UNIVERSITY OF CALIFORNIA,
IRVINE

Ways to Reform the Law

DISSERTATION

submitted in partial satisfaction of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

in Philosophy

by

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2023

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ACKNOWLEDGEMENTS

For their interest, support, and patience with respect to my dissertation and PhD progress, I have the following people to thank: my advisor, Marcello Oreste Fiocco, and my committee members: Duncan Pritchard, Jeff Helmreich, Kenneth Simons, and Shauhin Talesh.

For their departmental and philosophical support, I would also like to thank Miriam Torres and Gloria Simpson at UCI Philosophy. I extend this same gratitude to Annalisa Coliva, Aaron James, and Sven Bernecker.

For their interest, support, and patience with respect to my writing sample and MA progress at Northern Illinois University, I would like to thank David J. Buller, Craig Warmke, Steve Daskal, Lenny Clapp, and John Beaudoin.

For the same as an undergraduate at Berea College, I owe thanks to James Butler, Eric Pearson, and Robert Hoag. Special thanks are also owed to Jason Cohen.

I would also like to mention my appreciation for faculty and administration at the law school at Irvine. I would especially like to thank Emily Taylor-Poppe for her academic support and dedicated supervision and Dean Kyle Jones for his administrative support. I also have Shauhin Talesh to thank for his support of my law school application and his mentorship throughout law school.

The text of this dissertation is an adaptation of the material currently under review in *CUNY Law Review* as "Compensatory Preliminary Damages: Access to Justice as Corrective Justice," used with permission from CUNY Academic Works. I am especially indebted to Sulafa Grijalva-Perez for her efforts as an editor to publish this piece.

Finally, there are the people in my life whom I have counted on the most for their support as friends and colleagues: Jason Fontenot, Shen Tucker, Mohammed Kharboutli, Rena Goldstein, Louis Doulas, Oscar Piedrahita, Annabelle Tada, Nikita Prokhorov, Joost Ziff, and many others, including my adviser, who has played the role of a friend as he has an advisor. Likewise, to my family, thank you for all of it. And finally, to the love of my life—I know you're out there.

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ABSTRACT OF THE DISSERTATION

Ways to Reform the Law

by

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Doctor of Philosophy in Philosophy

University of California, Irvine, 2023

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I propose three ways to reform the law that concretely address major concerns across philosophical and legal scholarship: one on making civil litigation fairer and more efficient by reworking the civil procedure of awarding damages in court, another on imposing tort liability for risk impositions by recognizing what I call "infliction of precarity" as tortious conduct, and the last on reconceiving and justifying differential punishment of successful and failed criminal attempts by challenging the merger doctrine in criminal law. These proposals show how to rework existing features of the law to design novel interventions that address three questions: (1) How can we make justice through civil litigation more accessible to the public and less dependent on their wealth? (2) Why should people face civil liability for putting others at persistent risk of harm whether or not the risk materializes into the harm? (3) Why should criminal law punish offenders who complete a criminal attempt more so than offenders who fail to complete the attempt? These proposals provide concrete answers to the foregoing questions that integrate philosophical and legal scholarship. They represent my vision of legal philosophy that sees substantive legal reform as one of its inherent themes.

INTRODUCTION

In "Compensatory Preliminary Damages," I examine how the civil justice system in the United States allocates the risk of litigation expenses between parties to a suit according to the "American Rule," which states that each party is by default responsible for their own litigation expenses except in special cases. I consider how the American Rule complicates our ability to resolve legally actionable problems by making litigation subject to economic forces that effectively price individuals out of effective access to justice through civil litigation.

In turn, I propose a legal intervention that addresses the challenges faced by plaintiffs who are at substantially greater risk of lacking access to justice due to their financial circumstances despite the potential merits of their suit. This legal intervention is called "compensatory preliminary damages," which would work by providing plaintiffs with reasonable litigation expenses paid for by the defendant and are analogous to preliminary injunctions. Just as courts have the ability to award preliminary injunctions before deciding on the merits of the case in order to prevent irreparable harm, I argue that courts should also have the ability to award preliminary damages before deciding on the merits of the case, where the damages awarded relate to a plaintiff's need for access to justice and the defendant's likely degree of fault for the plaintiff's need and inability to meet that need. Given the prospects of preliminary damages, prospective plaintiffs can mitigate the risk of their litigation losses at a preliminary stage of a civil suit and, if awarded preliminary damages, can redistribute the risk of those litigation expenses onto the defendant.

In “Infliction of Precarity,” I consider how the law allocates risk through impositions of liability for risk of tortious harm in its own right. Currently, tort law in the United States does not recognize recovery for risk as a legal injury in its own right, although courts have recognized claims for emotional distress, medical monitoring, enhanced risk, and other recoveries that implicate the idea that risks can constitute legal injuries whether the risks materialize into the harms. Whereas such claims are based on theories of harm concerning the emotional, pecuniary, and anticipatory harms of imposing a risk, liability for risk in its own right must depend on a theory of harm that views the risk itself as harmful independently of its actual or anticipated consequences.

In this connection, I propose that putting others at persistent and heightened risk of harm, whether the risk materializes, should be tortious conduct. I call such conduct “Infliction of Precarity.” This action would allow individuals to recover for risky conduct and activity that put our welfare in “precarity,” which I define in terms of persistent and heightened vulnerability. The proposed injury in an infliction of precarity claim is not based on the anticipated harm or “pre-harm” within the risk that might not materialize. Instead, it is based on the actual harm to our dignitary interest in securing our life from persistent and heightened vulnerability that inflicting precarity causes. I argue that inflicting precarity actually and concretely invades an interest that falls within the scope of legally protected interests in tort law, and that such conduct should be subject to tort liability.

To support this proposal, I argue that precarity is a disvaluable condition that diminishes our well-being, and inherently so, because its disvalue does not depend on whether the potential harms that characterize it eventually occur. In this connection, I

attend to the ethical literature on risk and risking. I claim that current theories inadequately explain why it is harmful to put others at risk if the risk does not materialize. I propose a novel explanation based on the capabilities approach to value in contemporary normative philosophy. Putting others at risk is harmful because it subtracts from our capacity to secure our life from potential harm. This clarifies why it is especially harmful to inflict precarity, which occurs when the risk put on others has a persistent and heightened effect on that capacity. To support the claim that inflicting precarity should be actionable, I argue that it meets four general preconditions to the establishment of a new tort: (1) social salience and normative weight, (2) justiciability, (3) essentiality, and (4) practicality. To support the claim that inflicting precarity invades an interest that merits legal protection, I argue that it is relevantly related to interests that provide a traditional basis for suit in court. These include, but are not limited to, the interests implicated by assault, offensive battery, and false imprisonment.

Finally, in the Third Chapter, I argue against the philosophical position that supports punishing a criminal attempt as severely as the corresponding completed crime. Successful criminal attempts at an intended offense and failed attempts at the same are differentially punished, meaning that a successful attempt carries a greater penalty than the failed attempt. However, because success or failure can be decided by matters of luck or accident, moral and legal philosophers have opposed differential punishment on the argument that offenders are equally morally blameworthy whether or not their criminal attempts succeed. Using premises that the opposition accepts, I offer a justification of differential punishment grounded in a relevant moral difference that involves rejecting the merger doctrine in criminal law. Under this doctrine, the

criminal attempt and the intended offense merge at conviction, which means the offender faces a penalty for the attempt or for the intended offense but not both. I argue against applying the merger doctrine to attempted murder. A successful criminal attempt should thus carry more punishment than a failed attempt, by the same logic that committing two crimes should carry more punishment than committing either crime alone. In my view, rejecting the merger doctrine in criminal sentencing uncovers a substantive moral difference between unrealized and realized criminal attempts that justifies the legal practice of punishing them differently.

CHAPTER ONE:

Compensatory Preliminary Damages

Introduction

The principle of equal justice under the law plays a constitutive role in most legal processes.[1] Undermining that principle, however, is the reality that wealth determines how parties effectively litigate their actionable problems and their success in court.[2] As a result, wealth inequality constrains our ability to access justice and creates political disparities for different people in the legal system.[3] Because wealth inequality disparately impacts marginalized communities, such political disparities—including access to justice—are more pronounced among predominantly poor and minority people.[4] Although minorities are more likely to report experiencing civil legal problems than non-minorities,[5] they are not only *less likely* than others to attempt to solve these problems through the legal system,[6] but also more likely to experience worse results than non-minorities in making that attempt.[7]

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[1] *See* 28 U.S.C § 453; *see also* Richard M. Re, *"Equal Right to the Poor,"* 84 CHI. L. REV. 1149 (2017); *cf.* Rebecca E. Zietlow, Exploring a Substantive Approach to Equal Justice under Law, 28 N.M. L. REV. 411 (1998).
[2] E.g., Robert H. Frank, *How Rising Income Inequality Threatens Access to the Legal System*, 148 DÆDALUS 10 (2019); *see also* Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649 (2010).
[3] *See* Fatos Selita, *Improving Access to Justice: Community-based Solutions*, 6 ASIAN J. LEGAL EDUC. 83, 85-86 (2019).
[4] *See* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016).
[5] *Id.* at 1266 fn.7 (citing Rebecca L. Sandefur, Am. Bar Found., Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study 8, 9 fig.3 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf).
[6] Greene, *supra* note 4, at 1266 fn.8 (citing Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 551-54 (1980-1981); Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 346-49 (2008)).
[7] *Id.* at 1266 fn.8 (citing Sandefur, *supra* note 6, at 9).

Demographic differences—especially socioeconomic and racial—significantly structure the ability to access justice, revealing that unequal access to justice is more than a significant economic issue for a litigation-prone society that extols litigation as *the* dispute resolution process;[8] it is also a significant social justice issue, which exacerbates the perception[9] and reality[10] that the sources and structure of our justice system perpetuate, sustain, and normalize demographically stratified social oppression. Legal scholars have noted that the inability to access justice, especially through civil litigation, exemplifies "racial capitalism," which refers to the idea that "capitalism requires racial inequality and relies on racialized systems of expropriation to produce capital."[11] Here, the inability to access justice as it disproportionately impacts marginalized communities and society indicates that civil justice in America is a racialized system of expropriation.[12] This system promotes racially stratified distributive injustice under capitalism by making civil litigation inaccessible[13] on the one hand, but also a hostile site of racialized subordination when accessed[14] on the other.

[8] *See* Greene, *supra* note 4, at 1266 fn.6 (citing Miller & Sarat, *supra* note 6, at 532).
[9] *See generally* Greene, *supra* note 4, Part IV.A; *see also* HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE AND THINK ABOUT GOING TO LAW (1999).
[10] *See* Femina P. Varghese, et al., *Injustice in the Justice System: Reforming Inequities for True "Justice for All,"* THE COUNSELING PSYCHOLOGIST 682, 682-83 (2019) (providing numerous examples of contemporary substantive, distributive, or procedural injustice in the American legal system)
[11] Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg, and Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COL. L. REV. 1243 (2022).
[12] *Id.* at 1246 ("Even in cases where marginalized plaintiffs initiate litigation, they enter the civil courts due to a lack of other feasible options. They are forced to subject themselves and others to a system designed to devalue them, commodify their needs, and maximize financial extraction.").
[13] *See generally id.* (explaining primarily how racial prejudice and other related forms of discrimination influence the legal process).
[14] *Id.* at 1246. ("Civil cases are typically framed as voluntary disputes among private parties, yet many racially and economically marginalized litigants, particularly Black individuals, enter the civil legal system involuntarily, often in a defensive or vulnerable posture.").

Now, "access to justice" is an academic term of art and research theme that includes but is not limited to academic commentaries and criticisms, quantitative or qualitative studies, and political, legal, and economic agendas or programs,[15] all motivated by the idea that justice should be more "accessible"[16] to those with "justiciable" problems, i.e., legally actionable problems.[17] In one sense, justice can be made more "accessible" by creating economically and financially efficient or feasible ways to resolve justiciable problems. On that score, civil litigation is not only time-consuming and costly for most litigants, but potentially time- and cost-prohibitive.[18] In many cases, for example, parties can act in procedurally predatory ways to prolong and complicate litigation that targets the other party's ability to afford effectively responding to those actions.[19] Even absent such predatory behavior, inequalities in litigant resources have created conditions in which there is a strong relationship between litigant wealth, the costs of litigation, and litigation outcomes.[20]

[15] For example, one growing agenda or program is the "Civil Gideon Movement," which aims to address gaps in access to justice "by advocating for an expanded right to counsel for pro se low-income civil litigants in cases implicating basic human needs." Tonya L. Brito et. al., *What We Know and Need to Know about Civil Gideon*, 67 S.C. L. REV. 223, 224 (2016) (citing Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L. J. 37, 38 (2010)).

[16] The various senses in which justice can be "accessible" is a controversial foundational issue in the literature. *See generally* Rebecca Sandefur, *Access to What?*, 148 DÆDALUS 49 (2019).

[17] Kathryne M. Young, *What the Access to Justice Crisis Means for Legal Education*, 11 U.C. IRVINE L. REV. 811, 812-13 (2021) (defining justiciable problems as legally actionable problems).

[18] Parties in a civil action can, for example, strategize to prolong the legal action in a predatory manner in order to price out their opponents and pressure them to drop the action. *See* Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 101, 104 (2013).

[19] *Id.* n.13 at 104.

[20] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 103-04 (1974). For further discussion and research on the relationship between litigant wealth, the costs of litigation, and litigation outcomes, *see generally* Yoon, *supra* note 2.

On the one hand, fee-shifting and risk-bearing regimes in the legal field help indigent plaintiffs combat the class-stratifying effects of the "American Rule,"[21] which holds that litigants must absorb their own litigation expenses, including attorney's fees, unless the case meets some exception.[22] But those exceptions, which include contingency fee arrangements[23] and statutory fee-shifting schemes,[24] are not enough to fill the gaps in access to justice created by the American Rule.[25] On the contrary, these fee-shifting and risk-bearing regimes, especially contingency fee arrangements, intuitively play into the same economic factors that support unequal access to justice; contingency fee arrangements shift the risk of absorbing litigation expenses from the plaintiff to their attorney, thus incentivizing attorneys to refuse cases despite the merits because the chance of recovery does not justify the risk.[26] Likewise, statutory fee-shifting schemes do not significantly fill the gap because their application is limited to certain types of cases such as public interest or civil rights.[27]

On the other hand, legal aid corporations, societies, clinics, and *pro bono* programs can also alleviate the obstacles that individuals from indigent and minority

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[21] In contrast, the rule in most Western legal systems, the "English Rule," provides that the losing party must pay the winner's reasonable fees. *See* Theodore Eisenberg and Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 328-29 (2013). Another exception exists in the U.S. in Alaska, where the loser must pay a percentage of the winner's fees. ALASKA R. CIV. P. 82.
[22] Geoffrey C. Hazard, Jr., The Law and Ethics of Lawyering 525 (3d ed. 1999).
[23] *See, e.g.*, Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 739 (2002).
[24] *See* Henry Cohen, Awards of Attorneys' Fees by Federal Courts and Federal Agencies 25-39 (2008).
[25] *See, e.g.,* Allan C. Hutchinson, *Improving Access to Justice: Do Contingency Fees Really Work?* WINDSOR YEARBOOK ON ACCESS TO JUSTICE 36 (2019).
[26] *See* Thomas J. Miceli, *Do Contingent Fees Promote Excessive Litigation?* 23 J. LEGAL STUDIES 211, 212 (1994).
[27] *See generally* Cohen, *supra* note 24 ("There are also roughly two hundred statutory exceptions, which were generally enacted to encourage private litigation to implement public policy….Thus, attorneys' fees provisions are most often found in civil rights, environmental protection, and consumer protection statutes.").

communities face to navigate their justiciable problems.[28] But these organizations and services are greatly hindered by insufficient legal aid from public or private sources.[29] In a previous study, the Legal Services Corporation (LSC)—a federally funded corporation that funds applicable legal aid organizations—found that for every client who received service from an LSC grantee, another eligible client was turned away owing to insufficient resources to meet demand.[30] Compounding this scarcity is the problem that such organizations and services are usually understaffed, leaving civil aid attorneys overworked by excessive caseloads.[31]

Against the foregoing background, there exists a strong need for legal innovations or reform that can help mitigate class- and race-stratified disparities in access to justice brought about by the American Rule. On this score, Gideon Parchomovsky and Alex Stein have recently proposed a legal intervention of civil procedure: just as courts can grant equitable relief in the form of preliminary injunctions, give them likewise the ability to grant "preliminary damages," which plaintiffs can use to fund their legal battle.[32] Parchomovsky and Stein propose that preliminary damages would be categorically and

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[28] *See, e.g.,* Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 81 (2007) ("Civil legal assistance in the United State has a tripartite structure, comprising law clinics staffed by federally salaried lawyers, clinics staffed by lawyers salaried by funds from other sources, and lawyers working in pro bono programs . . . .").

[29] Venita Yeung, *Access to Justice Hindered by Insufficient Legal Aid, Says The Bar Council*, THE JUSTICE GAP, Nov. 18, 2022, https://www.thejusticegap.com/access-to-justice-hindered-by-insufficient-legal-aid-says-the-bar-council.

[30] *See* Legal Serv. Corp., Documenting The Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans. An Updated Report (Sept. 2009), *available at* https://www.lsc.gov/press-release/lsc-releases-updated-report-justice-gap-america.

[31] *Id.* at 27 ("Nationally, on average, only one legal aid attorney is available to serve 6,415 low-income people."). *See also, e.g.*, Matt Warren, *Legal Services Attorneys Help People Experiencing Poverty Enforce Their Rights, but Federal Restrictions on Funding Prevent Opportunities for Lasting Justice*, WESTERN CTR. ON LAW & POVERTY, Oct. 9, 2020, https://wclp.org/legal-services-attorneys-help-people-experiencing-poverty-enforce-their-rights-but-federal-restrictions-on-funding-prevent-opportunities-for-lasting-justice ("Limited funding (and for a long time, limited ability for legal aid groups to seek attorney's fees in cases they won) keeps legal aid attorneys chronically under-resourced, overworked, and underpaid.").

[32] Gideon Parchomovsky & Alex Stein, *Preliminary Damages*, 75 VAND. L. REV. 239, 260 (2022).

substantively on par with permanent damages, with the exception that the damages are awarded before rather than after a decision on the merits.[33] In their view, preliminary damages would work by making defendants "pre-pay" plaintiffs a minority percentage of their expected final recovery, which plaintiffs must repay to the defendant in the event that the court finds, after a decision on the merits, that the plaintiff is not owed as much or any recovery as a matter of law or fact.[34]

Like other fee-shifting or risk-bearing interventions, however, Parchomovsky and Stein's model of preliminary damages offers a remedy whose scope is significantly limited by the same economic factors that sustain unequal access to justice. Every plaintiff faces financial risk no matter the outcome of their case, but the fact that this risk is left to the plaintiff to completely internalize no matter the outcome of their case contributes to the access-to-justice crisis in the legal field. First, their proposed remedy does not shift the plaintiff's risk for litigation expenses. On the contrary, the plaintiff's risk is monetized and gambled. In effect, plaintiffs would borrow money from the defendant through the court against the value of their expected final recovery, which might leave the plaintiff in a worse position in the event that their recovery is denied or significantly decreased. At best, in case the plaintiff has a contingency fee agreement, the proposed remedy would temporarily shift the attorney's risk for the plaintiff's litigation expenses onto the defendant, but the plaintiff would remain at risk for paying those expenses to the defendant because the defendant is entitled to recoup the funds to the extent that the court finds against the plaintiff.

[33] *Id.*
[34] *Id.* at 267.

Second, the use case for their proposed remedy is significantly limited by the fact that the cost to see litigation through to a decision on the merits can exceed the prospective recovery from debt-based preliminary damages. Unless plaintiffs also agree to a contingency fee arrangement for a portion of the final recovery, then an attorney will be as incentivized as they were, despite the prospect of preliminary damages, to refuse cases whose expected recovery is either too unlikely on the merits or not sufficiently valuable for the attorney to tolerate the risk.

Far from being categorically and substantively on par with permanent damages, which serve to remedy plaintiffs by making them whole, Parchomovsky and Stein have proposed a mechanism in the guise of a remedy that, on the contrary, operates on the logic of credit and debt rather than legal relief. In effect, their proposed intervention functions like a kind of credit line that the court would open between the plaintiff and defendant, where that credit is a fraction of the prospective final recovery. By using that credit line to fund their legal battle, the plaintiff effectively goes into debt. In the event the plaintiff loses, the defendant is entitled to recoup that debt. In the event that the plaintiff wins, the debt subtracts from their final recovery. If this is the way that preliminary damages are supposed to work, then they are neither substantively nor categorically on par with permanent damages, but rather more akin to contingency-fee arrangements or other instruments that involve potential financial liabilities.

