

Level of care	Cost of care	Probability of harm	Expected social cost, individual h	Expected social cost, objective h
Low	$6	22%	$116	$39
Medium	$16	10%	$66	**$31***
High	$26	2%	**$36***	$32

* Lowest social cost

Using *objective h* = $300 for Victim 3 prescribes the Medium level of care, which corresponds to the lowest expected social cost of $31 (far right column). If the tortfeasor were to adopt that Medium level of care for Victim 3 under the *individualized h* model, which prescribes High care, the expected social cost would increase from $36 to $66, leading to a "distortion" of $30 (second column from the right). A skeptic of this system might thus question whether advancing distributive outcomes by distorting the legal rule is efficient, given the comparative advantage of the tax and transfer system or administrative regulation for achieving similar ends.[117]

---

[117] *See, e.g.,* Louis Kaplow and Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667 (1994).

The efficiency critique is misplaced. The fact that adopting the Medium level of care for both Victim 2 and Victim 3 would be inefficient under the individualized valuation model does not mean it is inefficient to adopt the Medium level of care for both victims under an alternative objective-valuation model. Only after "an initial distribution of legal rights and duties is described [can] the efficiency analysis show how to maximize its value."[118] The normative claim here is that people's lives should be valued equally *ex ante* to respect the "equal moral worth of all persons."[119] Only after fixing the price for "normative resources" can economics then show us "how to maximize their value."[120] Accordingly, a proper efficiency analysis cannot compare two different valuation systems—it must evaluate them internally.

The use of an objective valuation of harm might be open to a different kind of critique: the valuation fails to capture people's preferences and is therefore not welfare-maximizing. Assuming people's preferences for protection coincide with their level of individualized losses, imposing an objective valuation of harm can lead to over- or under-insurance, wherein victims are forced to pay for protection they may not want, or denied protection they would have preferred. The degree of over- or under-insurance can be measured as the difference between expected social costs at the optimal levels of care across the two regimes (because we are assuming people's preferences coincide with their individualized losses).[121]

There is also a potential issue of fairness to tortfeasors, who are made to pay more in some cases than they would otherwise pay if their compensatory obligation was tied to individualized losses. One potential counter is that these overpayments are offset by underpayments to rich victims—but this only holds true if risk allocations are uniform, which is improbable because the poor likely face greater

---

[118] Robert D. Cooter, *Liberty, Efficiency, and Law*, 50 Law and Contemporary Problems 141, 142 (1987). See also Mark Geistfeld, *The Role(s) of Economic Analysis in Tort Law*, UC Berkeley: Berkeley Program in Law and Economics at *1 n. 1 (2003), online at https://escholarship.org/uc/item/5nt1n0q2 ("Cost-benefit analysis depends on prices which in turn depend on the initial allocation of property rights.").

[119] Deborah Hellman, *When Is Discrimination Wrong?* 6 (2008); See Part II.

[120] Robert D. Cooter, *Liberty, Efficiency, and Law*, 50 Law and Contemp. Problems 141, 142 (1987).

[121] In the examples above, the objective valuation system would over-insure Victim 2 by $20.6 ($31 - $10.4) and under-insure Victim 3 by $5 ($31 - $36).The extent to which the "cost" of overinsurance is borne by the poor will depend on the relation of the victim to the good or industry causing the risk, as well as on the substantive liability rule. Assuming a victim consumes the output of a firm causing the risk, a strict liability rule will shift the entire cost of overinsurance to the poor because the price set by a firm will include both the costs of precautions and the cost of expected accidents. Shavell, *Accident Law* 48. A negligence rule will shift only the cost of precaution. *Id*. But if a victim does not consume the output of a firm, the cost-shifting of overinsurance will be more attenuated, and would likely only reach the victim through its effect on other market prices (if at all). In contrast, rich victims will be left to incur their own protection to the extent they prefer additional insurance, but this will not be compulsory.

risks. A more compelling counter is that decoupled liability makes liability more predictable by eliminating egg-shell luck. Tortfeasors will no longer face the prospect of paying ruinous liability if they injure a victim with losses far exceeding the average.[122] This might lower liability insurance costs by eliminating outlier liabilities and simplifying actuarial models as to make risk management administratively cheaper.