In this Note, I argue that preliminary damages should instead provide compensation for a particular kind of harm that is separate from recovery on the merits for the statutory or common law actions brought against the defendant. A compensation model of preliminary damages would address a plaintiff's need for access to justice by

providing reasonable litigation expenses, and a key component of that need is the potentially deserving plaintiff's exceptional risk of litigation expenses in order to have the opportunity to seek civil recourse for the underlying harms of the case. Where appropriate, compensatory preliminary damages would redistribute some of the burden of that risk onto the defendant, creating the possibility for some potentially deserving plaintiffs to shift the costs onto the defendant where (1) the defendant is liable, the (2) balance of equities favors the plaintiff, and (3) the prospective merit of the case justifies redistributing that burden.

This vision of preliminary damages as compensatory would be categorically on par with permanent damages in the sense that they compensate for harm to an interest that the law should recognize. Specifically, preliminary damages would serve to compensate plaintiffs for their diminished ability to meet their need for legal services based on factors that are reasonably traceable to the underlying harms. Preliminary damages would thus work on the same principle as the paradigmatic awards that juries grant to plaintiffs to compensate them for physical or mental harms. Here, the fundamental interest is the ability to seek civil recourse for injuries through civil litigation. Preliminary damages should be the remedy for plaintiffs whose interest in civil recourse has been culpably and harmfully impinged in ways that would make it right for the defendant to compensate the plaintiff for the costs to resolve their issues in court.

Preliminary damages as compensation serve not only to remedy harm to that interest but also to promote access to justice in general, for example, by mitigating the risk to plaintiffs that litigation would be a sunk cost, by incentivizing defendants not to engage in predatory litigation tactics, or by minimizing litigation expenses for all parties

by encouraging them to resolve the dispute outside court. As opposed to Parchomovsky and Stein's debt-based model, preliminary damages would not temporarily or contingently shift the pecuniary risks between various parties, nor would the award impinge on the plaintiff's final recovery on the merits. Instead, the compensation-based model is motivated by the principle that the ability to resolve problems through civil litigation is a fundamental interest that can be culpably and harmfully impinged in connection with the wrongful actions that give rise to the plaintiff's legal claims.

With those aims in mind, in Part I of this Note, I develop the proposal for compensation-based preliminary damages, which borrows from, and constructively elaborates on, the legal rules and standards that apply to preliminary injunctions. Then, I work through examples of how preliminary damages would or would not work to help plaintiffs finance their legal battle by compensating them for their diminished ability to meet their need for legal adjudication.

In Part II, I situate the proposal within Avraham and Hubbard's framework of civil procedure[35] as the regulation of various externalities, which provides a useful set of metrics for determining how beneficial compensatory preliminary damages would be for the court system, for parties to a case, and for the general public. Using that framework, I show why compensatory preliminary damages is compelling given the various externalities they address and resolve, and I showcase the contrast with Parchomovsky and Stein's debt-based model of preliminary damages.

[35] Ronen Avraham & William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1 (2022).

In Part III, I consider objections to the proposal. Principally, there is concern that compensatory preliminary damages are unfair for two reasons. The first reason is normative: it is unfair to hold defendants liable for preliminary damages because that liability depends in part on "moral luck," which refers to holding people liable for something even though a significant aspect of what they are judged for depends on factors beyond their control.[36] The second reason is practical: preliminary damages would be unfair because the decision to award them might create a "judicial lock-in effect," which refers to various biasing effects that earlier decisions might have on later ones.[37] In response, I explain why these fairness concerns do not apply to compensatory preliminary damages.

Preliminary Damages as Compensatory Damages

Low-income Americans encounter several civil legal problems each year, for which nearly all do not receive any or enough legal help.[38] In its latest report, the Legal Services Corporation found that nearly 74 percent of low-income households confronted at least one civil legal problem in the previous year and that these problems concerned basic needs such as housing, education, health care, income, and safety.[39] Half of such households also reported that these legal problems significantly impacted their finances, health, safety, and relationships, yet most—92 percent—sought little to no legal help, citing cost and affordability of such services as factors that influenced their decision-making process to resolve one or more of these problems.[40] In New York, for example,

[36] *See* Dana K. Nelkin, *Moral Luck*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 19, 201**9),** https://perma.cc/ZD32-TW38.
[37] *See* Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunction*s, 66 FLA. L. REV. 779, 783 (2015).
[38] *See* LEGAL SERVICES CORPORATION, JUSTICE GAP RESEARCH (2022), https://perma.cc/X8WV-M7KE.
[39] *See* LEGAL SERVICES CORPORATION, EXECUTIVE SUMMARY (2022), https://perma.cc/4ZXD-8QBD.
[40] *Id.*

millions try to navigate their high-stakes family law, consumer credit, and property law cases without a lawyer to represent them.[41] In turn, judges in such cases have observed and complained that unrepresented litigation adversely impacts court resources, case quality, and costs, leaving such parties with an impoverished experience of the rule of law.[42]

Legal inequalities arising from both free-market forces and self-regulation of the legal profession that structure the provision of legal services in the United States is one issue that the access-to-justice movement has put into greater focus, not only to raise awareness but also to criticize its predominant role in how the legal profession understands justice accessibility.[43] Although many within the access-to-justice movement are skeptical that unmet legal needs—for example, unmet needs for representation to navigate complex and high-stakes issues—are the predominant issue in the access-to-justice crisis,[44] novel legal intervention is still needed to address that problem. With this aim in mind, compensatory preliminary damages offer a concrete solution: to compensate plaintiffs for harm to their ability to meet their needs for legal adjudication that culpably arise from the alleged injuries for which they seek resolution in civil court. As a preliminary remedy like Parchomovsky and Stein's debt-based proposal, but one that offers recovery for cognizable and concrete harm, I term my version of this intervention "compensatory preliminary damages."

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[41] State of N.Y. Unified Court System, *Task Force to Expand Access to Civil Legal Services in New York*: *Report to the Chief Judge of the State of New York* 1 (2010), https://perma.cc/P6XJ-FPUX.
[42] *See id.* at 2.
[43] Sandefur, *supra* note 16, at 50 ("[T]he key assumption that any problem with legal implications requires the involvement of a legally trained professional . . . proceeds from a preference for a single specific solution: more legal services.").
[44] *Id.*

How Compensatory Preliminary Damages Would Work

After a successful showing of compensatory preliminary damages, plaintiffs would be compensated for culpable harm relative to their ability to meet their legal needs, arising from the injuries that plaintiffs allege were caused by the defendant during the pleadings stage. After the parties have pleaded their basic legal and factual positions, assuming the plaintiff has met the pleading requirements[45] and adequately responded to any preliminary challenges to the complaint,[46] plaintiffs can move for preliminary damages. In granting preliminary damages, the court would order the defendant to pay for some or all of the plaintiff's reasonable litigation costs on a continual basis until the case is terminated by some means or there is a dispositive change in fact regarding the plaintiff's ability to meet their legal needs. Reasonable litigation costs would be (a) defined as reasonable court costs and (b) based on prevailing market rates for the kind of quality of services furnished, which include reasonable (1) expenses of expert witnesses, (2) cost of any study, analysis, report, test, or project deemed necessary by the court, and (3) attorney fees.[47]

A successful motion for compensatory preliminary damages would have to show that the plaintiff meets three prerequisites. First is a need for access to justice, which itself has three components. To establish their need for access to justice, a plaintiff must plead with particularity that (A) their reasonable litigation costs would likely be cost-prohibitive relative to their financial ability to provide for those costs; (B) their alleged

[45] *See* FED. R. CIV. PRO. 8.
[46] *See* FED. R. CIV. PRO. 12.
[47] The definition of reasonable litigation costs used here borrows from the language of 26 U.S.C. § 7430, which permits a prevailing party in a court proceeding brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty to seek an award for reasonable litigation costs.

legal injuries have consequently affected their ability to provide for those costs; and (C) there exist special factors that compound (B), including, but not limited to, the plaintiff's experience with unavailable or unwilling qualified attorneys, the difficulty of the issues presented in the case and its estimated litigation footprint, a lack of reasonable alternatives or arrangements to meet their needs, or a lack of reasonable opportunities to alternatively resolve the dispute outside litigation.

Second, the plaintiff must demonstrate a likelihood of success on each claim brought against the defendant.[48] The justification for this requirement is simple. Compensatory preliminary damages are meant to be an extraordinary remedy that is partially based on a culpable connection between a defendant's alleged wrongdoing and the plaintiff's inability to meet their legal needs to attempt to right those wrongs. Here, that there is such a culpable connection presupposes that certain necessary elements of the alleged wrongdoing have occurred. By demonstrating a likelihood of success on the merits, plaintiffs provide justification for the award that is responsive to certain necessary elements of each alleged wrongdoing and meet that presupposition.

Lastly, the plaintiff must prove that the balance of equities weighs in their favor. The balance of equities concerns the hardships that an award of preliminary damages might impose on the defendant relative to the hardships for the plaintiff if the award is not granted.[49] The structure of this prerequisite is not a simple cost-benefit analysis but is ultimately based on the principle that the defendant's resulting hardship from a

[48] *Cf.* Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 32 (2008) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success[.]" (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546, n.12 (1987))).
[49] *Cf. id.* at 20. ("A plaintiff seeking a preliminary injunction must establish . . . that the balance of equities tips in his favor . . . .").

preliminary damages award should not be out of proportion with either the plaintiff's benefit from the award or the defendant's culpability for the alleged injuries in connection to the plaintiff's access to justice as defined by the first prerequisite.[50]

In sum, compensatory preliminary damages are awards to plaintiffs for culpable harm to their ability to meet their legal need that pays for some or all of the plaintiff's reasonable litigation costs. In deciding to award compensatory preliminary damages, I have described three prerequisites that the plaintiff must meet, which refer to the plaintiff's need for access to justice, the plaintiff's likelihood of success on the merits, and a balance of equities in the plaintiff's favor. To concretize and bring the proposal to life, I consider two hypothetical cases in which a motion for compensatory preliminary damages would be considered appropriate or inappropriate for indigent but potentially deserving plaintiffs. The examples below illustrate how the court in each case would consider the plaintiff's motion for preliminary damages under the standard I have provided.

1. Constructive Termination Case

Oscar, a welder at Hi-RYZ Inc., a construction company, is suing his former employer in state court for wrongful constructive termination despite an implied contract that he would not be terminated absent good cause. Although Oscar found a new job within a couple months, his financial circumstances required him to accept a job whose pay is half what he used to make. This has caused Oscar several financial

[50] *Cf.* Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in* Boomer v. Atlantic Cement), 4 J. TORT L. 1, 3 (2012) ("'Hardship' is a better label for the countervailing consideration that leads courts to consider withholding the injunction. But once a plausible showing of hardship is made, courts inquire into all sorts of things, including defendant's culpability, the public interest, plaintiff's delay or acquiescence that aggravated the risk of hardship, and the hardship to plaintiff of getting only damages instead of an injunction.").

difficulties, including trouble making his mortgage and car payments while also meeting other basic needs for his family. Due to the priority that Oscar must give to these basic needs, Oscar is unable to afford adequate legal representation without accepting a contingency fee arrangement.[51] However, due to the nature of Oscar's case, qualified attorneys have been unwilling to work on contingency alone. Although attorneys have communicated to Oscar that he might have a strong case, they have also warned him that the cost to litigate, especially if the case requires going to trial, would outweigh Oscar's prospective damages, which some attorneys have estimated to be $28,000. These same attorneys think that litigation, especially if it goes to trial, would incur an estimated average of $45,000 in legal services and fees, if not more, given the defendant's resolve for litigation. Although some attorneys considered Oscar's prospects for preliminary damages to be strong given his case, some judged the risk to be too great to justify the attempt. Yet not all attorneys estimate risk in the same ways.[52] Eventually, Oscar found an attorney who judged the risk to be outweighed by Oscar's prospect and agreed to represent him on the condition that they file a motion for preliminary damages.

In moving for preliminary damages, the court first assesses Oscar's need for access to justice. Here, Oscar has provided the court with a statement about his financial means and limitations relative to the costs of prospective litigation. He has also stated a

[51] Oscar's situation is not unlike most prospective clients who would not be able to afford legal services at a fixed rate. *See* Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1649 (1996) ("The most common justification for the use of the contingent fee system is that the system provides counsel for many who would not be able to pay a fixed fee for a competent lawyer."). Indeed, the contingency fee gained popularity during the Industrial Revolution, which often involves, like Oscar, "a poor factory worker suing a large company." *Id.*

[52] For an analysis of how lawyers or different parties perceive risk and relate that risk to the value of a potentially meritorious civil claim, *see* Robert J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193, 233 ("The matter is [] complicated if two parties do not hold the same view of risk."), 237 (2007) ("Relative risk preference and perception are important factors.").

plausible culpable link between the alleged injuries and his financial means and limitations relative to prospective litigation costs on two fronts. First, his alleged injury has put him in a financially precarious legal position by its very nature. But for the alleged injury, Oscar would not have a legal problem that he cannot afford to litigate. Here, what is relevant is not the fact that Oscar has a legal problem *per se*, but that the legal problem is the type that Oscar cannot afford. Second, his alleged injury exacerbates that precarious position due to the consequences it has had on his financial abilities. To litigate this problem, like any other plaintiff with a legal problem under the American Rule for allocating legal costs,[53] Oscar must assume the risk of absorbing his own litigation costs without recompense in the event of an adverse finding by the court.[54] The financial risk is more severe relative to Oscar's position than they are for plaintiffs with greater financial means to litigate or with greater prospective awards to attract contingency lawyers for whom shouldering that risk would be in their interest.

Finally, special factors exist in Oscar's case that compound his need for access to justice. These include Oscar's experience with unwilling attorneys, the complexity of litigating a constructive termination case involving an implied contract, and the

[53] *Cf.* James W. Hughes & Edward A. Snyder, *Litigation and Settlement under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995) ("From an international perspective, the American rule for allocating legal costs . . . is exceptional. Throughout most of the Western world the English rule applies, and the losing party in a dispute is liable for the winner's legal fees, up to a reasonable limit.").
[54] Oscar's situation reflects a common problem faced by low-income and even middle-class prospective plaintiffs, which is that they cannot afford legal assistance to avoid losing basic needs such as their home or job. *See* Jennifer S. Bard & Larry Cunningham, *The Legal Profession Is Failing Low Income and Middle Class People. Let's Fix That.*, WASH. POST (Jun. 5, 2017, 9:52 AM), https://perma.cc/2UYA-RV53. Moreover, middle-class plaintiffs face a distinct problem: they make too much money to qualify for legal aid despite also being unable to afford lawyers, given that such aid groups typically serve those at or below the poverty line. *See* Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, ABA J. (July 22, 2010, 1:36 PM), https://perma.cc/RSV2-M9JC. This reality provides an intuitive explanation for why people are likely to disengage with the legal system without some sort of intervention that will help them meet their need for legal assistance.

unwillingness of the other party to settle despite Oscar's attempts to resolve the matter outside court through a demand letter to the legal team of his former employer. Based on the foregoing claims and the evidence that Oscar presented as to his need for access to justice and the special factors that compound that need, Oscar's case shows a need for access to justice that makes preliminary damages an appropriate kind of remedy.

The second prerequisite that Oscar must establish is a likelihood of success on the merits, which will depend largely on the approach that a court uses to weigh the probability of success on the merits that a movant must show. Here, Oscar will need to allege facts that go to the elements of his claim. In the case of constructive termination, they include facts indicating, among other things, that he was not an at-will employee at the firm and that his employer subjected him to work conditions that any reasonable employee would find intolerable enough to justify resigning.[55] Here, Oscar has pleaded various facts indicating that his employer intentionally schemed to make Oscar resign by creating intolerable conditions of employment, including but not limited to harassment and unreasonable working conditions involving Oscar's safety.

Finally, Oscar must show that the balance of equities weighs in his favor. This requires weighing the hardship to the defendant if the motion is granted against the hardship to the plaintiff if the motion is denied. Given that the first prerequisite is met, the court will already have a strong idea of the hardship to the plaintiff. The court will consider the defendant's sophisticated status and, depending on the facts alleged, the

[55] *See, e.g.*, Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1237, 1246 (1994) ("The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normative motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve [their] employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.").

company's resources in order to evaluate the hardship to the defendant of paying Oscar's reasonable litigation expenses in addition to its own. In this case, the company has significantly more resources at their disposal, including their own legal department, indicating that the defendant's hardship is probably outweighed by Oscar's hardship stemming from his disproportionate risk of litigation expenses, his need for access to justice, and the consequences of his alleged injuries. Moreover, given the kind of culpability that Oscar attributes to his employer—that is, his allegation that the company purposefully resolved to drive him out of the company—the defendant's lesser hardship relative to Oscar's need for access to justice is the result of its own calculated business plans.

If the court decides to award Oscar preliminary damages, then the defendant will be ordered to create a fund that Oscar's attorneys can draw from on a continual basis not only to compensate them for their services but also to fund other litigation fees or expenses, broadly construed. The defendant must deposit the estimated or actual cost of legal services or fees that the plaintiff would incur each month to litigate the case, although the defendants can request an alternative reimbursement structure given special circumstances. To be sure, the court retains oversight as to the use of the funds. In particular, the defendant may petition the court to hold a hearing on any potential misappropriation or abuse of the funds, which would expose either the plaintiff or their attorney to embezzlement and disciplinary action.[56] Assuming that Oscar wins the case,

[56] Later in this Note, I address and respond to the concern that this creates the potential for abuse by lawyers and plaintiffs alike. *See infra* Part II.B. Although there is the potential for such abuse, it forms part of a larger pattern of potential abuse that is rampant in the legal profession. *See* Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money and Professional Integrity*, 30 HOFSTRA L. REV. 879 (2002).

then he will likely receive $28,000 in damages for his lost wages. In addition, assuming that seeing litigation through trial resulted in litigation expenses of $45,000, these will have been covered by the preliminary damages award.

These litigation expenses would still be covered even if Oscar loses the case and is not compensated for the lost wages. After all, the preliminary damages award is meant to compensate Oscar for his need for access to justice that culpably arises from the alleged injuries for which he is seeking final recovery on the merits. Although the court might find against Oscar and reject his claims, this does not contravene the court's award of compensatory preliminary damages because Oscar's need for access to justice was substantially justified by the court's finding of sufficient probability of success on the merits. Assuming that Oscar did not succeed on the merits, it would be unjustified hindsight bias to conclude that the court erred as to Oscar's probability of success on the merits.

So long as Oscar has presented a sufficient degree of success on the merits to the court given his claims, Oscar's need for access to justice would be an appropriate kind for a motion of compensatory preliminary damages. This claim can be supported by considering the converse: suppose Oscar fails at a motion for compensatory preliminary damages because the court did not find a sufficient likelihood of success on the merits, but ultimately wins the case at trial. Did the court thus err in not granting the preliminary award, and should Oscar be entitled to reasonable litigation costs despite the court's denial of the award? In my view, the court would not abuse its discretion in the event that Oscar is denied preliminary damages but succeeds after a decision on the merits. By the same token, the court would not necessarily abuse its discretion by

awarding Oscar compensatory preliminary damages even if he does not prevail at trial. This stems from the fact that the compensation-based model of preliminary damages does not make the award parasitic on a plaintiff's actual success or failure after a decision on the merits.

2. Wrongful Eviction Case

Samantha is a native San Franciscan and retiree who recently purchased a mixed-used building in San Francisco that has a commercial space on the ground floor and residential units on the second and third floors. In San Francisco, an owner move-in provision permits evicting a tenant with sufficient notice when the owner seeks to recover possession in good faith and with honest intent to use or occupy the unit as the principal place of residence for at least 36 continuous months.[57] Samantha informed residents of the second floor, who have occupied the unit for eight years, that she was going to make their unit her principal residence. She served them with notice to terminate the tenancy within three months. The tenants refused to intend to vacate the premises, arguing with Samantha that she acted in bad faith by intending to move into their unit because they are tenants with rent control who pay substantially less in rent than the current market rate for the unit, whereas the tenants of the third-floor unit are paying the market rate.[58]

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[57] San Francisco, CA., Admin. Code § 37.9 (2022). *Cf.* N.Y., Comp. Codes R. & Regs. Tit. 9 § 2524.4(a) (providing for landlord's refusal to renew lease on the grounds that the owner seeks to recover the housing for occupancy as his or her primary residence in New York City).

[58] The idea that landlords regularly engage in bad-faith evictions in order to push out tenants and sidestep rent control laws, especially tenants from marginalized communities, is supported by robust evidence. *See* John Whitlow, *Gentrification and Countermovement: The Right to Counsel and New York City's Affordable Housing Crisis*, 46 FORDHAM URB. L.J. 1081, 1092-93 (2019). For example, the Housing Court in New York City is increasingly being used by landlords to evict poor and working-class tenants, often from racially marginalized communities, in order to sidestep rent regulations. *See id.* (citing Kim

Because the tenants did not vacate, Samantha filed an unlawful detainer action against them, who responded by submitting a wrongful eviction claim that a legal aid attorney helped prepare for them in the event that Samantha took legal action. However, due to the attorney's excessive caseload and the parties' prior agreement to limited legal services, the attorney could not represent the tenants in their action. Instead, the attorney referred them to another lawyer who has experience requesting preliminary damages from the court for similarly situated plaintiffs facing high-stakes legal problems. This attorney agreed to represent them on the condition that they file a motion for preliminary damages, although the attorney advised them that their likelihood of success on the merits will crucially depend on how the court interprets Samantha's alleged bad faith in evicting them rather than some other occupied or unoccupied unit.

Now, after the wrongful eviction claim survived a motion to dismiss, the tenants moved for preliminary damages to compensate them for Samantha's alleged harm to their ability to access justice, seeking reasonable litigation costs to fund their legal battle. Having moved for preliminary damages, the court first assesses the tenants' needs for access to justice. Here, the tenants argue their need for access to justice is established by their limited financial means, including but not limited to their personal finances as well as their relative inability to afford legal services, by the high-stakes nature of the case that puts their housing status into controversy, by the impasse between the tenants and

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Barker et al., *The Eviction Machine Churning Through New York City,* N.Y. TIMES (May 20, 2018), https://perma.cc/89XG-XD4R
). Likewise, for tenants in San Francisco, landlords have attempted to sidestep rent control laws and raise rent costs by converting apartments to condominiums. *See* Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, AM. EON. REV. . (Sept. 2019), https://perma.cc/5HC4-K237.

Samantha, and by failed attempts to secure consistent civil legal aid. In turn, the tenants add that Samantha is culpable for the inability to access justice because Samantha's allegedly wrongful eviction has put them in a precarious position in which they must weigh the risk of absorbing their own litigation costs to defend themselves from the eviction against their need for housing and their ability to afford housing in a comparable unit.[59] Finally, special factors exist in this case that compound the need for access to justice: although the tenants tried to negotiate with Samantha to continue living in the unit by increasing rent at a rate that was comparable to the other units, Samantha refused. Based on this factual background and argumentation, the court found that the tenants' needs for access to justice makes the motion for preliminary damages appropriate.

Next, the tenants must show likelihood of success on the merits and that the balance of equities weigh in their favor. Regarding the balance of equities, the court found that the balance of equities sufficiently tips in the tenant's favor given their precarious position financially and with respect to their housing options. As factually presented by the plaintiffs, Samantha's current assets and expected future earnings potential, as well as her retiree status from a high-earning field, frames Samantha as being multiply more well-resourced than the tenants.

[59] Data shows that, in order to afford a fair market rent two-bedroom apartment in San Francisco, workers earning minimum wage would need to work more hours than are possible in a week. *See* Andrew Chamings, *Report Shows San Franciscans on Minimum Wage Need to Work 4.9 Jobs to Make Rent*, SFGATE (July 14, 2021), https://perma.cc/8YLX-KZFN . Indeed, as most Californians know, housing costs in San Francisco are among the highest in the world, where only 9% of current housing units are considered "affordable" according to the city's housing needs assessment. *See* Adriana Rezal & Erin Caughey, *Key Facts about Housing in San Francisco*, S.F. CHRONICLE (June 29, 2022, 1:52 PM), https://perma.cc/2L9F-CSHX .

In considering the prerequisites of the likelihood of success on the merits, however, the court found that the tenants failed to show a sufficient likelihood of success that Samantha acted in bad faith despite significant evidence from the tenants that Samantha was not intending to live there for a 36-month period. With respect to the merits, the court noted that the "good faith" condition that applies to the landlord move-in eviction process is narrowly tailored to intent to use or occupy a unit in their legal possession as their principal residence for a period of at least 36 continuous months.[60] Any other reason that the landlord might have for choosing a specific unit rather than another is immaterial to the inquiry into good faith, which focuses solely on whether an owner seeking repossession of a unit does so to establish a long-term primary residency.[61] In other words, so long as Samantha has intended to make a unit that she owns her long-term principal place of residence, then Samantha can choose any such unit at-will. Here, Samantha's desire to move into the unit and establish it as her primary residency, regardless of her reasons for doing so, were enough for the court to show good faith and honest intent as required by the ordinance.[62] Moreover, the court noted that Samantha's level of culpability for the tenant's need for access to justice in the instant case is dispositive. In moving to evict the tenants, Samantha followed a legally sanctioned process that reflected her desire to move into a unit that she owns, giving the tenants adequate notice.

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[60] Reynolds v. Lau, 39 Cal. App. 5th 953, 964-965 (2019).
[61] *Id.*
[62] Of course, the fact that Samantha has met the intent requirement for San Francisco's move-in provision is consistent with the fact that she is also incentivized to make more profit in the future and evict lower-income tenants by freeing up the unit after she has occupied the building for three years. In 2016, NBC Bay Area's Investigate Unit reported that nearly one in four owner move-in evictions could be fraudulent. Bigad Shaban et. al, *Investigate Unit: San Francisco Landlords May Have Wrongfully Evicted Hundreds of Tenants*, NBC BAY AREA (Aug. 9, 2018, 11:31 AM), https://perma.cc/H6SU-34NU .

In sum, although the tenants have a need for access to justice to litigate their likely wrongful eviction case, and the inquiry into the balance of equities tips in their favor, the fact that they are unlikely to succeed on the merits indicates that awarding compensatory preliminary damages would not be an appropriate exercise of the court's equitable discretion at this stage in the case. As explained by the court, the law makes clear the legal standard that governs the inquiry into whether Samantha acted in bad faith by evicting the plaintiff's residence under the authority of the applicable city ordinance. According to that standard, Samantha did not act in bad faith because she has provided evidence that she intends to make the residence her principal place of address, including but not limited to selling her former place of residence, communications to her professional and personal networks as to her change of residence, and detailing ties to the location that motivate the move. Because a necessary prerequisite for awarding preliminary damages is not met, it would not be an abuse of discretion for the court to deny the motion.

3. Appealing the Wrongful Eviction Case

The standard of appeal for a motion for the proposed preliminary damages would be the same as that governing a motion for a preliminary injunction or any other issue over which a trial court has discretion: namely, abuse of discretion.[63] Because of the tight analogy between the proposal of preliminary damages and the preliminary injunction, the specific language that California courts use to review a grant or denial of a preliminary injunction for abuse of discretion would be a useful and appropriate guide

[63] Appellate courts use the abuse of discretion standard to review issues over which the trial court has discretion. *See, e.g.,* Pierce v. Underwood, 487 U.S. 552, 558 (1998); Brown v. Chote, 411 U.S. 452, 457 (1973); *see also* Butt v. State of California, 4 Cal. 4th 668, 678 (1992); .

for reviewing abuse of discretion concerning a motion for preliminary damages. California state court precedent, which governs the appellant's case, establishes that a trial court abuses its discretion in denying a preliminary injunction by abusing its discretion to either the question of success on the merits or the question of irreparable harm.[64] By analogy, then, a trial court abuses its discretion in denying preliminary damages by abusing its discretion to either the question of success on the merits or the question of access to justice. In this connection, the California Supreme Court has provided guidance:

The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.[65]

California state court precedent, which governs the appellant's case, thus establishes that the trial court's denial of preliminary damages depends on whether its application of the law to the facts concerning the likelihood of success on the merits at trial was arbitrary and capricious. This means inquiring whether the decision was based

[64] *See, e.g.*, Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1450 (2002). *Cf.* Ninth Circuit precedent, which is that "district court abuses its discretion if it rests its decision 'on an erroneous legal standard or on clearly erroneous factual findings.'" Am. Beverage Ass'n v. City & County of San Francisco, 916 F.3d 749, 754 (9th Cir. 2019) (en banc) (quoting United States v. Schiff, 379 F.3d 621, 625 (9th Cir. 2004)). Once the trial court identifies the right standard, "the second step is to determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." Cal. Chamber of Com. v. Council for Ed. & Rsch. Toxics 29 F.4th 468, 475 (9th Cir. 2022) (quoting Enyart v. Nat'l Conf. of Bar Exam'rs, Inc., 630 F.3d 1153, 1159 (9th Cir. 2011)).

[65] Haraguchi v. Superior Court, 43 Cal. 4th 706, 711-12 (2008); *see also* People v. Roldan, 35 Cal. 4th 646, 688 (2005) ("A trial court will not be found to have abused its discretion unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice.") (quoting People v. Lawley, 27 Cal.4th 102, 158 (2002))).

on the wrong legal standard or on expressed or implied factual findings that are not supported by substantial evidence.[66]

Despite the unfavorable ruling from the trial court, the tenants in the wrongful eviction case believe that the district court erroneously denied its motion for preliminary damages because the factual record raises a genuine dispute of material fact as to whether their landlord intended in good faith to move into the unit occupied by the appellant tenants, and because there is a likelihood of success on the merits that a reasonable fact finder could resolve in their favor. This factual record, appellants contend, supports a reasonable inference that although Samantha desired to move into the unit, she is not doing so to make the residence her primary home for a continuous period. Rather, they conjecture based on evidence that Samantha will likely make renovations and repairs to the unit before subletting or renting out the unit at a higher rate within the next year. They also have in their possession evidence that undermined Samantha's intent to move into that particular unit given recent and past real estate purchases and investment near the area. On reviewing the trial court's denial of preliminary damages, the appeals court recognized that although the correct legal standard was applied, there is a significant question as to whether the court's dispositive factual findings were supported by substantial evidence. According to the appeals court, a genuine issue of material fact exists that could affect the outcome of the case and indicates a likelihood of success on the merits given the evidence claimed and presented by the appellants, evidence that is such that a reasonable jury could return a verdict for

[66] *See* People v. Bunas, 79 Cal. App. 5th 840, 848-49 (2022) (quoting People v. Moine, 62 Cal. App. 5th 440, 449 (2021)).

appellants.[67] The claims and evidence presented are responsive to whether the respondent intended to move into the unit for the requisite period by putting into question the consistency of that intention with evidence that the respondent has also recently purchased other units in the vicinity, including a unit in a more residential neighborhood in which she has previously lived near her family.

Given the substance of their evidence, the appeals court found that the trial court abused its discretion in making factual findings substantially unsupported by the evidence, which favored appellants' likelihood of success on the merits and, relatedly, whether a genuine dispute of material fact exists. The appeals court thus reversed the trial court's decision and remanded the case for further proceedings consistent with the appeal opinion, which entails granting the motion for preliminary damages so that the appellants' wrongful eviction claim can proceed with reasonable litigation fees owed to them by the respondent.

The Equitable Roots of Preliminary Damages

In my view, preliminary damages work like compensatory damages, but an essential element of equitable relief also motivates the proposal. In each case, the court was guided not only by considerations about the harm created to the moving party's ability to access justice but also by whether justice requires the court to exercise its equitable discretion by compensating for that harm. On appeal, the analogy between compensatory preliminary damages and preliminary injunctions was made tighter by

[67] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.") (internal quotation marks omitted).

showing how plaintiffs might appeal a denial of preliminary damages and a court should respond according to the appropriate standard of review, that is, abuse of discretion.

Motivating the proposal for compensatory preliminary damages is the underlying principle of equitable relief, which is that courts should have the ability to provide more flexible responses to legal needs that cannot be adequately addressed at common law.[68] This element of equity suggests that it would be consistent to take the legal standards that govern equitable relief, specifically the standards governing pretrial relief like a preliminary injunction, and apply them to preliminary damages, which I have already done and illustrated in my explanation for how preliminary damages would work on my proposal. Procedurally, preliminary damages provide pretrial relief like a preliminary injunction, but the relief it offers is categorically compensatory rather than injunctive. Substantively, both aim to address and protect a party's equitable interests. However, there are important differences between preliminary damages and preliminary injunctions that support the way that I have constructed compensatory preliminary damages. To draw out some of these differences, it is worth considering the roots of preliminary damages in equitable relief.

In brief, a preliminary injunction grants relief to the moving party where there is an inadequate remedy at law for irreparable harm that the plaintiff fears will occur before a final judgment on the merits takes place.[69] Preliminary injunctions are issued in a variety of legal disputes, including intellectual property cases, contract cases,

[68] *See, e.g.*, Douglas Edward Pittman, *Is Time Up for Equitable Relief? Examining Whether the Statute of Limitations Contained in 28 U.S.C. § 2462 Applies to Claims for Injunctive Relief*, 70 WASH. & LEE L. REV. 2449, 2458 (2013) (explaining that equitable powers developed in order to provide a more flexible legal approach in response to rigid or unsatisfactory legal rules).
[69] *See generally* FED. R. CIV. P. 65.

environmental cases, federal immigration policies, and nationwide medical or abortion cases.[70] Likewise, compensatory preliminary damages would grant relief to a moving party who can demonstrate, among other things, that the defendant has inequitably exacerbated the financial risks of litigation because the alleged wrongs have resulted in financially overwhelming medical expenses, loss of income, or other problems with financial consequences that not only require urgent relief but also bear on the plaintiff's prospect to find adequate services for their legal needs. In this sense, the equitable interest that preliminary damages would serve is to mitigate the disproportionate risk that indigent plaintiffs face in order to litigate alleged injuries.

Given these essential similarities, there is a credible case for modeling the standards that would govern compensatory preliminary damages after the standards that govern the preliminary injunction. However, there are also essential dissimilarities between the two that require distinguishing the standard for preliminary damages from that of the preliminary injunction. Once these dissimilarities are brought to light, the case for making preliminary damages compensatory awards rather than another fee- and risk-sharing arrangement, as Parchomovsky and Stein would have it, will be made more evident in light of its roots in equitable relief. It will also become clearer that not all the factors that guide a decision to award a preliminary injunction should be included in the proposed standard for compensatory preliminary damages. To that end, I begin by providing some context about preliminary injunctions and their current legal status.

[70] Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 U.C. IRVINE L. REV. 1331, 1136-1137 (2020).

Courts do not liberally exercise their ability to grant a preliminary injunction, which is considered "an extraordinary and drastic remedy. . . ."[71] According to John Leubsdorf, courts considering such a motion face a dilemma:

> If [the court] does not grant prompt relief, the plaintiff may suffer a loss of his lawful rights that no later remedy can restore. But if the court does grant immediate relief, the defendant may sustain precisely the same loss of his rights."[72]

Crucial to the decision to award or reject a motion for a preliminary injunction, then, is the controversially interpreted "status quo" that courts often cite as the goal of a preliminary injunction.[73] Understood not as a doctrinal safeguard of interlocutory relief, but rather a principled recognition of its aims or purpose, the principle of preserving the status quo indicates the court's interest in minimizing or preventing irreparable injury not only to the plaintiff but also to the defendant whose enjoinment may also lead to their irreparable injury.

The role that the defendant's equitable interest plays in the legal standard for preliminary injunction finds further expression in the requirement that plaintiffs post bond as security that creates actionable liability for damages caused by a wrongfully issued injunction.[74] Defendants can generally seek damages caused by the injunction as

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[71] 11A CHARLES ARTHUR WRIGHT, ARTHUR MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995).
[72] John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541 (1978).
[73] TRACY A. THOMAS, DAVID I. LEVINE, & DAVID J. JUNG, REMEDIES: PUBLIC AND PRIVATE 159 (6th ed. 2016). *See generally* Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 124-29 (2001) (identifying a significant circuit split as to the relevance of preserving the status quo as a principle of the preliminary injunction).
[74] *See, e.g.*, FED. R. CIV. P. 65(c). The bond surety requirement also exists in state courts. *See* Dan B. Dobbs, *Should Security Be Required as a Pre-condition to Provisional Injunctive Relief,* 52 N.C. L. REV. 1091, 1173-74 (1974) (providing a list of specific statutes across the states that enact a bond requirement for interlocutory relief).

determined by a jurisdiction's general rules of assessing damages.[75] Although the status quo principle and the idea of plaintiff liability for interlocutory relief may figure into the court's inquiry on a motion for a preliminary injunction, at the heart of that inquiry is a four-part test developed at common law.[76] In *Winter v. Natural Resources Defense Council, Inc.*, the United States Supreme Court outlined a four-part test of preliminary injunctive relief, requiring that a "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that the injunction is in the public interest."[77]

Repurposing the *Winter* test, Parchomovsky and Stein argue that a plaintiff seeking preliminary damages would need to prove that their motion meets the same conditions.[78] First, the plaintiff would need to prove that their causes of action are likely to succeed on the merits.[79] Parchomovsky and Stein do not comparatively distinguish this condition in the preliminary damages context from the preliminary injunction context, leaving it open as to whether there are any significant differences between the two. This is also true of my approach to preliminary damages. If preliminary damages are included in the menu of remedies that courts can offer, it should be up to the courts

[75] *See* Elizabeth L. Quick, *The Triggering of Liability on Injunction Bonds*, 52 N.C. L. REV. 1252, 1256 (1974).
[76] *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).
[77] *Id.* It is worth noting that many circuit courts are divided as to the burden, weight, and explanation attached to each *Winter* factor, especially the public interest factor. M.D. Moore, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH L. REV. 939, 945 (2019).
[78] *See* Parchomovsky & Stein, *supra* note 32, at 263 ("[W]e view our reliance on the same conditions used by courts in deciding whether to grant preliminary injunctions as a key strength of our scheme.").
[79] *Id.* at 264.

to determine, given the stakes of a preliminary damages motion, the degree or level of probability needed to meet the condition of the likelihood of success on the merits.

Second, the plaintiff would need to show that they are at risk of irreparable harm if the motion for preliminary damages is denied.[80] Here, Parchomovsky and Stein distinguish this factor as it is originally articulated in the preliminary injunction context, arguing instead that the inquiry should "focus on the plaintiff's financial situation and her ability to continue with the lawsuit if her request for preliminary damages is denied."[81] Irreparable harm is typically understood by courts to mean harm for which no legal remedy could place the plaintiff in the position they would have been in without the harm.[82] To be consistent with the court's typical understanding of irreparable harm, then, a plaintiff's inability to afford to litigate and recover for alleged harms should be construed as an irreparable injury for which there is no legally actionable remedy under the law. This is a plausible claim on its surface, as the very idea that courts should introduce preliminary damages into the menu of remedies indicates that there is no legal remedy for the plaintiff's inability to litigate. However, implicit in such a claim is the idea that the ability to afford to litigate some justiciable problem is, in some sense, owed to the plaintiff.

This idea has some merit if the inability to afford to litigate the problem flows directly from the legally remediable harms that the plaintiff alleges against the defendant, which suggests making preliminary damages compensatory awards that are linked to the alleged injuries underwriting the complaint. In contrast, Parchomovsky and

[80] *Id.* at 265.
[81] *Id.*
[82] Tracy A. Thomas et. al., *supra* note 29, at 62.

Stein's proposal for how preliminary damages should work ignores whether the plaintiff's inability to litigate is a type of harm that would justify an award of debt-based preliminary damages. Although they model preliminary damages on the logic of credit and debt, a significant distinction between that logic and debt-based preliminary damages is that the funding party's choice in the matter is not voluntary. If the court awards Parchomovsky and Stein's version of preliminary damages, then the defendant is legally compelled to provide funds for the credit line that the court opens between the parties which the moving party can then use to fund their legal battle. But given that the condition of irreparable harm and preserving the status quo are not applicable in the context of awarding debt-based preliminary damage, the justification for awarding debt-based preliminary damages is entirely dependent on the justification for awarding final damages after a decision on the merits. But because debt-based preliminary damages and final damages are neither substantively nor categorically on a par, the justification for the latter cannot be used to justify the former.