In sum, decoupled liability can equalize the allocation of risk *ex ante* by diluting the inventive to observe different levels of care and activity based on victims' individualized losses. I now turn to how decoupled liability affects accident victims *ex post*.

2. *Ex Post* Effect: Leveraged Settlements.

Parties litigate in the shadow of settlement. A system of decoupled liability will asymmetrically affect settlement incentives depending on the variance between a defendant's expected payment and a plaintiff's expected award. The variance will lead to a reallocation of trial and settlement rates: richer plaintiffs will tend to litigate, poorer plaintiffs will tend to settle.

Plaintiffs who expect to receive a compensatory award in excess of what a defendant expects to pay under the objective measure will be unlikely to settle—there will be no overlap between the minimum a plaintiff expects to get and the maximum a defendant expects to pay (unless litigation costs are substantial). Conversely, defendants will not want to pay a sum that exceeds the objective measure, and plaintiffs will not want a sum that is less than what they expect to get as an individualized award (again, assuming litigation costs do not cover the gap).

In contrast, plaintiffs who expect to receive compensatory awards that are lower than what the defendant expects to pay under the objective measure are inclined to settle for somewhere between their expected make-whole award and the higher objective measure. Defendants face a similar incentive, as they would prefer paying a sum less than the objective measure plus litigation costs.[123]

---

[122] Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va. L. Rev. 774, 790 (1967) ("Two defendants who commit identical careless acts may find themselves liable for vastly different amounts depending solely on the fortuitous nature of the harm that results.").

[123] See A. Mitchell Polinsky, *Detrebling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 GEO. L. J. 1231 (1986) ("by raising the defendant's trial payment and lowering the plaintiff's trial award, the likelihood of a settlement is enhanced because the defendant will be willing to pay more in settlement and the plaintiff will be willing to accept less."). However, some scholars suggest that making defendants pay more would lead more defendants to trial: when defendant's expected loss exceeds plaintiff's expected gain, the defendant's spending on "litigation efforts" will outpace the plaintiff's, increasing the likelihood that the defendant will win—reducing the incentive to settle. *See* Albert Choi & Chris William Sanchirico, *Should*

Thus, in cases where the plaintiff's award is less than the objective measure, settlement is likely to happen regularly.[124] This raises an immediate problem for decoupled liability's compensatory function: cases where the plaintiff's award exceeds the objective measure (*i.e.*, rich plaintiffs) will need a source of funding to make up the difference. If those cases most likely to generate the needed surplus are *also* most likely to settle (*i.e.*, cases by poor plaintiffs), the Fund will need to look elsewhere to maintain its solvency. I return to this funding problem momentarily—after discussing a potential upside to settlement.

Decoupled liability may exert an equalizing effect on settlement *ex post*. Generally, settlements favor the party with higher risk tolerance.[125] A well-capitalized firm who can tolerate drawn out litigation, uncertainty, and capital outlays will often outlast a plaintiff wage-earner, leading to settlements that favor the firm.[126]

To illustrate, imagine a contract dispute where a bank and a customer each have a 50% chance of winning $100 and a 50% chance of winning $0, but face different levels of risk tolerance.[127] For the risk-neutral bank, the "value of the lottery of a trial is the expected judgment," which equals $50, but a risk-averse customer might prefer "a lower, but certain sum of money to the outcome of a risky lottery."[128] Assuming the risk-adverse customer values the trial at $25, the "disagreement payoffs of the bank and the customer are 50 and 25, respectively, and the surplus is 25. Let us assume that the parties will share the surplus equally,

---

Plaintiffs Win What Defendants Lose? Litigation Stakes, Litigation Effort, and the Benefits of Decoupling, 33 J. LEGAL STUD. 323 (2004).

[124] To be sure, financial incentives are not the only reason a party chooses to settle. A plaintiff may prefer to vindicate their claims in a public court for reasons unrelated to monetary compensation, such as revenge or vindication. *See* John Bronsteen, *Some Thoughts about the Economics of Settlement*, 78 Fordham L. Rev. 1129, 1140 (2009) ("A plaintiff who wants to participate in a trial and to seek an impartial judgment that she has been wronged—along with, possibly, an injunction that would secure justice going forward—will be harmed by the coercive tactics of a judge who tries to influence her to settle.").