In other words, whereas the court's ability to do equity by issuing a preliminary injunction stems principally from the justification that such an injunction is necessary to prevent irreparable harm and preserve the status quo, the court's ability to do equity by issuing debt-based preliminary damages does not analogously stem from the justification that it prevents irreparable harm. For their model, Parchomovsky and Stein do not identify a plaintiff's need for access to justice as a type of harm that the defendant bears some responsibility for creating or exacerbating. Instead, the justification for debt-based preliminary damages is purely an instrumental one that is not based on the logic of *interpersonal* harm and liability between a plaintiff and a defendant that is

traditionally understood as underlying tort law.[83] Rather, the justification appears to be based on impersonal concerns for fairness that do not make essential reference to how the particular defendant owes preliminary damages to that particular plaintiff because of some corresponding harm or injury for which the defendant is responsible.[84]

Yet that instrumentality raises the question of whether the court is justified in exercising its equitable powers to advance impersonal concerns for fairness between the parties and whether it is justified to make the defendant a means toward achieving that fairness if the defendant is not sufficiently culpable for the inequality. In contrast, compensatory preliminary damages do not raise such worries about whether their award is justified. As compensatory awards, the justification for preliminary damages is substantively the same as the justification for final damages granted after a decision on the merits, which is to make plaintiffs whole for injuries to their interests caused by culpable wrongdoers. This is why the condition of irreparable harm is absent from the standard that I propose for compensatory damages and replaced by the condition that the defendant bears some culpability toward the plaintiff with respect to the plaintiff's need for access to justice.

Finally, the third and fourth conditions that plaintiffs would need to prove in a motion for a preliminary injunction are, respectively, that the balance of equities favors the plaintiff and that awarding preliminary damages is consistent with the public

[83] *See*, *e.g.,* Benjamin Ewing, The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility, 8 J. TORT LAW 1 (2015).

[84] In other words, debt-based preliminary damages are proposed as a sort of financial technology that can help promote optimality in the legal system with respect to deterrence and fairness, which fits into the law and economics approach to tort law. *See id.* ("Since the advent of the law and economics movement, it has been extremely common for tort scholars to explain and justify tort law principally with reference to the goal of economically optimal deterrence—i.e., maximizing wealth . . . ").

interest.[85] In the injunctive context, courts typically interpret the balance of equities by weighing the hardship to the defendant of the injunction against the hardship to the plaintiff.[86] This is not a simple cost-benefit analysis in the binary terms of benefits and burdens to the plaintiff or defendant, but rather, as the "undue hardship" defense, the balance of equities also contemplates, among other factors, such attenuating or aggravating factors as the defendant's or plaintiff's culpability for the hardship.[87] Rejecting the scope of that approach to balancing the equities, Parchomovsky and Stein suggest limiting the inquiry to the economic and financial capacities of the parties, such that the "line should be drawn between well-to-do corporate defendants and cash-strapped individual defendants."[88] In turn, they contend that "[t]he main risk preliminary damages pose to defendants is the risk of nonrepayment if they win the case in the end."[89] In that case, "if the plaintiff used the preliminary damages to finance the litigation, she would not be able to repay the defendant right away, if ever,"[90] but Parchomovsky and Stein suggest that such a risk can be addressed by capping preliminary damages "at forty percent of the total damages sought by the plaintiff."[91]

Capping preliminary damages at 40 percent raises two problems. First, it seems to be an arbitrary cap. Preliminary damages are a novel legal intervention precisely because they bring flexibility to the rigidity of awarding damages in civil litigation, but

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[85] Parchomovsky & Stein, *supra* note 8, at 266-68.
[86] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 542 (1987) ("[A] court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.").
[87] *See* Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. Tort L. 1, 3 (2012) (citing 1 DAN. B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION §§2.4(5), 5.7(2), at 108-13, 765-71 (2d ed. 1993)).
[88] Parchomovsky & Stein, *supra* note 32, at 266.
[89] *Id.* at 267.
[90] *Id.*
[91] *Id.*

capping them at 40 percent, rather than allowing courts to determine the percentage themselves given the risk of non-repayment, undercuts the flexibility that motivates the intervention. Second, capping preliminary damages to accommodate the risk of non-repayment severely limits its use case. As previously discussed, the use case for debt-based preliminary damages would be limited to cases in which the expected final recovery of the case is great enough to justify the risk of litigation expenses as well as make an award of preliminary damages substantial enough to pay for a significant portion of those expenses. By limiting preliminary damages to a particular percentage, Parchomovsky and Stein furthermore limit the use case of the intervention to cases in which the expected final recovery is enough to justify the risk and pay for the expenses even at 40 percent.

Compensatory preliminary damages avoid the foregoing problems. If compensatory preliminary damages are awarded, then that is because the plaintiff is owed the award by the defendant for the defendant's culpable wrongdoing to their ability to access justice for the same reason that a plaintiff is entitled to final damages after a decision on the merits for other culpable wrongdoing. The defendant is thus not entitled to repayment because an equilibrium has been reached between the parties in the same way that equity is thought to be reached when a court awards final damages at the end of a trial. Like the plaintiff who is thought to be fully compensated by an award of final damages for consequential or incidental damages arising from the defendant's culpable wrongdoing, an award of compensatory preliminary damages restores a plaintiff's inability to meet their need for access to justice caused by the defendant's creation of that need and their culpable impact on that inability.

Lastly, Parchomovsky and Stein take for granted that preliminary damages are consistent with the public interest because they would make the court system fairer and more efficient. Their approach suggests that courts should take the public interest of awarding preliminary damages as a rebuttable presumption that the defendant has the burden of rebutting.[92] This condition is absent from my version of preliminary damages because, as compensatory awards, preliminary damages focus on a problem arising specifically and uniquely between the plaintiff and the defendant. Although public interest considerations can be relevant as they are in all cases, the requirement that compensatory preliminary damages need to be consistent with the public interest is incongruent for the same reason that it would be incongruent to consider the public interest in the decision to award damages in a personal injury case for private harm.

In conclusion, although both the debt-based and compensatory approaches to preliminary damages are modeled after preliminary injunctive relief, there are significant differences. These differences need to be considered when modeling preliminary damages after preliminary injunctions. In outlining these differences, I have shown how compensatory damages overcome the obstacles faced by debt-based preliminary damages stemming from their imperfect analogy to preliminary injunctive relief.

Preliminary Damages and Civil Procedure

The introduction of compensatory preliminary damages into the civil legal system raises various questions about its relationship to civil procedure. In the United States, the power to prescribe general rules of practice and procedure in court lies with the

[92] *Id.* at 268.

judicial branch at the federal and state level, [93] This power to regulate court proceedings is based on the need to structure litigation in ways that promote efficiency and justice.[94] The answer to whether compensatory preliminary damages promote simplicity, fairness, and justice, among other values of civil procedural design,[95] is based on a novel theory of civil procedure recently proposed by Ronen Avraham and William H.J. Hubbard.[96]

Avraham and Hubbard posit that the various goals of civil procedure are rooted in one purpose: to address and regulate three kinds of externalities that litigation creates. The first type, "system externalities," refer to the positive or negative effects that litigation has on cases or the court system in general.[97] The second are "strategic externalities," which refer to the positive or negative effects of a party's actions on opposing parties in the same case.[98] Finally, "public-goods externalities" refers to the positive or negative effects of litigation on society as a whole.[99] Based on this theory, compensatory preliminary damages address and resolve more externalities than they create. By the same token, Parchomovsky and Stein's debt-based approach to preliminary damages creates more externalities than it addresses and resolves. Both of these arguments are explained further below.

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[93] *See, e.g.,* 28 U.S.C. § 2072 (2018).
[94] For example, FED. R. CIV. P. 1 states that the purpose of its rules is "to secure the just, speedy, and inexpensive determination of every action and proceeding."
[95] Another such question is whether preliminary damages would abridge, enlarge or modify a substantive right, which is prohibited by the Rules Enabling Act, 28 U.S.C. § 2072 (2018). Arguably, preliminary damages would provide plaintiffs with a substantive right to a remedy against harm to their need for access to justice, and so this power must be delegated to courts by Congress and state legislative bodies.
[96] Avraham & Hubbard, *supra* note 35 at 4-5.
[97] *Id.* at 6.
[98] *Id.*
[99] *Id.*

Specifically, compensatory preliminary damages address and resolve, respectively, (a) system externalities that create excess litigation costs and delay in legal proceedings, (b) strategic externalities that create conditions for gamesmanship between the parties that disrespect the rule of law and exacerbate system externalities, and (c) public-good externalities that impede progress in the development of law and give rise to the access-to-justice crisis in the legal field. In this way, the compensatory model of preliminary damages improves civil litigation overall by effectuating its aims of efficiency, respect for the rule of law, and benefiting society, and are thus suited to the goals of civil procedure: to promote fairness, simplicity, and justice in practice.

A. System Externalities: Cost and Delay

There is a significant decline in civil trials both in absolute numbers and relative to other relevant measures such as the number of lawyers or the size and innovation of the legal field.[100] Indeed, the conventional wisdom in the legal field is that at least 85percent of civil cases terminate in some form of pretrial settlement.[101] One potential explanation for this decline is the grossly expensive cost of litigation relative to the potential payout: in a 2008 litigation survey, nearly 81 percent of respondents reported that their law firms turn away cases when it was not cost-effective to handle them and that 94 percent believed that trial costs and attorney fees are an important factor in driving cases to settle rather than litigate.[102]

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[100] Marc Galenter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).
[101] *See, e.g.*, Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STANFORD L. REV. 1339, 1339-40 (1994).
[102] Institute for the Advancement of the American Legal System, Interim Report & 2008 Litigation Survey of the Fellows of the American College of Trial Lawyers on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System A-6 (Sept. 9, 2008), https://perma.cc/3BV5-EWZY.

A prevalent system externality that litigation creates, then, is the effect that expected litigation costs and efforts can easily outweigh its expected benefits, driving plaintiffs either to settle for less than their claim is worth or driving them away from litigation in the first place. Because the cost to litigate can exceed the amount in controversy, an award of damages—whether preliminary or permanent—is not always an economically optimal or rational goal to pursue. As a result, plaintiffs whose cases would be more expensive to litigate than they are worth are deterred from vindicating their claims in court. This may suggest an efficient equilibrium in which cases that do not warrant litigation will be resolved in other ways and not burden the litigation system. On the other hand, however, this may actually suggest a suboptimal level of litigation.

The high transaction costs that lead to suboptimal levels of litigation are largely driven by factors that are constitutive of the sources and structure of litigation, which include constitutions, statutes, regulations, and cases, as well as the rules of civil procedure, rules of evidence, and the like. As these legal sources and structures increasingly grow, interact and counteract, take on new mediums—such as electronic discovery—and subsequently complicate litigation, there will be a corresponding increase in the costs and efforts needed to litigate that are not captured by present parties that contribute to this effect and make litigation more costly over time. To be sure, the contemporary costs and efforts needed to litigate can be attributed to other factors than the simple fact that the law in its various guises gets more complicated over time. Free market forces that make legal education more expensive and make the market

for legal services more costly for all,[103] as well as the legal profession's monopoly on the provision of legal services,[104] contribute to our society's access-to-justice barriers. Compensatory preliminary damages address and mitigate the foregoing system externality, in part, by making well-resourced defendants bear some of the costs of a litigation system whose high transaction costs do not disfavor them to the same extent as less-resourced plaintiffs.

Rather than letting this system externality inequitably exclude indigent plaintiffs from bringing deserving claims against wealthy defendants, preliminary damages redistribute the burgeoning costs of litigation more equitably between plaintiffs and defendants by providing a way for plaintiffs to shift the responsibility for internalizing the inflation of litigation costs onto the defendant. Compensatory preliminary damages also address the worry that plaintiffs would drive up litigation costs by suing wealthy defendants based on frivolous claims that lack merit to obtain a settlement,[105] which is an instance of a strategic externality I discuss next. Given the high bar that plaintiffs need to meet in order to show a likelihood of success on the merits at the preliminary stage, compensatory preliminary damages are unlikely to foster the sort of abuse that would force a defendant to accept a settlement in a frivolous case.

In contrast, Parchomovsky and Stein's debt-based model of preliminary damages does not address and mitigate the system externality at issue. This debt-based model of

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[103] *See*, e.g., John R. Brooks, *Curing the Cost Disease: Legal Education, Legal Services, and the Role of Income-Contingent Loans*, 68 J. LEGAL EDU. 521, 522 (2018).
[104] *See generally* Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683 (2014) (discussing how lawyers have monopolized the provision of legal services, in part due to the strict regulation of legal services).
[105] *See* Thomas Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 Law and Contemporary Problems 139, 151-52 (1984) (discussing the allegation that a significant proportion of frivolous lawsuits are brought in the hopes of obtaining a favorable settlement).

preliminary damages cannot mitigate this externality because their intervention requires that the award be limited to a fraction of the expected compensatory damages of a case. In other words, if the expected compensatory damages of a case are not valuable enough to pursue the case given outweighing litigation expenses, the prospect of preliminary damages would not justify pursuing the case.

Second, debt-based preliminary damages would likely lead to more delay and cost effects than compensatory damages would because the debt-based model provides for the possibility that prevailing plaintiffs would have to repay the award to defendants in the event that the court finds against them. An award of debt-based preliminary damages may require further costly and time-consuming action between the parties in the event that the plaintiff must repay the award, or if the plaintiff cannot afford to repay the award. On the contrary, an award of compensatory preliminary damages, being procedurally preliminary, need not be altered even if the plaintiff loses the case, leaving the court and the parties only to focus on the decision on the merits after the award is granted. In a similar vein, it is worth noting that, in some cases, costs and time will be expended on the issue of the amount of expected compensatory damages that a plaintiff would be entitled to in a case and on which their award of preliminary damages would be based. Unlike reasonable litigation expenses, which can be ascertained easily based on a lawyer's hourly rate and other itemized receipts, determining the expected damages that a plaintiff is entitled to before a decision on the merits in the case of debt-based preliminary damages would be a foreseeably sordid affair.

Plausibly, plaintiffs and defendants might argue over the preliminary value that the court should assign to the plaintiff's non-pecuniary or non-itemized damages that

are ordinarily valued by fact finders during the final remedial phase of a trial. Since the value of a plaintiff's damages varies in different cases and can be changed subject to the court's determination on whether the damages awarded were too low or too high, considerable delay is likely. As such, the costs to calculate the debt-based preliminary damages are avoided by compensatory preliminary damages.

In summary, compensatory preliminary damages address and mitigate the system externality that drives plaintiffs, especially indigent plaintiffs, to abandon their legally actionable claims because the costs of litigating them outweigh their commensurate benefits. Even in cases in which litigation costs might outweigh prospective damages, compensatory preliminary damages would offset this externality by shifting it onto the defendant to pay for the reasonable litigation expenses of the plaintiff. In contrast, the debt-based model of preliminary damages does not shift this externality onto the defendant. If the prospective damages that a plaintiff expects to receive in a case do not outweigh that plaintiff's litigation expenses, then there is nothing that an award of debt-based preliminary damages would do to offset that fact, leaving plaintiffs financially worse off than they would be even in the event that they win the case.

B. Strategic Externalities: Gamesmanship

Whereas system externalities concern benefits or shifted onto others on a more general level, affecting all who participate in the system, strategic externalities operate at a smaller scale between parties to a case. Strategic externalities arise from parties imposing costs on one another for the purpose of gaining strategic advantage in

litigation.[106] These externalities come in various kinds, but some of the more prevalent come in two forms. The first occurs at the level of a case itself, arising from what are called "SLAPP" suits,[107] and the second occurs within a case. In the context of party discovery, one side pressures the other by raising the costs of responding. In focusing on the phenomenon of discovery abuse in litigation, compensatory preliminary damages addresses and resolves the externalities this practice creates.

Discovery is a formal tool used to obtain information from opposing parties, to determine before trial begins what evidence exists or may be presented in a case through such methods as depositions, interrogatories, subpoenaing, and physical or mental examination, among other methods of gathering evidence.[108] In theory, the discovery process minimizes uncertainty between the parties, lowers the transaction costs of dispute resolution, improves the accuracy of claims, and promotes simplicity, fairness, and justice in practice just as other processes governed by the rules of civil procedure.[109] However, in practice, party discovery has become a highly controversial, adversarial proceeding that can result in what the legal community refers to as "discovery abuse,"[110] which can manifest in two major ways: (1) "excessive or improper use of discovery devices to harass, cause delay, or wear down an adversary by increased costs" and (2)

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[106] Avraham & Hubbard, *supra* note 35 at 31.
[107] *See* Shannon Jankowski & Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws,* American Bar Association (Mar. 16, 2022), https://perma.cc/JT5B-2UGJ. . SLAPP stands for "strategic lawsuits against public participation," which refers to "meritless lawsuits designed to chill constitutionally protected speech on matters of public concern," whose goal is to punish targets with time-consuming and costly litigation in order to deter similar speech in the future. They are "often brought by the wealthy or influgential against the less-well-resourced or powerful," and have led to most but not all states to adopt anti-SLAPP laws, though the issue remains controversial in federal court. *Id.*
[108] *How Courts Work*, American Bar Association (Nov. 28, 2021), https://perma.cc/8PEW-UZ6U.
[109] *See* Jeong-Yoo Kim & Keunkwan Ryu, *Sanctions in Pre-Trial Discovery*, 14 EUROPEAN J. L. & ECON. 45, 45 (2002).
[110] *See* Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 Vand. L. R. 2037, 2037-38 (2019).

"'stonewalling' or opposing otherwise proper discovery requests for the purpose of frustrating the other party."[111]

Our current legal environment is ripe for and incentivizes discovery abuse because parties are expected to absorb their own litigation costs in most cases, including the costs of discovery. For example, a party may gain strategic advantages in court by engaging in excessive discovery, in order to raise its costs on opposing parties to force them to settle, abandon their case, or lower the overall value of their case, among other motivations.[112] Discovery abuse contributes to the fact that litigation can easily be made cost-prohibitive for litigants, and in cases involving parties with unequal resources, the party with more financial resources can obstruct less resourced plaintiffs by raising the cost of discovery to impede their ability to effectively litigate their case. This same effect can be achieved not only through document dumping but also abuse of other procedural tactics such as excessive retaliatory motions, including motions to quash a subpoena[113] or opposition motions to compel disclosure or discovery.[114]

Whether through discovery abuse, SLAPP lawsuits, or other gamesmanship tactics that create negative externalities on opposing parties, such as plaintiffs bringing frivolous suits to extract settlements from defendants as alluded to earlier,[115] compensatory preliminary damages would deter such practices for especially vulnerable plaintiffs. Although compensatory preliminary damages would not solve discovery abuse writ large, they would significantly deter such abuse by requiring

[111] William Hopwood, Carl Pacini & George Young, *Fighting Discovery Abuse in Litigation*, 6 J. FORENSIC & INVESTIGATIVE ACCOUNTING 52, 53 (2014). .
[112] Lahav, *supra* note 110, 2038-45.
[113] *See* Fed. R. Civ. P. 45.
[114] *See* Fed. R. Civ. P. 37.
[115] *See* Rowe, *supra* note105.

defendants to pay for a plaintiff's reasonable litigation costs and deterring such a problematic practice because defendants would be on the hook for those costs as soon as the award is granted. Under the paradigm of compensatory preliminary damages, the defendant must internalize the cost of discovery, responding to motions, and the like, meaning opposing parties should be deterred from bringing excessive motions during discovery or other phases of a case because they would also have to pay for the plaintiff's costs to respond.

Admittedly, a concern exists that compensatory preliminary damages only partially address and resolve concerns of discovery abuse by defendants. Given that compensatory preliminary damages provide for litigation expenses, plaintiffs' lawyers may drive up costs and create more strategic externalities by over-complying with discovery requests or requesting excessive discovery from defendants.[116] Although this is a valid concern because legal work is significantly motivated by its profitability, there is a parallel significant deterrent built into the award for compensatory preliminary damages. Courts will pay special attention to the costs that plaintiffs generate in the case and scrutinize them for any potential abuse or fraud. In a case where compensatory preliminary damages are awarded, plaintiffs will and should face scrutiny from the courts for any potential abuse that could lead to even worse sanctions than is typical in

[116] This problem also generalizes: Plaintiffs' lawyers may drive up costs and engage in more gamesmanship given that the prospects of preliminary damages would incentivize them to be more litigious and legally proactive. For example, bad-faith lawyers might engage in a strategy where they bring multiple suits by indigent plaintiffs seeking preliminary damages in the hopes that the court will award such damages in at least one of the cases. Although this concern is valid, it is unrealistic because the potential preliminary fees from one case would surely not outweigh the work, expenses, and risk of ethics violations created by engaging in the foregoing strategy. As in discovery, mechanisms exist to prevent abuse of discretionary matters in the court system, and courts will likely respond to suspicions of such strategy with critical scrutiny and severe repudiation.

situations where a court finds discovery abuse. Just as sanctions for discovery abuse are already codified by the rules of civil procedure,[117] the rules governing compensatory preliminary damages would likely include sanctions that compound existing discipline for discovery abuse.

Notably, Parchomovsky and Stein's debt-based model does not address the issue of litigation abuse, because the debt-based model does not shift the risks of litigation costs from the plaintiff to the defendant at all. Awarding debt-based preliminary damages to plaintiffs leaves them as vulnerable to the gamesmanship of litigation abuse as they were originally, if not more vulnerable because opposing parties might engage in abusive litigation tactics to increase the costs of moving for preliminary damages or to delay the award to their advantage. As a result, the value of debt-based preliminary damages would be reduced given the defendant's partial control over the costs of litigation that might make final recovery ultimately not worth pursuing the case in hindsight. Basically, well-resourced defendants could punish potentially deserving plaintiffs who are awarded debt-based preliminary damages. This suggests, once again, that debt-based preliminary damages are flawed in their design as a financial instrument, a flaw that extends to their design as a remedy.

A. Public-Goods Externalities: Access to Justice

In examining externalities at an even larger scale than system externalities, I now focus on benefits and burdens created by litigation and law that affect society as a whole and not just the legal system and its constituents.[118] Examples of such externalities that

[117] *See* Fed. R. Civ. P. 37.
[118] Avraham & Hubbard, *supra* note 35 at 33.

affect society as a whole include legal precedent, which clarifies the law, provides certainty regarding legally expected behavior in society, and legitimizes and stabilizes the rule of law, among other things.[119] Other and more negative public-goods externalities arise, for example, from the fact that most cases do not go to trial.[120] Although most cases do not raise legal questions that give rise to new precedent, it is plausible that at least some cases that settle rather than go to trial could have raised new precedent, and that among these cases, but for cost-prohibitive financial strains of bringing them to trial, some went to settlement or were abandoned.

Conceiving of the problems of access to justice as a public-goods externality, especially the financial limitations of access to justice, puts into focus how compensatory preliminary damages would address and resolve problems stemming from costs and benefits that affect both the court system and society as a whole. Preliminary damages do so by providing indigent plaintiffs recompense for a special type of harm to their fundamental interest in resolving their justiciable problems through litigation that would provide them with the financial resources to see their case through litigation after meeting the requisite safeguards. Both the court system and society as a whole suffer from the limitations that indigent plaintiffs face when they are priced out of litigation due to the cost-prohibitive nature of their need for legal services. This harm to the court system and to society can be illustrated by considering at least three functions that litigation serves in civil society.

[119] *Id.*
[120] Galenter, *supra* note100.

Ordinarily, litigation is thought to serve two functions: dispute resolution and law declaration.[121] Under the dispute resolution rationale, civil recourse, including litigation, is considered necessary to civil society because if individuals cannot resolve their disputes in a fair and just manner, then society would resort to violence.[122] Under the law declaration rationale, litigation is necessary for the law to evolve as courts interpret and develop the law based on unique cases.[123] In essence, these rationales point to the regulatory functions of litigation as a way for civil society to resolve disputes and to produce, clarify, legitimize, and stabilize the law over time.

But as many scholars have pointed out, a third understanding of litigation performs a more fundamental civic or political function, such as self-governance[124] or political participation.[125] For example, Alexandra D. Lahav argues that litigation "promotes democracy by permitting participants to perform acts that are expressions of self-government," with civil rights litigation being the strongest example of that performance.[126] Lahav claims that litigation generally creates five democratic benefits: (1) obtaining recognition from a governmental officer, (2) promoting public reason and debate, (3) promoting transparency, (4) aiding in the enforcement of the law by requiring wrongdoers to answer for their conduct, and (5) enabling citizens to serve as adjudicators on juries.[127]

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[121] Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1658 (2016).
[122] *Id.*
[123] *Id.*
[124] *Id.* at 1659.
[125] Gal Dor & Menachem Hofnung, *Litigation as Political Participation*, 11 ISRAEL STUDIES 131 (2006).
[126] Lahav, *supra* note 122 at 1659.
[127] Lahav, *supra* note 122 at 1660.

A civil legal system that effectively excludes a large class of people from performing self-governance and producing the democratic benefits that Lahav has identified indicates that our society has a major public-goods externalities problem. Compensatory preliminary damages would facilitate the resolution of some of these externalities by promoting not only dispute resolution and law declaration for indigent plaintiffs but also self-governance or political participation by giving indigent plaintiffs who prevail the ability to meet their need for access to justice.

Two Fairness Objections

While compensatory preliminary damages offer several benefits in the senses described in Part II, they also raise potential fairness concerns. One concern addressed in Part I is that an award of preliminary damages would be unfair to a plaintiff if the court finds for the defendant on the merits, signaling that the plaintiff's need for access to justice was not justified.[128] However, this concern is unwarranted because an award of preliminary damages arises out of the plaintiff's separate preliminary claim that their need for access to justice has been culpably harmed by the defendant and there is a traceable link between *that* claim, and other underlying harms of the litigation. Such concern arises from misunderstanding that compensatory preliminary damages serve to recompense plaintiffs for a special type of harm: their ability to access justice that is tied to the defendant's culpability for that harm. A defendant may ultimately be exculpated by a court for the other claims brought by a plaintiff based on a decision on the merits, but if the plaintiff demonstrates (1) a need for access to justice, (2) a likelihood of success on the merits for the underlying harms of the litigation, and (3) that

[128] *See* discussion *supra* Part I.A.1.

the balances of equities favors the plaintiff, then that is not contradicted by a court's decision that the defendant is ultimately not at fault after a decision on the merits. Accordingly, this Part extends the foregoing concern related to fairness by discussing further concerns of this nature and objections to compensatory preliminary damages that raise the issues of responsibility and of judicial bias.

In particular, there are concerns that compensatory preliminary damages are fundamentally unfair because they involve factors or circumstances that are not under a defendant's control and for which it would be inappropriate to hold them responsible as required for compensatory preliminary damages. That is, it would be unfair to force defendants to pay for the costs of litigation for indigent or less-resourced plaintiffs, given that a plaintiff's financial circumstances and relative ability to pay those costs are not the fault of the defendant. Likewise, it would be unfair to penalize large, well-resourced defendants by forcing them to pay compensatory preliminary damages that another defendant bearing the same level of culpability would not have to pay because their opponent is similarly well-resourced. There are also concerns that compensatory preliminary damages could result in biased decision-making by courts because the significant favorability shown to plaintiffs who are awarded compensatory preliminary damages might extend to other judgments, including a final judgment. However, because preliminary damages are compensatory for concrete and cognizable harms, questions about responsibility for factors not under our control—referred to as "moral luck"[129]—and questions about judicial bias do not significantly undermine their use case.

A. Moral Luck

[129] *See* Nelkin, *supra* note 36.

Like in our moral practices, in our legal practices luck plays a significant role in determining legal liability for our conduct, especially in tort law.[130] People generally share the intuition that we are only morally responsible for what is roughly within our control, powers, or capacity to do or prevent.[131] But situations frequently arise, including in the legal context, in which we breach our obligations and duties to others despite the breach involving circumstances not under our control or realistic power to prevent. These are best illustrated by scenarios exploring the notion of luckiness in the tort of negligence.[132] A classic example from moral philosophy describes two equally negligent drivers who take virtually the same actions, but one of the drivers hits a pedestrian as a matter of bad luck.[133] In examples like these, what is under each driver's control is the same. The example assumes that the negligent drivers are driving carelessly for the same reasons under virtually similar conditions, and while both fail to pay attention to a red traffic light at a busy intersection, only one hits a pedestrian due to circumstances beyond the foresight and control of all parties.[134] In moral philosophy, "moral luck" refers to the practice of treating someone as morally blameworthy or praiseworthy for conduct that significantly involves factors outside of one's control or foresight, especially factors

[130] *See* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1133-35 (2007).
[131] *See* Matthew Talbert, *Moral Responsibility*, STAN. ENCYL. PHIL. (Oct. 16, 2019), https://perma.cc/UHB4-YPUN ("The judgment that a person is morally responsible for her behavior involves—at least to a first approximation—attributing certain powers and capacities to that person, and viewing her behavior as arising (in the right way) from the fact that the person has, and has exercised, these powers and capacities.").
[132] *See, e.g.*, Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David G. Owen ed., 1995) (arguing that if compensatory damages vary in proportion to the severity of damages rather than the tortfeasor's culpability, then compensatory damages sometimes impose undeserved costs).
[133] *Id.*
[134] *Id.*

that are considered lucky or unlucky.[135] As Oliver Wendell Holmes noted concerning the tort of negligence, "The law considers . . . what would be blameworthy in the average man . . . and determines liability by that. If we fall below the level in those gifts, it is our misfortune . . . ."[136]

In the legal context, parties are typically liable for harms that involve causal factors beyond our control, so long as the type of resultant harms are reasonably foreseeable. However, there is no requirement in tort law that the severity of compensatory damages owed to tort victims be proportional to the damages that were under the tortfeasor's control. For example, under a widely accepted rule in American tort law—the "eggshell rule"—the measure of what is owed to a tort victim varies according to the actual damages suffered by the victim due to a foreseeable type of harm. But the extent to which that type of harm results in damages to the victim is not constrained by the tortfeasor's liability or culpability for that extent.[137] Putting the eggshell rule plainly, a tortfeasor could kick two young adults with similar outward appearances in the shin with a mechanical force of around 100 pounds, leaving one with a bruise but the other, who has especially fragile bones, with a broken shin that requires expensive medical intervention. Although there is not a sense in which the tortfeasor is responsible for the fact that the latter victim was especially physically vulnerable, the tortfeasor is nevertheless responsible for the consequences of their tortious conduct.

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[135] Nelkin, *supra* note 36.
[136] OLIVER W. HOLMES, JR., THE COMMON LAW (108) (1881).or Oliver W. Holmes, The Common Law, 38 (2000) (ebook).
[137] In some cases, this is called the "eggshell rule." *See* Steve Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375 (2013) ("Liability attaches even when the victim's condition and the scope of her injuries were completely unforeseeable ex ante.").

Consider also *Smith v. Leech Brain & Co.*, in which William Smith's wife sued her deceased husband's defendant-employer for burns to his lip caused by spattered molten metal arising from inadequate safeguards.[138] Here, although the burn was relatively minor, the injury developed into a cancer that led to the husband's death.[139] In granting damages that takes into account the cancer and death, the court rejected the defendant-employer's argument that the award amount was disproportionate to the defendant-employer's degree of fault, finding the defendant on the hook for that amount even though the degree of injury caused by his negligent action was not under his control.[140]

Like cases of negligence in which the extent of damages owed to a victim can be based on factors that are outside the negligent agent's control, compensatory preliminary damages are based on a theory of harm and liability that generally involves factors outside the control of the paying party. A plaintiff's need for access to justice is in part constituted by a complex and multidimensional web of past and present matters relevant to that person's life. These include their private choices that have shaped and continue to determine the rough trajectory of their life, but also their background, social capital or network, and luck. At the same time, it would be a misrepresentation to think that the rough trajectory of an individual's life, including their financial capabilities, is shaped solely by their private choices. Our ability to plan our life in accordance with our own evaluations of ends[141] is as constrained by structural or systemic factors as it is facilitated by our private choices. Cultural and economic resources are unevenly

[138] Smith v. Leech Brain & Co., 2 Q.B. 405 (1962).
[139] *Id.*
[140] *Id.*
[141] The phrasing concerning this ability is taken from Martha Nussbaum's capabilities approach to normative theory. *See* MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 57 (1999).

distributed across certain populations that constrain their capabilities and opportunity, including their financial capabilities.[142] Social and economic networks of support designed to minimize our vulnerability and provide opportunities for self-improvement consistently fail certain populations,[143] especially people who experience chronic or acute poverty.[144] Setting that important debate aside, if the question of whether it is appropriate to award plaintiffs compensatory preliminary damages depends on their need for access to justice—which is in part based on their financial status as well as the inherent costs of legal services and litigation—then, arguably, compensatory preliminary damages require defendants to bear burdens on the plaintiff's behalf based on facts that are outside their control. Why should a defendant be required to pay the litigation expenses of a plaintiff with a sufficient need for access to justice when part of that need is based on factors for which the defendant is not liable? This question suggests that compensatory preliminary damages would be inherently unfair to defendants by making them bear costs that are determined by factors that are not within their control.

The problem with this line of thinking is implicit in the earlier discussion of the tort of negligence. Although a tortfeasor may not be responsible for the antecedent conditions of their victim that roughly determine or define the extent of their damages, the tortfeasor is responsible for the fact that the extent of those damages manifested as a result of the tortious conduct. In the same vein, although a defendant may not be

[142] *See* JESSICA SILBEY, AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE 270 (2022).
[143] *See* Judith Butler, *Performativity, Precarity and Sexual Politics*, 4 J. IBEROAMERICAN ANTHROPOLOGY i, ii (2009).
[144] *See* David A. Super, *Acute Poverty: The Fatal Flaw in U.S. Anti-Poverty Law*, 10 U.C. IRVINE L. REV. 1273, 1277-1280 (2020).

responsible for an indigent plaintiff's financial status and its limitations on the plaintiff's ability to access justice through litigation, the defendant *is* responsible for the extent to which the plaintiff needs but is unable to access justice as a result of the defendant's *likelihood* of legal wrongdoing. Put differently, a defendant who has likely committed legal wrongdoing against a plaintiff who is unable to afford litigation has created an expensive need for civil recourse that should be a compensable item of damage when liability is established under the theory presented in Part I. The fairness of compensatory preliminary damages is thus not unlike the fairness of final compensatory damages that plaintiffs currently seek when they go to court to resolve their disputes. In both cases, defendants must bear costs to make the plaintiff whole, even though the severity of those costs is partially a function of factors outside the defendant's control. The case for compensatory preliminary damages is not undermined by luck, any more than final recovery is undermined by luck with regard to the extent of damages. At the same time, compensatory preliminary damages depend in part on the claim that the need for civil recourse can and should be a compensable item of damage flowing from the defendant's likelihood of legal wrongdoing.[145]

Although making the need for access to justice compensable is novel, redressing harm to this need is analogous to a relatively new concept of recovery in tort law, which illustrates why compensation for access to justice does not depart so significantly from the traditional tort paradigm. This new concept is called "medical monitoring," which refers to recovery for the cost of diagnostic treatment thought to be necessary to detect

[145] To be sure, this is a more controversial claim than the claim that a tortfeasor's liability for damages can extend to items of damage that are disproportionate to their fault or control for the foreseeable type of harm that led to those consequences.

the potential onset of illness due to exposure to a risk of illness caused by the defendant.[146] The inquiry of a medical monitoring claim is not whether the plaintiff will, in fact, suffer harm in the future, but whether medical monitoring is reasonably necessary to properly diagnose warning signs of the disease that makes the costs of such a necessity a compensable item of damage given the defendant's liability for creating the likelihood of future harm that requires such monitoring.[147] Similarly, the inquiry of a motion for compensatory preliminary damages is not whether the plaintiff has, in fact, suffered the legal wrongdoing for which they seek final recovery on a decision after the merits. Rather, the focus is in part whether litigation is necessary for recourse but also prohibitive in light of the plaintiff's hardship, in turn making the cost of that necessity a compensable item of damage. As such, just as in the case of medical monitoring, compensation for access to justice becomes a requirement imposed by the defendant's liability for creating the likelihood of legal wrongdoing that requires such civil action and the hardship that the facts constituting that likelihood has forced upon the plaintiff the costly burden to access justice via litigation. This is consistent with common law conceptions of tort injury and recovery.[148]

With respect to the extent of the costs that defendants must pay plaintiffs in order to make them whole, the underlying theory of liability for the extent of the plaintiff's damages is the same whether the compensatory damages are preliminary or final. Compensatory preliminary damages are thus no more unfair than compensatory

[146] Medical Monitoring, 6 Litigating Tort Cases § 67:24 (West 2022), https://perma.cc/7DNM-F2EF.
[147] In re Paoli R.R. Yard PCB Litig., 916 F.2d 829, 849-50 (3d Cir. 1990), https://perma.cc/9FWB-JZ7N.
[148] *See generally* Medical Monitoring, 6 Litigating Tort Cases § 67:24, *supra* note 147. https://perma.cc/Z7KU-D59M.

damages awarded after a decision on the merits with respect to the extent or sum of the award. In medical monitoring claims, which is gaining acceptance,[149] courts have compensated plaintiffs for diagnostic expenses that flow from the plaintiff's need to monitor a likelihood of harm created by a defendant's actual or reasonably likely legal misconduct.[150] Similar to medical monitoring claims, in motions for compensatory preliminary damages, courts would compensate plaintiffs for litigation expenses that flow from the plaintiff's need for access to justice created by a defendant's actual or likely legal misconduct.

B. Judicial Bias

Another concern for the fairness of preliminary damages stems from practical considerations about judicial bias. One worry is that compensatory preliminary damages might cause judicial bias because such damages require judges to assess the merits of a case at a preliminary stage and then revisit the merits at a later stage after

[149] On the one hand, courts show a growing pattern of accepting medical monitoring claims for potential future injury as compensable damages arising from underlying tortious conduct, such as negligence. *See In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 849 (3d Cir. 1990) ("Medical monitoring is one of a growing number of non-traditional torts that have developed in the common law to compensate plaintiffs who have been exposed to various toxic substances."); *Buckley v. Metro-N. Commuter R.R.*, 79 F.3d 1337, 1346 (2d Cir. 1996) ("We find that medical monitoring costs are a reasonable basis for an award of damages") (Overruled by *Metro-N. Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997)); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795 at 824 (1993) ("[W]e hold that the cost of medical monitoring is a compensable item of damages."); *Ayers v. Jackson Twp.*, 106 N.J. 557, 525 A.2d 287 at 312 (1987) ("[W]e hold that the cost of medical surveillance is a compensable item of damages."); Additionally, courts show a growing pattern of accepting medical monitoring claims as an actionable tort that permits recovery even absent actual injury. *See, e.g., Friends for All Child., Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 823 (D.C. Cir. 1984) (recognizing medical monitoring as a cause of action lying in tort for which awarding damages would also serve equitable ends). *See also Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193, 204-205 (N.D. Cal. 1987) (Holding that the costs of establishing and maintaining medical monitoring programs constitute compensable damages despite seeking those costs under an equitable theory of recovery); *In re Rezulin Prod. Liab. Litig.*, 168 F. Supp. 2d 136 (S.D.N.Y. 2001) (holding that medical monitoring costs satisfy federal diversity jurisdiction despite seeking those costs under an equitable theory of recovery).

[150] *See, e.g.,* Friends for All Child., Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 823, 832, 837 (D.C. Cir. 1984).

significant resources have already been invested in the case and cannot subsequently be recovered.[151] This might be thought to create the conditions for what psychologists and economists call the "lock-in effect,"[152] which refers to a decision-maker being locked into their earlier decision given the investment of resources into the earlier decision that cannot be recovered.[153]

According to Kevin Lynch, whose legal scholarship focuses on civil litigation and access to justice, especially as it relates to preliminary injunctions, the primary cause of the lock-in effect is thought to be self-justification, meaning that decision-makers allocate further resources toward a suboptimal course of action due to the desire to justify a past decision.[154] Lynch argues that the preliminary injunction involves conditions where the lock-in effect can be expected to occur because it requires judges to assess the movant's likelihood of success on the merits in a premature stage of the case.[155] Of course, a significant limitation of Lynch's argument is that it requires empirical research to determine whether lock-in affects preliminary injunctions, which Lynch explicitly recognizes.[156]

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[151] Another related worry implicating bias is the concern that judges carry biases against low-income plaintiffs, which is likely to manifest when such judges review a motion for preliminary damages. *See* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 152-58 (2013) (verifying implicit socioeconomic bias on the part of judges in Fourth Amendment and child custody cases). This bias is not unique to preliminary damages, however, and may manifest at any stage in a case involving indigent plaintiffs. Nevertheless, it is important to note that such bias would be more pronounced if preliminary damages are implemented. Yet at the same time, this might lead to further scrutiny of judicial bias if greater attention is drawn to it in preliminary damages cases.