[125] *See* Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 1 J. of Dispute Res. 149, 164–66 (2019) ("legal uncertainty lowers the disagreement payoff of the risk-averse side, whereas it does not change that of the risk-neutral side. Thus, the higher the legal uncertainty, the less the risk-averse side is going to receive in the settlement, and the more the risk-neutral side will receive."); Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984).

[126] Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984) (the poor may have less capital to fund a lawsuit, or be "less able to amass and analyze the information needed to predict the outcome").

[127] Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 1 J. of Dispute Res. 149, 165 (2019).

[128] Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 1 J. of Dispute Res. 149, 165 (2019).

giving each side 50% of it. This leads to an expected settlement of 62.5–37.5 in favor of the risk-neutral side—the bank."[129]

The same result would follow in a $100 tort liability suit with 50% legal uncertainty: a risk-averse plaintiff may discount the value of expected judgment to $25,[130] leading to a settlement of $37.5 in favor of the risk-neutral tortfeasor. In contrast, if *both* parties were risk-neutral, their disagreement payoffs would both be $50—making $50 the only possible settlement.

One way to address the regressive effects of settlements is to reduce legal uncertainty.[131] Another way is to differentially adjust expected payouts—*i.e.*, to decouple liability. Adjust the tort hypothetical above so the plaintiff's loss is $100, but the defendant's expected liability payment under an objective measure is $150. The disagreement payoff of the risk-adverse plaintiff remains $25. But the disagreement payoff of the risk-neutral tortfeasor moves from $50 to $75.[132] Thus, the surplus becomes $50 (up from $25). Assuming the parties share the surplus equally, the expected settlement under decoupled liability will be $50, an amount equal to what would result if both the defendant and the plaintiff were risk-neutral.

Stated differently, decoupled liability may give poor plaintiffs added leverage, making settlements fairer for the poor. If a poor plaintiff knows that a defendant will pay damages in excess of what the plaintiff expects to receive, the plaintiff will, in theory, be able to bargain in the direction of the objective measure. The efficacy of a plaintiff's bargaining efforts will of course depend on risk aversion and the availability of private information,[133] but these qualifications aside, the variance between what defendants pay and what poor plaintiffs get will equalize bargaining.

C. The Balanced Budget Problem

---

[129] Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 1 J. of Dispute Res. 149, 165 (2019).

[130] "This happens when the utility function of money is $y = x1/2$ and the initial wealth of the customer is 0." Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 1 J. of Dispute Res. 149, 165 n. 63 (2019)

[131] Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 1 J. of Dispute Res. 149 (2019). Another potential method is to eliminate the champerty doctrine, which prohibits risk-averse plaintiffs from the selling their lawsuits to risk-neutral third parties. *Id*. at 174.

[132] $(0.5 \times 150) + (0.5 \times 0) = \$75$

[133] The conventional economic literature posits parties will go to trial when they have divergent views about the expected result due asymmetrical information. For example, if a defendant is keenly aware of their compliance with a standard of care, but a plaintiff does not know the extent of the defendant's precaution, trial is more likley. *See* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert Cooter and Thomas Ulen, *An Economic Theory of the Legal Process*, in 2 *Law and Economics* 6th ed. (Berkeley Law 2016).

Assuming decoupled liability works as designed, both *ex ante* and *ex post* equalizing effects would occur. But there might be a design problem. Because decoupled liability permits variance between what defendant pay and what plaintiffs get, a mechanism must close the gap when defendants pay less than a plaintiff's make-whole entitlement.

The underpayment might be derived internally from cases where the pay-out exceeds the pay-in. But as we just saw, those cases might all settle. And as I discuss below, poor plaintiffs might not make it into court in the first place. Thus, an external subsidy might be needed.

1. Resolution through Internal Balancing.

If the average payment by defendants equals the average of plaintiff's awards, there will be no funding shortfall. For example, if there are only two plaintiffs, entitled to awards of $300k and $700k respectively, and the objective damages amount is $500k, the $200k overpayment in the first case will satisfy the $200k underpayment in the second case, leading to a balanced budget.