[152] The lock-in effect originated in studies on investment decisions, but it has also been studied in hiring decisions, performance appraisals, auctions, technology formats, and policy decisions. *See* Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 783-84 (2015) (citing studies). Terms such as "escalating commitment," "entrapment," or, most commonly, "sunk costs" may be familiar. *Id.*

[153] *Id.* at 784.

[154] *Id.*

[155] *Id.* at 805.

[156] *Id.* at 811.

Lynch's concern for lock-in effects in the preliminary injunction context is also relevant to awarding compensatory preliminary damages and helps frame some practical concerns for fairness related to awarding them. Although compensatory preliminary damages and preliminary injunctions have significant structural similarities, compensatory preliminary damages are susceptible to the lock-in effect by design. Due to the significant investment of resources that the judge would order the defendant to put into the case by paying the plaintiff's reasonable litigation expenses, it is highly plausible that a judge would face significant pressure to justify their earlier assessment of the likelihood of success on the merits in their later assessment of the case, such as in the summary judgment motion. But like the limitation facing Lynch's argument, the idea that preliminary compensatory damages would be especially susceptible to judicial lock-in bias would require empirical research—research that is currently impossible to undertake given that compensatory preliminary damages are not (yet) an option.

Nevertheless, whether there is the potential for such bias, the judicial bias objection does not present a generalized challenge to introducing compensatory preliminary damages. If preliminary injunctions are justified exercises of a court's equitable discretion even though they may create a lock-in effect, then the same should be argued in favor of compensatory preliminary damages. Still, the concern for judicial bias raises an important distinction between the compensation- and debt-based models of preliminary damages. If the cause of the lock-in effect involving a motion for preliminary damages is the judge's need to justify their decision to award such damages in later assessments or judgments of the case, then compensatory preliminary damages

might not be so susceptible to the effect because the standard governing their award does not entirely lie in factors that are revisited at later stages of the case. Accordingly, the likelihood of success on the merits is a significant assessment that will be related to later assessments when the merits are judged in light of the full development of the case, but the equally—if not more—important factor of the plaintiff's need for access to justice and balance of equities will not need to be revisited at later assessments of the case. Therefore, by design, compensatory preliminary damages are more resistant than preliminary injunctions to the lock-in effect.

Conclusion

My proposal for compensatory preliminary damages responds to a sobering truth: the civil legal system and the legal field, despite their putative ambitions for fairness, justice, equality, and the like, are indisputably creations and instruments of market capitalism.[157] Courts are stratified, legal services are allocated, and litigation expenses and outcomes are overdetermined by market principles that favor the economically powerful and subordinate the rest.[158] The same goes for fee-shifting regimes, like contingency agreements, and legal aid or public interest groups, which are significantly constrained and undermined by market structures and forces that sustain access-to-justice scarcity.[159]

The fact that Parchomovsky and Stein offered an intervention that is based on debt for litigation expenses expresses the logic of capitalism. The promise of credit for

[157] Kathryn A. Sabbeth, *Market-Based Law Development*, L. & POL. ECON. PROJECT (July 21, 2021), https://perma.cc/GGD6-GC5J.
[158] *Id.* On low-income plaintiffs' increasing lack of access to litigation and relief, *see generally* Myriam E. Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016).
[159] *See, e.g.*, Sabbeth, *supra* note 158.

litigation expenses from a preliminary damages award belies the devastating potential consequences of that debt for those expenses, debt that they take to be riskier for wealthy defendants than for plaintiffs.[160] Under capitalism, debt is a socially powerful instrument[161] as much as it is an opportunity to shift and stagger costs toward the future. Debt-based preliminary damages would function likewise to bring indigent plaintiffs under the court and defendant's control in the event that they must, but cannot afford to, repay their borrowed litigation expenses, leaving them worse off than originally. Likely, such damages would contribute to the disproportionate impact that debt already has on racially marginalized communities.[162]

My proposal to make preliminary damages compensatory awards resists capitalist logic. Rather than a financial instrument, it is an experimental procedure of equity and legal relief that can be introduced to help address a substantive social and economic problem intrinsic to a market-based civil justice economy whose inflationary litigation costs stratify access to justice by economic class and, consequently, by race. This intervention is designed to compensate indigent plaintiffs for concrete harm to their ability to get their need for legal services met that can be traced to the defendant's liability for that harm arising from the defendant's likely alleged wrongdoing for which the plaintiff seeks relief after a decision on the merits.

The proposal describes actionable legal reform that goes into substantial detail as to how compensatory preliminary damages would work that can be tested, modified,

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[160] *See* Parchomovsky & Stein, *supra* note 32, at 273-75.
[161] *See, e.g.*, RICHARD H. ROBBINS & TIM DI MUZIO, DEBT AS POWER (2016). *See also* DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 379 (2011) ("One must go into debt to achieve a life that goes in any way beyond sheer survival.").
[162] *See* Katherine Lucas McKay, Joanna Smith-Ramani, & Tashifa Hasan, *Disparities in Debt: Why Debt Is a Driver in the Racial Wealth Gap*, ASPEN INST. (Feb. 7, 2022), https://perma.cc/FU9X-F55F.

and adopted by jurisdictions to address externalities that are not captured by current civil procedure but should be. More practically, this Note describes a framework, set of rules, and concrete examples that make compensatory preliminary damages realistic and not easily abused. It is not a dreamy solution to a particular aspect of the access-to-justice crisis that leaves the details and benefits of the solution to be worked out by policymakers, politicians, the judicial branch, legislative bodies, or other legal changemakers. However, acceptance of this solution does require an ability to reimagine the law and a willingness to recognize who the law currently benefits and why it is time for a change.

CHAPTER TWO:

Infliction of Precarity

Introduction

Anglo-American law has rarely recognized a risk of harm *in its own right* as a legal injury underwriting a cause of action in civil court.[1] In many cases, courts have dismissed risk-based claims without attendant harm: In *Berry v. City of Chicago*, for instance, the Illinois Supreme Court held that the risk of toxic exposure in a negligently-maintained water supply does not support a cognizable claim against the city because the purpose of tort law is to compensate victims for actual harms but not risks.[2] The court also reasoned that tort law is limited to actual harm because it is practical.[3]

The idea that risking a tort is not itself a tort because, likewise, a risk is not itself an actual harm finds further expression in a recent U.S. Supreme Court decision. In *TransUnion v. Ramirez,* the Court held that risking tortious harm is not enough for standing to sue in federal court under Article III of the Constitution.[4] The Court's reasoning was that, in the class-action suit before them, the alleged risk of harm did not rise to the level of a *concrete* harm. For one thing, the risk materialized only in a few cases, and for another, the Court did not see evidence that the risk exposure caused some attendant harm, such as emotional, reputational, or physical harm.[5]

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[1] *See* Kathleen A. O'Nan, *The Challenge of Latent Physical Effects of Toxic Substances: The Next Step in the Evolution of Toxic Torts*, 7 J. MIN. L. & POL'Y 227, 236-38 (1991-92) (citing and discussing cases).
[2] *Berry*, *supra* note 4, at 688 ("[T]he long-standing and primary purpose of tort is not to punish or deter the creation of . . . risk but rather to compensate victims when the creation of risk tortiously manifests into harm.").
[3] *Id.* ([It] establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability").
[4] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2212 (2021).
[5] *Id.* at 2211-12.

Instructively, courts have addressed risk-based claims in three kinds of cases that parallel the reasoning in the two cases above. For instance, courts have denied emotional distress claims arising from the fear of developing a future disease without some physical nexus tying the risk and fear together.[6] In medical malpractice cases, plaintiffs can recover for increased risks of future injury as a separate element of damages, but in such cases, there must also be a physical injury caused by the medical malpractice that caused the increased risk.[7] In negligence cases alleging risk of future injury without attendant physical impact, courts have ruled that the allegations fail to state a cognizable claim because a risk of harm is not an actual injury against a legally protected interest.[8] We can infer from the foregoing caselaw that, in general, Anglo-American courts do not recognize risk of harm in its own right as a cognizable injury for which tort law will provide compensation unless there is some physical nexus that satisfies the requirement that injuries be concrete, actual events.[9]

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[6] *See* Metro-North Commuter R. Co. v. Buckley, 521 U.S. 424, 430 (1997) (Rejecting recovery for an emotional distress claim based on fear of cancer developing from exposure to asbestos where the exposure did not present any "physical impact" to the plaintiff, who was healthy and asymptomatic of asbestosis); *accord* Norfolk & W. Ry. v. Ayers, 538 U.S. 135, 148 (2003) (Permitting recovery for an emotional distress claim based on fear of developing cancer from asbestosis because, unlike in *Metro-North*, plaintiff's asbestosis showed physical impact); *see also* Conrail v. Gottshall, 512 U.S. 532, 556 (1994) (Holding that the plaintiff, who was within the zone of danger of negligent conduct that caused his co-workers death, can recover for an emotional distress claim based solely on a fear of dying under similar circumstances).

[7] *See, e.g.*, Dillon v. Evanston Hosp., 771 N.E.2d 357, 367 (Ill. 2002) (Plaintiff awarded $500,000 for increased risk of injuries, although improbable, resulting from improper insertion and removal of chest catheter).

[8] *See* Williams v. Manchester, 888 N.E.2d 1, 13 (2008) ("An increased risk of future harm is an *element of damages* that can be recovered for a present injury—it is *not* the injury itself."); *accord* Berry v. City of Chicago, 181 N.E.3d 679, 688-89 (2020) (Ruling that plaintiffs failed to state a claim for a negligence action because the complaint alleges only an increased risk of harm rather than any bodily harm as a result of lead-contaminated drinking water).

[9] Although American law and courts are the focus of this article, it is worth noting that this is a rule in other jurisdictions. In the United Kingdom, for example, the House of Lords has held that a risk of harm is not in itself actionable but merely relevant to assessing damages for some actually actionable injury. *See* Johnston v. NEI Int'l Combustion Ltd. [2007] 1 AC 281.

Despite the pattern of unfavorable rulings against complaints alleging a risk of harm, Anglo-American courts have addressed and sometimes sustained complaints that allege a risk of future injury, or "pre-manifestation" claims,[10] in at least three exceptional kinds of cases. First, as alluded to earlier, plaintiffs have succeeded in emotional distress cases[11] involving the plaintiff's fear of developing a future disease in which the emotional distress concerning the risk of future disease was deemed a compensable element of damages, but only in a narrow subset of cases.[12] Second, they have also succeeded in medical monitoring claims[13] in which the cost of medical surveillance to detect the likely onset of disease was a cause of action or compensable element of damages arising from some other tortious conduct.[14] Third, but rarely, plaintiffs have succeeded in enhanced risk of disease cases[15] in

[10] "Pre-manifestation claims" are complaints alleging a latent disease, impairment, or disability brought by a plaintiff before the plaintiff has suffered any consequences from the manifestation or onset of the allegedly latent physical impact. *See* Andrew R. Klein*, A Model for Enhanced Risk Recovery in Tort*, 56 Wash. & Lee L. Rev. 1173, 1175 (1999)

[11] *See* Ernest G. Getto, Cynthia H. Cwik & Jill M. Houlahan, *Evolving Standards for Fear of Future Disease Claims in the Post-Potter Era*, 10 Tul. Envtl. L.J. 307 (1997) (discussing recovery for fear of cancer in toxic tort actions); *see also* Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box*, 53 Fordham L. Rev. 527, 570-71 (1984) (discussing evolving caselaw on fear of future disease claims).

[12] *See* Debbie E. Lanin, *The Fear of Disease as a Compensable Injury: An Analysis of Claims Based on AIDS Phobia*, 67 St. John's L. Rev. 77, 87-88 (1993).

[13] *See, e.g.*, Friends for All Children Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 824 (D.C. Cir. 1984) ("Sustaining a cause of action for diagnostic examinations in the circumstances here serves the two principal purposes of tort law -- the deterrence of misconduct and the provision of just compensation to victims of wrongdoing."); Bower v. Westinghouse Elc. Corp., 206 W. Va. 133, 139 (1999) ("We now reject the contention that a claim for future medical expenses must rest upon the existence of present physical harm. The "injury" that underlies a claim for medical monitoring--just as with any other cause of action sounding in tort--is 'the invasion of any legally protected interest.') (citing Restatement (Second) of Torts § 7(1) (1964)).

[14] *See* Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1006 (1993) ("[W]e conclude that a reasonably certain need for monitoring is an item of damage . . . . Recognition that a defendant's conduct has created the need for future medical monitoring does not create a new tort. It is simply a compensable item of damage . . . ."); *see also* Exxon Mobil Corp. v. Albright, 433 Md. 303, 378 (2013); Sadler v. PacifiCare of Nev., 130 Nev. 990, 999 (2014); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979 (Utah 1993).

[15] In re Paolo R.R. Yard PCB Litig., 916 F.2d 829, 850 (3d Cir. 1990) ("[A]n enhanced risk claim seeks compensation for the anticipated harm itself, proportionately reduced to reflect the chance that it will

which they seek recovery for the latent risk of disease itself as a compensable element of damages.[16]

Three constraints on risk-based or risk-implicating claims and the theory of harm underlying them can be discerned based on the contexts above. First, there must be a physical nexus of attendant or concomitant physical impact that led to the emotional distress or the need for medical monitoring, although this is not always a requirement in medical monitoring cases.[17] Second, there must be reasonable certainty or a preponderance of future harmful consequences resulting from the impact, especially in enhanced risk cases in which there is a high burden of proof, but not in medical monitoring cases.[18] Third, rather than treating risk-based claims as causes of action, courts have generally treated these claims as elements of damages predicated on extant tortious misconduct.[19] These three constraints

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not occur."); *see also* Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 975 n.6 (1993) ("While judicial recognition of the enhanced-risk cause of action has been infrequent, at least one commentator advocates the need for a growing acceptance of the claim and suggests that the trend has begun.") (citing Kristen Chapin, Comment, *Toxic Torts, Public Health Data, and the Evolving Common Law: Compensation for Increased Risk of Future Injury,* 13 J. Energy Nat. Resources & Envtl. L. 129 (1993)).

[16] Since the mid-nineteenth century, courts have awarded damages for risk of future harm with attendant physical injury. *See* Note, *Latent Harms and Risk-Based Damages*, 1505, 1509 (1998) (citing Feeney v. Long Island R.R., 22 N.E. 402, 404 (N. Y. 1889) (holding that a woman hit by a railroad gate could be compensated for risk of future pain and suffering); Curtis v. Rochester & Syracuse R.R., 18 N.Y. 534, 542 (1859) (allowing future damages for a running sore that was reasonably certain to occur)). *See also* McCall v. United States, 206 F. Supp. 421, 426 (E.D. Va. 1962) (allowing recovery for a small chance of developing epilepsy in the future as a result of a head injury). At least two appellate courts, both asbestos cases, have upheld enhanced risk awards. *See* Klein, *supra* note 9 (citing Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985)).

[17] *See* Klein, *supra* note 9 (citing Feist v. Sears, Roebuck & Co., 517 P.2d 675 (Or. 1975); *see also* Amendola v. Kansas City Southern Railway Co., 699 F. Supp. 1401, 1407 (W.D. Mo.1988); Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir. 1985).

[18] *See* Klein, *supra* note 9, at 1180 (citing cases); *see also* Tamsen D. Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk Causes of Action*, 49 Vand. L. R. 789, 809-10 (1996) ("Increased risk is the most difficult claim on which to proceed, because courts apply traditional causation principles.").

[19] *See* sources cited *supra* notes 2-4, 13-16.

reflect how courts have tried to fit novel claims involving risk-based harm and damages into the traditional paradigm of tort law.

Under the traditional paradigm of tort law, a tortious cause of action that justifies intervention in civil court occurs when a victim suffers an injury, defined as a harm to or invasion of a legally protected interest,[20] caused by a defendant's tortious conduct.[21] In tort law, "interest" is broadly defined as anything that is the object of human desire, which becomes the subject of a right in so far as that interest is protected against invasion.[22] "Harm" is defined as "loss or detriment in fact of any kind to a person resulting from any cause,"[23] and harm constitutes an injury when that loss or detriment amounts to "the invasion of any legally protected interest of another."[24] For that injury to be actionable, it must also be factually and proximately caused by the tortious conduct of another.[25] For conduct to be a factual and proximate cause concerned in the invasion of a legal interest, then (1) the harm would not have occurred absent the conduct[26] and (2) the harms result from the risks that made the actor's conduct tortious.[27] In turn, "tortious conduct"[28] describes conduct intended

[20] Not all invasions of our legally protected interests that give rise to an actionable claim in tort are harms. Sometimes, our legally protected interests can be invaded even though we are ultimately benefited or unharmed. See RESTATEMENT (SECOND) OF TORTS § 7(a) (1965).
[21] *See generally Id.* § 7.
[22] *Id.* § 1(a-c).
[23] *Id.* § 7(2).
[24] *Id.* § 7(1).
[25] *Id.* § 7(c).
[26] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26.
[27] Id. § 29
[28] RESTATEMENT (SECOND) OF TORTS § 6(a) (1965).

to cause an injury,[29] or which is negligent in creating an unreasonable risk of injury,[30] or which is carried on despite the risk of strict liability[31] for any resultant harms.

In this paper, I propose that the U.S. civil justice system should recognize a novel tortious cause of action—namely, infliction of precarity—that overlaps with, but is categorically distinct from, extant pre-manifestation claims. Unlike such pre-manifestation claims, whose theories of injury include mental harm in fear of future disease cases,[32] pecuniary harm in medical monitoring cases,[33] and anticipated or potential harm in enhanced risk cases,[34] the theory of injury in an infliction of precarity case would be harm to our interest in securing our life against "unreasonable precarity." As used here, "precarity" is defined as an unjustified condition of persistent and heightened vulnerability to potential harm or injury brought about by special kinds of exposure to risk.

The legal concept of precarity contrasts but overlaps with specialized notions of precarity in social, economic, political,[35] or psychological[36] work. For example, socio-legal scholar Jessica Silbey defines precarity socially and economically as:

> [T]he state or production of insecurity and vulnerability born of unevenly distributed cultural and economic resources. Precarity produces the experience of disenfranchisement, displacement, and uncertainty regarding one's expectation for future betterment, both as an individual and as a member of a community. It is a function

[29] Intent applies to the consequences of an act, rather than the act itself, which the actor desires to bring about or believes is substantially certain to result from the act. Id. §8(A)(b).
[30] Negligence applies to unintentional conduct that creates a recognizable risk of harm to others to whom the actor could have reasonably anticipated injury. Id. § 281(c).
[31] Strict liability applies to and arises out of abnormally dangerous activities, whose special, abnormal, and dangerous character justifies holding the actor responsible for any resultant harm. Id. § 519(d).
[32] *See* sources cited *supra* notes 2, 11.
[33] *See* sources cited *supra* note 13.
[34] *See* sources cited *supra* note 15-16 and accompanying text.
[35] For a succinct overview of precarity as a social, economic, and political notion, *see* Sharryn Kasmir, *Precarity*, The Open Encyclopedia of Anthropology (Mar. 13, 2018), https://www.anthroencyclopedia.com/entry/precarity.
[36] *See generally* Clare Coultas et. Al, *Towards a Social Psychology of Precarity*, 62 Brit. J. Soc. Psychol. 1 (2023).

> of an advanced capitalist society in which free market ideologies of possessive individualism dominate, capacity for collective action weakens, and feelings of belonging are about identity and difference rather than mutual interdependence and a shared fate.[37]

Like other work on precarity in the social sciences, the foregoing definition allows for an engagement with structural rather than individual relations and problems, and it provides for a notion that can be used to individuate new social, political, and economic paradigms that represent contemporary interpersonal relations.[38] In a similar vein, Judith Butler's work on precarity and precariousness, which is considered foundational in the literature,[39] explores how our inherent vulnerability to harm shapes our contemporary social and political condition.[40] In one such work, Butler claims:

> Precarity . . . describes a few different conditions that pertain to living beings. Anything living can be expunged at will or by accident; and its persistence is in no sense guaranteed. As a result, social and political institutions are designed in part to minimize conditions of precarity . . . . And yet, "precarity" designates that politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death. Such populations are at heightened risk of disease, poverty, starvation, displacement, and of exposure to violence without protection.

For Butler, like Silbey, the nexus of precarity is not the individual. Rather, precarity seems to be an impersonal harm arising from social, political, and economic norms, structures and institutions that disparately produce experiences of vulnerability across populations differentiated by race, gender, class, nationality, age, and other important demographics.[41] Although precarity has been significantly theorized and researched in the social and

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[37] Jessica Silbey, Against Progress: Intellectual Property and Fundamental Values in the Internet Age 270 (2022).
[38] *See* Margaret Chon, *Precarity and Progress*, 102 B.U. L. Rev. Online 65 (2022) (
[39] *See* Coultas, *supra* note 31 ("Philosopher Judith Butler's writing is a cornerstone for the growing body of literature on precarity.").
[40] *See* Judith Butler, *Performativity, Precarity and Sexual Politics*, 4 J. Iberoamerican Anthropology i, ii (2009).
[41] For example, Butler highlights how gender norms create precarity in the sense that "those who do not live their genders in intelligible ways are at heightened risk for harassment and violence." *Id.*

psychological sciences, there has been little *systematic* treatment of the concept in analytic philosophy, especially the idea of precarity as a personal harm.[42] In this paper, I develop a conception of precarity that addresses this gap in the literature, viewing it as a harmful state of being that individuals experience and can cause others to experience.

However, because I define precarity as a persistent and heightened state of *vulnerability*, this notion can be fruitfully elucidated by referring to and repurposing the systematic analysis of vulnerability in analytic philosophy.[43] In this connection, there are two distinct but overlapping views of vulnerability that are discernible in the literature.[44] On the one hand, the first kind of view treats vulnerability as the *capacity* to suffer that is inherent in human embodiment and that is "a universal, inevitable, enduring aspect of the human condition."[45] This concept is especially concerned with our corporeal embodiment and animality in the senses of "'organic propensity to disease and sickness, that death and dying are inescapable, and that aging bodies are subject to impairment and disability.'"[46]

On the other hand, the second kind of view contemplates the fundamentally ethical character of vulnerability, focusing on our *situational* susceptibility to specific kinds of harms

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[42] A search for "precarity" in the Stanford Encyclopedia of Philosophy, for example, currently brings one to the entry on feminist political philosophy, in which "precarity" is mentioned twice and in the context of the political significance of an *emotion* rather than a condition of an individual. *See* Noëlle McAfee & Katie B. Howard, *Feminist Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Oct 12, 2018), https://plato.stanford.edu/entries/feminism-political/. However, a search for the same on PhilPapers shows that precarity features in various work in feminist philosophy, bioethics, and critical theory in both the analytic and continental traditions.

[43] *See* Catriona Mackenzie, Wendy Rogers & Susan Dodds, *Introduction: What is Vulnerability, and Why Does It Matter for Moral Theory?*, *in* Vulnerability: New Essays in Ethics and Feminist Philosophy 1-32 (Catriona Mackenize, Wendy Rogers & Susan Dodds eds., 2013).

[44] *Id.* at 4-7.

[45] *Id.* at 4 (citing Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, Yale J.L. & Feminism 1, 8 (2008))

[46] *Id.* (citing BRYAN S. TURNER, VULNERABILITY AND HUMAN RIGHTS 29 (2006)).

or threat by *others*.[47] On one version of this kind of view, vulnerable people are "those with reduced capacity, power, or control to protect their interests relative to other agents"[48] in situations of unequal power and potential risk or threat. Ethical theories of vulnerability are further divided on whether vulnerability is a ground of our (moral) obligations in its own right or derives its moral significance from other claims that characterize vulnerability, such as harm or need.[49] Yet whether or not vulnerability is morally derivative in that sense, the notion has an uncontestably essential role in various areas of moral concern, including but not limited to exploitation, dependency, custody and guardianship.[50]

We have general and particularized needs and face corresponding harm and suffering because we are differentially vulnerable beings. We rely on others to show sufficient concern for our needs and to take sufficient care not to harm or cause suffering because we reciprocally affect and depend on each other to help meet those needs, prevent or mitigate that harm and suffering, and uphold that mutually-advantageous reliance.[51] Responsibility for the situational vulnerability of others falls on all of us. To meet that responsibility, we must observe sufficient standards of concern for the needs and interests of others. If vulnerability is the situational susceptibility to harms or threat by others that grounds certain obligations to show sufficient concern for others' needs or interests and sufficient

[47] *Id.* at 6.
[48] *Id.* (citing ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 112 (1985)).
[49] *Id.* at 10.
[50] *See, e.g.,* Matt Zwolinski & Benjamin Ferguson, *Exploitation*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 3, 2022), https://plato.stanford.edu/entries/exploitation/.
[51] *See id.* at 12 ("We have needs because we are vulnerable biological and social beings. We need care because we depend upon each other to help us meet our needs. This interdependency gives rise to an obligation to provide care to others.") (citing Sarah Clark Miller, The Ethics of Need: Agency, Dignity, and Obligation (2014)).

care against their suffering, then precarity is the persistent and heightened state of vulnerability. It is a graduated state of vulnerability involving needs, interests, potential harms, and persistent lack of concern or care for the same.

Against this philosophical background, my proposal to recognize infliction of precarity as an injury caused by harmful impositions of risk in tort law is meant to be consistent with the traditional tort paradigm. Inflicting precarity is framed as invading an interest that bears a close relationship to interests that provide a basis for a right of action and redress in court. This interest concerns being free from persistent and heightened vulnerability that reduces our capacity for being secure in our life against the harms or wrongs at risk, which is invaded by intentional, negligent, or strictly liable activities that result in such precarity.

The proposal is divided into two parts. Part I addresses why inflicting precarity is a candidate for tort liability with reference to its harmful and socially undesirable nature. I argue that we should be liable for inflicting precarity because it is harmful and socially undesirable conduct resulting from harmful impositions of risk that curtail various capabilities to secure our life from harm and wrongdoing. First, precarity is harmful because our lives are bettered or diminished not only by what actually happens to us, but also what potentially can happen to us. Two principles of well-being are developed and compared to support this view:

> The Vulnerability Principle (VP): Our capacity to secure our vulnerability against interpersonal harm is an interest that affects our well-being.
>
> The Realization Principle (RP): Our capacity to be free to realize our potential is an interest that affects our well-being.

Arguing by analogy, I claim that if interference with our capacity to realize our potential life diminishes our well-being, then interference with our capacity to secure our vulnerability diminishes our well-being, too. Infliction of precarity is thus harmful because it interferes with our capacity to secure our vulnerability from vulnerability-affecting experiences or events.

More generally, this view suggests that impositions of risk are harmful or wrong in some cases.[52] In Part I, I attend to the ethical literature on the moral significance of risk and risking supporting this view.[53] I show that representative views in the literature are explanatorily inadequate, and I offer an alternative account of moral risk that is based on a capabilities approach to understanding the relationship between risk and well-being. According to this view, risks are harmful to the extent they affect capabilities to secure our vulnerability from disvaluable events. Thus, inflicting precarity is harmful by extension of persistent and heightened harmful risks imposed by others that impact various capabilities that we value. Second, inflicting precarity is also socially undesirable because it is counterproductive to the mutually-advantageous reliance between differentially vulnerable people that is elemental to a well-ordered and well-functioning society. This reliance requires us to observe standards of care that protect us against interpersonal susceptibility to harm and wrongdoing, and inflicting precarity on others deviates significantly from that standard. Because inflicting precarity is harmful and socially undesirable, it should be considered tortious wrongdoing that supports a right of action.

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[52] There is a vast and burgeoning literature in philosophy on the ethical significance of risk and risking. *See, e.g.*, Sven Ove Hansson, *Risk*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 8, 2022), https://plato.stanford.edu/entries/risk/

[53] In particular, I examine four different views in the literature. *See infra* Part I.A.ii.

In Part II, I outline extant attempts to introduce tort liability for novel causes of action in legal scholarship and relevant caselaw. In turn, a general theory of the preconditions for adopting new torts in legal scholarship is introduced.[54] The theory provides criteria for evaluating inflicting precarity as a candidate for tort liability in light of its harmful and socially undesirable nature. Then, I elaborate on the theory of harm underlying infliction of precarity, distinguishing it from extant pre-manifestation claims but analogizing it to other actions in tort law involving tangible and intangible interests and harms. Despite its distinction from pre-manifestation claims, infliction of precarity redresses a category of wrongful conduct that pre-manifestation claims fail to capture although those claims fall within the scope of that category of wrong. This establishes a continuity between existing tort law and infliction of precarity that supports their consistency. Then, I provide two concrete examples of scenarios in which the facts would give rise to an actionable claim for intentional or negligent infliction of precarity. In these examples, I describe what a plaintiff would have to prove in order to succeed on a claim for infliction of precarity based on the facts of the case, illustrating that tort liability for inflicting precarity would be realistic. Finally, I anticipate and address objections to the proposal that concern the practical burdens that this cause of action could create for the civil justice system. More likely than not, infliction of precarity would be a supplemental claim in complaints that allege various other causes of action that would proceed in court.

The Civil Wrong of Inflicting Precarity

[54] Kenneth S. Abraham & G. Edward White, *Torts without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 Am. U. L. Rev. 2089 (2019).

Precarity is a persistent and heightened state of vulnerability characterized by situational susceptibility to harm.[55] Precarity is brought about, not just legally but in general, by conduct that creates an environment in which our capabilities, interests, rights, and mental or bodily integrity are repeatedly threatened by factors that can be traced back to the risky actions or omissions of others. Typically, the actual or potential actions that lead to such precarity involve an element of risk. A risk is, roughly, the potential for an unwanted event to occur.[56] Persistent exposure to risk elevates that potential to an extent that erodes others' security in their persons, even if that security is materially unaffected because the risks do not materialize. Because precarity is constituted by risks of harm, its harmful character is grounded in part by the harmful character of the risks themselves. Yet not all risks materialize into the harmful events at risk, and so it is puzzling why precarity is a harmful condition brought about through risks that themselves do not result in any actual injury.

Momentary risky conduct is usually unjustified for various reasons. Here is a graphic example: Imagine someone brazenly brandishing a firearm in a populated area, like Times Square in New York City. The crowd at Times Square that witnesses someone flailing a handgun will likely react with panic, and justifiably so, given the subjective and objective risk that brandishing a weapon in public carries. The owner might accidentally trigger the gun while handling it. The owner might intend to shoot wantonly in random directions. The owner might intend to shoot at a specific target but miss and accidentally hit someone else. But suppose that no physical harm materializes from the risk of physical harm in this case. It would still be justified for the crowd to panic, whether or not any perceive the risk. It would

[55] *See* discussion *supra* pp. 8-9.
[56] *See* Hansson, *supra* note 51.

be justified for witnesses to react with personal anger and social indignation. It would be justified for each witness to blame the gun owner for brandishing the weapon in an area populated by people who would reasonably infer that they are in danger at the random sight of a gun, especially in a country where gun violence is pervasive.[57]

Now, the inquiry is whether the risk of physical harm—in its own right—created by brazenly handling the gun in public figures into the justification for the foregoing moral reactions, especially the blame and perceived wrongdoing. This relation between the risk and the reactions would be substantially different from other relations manifested by the gun owner and his conduct that figure into that justification. The moral responses might be justified because the gun owner and his conduct manifests criminal culpability by knowingly defying the law; they might be justified because the events reflect that the gun owner has a morally and socially undesirable character; they might be particularly justified by its contingent consequences, such as psychological trauma. But these justifications do not make essential reference to the *unrealized risk* of gun violence.

The point is that there are various reasons that explain why someone might be justified to hold moral attitudes against risky conduct that suggests that the conduct amounted to personal or general wrongdoing. The question is whether the risk constitutes one such reason. Experience suggests that it can; people regularly blame each other for imposing risks even in the event that the risk does not materialize—even in mundane cases. For example, suppose that an aggressive soccer player nearly collides into a defender while dribbling the

[57] In the United States, gun violence is a leading cause of premature death. *See* John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RESEARCH CENTER (Feb. 3, 2022), https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/..

ball at a casual pick-up game. Others at the game would likely agree that the player violated game etiquette and norms by engaging in such reckless behavior, but I take it for granted that the defender who was almost trampled especially deserves a personal apology from the risk-taker. More extremely, imagine the difference between two doctors who negligently prescribe the wrong medicine to two sick patients, but only the second doctor's negligence results in additional risks for the second patient because the second prescription has severe side effects. Imagine further that the side effects of that second medication did not materialize. Although both doctors performed the same type of negligent action, there seems to be a moral excess in the second doctor's case that is absent from the first doctor's case because the first doctor's prescription merely led to the patient using a drug that was ineffective. That moral excess, I suggest, is attributable to the fact that the second doctor's action, unlike the first doctor's same type of action, involved a risk of harm to the second patient. Despite this moral excess, however, because the second patient did not actually develop those side effects, it is puzzling why there is a moral difference between the two cases.

One way to put the philosophical challenge is that, because the anticipated harms that define an unrealized risk do not occur, the unrealized risk makes the same material difference to the world whether the risk was virtually certain to occur or was negligible in that same respect. Put differently, imposing a negligible unrealized risk of significant harm on others for personal gain seems morally permissible in many cases, like commuting to work by car rather than by bus despite the potential to cause an accident. Yet it seems morally impermissible to impose an extreme unrealized risk of harm on others for a similar gain, such as speeding dangerously through residential streets, ignoring traffic lights and stop

signs, all to avoid being late to work. However, because the risks are unrealized in both cases, the different degrees and kinds of risk involved make the same material difference to the world in terms of the anticipated harms as though there never was a difference in degree at all. Based on their consequences, this suggests viewing the risks as being morally on a par: either both are permissible or impermissible. Neither are the case, as prevailing moral common sense to the difference between extremely or negligibly risky conduct indicates. The problem is thus not just puzzling, but paradoxical.

However, the paradoxical façade of this problem rests on the misconception that the moral significance of a risk depends on and is determined by the moral significance of its material consequences. Any solution to the problem must take a different approach that attributes moral significance to risk based on intrinsic properties of the risk in its own right, or so it seems. In this connection, moral philosophers have advanced four distinct views concerning the moral significance of risk: the Intrinsic Harm Account, the Dignity Account, the Autonomy Account, and the Buck-Passing Account. Each of these four views advances a sufficient or necessary condition of risk that makes it morally significant in its own right. In Part A, after reviewing these accounts, I raise an objection to the singular effect that each account is explanatorily inadequate. In Part B, I present an alternative view: the "Capacity Account," according to which risk is morally significant in its own right because it affects particular capabilities extrapolated from the capacity to secure our vulnerability from the harms and wrongs put at risk. In Part C, I argue that inflicting precarity is tortious wrongdoing because it comprises harmful risks whose persistent exposure affronts that general capacity to secure our vulnerability. In turn, I argue that inflicting precarity is also

socially undesirable because it is counterproductive to the mutually advantageous interdependence between vulnerable people that is elemental to a well-functioning society.

A. Moral Risk

In Part A, I outline four different views about what makes risk exposure harmful or wrong. Despite the diversity of these views, they do not exhaust the literature, but I put them forward because they describe categorically different views about what makes risking wrong or harmful that are representative of the literature. Next, I present a singular objection based on the explanatory inadequacy of these views. These views, I argue, are explanatorily inadequate because they violate both grounding and normative constraints on the relationship between the risk of a harm or wrong and the harm or wrong at risk.

Four Views

First, Claire Finkelstein argues that unwanted risk is a form of harm independent of its actual outcome because agents have a legitimate interest against risks, and that legitimate interest is grounded in the fact that risk exposure detracts from an agent's basic welfare.[58] This is the Intrinsic Harm Account. Its thesis is that risks are intrinsically harmful to our welfare because we prefer to avoid harm, risks thwart that preference, and setbacks to our preferences affect our welfare.[59] In arguing for this view, she employs an argumentative

[58] Claire Finkelstein, *Is Risk a Harm?*, 151 U. Pa. L. Rev. 963, 966 (2003) ("A person who inflicts a risk of harm on another damages that interest, thus lowering the victim's baseline welfare.")

[59] Others have interpreted the account along similar lines, construing it as the claim that risks are harms because they thwart our preference to avoid harms. *See, e.g.*, Thomas Rowe, *Can a Risk of Harm Itself Be a Harm?*, 81 *Analysis* 694, 698 (2021) ("A satisfied preference benefits us and a thwarted preference harms us. Therefore, as a chance of a harm thwarts our preference to avoid harm, it sets back a welfare interest.").

strategy that mirrors my own, in Part B, in which I draw a comparison between opportunities and risks. According to her strategy, if the chance of a benefit—for example, a free ticket to a fair lottery—is an opportunity that betters an agent's basic welfare by satisfying our preference for a chance at a benefit, then that claim translates into the analogous claim that the chance of a harm—for example, the risk of catching a cold on commercial planes when sitting next to a sick passenger—worsens an agent's basic welfare.[60] This translation is premised on two symmetries: a symmetry between benefits and harms with respect to welfare, and a symmetry between a chance benefit and a chance harm as being chances. In the first sense, benefits and harms are symmetrically related to welfare because they are commensurable. For example, a small harm with a negative value *x* to our welfare can be equalized by a small benefit with a positive value *y* to our welfare, holding these values numerically equal. In the second sense, chance benefits and chance harms are categorically on a par as chances. Given their symmetry in function to welfare and in category as chances, the claim that chance benefits increase welfare entails that chance harms decrease it.

Second, Adriana Placani argues that there is one category of risk that is both wrongful and harmful.[61] This category is risk created with the intention to cause harm to an agent. Placani explains that what makes such risk *wrong* is its relation to the perpetrator's wrongful intention to cause harm,[62] and that what makes it also *harmful* is the extent to which it sets back our dignity interest in being treated with due moral respect and worth. This is the Dignity Account. Its thesis is that moral respect is owed to others but violated by producing

[60] *Id.* at 970.
[61] Adriana Placani, *When the Risk of Harm Harms*, 36 L. & Phil. 77, 85 (2017).
[62] *Id.*

risk with the intention to cause harm; and the target suffers harm by being put at sufficient risk because regarding others and treating them in ways that are consistent with intentionally imposing such a degree of risk on them is an offense to their dignity.[63]

Third, John Oberdiek argues that risks can be harmful in their own right when and because they impinge our autonomy.[64] The relevant characteristic of autonomy that risks affect is the safety to choose between enough options as reasonably needed for individuals to decide on the direction of their life.[65] This is the Autonomy Account. According to this view, it is the extent to which risks make such options unsafe for individuals that explains why risk diminishes autonomy, and the diminishment to autonomy explains why risks are harmful in their own right. To illustrate, Oberdiek compares imposing such risks to laying a trap: although one might avoid being ensnared by a trap, its potential to incapacitate curtails our autonomy by limiting our options and thus something of value.[66]

Finally, Tom Parr and Adam Slavny argue that imposing a risk is wrong when and because the imposition increases the probability of the wrongness-making properties of the thing at risk.[67] Put differently, for some Agent *S*, some risk *R*, and some candidate wrong *W*—what makes *R* wrong is the fact that *S* has increased the probability of the wrongness-making properties of *W* by imposing *R*.[68] This is the Buck-Passing Account, which is based on a version of the fitting attitude theory of value in the philosophical literature.[69] This version of

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[63] *Id.* at 87.
[64] JOHN OBERDIEK, IMPOSING RISK: A NORMATIVE FRAMEWORK (2017).
[65] This account is based on Joseph Raz's conception of autonomy. JOSEPH RAZ, THE MORALITY OF FREEDOM 370-399 (1986).
[66] 2017, 131.
[67] Tom Parr & Adam Slavny, *What's Wrong with Risk?*, 8 THOUGHT 76, 83 (2019).
[68] *Id.*
[69] *See* Christopher Howard, Fitting Attitude Theories of Value, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 24, 2023), https://plato.stanford.edu/entries/fitting-attitude-theories/.

the fitting-attitude theory is called the "buck-passing" approach to value, according to which claims about the value of a thing are grounded in the reason-providing properties of that thing.[70] According to the Buck-Passing Account, then, the reason-providing properties of a risk that make it harmful or wrong is the fact that it increases the probability of the reason-providing properties of the acts or events at risk that make it fitting to regard those acts or events as harmful or wrong.