But real-world conditions are not so ideal. Poor people are less likely to sue for accidents due to a relative lack of legal resources and the nature of the contingency fee system.[134] "Among all civil legal problems by low-income Americans," it is estimated "that 92% do not get any or enough legal assistance."[135] If the poor are not getting their day in court compared to the rich, then most of the pay-in to the fund will be at the objective amount, but the majority of the pay-out will be to rich plaintiffs in excess of that objective figure. This creates a chronic funding deficit.

One potential fix is to expand access-to-justice efforts (*i.e.*, more funding and subsidies for pro bono attorneys). Another potential fix could require that contingency fees be recouped only from *the defendant's payment*, rather than the award given to the plaintiff. Such an approach might be vulnerable to the leveling-down objection—that it would dilute the incentives to represent the rich. A compromise might permit contracting out of this rule. The differential incentives would thus persist, but at least not at the same magnitude as in a system where poor plaintiffs could not leverage the defendant's potentially higher objective damage payment to attract contingent representation. But this poses another problem: attorneys representing poor plaintiffs might be disincentivized to settle if a greater award awaits them after a trial, even if the client prefers to settle. The rules of

---

[134] *See* Frank M. McClellan, et al., *Do Poor People Sue Doctors More Frequently? Confronting Unconscious Bias and the Role of Cultural Competency,* 470(5) Clin. Orthop. Relat. Res. 1393 (2012).

[135] Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans* (2022), online at www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid (accessed June 12, 2023).

professional responsibility might help police this misalignment of incentives, but it would nonetheless exert an *ex ante* effect on plaintiff attorneys' case selection.

Even if the financial barriers to the courthouse were reduced as to facilitate equal representation of rich and poor plaintiffs, the prospect of settlement still poses an intractable problem for the Fund. A tempting solution might be to bar settlements.[136] But such a restraint would not only be adverse to the autonomy interests of individual plaintiffs, it might also reduce overall social welfare.[137] External funding must thus be considered.

2. Resolution through External Subsidy.

Given the difficulties of achieving internal balancing, the solution to the fund's chronic deficit might lie elsewhere—namely, a subsidy from the tax and transfer system. Such an approach would functionally turn decoupled liability into an insurance mechanism for the rich. Due to these optics, the political action costs of obtaining such a subsidy might be prohibitively high.[138] Further, a subsidy that draws on the general tax base would be regressive, taking money from the general public and moving it to rich accident victims. But regressiveness is not inevitable.

The revenue base for the subsidy could be structured progressively, much like current income tax practices, ensuring that the rich make a greater contribution to this pool of money. The tax obligation could also feature an "opt-out" provision wherein taxpayers forfeit their right to receive compensation in excess of the objective measure of liability. Thus, those with above-average compensatory expectations will be unlikely to opt-out relative to those with below-average compensatory expectations, thereby mitigating the regressive nature of the tax transfer.

---

[136] For example, we might say settlement contracts are unenforceable. This would incentivize defendants to proceed to trial. Alternatively, settlement bars may be enforced through the intervention of the Fund, which could have standing to sue based on its legal interest in payment. Similarly, plaintiffs could receive a *qui tam* right based on the Fund's interests, thus facilitating enforcement.

[137] *See* Robert Cooter and Thomas Ulen, *Law and Economics Book 2 6th ed.* (Berkeley Law 2016) ("[A] settlement that replicates the expected judgment at trial usually reduces social costs. Given this fact, the law should encourage settlements that replicate the expected judgment."); A. Mitchell Polinsky, *Detrebling Versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 GEO. L. J. 1231 (1986) ("Increasing the likelihood of a settlement is beneficial because settlement costs are less than trial costs."). For an alternative view, see Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085–86 (1984) ("[W]hen the parties settle, society gets less than what appears, and for a price it does not know it is paying. [ ] The settlement of a school suit might secure the peace, but not racial equality.").

[138] See Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 Minn. L. Rev. 1051, 1052–53, 1083 (2016), (characterizing the "political action costs" that arise in the course of obtaining government subsidies aimed at redistributing wealth).

IV. Corrective Justice Decoupled?

I have so far discussed practical hurdles of decoupling. This section moves to the conceptual, discussing whether decoupled liability fits into the rubric of corrective justice.[139] As we just saw, decoupled liability relaxes the "artificial restraint[s]"[140] that link deterrence to compensation, and individual plaintiffs to individual defendants. Corrective justice might have two objections. First, variance between what the defendant pays and what the plaintiff gets may offend Aristotelian balance, which dictates the remedial obligation mirror the entitlement. Second, the intermediary Fund may interfere with the "plaintiff-defendant nexus"[141] such that plaintiff and defendant are no longer linked in a bipolar sense. I address each of these issues in turn.

A. The Mirror Image Problem of Decoupled Damages

Aristotle's imagery in *Nicomachean Ethics* provides the classic illustration of corrective justice, where he imagines two parties "in an initial position of equality" represented by equal parallel lines.[142] When one party disturbs the equality, "lengthening her own segment and shortening the other's, corrective justice demands we restore the equality, taking from the party with the lengthened segment just what is necessary to restore the shortened one."[143] In Ernest Weinrib's view, parties to a lawsuit are linked "as the doer and sufferer of an injustice that is

---

[139] Jules L. Coleman, *The Practice of Principle* 32 (Oxford 2001) ("corrective justice is an account of the second-order duty of repair … the relevant first-order duties are not themselves duties of corrective justice. Thus, while corrective justice presupposes some account of what the relevant first-order duties are, it does not pretend to provide an account of them"); John Oberdiek, *Structure and Justification in Contractualist Tort Theory*, in *Philosophical Foundations of the Law of Torts* 105, John Oberdiek, ed. (Oxford 2014) ("corrective justice theories only explain the basis of tort law's secondary, remedial obligations that are incurred by the violation of wholly unspecified antecedent primary obligations—remedies are triggered by wrongful harms or their prospect.").

[140] Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. Rev. 621, 628 (2002) (describing such decoupled approaches as "interesting and imaginative" but fundamentally at odds with corrective justice)

[141] See Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. Rev. 621, 628 (2002).

[142] Scott Hershovitz, *Tort as a Substitute for Revenge*, in *Philosophical Foundations of the Law of Torts* 89, John Oberdiek, ed. (Oxford 2014).

[143] Scott Hershovitz, *Tort as a Substitute for Revenge*, inn *Philosophical Foundations of the Law of Torts* 89, John Oberdeik, ed. (Oxford: Oxford University Press 2014), citing Aristotle, *Nicomachean Ethics, bk. V* 88 Roger Crisp (ed. & trans.) (Cambridge 2000).

Some commentators disagree on whether Aristotelian corrective justice requires restoring complete equality. See Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* 93 n. 15 (Harvard 2009) (citing Aristotle's statement that corrective justice "will be the intermediate between loss and gain").

itself undone by the corresponding remedy,"[144] such that plaintiffs are "entitled to receive the very sum" that defendants pay.[145]

Taking Aristotle's imagery literally suggests that it is possible to restore equality between parties—whatever was "taken" from the victim can be "given back" through addition and subtraction.[146] But this arithmetic account of corrective justice is unhelpful for "wide swaths" of tort law where losses do not produce corresponding gains, and where money damages cannot adequately replace what was lost.[147] For example, a personal injury might cause the victim to lose earning capacity, but the tortfeasor does not "gain" that capacity. Life enjoyment may also be lost, but enjoyment is not added to anyone's tally (unless one derives pleasure from victims' suffering).[148] And not every loss is reversible. Some losses, like a dead person's loss of enjoyment, are "irreparable harms" that cannot be corrected regardless of how much money is paid.[149]

Weinrib thus provides a slightly varied account of the role of compensation: money damages "are the notional equivalent at the remedial stage of the right that has been wrongly infringed."[150] This conception of "notional equivalency" provides a more robust account of damages in corrective justice—an account which accommodates a decoupled liability system where the plaintiff gets an arithmetic sum different from what the defendant pays. Outside of clear-cut cases calling for restitution, the point of damages is not to achieve arithmetic equalization of gains and losses, but instead to give a "qualitatively unique moral event" a "quantitative

---

[144] Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 Theoretical Inquiries L. 107, 110 (2001).

[145] Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 Theoretical Inquiries L. 107, 110 (2001). See also Stephen R. Perry, *Tort Law*, in *A Companion to Philosophy of Law and Legal Theory*, Dennis Patterson, ed. (Blackwell Publishers 1996) ("In general, corrective justice requires A to compensate B for loss caused by A's conduct (in a fault-based theory, by A's faulty conduct").

[146] This view is expressed in John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice* 30 L. & Phil. 1, 9 (2011) ("Norms of corrective justice ... are to be understood on the 'arithmetic' model of addition and subtraction. Only two potential holders are in play at a time. One of them has gained certain goods or ills from, or lost certain goods or ills to, the other. The question is whether and how the transaction should be reversed, undone, counteracted").

[147] Weinrib, *Restitutionary Damages as Corrective Justice*, 1 Theoretical Inquiries in L. 1, 4–5 (2000).

[148] *See* Weinrib, *The Gains and Losses of Corrective Justice*, 44 Duke L. J. 277, 278 (1994) ("most tort cases involving accidental harms feature a loss by the plaintiff from which the defendant realizes no corresponding gain")

[149] *See* Mark Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability,* 121 Yale L. J. 142, 159 (2011) ("monetary damages cannot compensate a dead rightholder for the premature loss of life.")

[150] Ernest J., Weinrib, *Restitutionary Damages as Corrective Justice*, 1 Theoretical Inquiries in Law 1, 4–5 (2000) (emphasis added).

expression" that sufficiently enables the moral event "to be reversed through a monetary transfer."[151] No one seriously contends wrongful death is reversible through monetary transfer.[152] Life and limb are largely incommensurable with money damages.[153] The most we should ask of money damages is for rectification of *normative* changes which are independently borne by each party—which sometimes, but not always, coincide with monetary gains and losses. This formulation does not require the plaintiff get the same arithmetic "sum" the defendant pays.

Assume, for example, that people have a substantive entitlement to their entire net worth. A tortfeasor who infringes on this right by wrongfully taking a victim's entire net worth might be made to repay the exact amount of money taken. Under this approach, the "notional equivalent" of the right is the amount of money protected by the right. But that need not be the equivalency we draw. The right to hold on to one's entire net worth may also give the rightholder a sense of security, and it can be that "sense of security" that the tortfeasor takes from the victim through the commission of the wrong. The proper remedy may thus be the surrender of the *tortfeasor's* entire net worth, in order to capture the "notional equivalent" of the victim's infringed sense of security. The surrender of a tortfeasor's entire net worth, of course, may mean giving the victim more or less than they actually lost, and thus be over-compensatory in that sense. Decoupling can solve that problem: if a tortfeasor with $1,000 in net worth takes a victim's entire $50 net worth, decoupling could take $1050 from the tortfeasor and give only $50 to the victim, thereby rectifying "both the normative gain and the normative loss in a singular bipolar operation."[154]

Thus, I do not believe giving plaintiffs a sum different than what defendants pay necessarily departs from the principles of corrective justice, at least under certain interpretations. If we accept that torts violate underlying substantive right to physical security, the notional equivalent at the remedial stage might be an

---

[151] "[D]amages represent in monetary terms (*to the extent that such a representation is possible*) the injustice committed by the defendant upon the plaintiff." Weinrib, *Restitutionary Damages as Corrective Justice*, 1 Theoretical Inquiries in Law 1, 4 (2000) (emphasis added).

[152] *See* Scott Hershovitz, *Tort as a Substitute for Revenge*, in John Oberdiek, ed., *Philosophical Foundations of the Law of Torts* 89 (Oxford 2014) ("everyone who writes about corrective justice appreciates this, at least to some extent. So they douse their claims in qualifiers."); Mark Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability,* 121 Yale L. J. 142, 159 (2011) ("monetary damages cannot compensate a dead rightholder for the premature loss of life").

[153] Margaret Jane Radin, *Compensation and Commensurability*, 43 Duke Law Journal 56-86 (1993) ("If we do not accept a commodified conception of compensation, in which harms and money are commensurable, then payment of money cannot restore persons to the status quo ante, and corrective justice will be impossible if that is what we demand of it.")

[154] Quote, but not concept, from Weinrib, *The Idea of Private Law* 136 (Oxford 2012).

individualized damage award for the plaintiff. But for tortfeasors whose normative gain does not equal the loss borne by the plaintiff, the proper remedy might be based on an objective valuation of injury keyed to an extrinsic conception of the substantive right itself.

B. The Bipolarity Problem Posed by an Intermediary

Corrective justice is a relational concept that treats the defendant and plaintiff as opposite poles of a remedial right and remedial duty. In decoupled liability, the presence of a third party intermediary that receives defendant's payment and gives plaintiff compensation might seem to treat defendant and plaintiff as independent of one another, offending this "bipolarity." New Zealand's adoption of a no-fault scheme to replace tort liability attracted scrutiny for this reason—*i.e.*, that it "displaced" corrective justice .[155] In the view of one commentator, "[t]he departure from corrective justice occurs when someone is involuntarily required to discharge the duty of another, or when the duty is initially placed on someone other than the party who should bear the duty as a matter of corrective justice, as occurs in compulsory no-fault compensation schemes."[156]

Under decoupled liability, the defendant's remedial duty is not alienated—defendants must discharge their remedial duty as they would under a coupled liability system. While the intermediary receives and disburses the funds, its institutional role is closely analogous to that of a liability insurer.[157] Even though the insurer might ultimately transfer the funds, the defendant bears the duty to make the plaintiff whole. Corrective justice is not offended merely because another mechanism is involved in discharging the duty.[158]

That defendants sets in motion institutional processes resulting in plaintiffs receiving compensation is no different than present realities. For example, to collect civil judgments against a defendants who are insolvent or refuse to pay, plaintiff must generally get the state's aid and obtain a lien or garnishment against the

---

[155] *See* Jesse Wall, *No-Fault Compensation and Unlocking Tort Law's: 'Reciprocal Normative Embrace,'* 27(1) New Zeal U. L. Rev., 125–144 (2016).

[156] Richard W. Wright, *Substantive Corrective Justice*, 77 Iowa L. Rev. 625, 704 (1992).

[157] Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from The Progressive Era to 9/11* 226-27 (Harvard 2008) ("Corrective justice, economic and political accountability, and the morality of civil liability all must be understood as taking place in this intermediated context.").

[158] Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 Iowa Law Rev 427, 443 (1992). ("Even if the injurer has the duty to repair injustice, it does not follow that justice requires that the duty be discharged by the injurer. We need to distinguish between the grounds of the duty and the institutional mechanism that are permissible ways of implementing the duty.").

defendant.[159] Sheriffs then collect money from the defendant's bank or employer, deduct a portion fees, and deliver the balance to the plaintiff. That the defendant's remedial obligation is facilitated by institutional mechanisms outside of their control does not negate the defendant being the party who ultimately satisfies the plaintiff's remedial right.

In sum, I do not believe that decoupled liability—as conceived in this Article—seriously departs from the principles of corrective justice. The variance between what the defendant pays and what the plaintiff gets is consistent with a normative conception of damages, and an intermediary no further separates the plaintiff and defendant from their bipolar position than do the mechanisms of private insurance and state-backed collection of deficiency judgments.

Conclusion

This Article examined a novel solution to tort law's most pervasive distributive problem: that poor people are exposed to greater risks than the rich due to deterrence disparities driven by differences in individualized compensation. It is of course possible to look outside of tort law for solutions. The administrative state could regulate risks more equitably; the poor could receive tax transfers to offset for their risk burdens; tortfeasors could even receive subsidies to encourage greater care-taking in poor communities. This article sought to chart a path within tort law itself. As past efforts demonstrate, finding a solution within tort law's coupled structure often means accepting inequality in one domain for equality in another. Decoupled liability offers something new, allowing one to achieve *ex ante* equality in deterrence while preserving make-whole compensation *ex post*. I hope the contribution expands the tort-scholar's toolbox for putting fairness in accident law first, and efficiency second.[160]

---

[159] *See, e.g.,* Ca. Code Civ. P. § 706.100 et seq., New York Civ. P. L. and Rules § 5200 et seq.

[160] Guido Calabresi, *The Costs of Accidents* 24 (Yale 1970) ("What, then, are the principal goals of any system of accident law? First, it must be just or fair; second, it must reduce of costs of accidents.").