To illustrate, consider the reason-providing properties of destroying someone else's sentimental belongings that make it wrong to destroy those belongings. Those properties include, but are not limited to, tangible harm to their economic interests and nontangible harms to their autonomy, privacy, and emotional attachment to those belongings. What would make it wrong for someone to risk destroying these belongings, according to the Buck-Passing Account, just is the fact that the risk increases the probability of the tangible and non-tangible properties of destroying someone else's sentimental belongings that provide reasons to regard such an action as wrong and harmful.

These four views do not exhaust attempts to explain what makes risk and its imposition morally significant, but they are a representative sample because they range under different argumentative strategies and over categorically different normative states or properties. Despite their variety, these four views are uniformly flawed: they are explanatorily inadequate, and for the same two reasons. The first reason is that they run afoul of a necessary grounding constraint between the risk of a thing and the thing itself that defines the risk with respect to its harm- or wrongness-making properties. The second reason is that

[70] Jussi Suikkannen, *Reasons and Value – In Defense of the Buck-Passing Account*, 7 Ethical Theory and Moral Practice 513 (2005).

they run afoul of a necessary normative constraint between the risk of a thing and the thing itself that defines the risk.

Finally, these objections are *not* unprecedented in the literature, but the metaphysical and normative principles that ground these objections have not been thoroughly analyzed, and the objections have been raised only against some but not all the foregoing views. In the next subsection, I give a principled explanation for why these constraints govern correct ethical theorizing of risk, and I claim that the representative views in the literature above fail to meet them, in one way or the other. Then, in Part B, I present an alternative view that meets these two constraints. According to this view, risk is harmful or wrong in virtue of its relationship to our capabilities to secure our vulnerability from the harms or wrongs at risk. This alternative view, which is based on the "capabilities approach" to normative philosophy,[71] is set forth not only as an independent and novel theory of the moral significance of risk; it also foregrounds my primary claim that infliction of precarity is tortious wrongdoing that should be actionable in civil court.

The Four Views Are Explanatorily Inadequate

The four views are explanatorily inadequate because they violate some necessary constraints that govern the relationship between a risk of harm and the harm at risk that constrains correct moral theorizing on the same. The constraints are these:

> **Grounding Constraint:** The facts that make an event wrong or harmful are a subset of the facts that make risking that event wrong or harmful.
>
> **Normative Constraint:** The severity of the wrong or harm of risking an event is proportional in kind to the severity of the wrong or harm of causing the event and proportional to the degree to which the wrong or harmful event was put at further risk by the actor.

[71] *See* discussion *infra* Section I.B.

Before developing and defending these constraints, three preliminary matters must be addressed.

First, Parr and Slavny provided the precedent for the Grounding Constraint. They argued that the Harm and Autonomy Accounts "implausibly separate the grounds of the wrongness of risking *v* from the grounds of the wrongness of *v*-ing."[72] My own argument for why it is implausible to separate these grounds is provided below. Second, the Normative Constraint is also precedented in the literature; it is implicit in a recent counterexample to Oberdiek's Autonomy Account.[73] Finally, the Normative Constraint is intended to be neutral between probabilistic and non-probabilistic interpretations of riskiness. Any theory of determining the riskiness of an event—whether based on subjective or objective probability,[74] modal closeness,[75] or normalcy[76]—that contravenes the Normative Constraint would be explanatorily inadequate with respect to how moral assessment of risk varies according to the severity of that risk in kind and in degree.

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[72] *Id.* at 79.

[73] Kritika Maheshwari, *On The Harm of Imposing Risk of Harm*, 24 Ethical Theory and Moral Practice 965 (2021). Maheshwari argues that the Autonomy Account cannot explain why a severe unrealized risk of harm that diminishes autonomy to the same extent by impacting one option is worse than a much smaller unrealized risk of that same harm that likewise diminishes autonomy to the same extent by impacting that same option. *Id.* at 977. Because the extent to which autonomy is diminished can be hold fixed in cases where the likelihood that the harm will occur varies significantly, Maheshwari presents a strong case that the Autonomy Account cannot explain why the severity of a risk is morally significant in ways that align with the Normative Constraint.

[74] For various interpretations of probability, *see* Alan Hajek, *Interpretations of Probability*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 28, 2019), https://plato.stanford.edu/entries/probability-interpret/.

[75] *See, e.g.,* Duncan Pritchard, *Risk*, 46 Metaphilosophy 436 (2015) (providing a "modal theory" of risk based on possible worlds semantics that claims that the risk of an event is determined by how modally close the risk event is to the actual world).

[76] *See* Philip A. Ebert, Martin Smith & Ian Durbach, *Varieties of Risk*, 101 Phil. & Phenomenological Research 432 (2019) (providing a theory of risk based on how normal or abnormal it would be for the risk to occur relative to the actual world).

Now, the Grounding Constraint follows from the simple fact that risks are individuated and defined by the things of which they are risks. The risk of being accidentally elbowed in the face at a rock concert, for example, and the risk of being accidentally kicked in the ankle, are distinguishable because these events are constituted by distinct things that make these events what they are. Simply put, what makes a risk the kind of risk it is depends on what it is a risk *of*. Whatever makes an event the kind of event it is determines not only whether there is a risk of that event, but also what properties that risk can have based on that event. What distinguishes a systemic risk from an individualized risk, for example, is that the systemic risk is a risk of an action or a harm that impacts a collective entity, whereas an individualized risk is a risk of an action or a harm that can only impact a single entity. Just as a risk cannot be harmful if it is a risk of a harmless event, or a risk cannot curtail autonomy if it is a risk of an event that would have no effect on autonomy, there is an essential correlation between the properties of the risk and that of the events at risk.

A corollary of the Grounding Constraint is the Normative Constraint. The proportional relationship between the severity of the risk of an event in kind and in degree is just an extension of the claim that risks and their properties are grounded by the events at risk. For example, a person forced to play Russian Roulette with a six-chambered gun is at higher risk of being shot rather than another who is forced to play with a twelve-chambered gun because the event of being shot has different conditions between the two cases. If the first player is forced to pull the trigger six times, it is guaranteed they will lose and die. Yet it is possible that the first player who is forced to do the same still lives if the bullet is located in the seventh chamber, which is a way for the bullet to be in this case that is not a way for that bullet to be

in the other case. The same logic applies to why an action that, for example, risks permanent physical impairment is worse than an action that equally risks temporary physical impairment. Simply put, the former is a risk of a worse harm than the latter. In both cases, the comparative severity between the risks in kind and in degree is grounded by the comparative severity between the events at risk and their different degrees of potential. Unless the Grounding and Normative Constraints are both met, any theory of the moral significance of risk will be explanatorily inadequate. In support of this claim, I will show how the representative sample of the four views above are explanatorily inadequate because they fail to uphold either the Grounding or Normative Constraints.

First, Finkelstein's view violates the Grounding Constraint in a simple way. Using her own argumentative strategy against her, suppose that Michael forces Bob to flip a coin. If it lands heads, 15% of Bob's liquid assets will be destroyed. If it lands tails, Bob's liquid assets will be increased by 15%. According to Finkelstein's view, a chance benefit and a chance harm are commensurably beneficial and harmful, independently of their outcome. If so, then the coin flip—the same event that creates a chance benefit and a chance harm—does not affect Bob's welfare, where for this example his welfare is defined by his liquid assets. The risk that Bob's assets will be decreased does not reduce Bob's basic welfare, according to Finkelstein's view, because it is counterbalanced by an equal chance of a benefit whose gain is numerically equal in value to the loss that Bob is at risk of losing. But this seems implausible. Even if the coin lands tails and Bob's assets are increased, he still has a justifiable complaint against Michael for imposing the risk upon him. The fact that Bob faced the chance harm, despite being counterbalanced by the chance benefit, is a reason for Bob to treat the risk as disvaluable.

But that reason does not relate to Bob's welfare. The fact that the risk has the property of being forced upon someone, even though Bob's welfare was not diminished, is not reflected by the Intrinsic Harm Account.[77]

In a similar vein, the Dignity Account and the Autonomy Account violate the Grounding or Normative Constraints. One example—a variant of Parr and Slavny's counterexample to Finkelstein's and Oberdiek's views[78]—can show why that is the case for both:

> *Overdetermination:* Irina and Emma both wish to take revenge against Rosaria by poisoning her. Irina's poison has a 50% chance to do nothing or cause Rosaria to die by having a painful seizure. Emma's poison only works if Irina's poison works. If Irina's poison works, Emma's poison will have a 99.9% chance to do nothing or a 0.1% chance to cause Rosaria to die by having an equally painful heart attack rather than seizure. Irina doses Rosaria first, and Emma doses Rosaria second.

According to Placani's Dignity Account, Irina and Emma's intentionally risky conduct are wrong because they culpably intend to take revenge on Rosaria by causing her death. But it also entails that Irina's risk is equally as harmful as Emma's risk, even though Emma's risk is extremely unlikely, because Irina and Emma risk the same kind of act—murdering Rosaria. Nevertheless, Placani's view collapses the difference in degree between the risks, making them out to be equally harmful to Rosaria's dignity despite the fact that Emma's risk is not only extremely unlikely to materialize, but virtually certain not to take effect. This violates the Normative Constraint.

The example presents an even more serious issue for Oberdiek's Autonomy Account. Assume that Irina's poison works and begins to take effect, and that Emma's poison is equally

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[77] Likewise, Parr and Slavny have shown that Finkelstein's view violates the Grounding Constraint because there are cases in which an agent can impose a risk of a wrong act that is beneficial to the person at risk, but the act is wrong because of a factor that is unrelated to considerations about welfare, such as the culpable intent to take another's life or knowingly assist in taking a life. *See* Parr & Slavny, *supra* note xx, at 79-80.

[78] *Id.* at 80.

as likely to take effect. If so, then Rosaria's autonomy interests are maximally foreclosed. She will die, and there is nothing to do about it. But because the only difference between Irina's poison and Emma's poison would now be the mechanism of death rather than the level of pain, there are no further valuable options within Rosaria's life that can be curtailed by Emma's dosage. Even though the kind of harm that Emma puts at risk, and Emma's culpability for imposing that risk, have no impact on Rosaria's autonomy, there is still something morally significant about the risk that Emma imposes, whether Emma's poison causes Rosaria to die from a heart attack rather than seizure. The Autonomy Account thus implausibly entails that Emma's risk is not harmful because it does not affect Rosaria's autonomy in any meaningful way.

Finally, Parr and Slavny's account also violates the Grounding Constraint. To reiterate, their view is that P wrongly or harmfully imposes a risk of an action or event on Q because P increases the probability of the harm- or wrong-making properties of the action or event at risk. They claim that this "buck-passing" approach is basic in the sense that it passes on the explanation of a wrong or harmful risk by referring to the explanation of what makes the thing at risk wrong or harmful.[79] But the problem with this is that there are cases of risky conduct that are harmful or wrong that do not involve increasing probabilities in the sense required by the Buck-Passing Account. Indeed, consider the following example.

> *Risking Pain to Another for Dollars*. An evil demon has invited Bob to play a game. In this game, Bob can press a button on a device that imposes a 0.00001% independent risk of death on a stranger, Jerry. If the risk materializes, Jerry will die. If the risk fails to materialize, Bob gets $10,000 dollars.

[79] *Id.* at 83.

To test the Buck-Passing Account, let us stipulate that it would be wrong for Bob to risk Jerry's death. According to the Buck-Passing Account, the wrongness of Bob's risking Jerry's death is grounded in the wrongness of Bob killing Jerry. But suppose that Bob presses the button one hundred times, and fortunately—although expectedly—Jerry lives. Is there a morally significant difference between Bob risking Jerry's death only once and risking Jerry's death more than once? If there is no difference, then that means the reasons that make it wrong for Bob to risk Jerry's death once are the same reasons that make it wrong for Bob to risk Jerry's death one-hundred times. But this can't be right—imposing a hundred independent risks of death on Jerry wrongs him differently than imposing that same risk only once. We can discern several reasons that support this intuition.[80]

First, wrongfully risking Jerry's death one hundred times rather than only once indicates Bob's greater indifference to the expected consequence of Jerry's death. Second, each time Bob wrongfully risks Jerry's death, that indicates Bob's greater indifference to committing such wrongdoing. Third, each time Bob risks Jerry's death, he exploits Jerry to a greater extent. As the scale at which Bob risks Jerry's death grows, so too does the extent to which Bob wrongs Jerry. Yet the Buck-Passing account cannot account for this difference because the change in the extent to which Bob wrongs Jerry as he continues to press the button is not paralleled by a change in probability of the set of facts that make killing Jerry wrong. Each time Bob presses the button, the probability of the facts that make killing Jerry wrong are the same. After all, it is not as if Bob is risking killing Jerry a hundred times by risking Jerry's death one hundred time. Jerry can only die once, and Bob is risking Jerry's singular death

[80] *See* Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. Rev. 1, x (2012).

each time he presses the button. Yet each time he presses the button, the extent to which he wrongs Jerry is greater while the probability of killing Jerry in that instance, and the buck-passing reasons that make killing Jerry wrong, remains the same.

The general upshot of this counterexample cannot be dismissed by trying to attribute the difference to an independent normative consideration that is outside the scope of the Buck-Passing Account. One such consideration might be that Bob performs a wrong action (the risking) one hundred times and performing that wrong action one hundred times is morally worse, holding all else fixed, than performing it once, regardless of the kind of action it is. In other words, there is nothing unique about the action of risking that makes risking multiple times morally different than risking a single time—this is true, arguably, of all wrongful action types. But if that is true, then the reasons that make it wrong for Bob to impose the same risk multiple times comes apart from the reasons that make it wrong for Bob to kill Jerry multiple times because, logically, it is impossible for Bob to kill Jerry multiple times. The repeated imposition of the risk of death, unlike the risk of other harms in which the victim might survive, cannot be grounded in the repeated occurrences of death because death is necessarily a singular event.

In conclusion, I have shown that representative views in the literature on the moral significance of risk are explanatorily inadequate. They ascribe moral significance to risk based on properties or relations that violate the Grounding and Normative Constraints that govern the relationship between a risk of an action or event and the action or event that grounds our moral assessment of risk. Principally, these views are violated because they appeal to independent normative considerations that are not sufficiently generalizable to

describe the relationship between the relevant relata. In Part II, I propose an alternative view designed to be consistent with the Grounding and Normative Constraints. To explain the moral significance of risk, it appeals to a normative consideration manifested by any conduct whatsoever as part of its moral grounds—a normative consideration even more generalizable than our umbrella interest in our own preferences, dignity, or autonomy. This normative consideration is our capacity to secure our vulnerability from harm and wrongdoing, and it is based on the "capabilities approach" to various areas of normative concern.[81] Aptly, I call it the "Capacity Account."

The Capacity Account

Capacities are, roughly, potential ways for someone to be or act that are generalizable from capabilities.[82] Capabilities are also potential ways for someone to be or act, but the notion is more fine-grained and contextual.[83] Capabilities can be innate, developed, empowered or impaired, sufficient or inadequate, and lost or restored. People who have the capacity for language can lack the capability to speak Arabic. People who are sick have the

[81] *See generally* Ingrid Robeyns & Morten Fibieger Byskov, *The Capability Approach*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 10 2020), https://plato.stanford.edu/entries/capability-approach/.

[82] This is not a standard definition in the literature across the sciences and the humanities, but it is a generalizable definition from work in these areas. *See, e.g.*, Julie Chalmers, *Capacity*, in THE CAMBRIDGE TEXTBOOK OF BIOETHICS 17, 17 (Peter A. Singer & A. M. Viens, eds., 2008) ("Capacity is a complex construct that refers to the presence of a particular set of 'functional abilities' that a person needs to possess in order to make a specific decision."); *see also* Stuart M. Glennan, *Capacities, Universality, and Singularity*, 64 PHIL. SCI. 605 (1997) ("1) Capacities belong to individuals; 2) Capacities are typically not metaphysically fundamental properties of individuals, but can be explained by referring to structural properties of individuals . . . .").

[83] Here, the precise distinction and relationship between "capacities" and "capabilities" is also not standard in the literature across the sciences and humanities. But the discourse, which also includes terms as "ability," "powers," "skill," "competence," and the like, reveals that whichever term we use, we are talking about a species of basically the same thing,: that is, a disposition or the potential way for something to be or act. *See generally*, Sungho Choi & Michael Fara, *Dispositions*, STAN. ENCYCLOPEDIA OF PHIL. (June 22, 2018), https://plato.stanford.edu/entries/dispositions/ ("Many terms have been used to describe what we mean by dispositions: 'power' (Locke's term), 'dunamis' (Aristotle's term), 'ability', 'potency', 'capability', 'tendency', 'potentiality', 'proclivity', 'capacity', and so forth.").

capacity to be healthy but lack the capability to afford treatment. Capacities are thus fulfilled or constrained by the extent to which people have the capabilities to bring about ways for themselves to be or act that shape the content of their capacities.

Across the contemporary human and social sciences, capabilities are approached as a standard background against which to frame normative thought and practice.[84] This approach to capability as a normative nexus was pioneered by Amartya Sen, who argued that capabilities are relevant determinants of social welfare that should guide economic development.[85] Repurposing this approach, Martha Nussbaum has pioneered an account of value based on capability that identifies core human capabilities as primary figures of value around which to structure substantive ethical and political theory.[86] These core capabilities are the answer to Nussbaum's question, "What activities characteristically performed by human beings are so central that they seem definitive of a life that is truly human?"[87] According to Nussbaum, they include particularized capabilities throughout categories of life, bodily health and integrity, cognitive and emotional experience and self-development, social affiliation, nature, recreation or leisure, and political and material participation.[88] These capabilities and their cognate activities are owed to all human beings, according to Nussbaum, because human beings are essentially rational agents who are equally worthy and

[84] *See* Ingrid Robeyns & Morten Fibieger Byskov, *supra* note xx.
[85] *See, e.g.*, Amartya Sen, *Equality of What?*, *in* TANNER LECTURES ON HUMAN VALUES 197 (Sterling M. McMurrin ed., 1979)
[86] Martha Nussbaum, Sex and Social Justice (1999).
[87] *Id.* at 39.
[88] *Id.* at 41-42.

whose equal worth is constituted by their capacity "to plan a life in accordance with one's own evaluation of ends."[89]

I extend Nussbaum's capability approach to develop an account of the moral significance of risk that sees risks as harmful or wrong in their own right, whether or not they materialize, because they curtail capabilities that can be generalized under the capacity to secure our vulnerability from the harm- and wrongness-making properties at risk. This capacity to secure our vulnerability is taken to be an essential element of the capacity to plan a life in accordance with one's own evaluation of ends. Indeed, the capacity to plan a life in accordance with one's own evaluation of ends is divided between two further capacities that reflect each other: first, the capacity to secure our vulnerability from *unwanted* events, including harm or wrongdoing, which interfere with that plan; and second, the capacity to fulfill our potential life by realizing *wanted* events, which make progress on that plan.

Not all instances of risky conduct affect our capacity to secure our vulnerability from unwanted events, but it does affect at least some capability. This capacity is affected only when such capabilities particularized harms or wrongs are persistently under threat, thus rising to the scale of harming or wronging capacities constituted by those capabilities. But the basic idea is that an imposition or exposure of risk is harmful or wrong to the extent that it curtails capabilities to secure our vulnerability from the particular harm or wrong put at risk.

My first argument in support of this theory is that it is consistent with the Grounding and Normative Constraints. My second argument in support of this theory is an analogy. To show

[89] *Id.* at 57.

that the relation to capabilities explains why risks are disvaluable in their own right, I argue that this explanatory relation is symmetrically reflected in an analogous relationship between opportunities and capabilities. According to this analogy, risks and opportunities are mirror images of each other, and the capacity to secure our vulnerability from unwanted events is the mirror image of the capacity to fulfill our potential life by realizing wanted events. By "mirror images," I mean that risks and opportunities, and the capacity to secure and fulfill our potential life, are reversed in their direction of fit as key relations of well-being. Our capacity to fulfill our potential life depends on capabilities that involve opportunities that facilitate their exercise to achieve what the capability is directed at and thus make us better off; whereas our capacity to secure our vulnerability depends on capabilities that involve risks that impinge their exercise to prevent what the capability is directed at and thus make us worse off. The capability to realize certain wanted events to fulfill our potential life are in part empowered by the opportunities available to us, just as our capability to secure our vulnerability from unwanted events are constrained by the risks we face. These opportunities contribute to our well-being, and are valuable to us, whether the opportunities are realized. Likewise, risks detract from our well-being, and are disvaluable, whether the risks materialize.

First, the Capacity Account is entirely consistent with the Grounding and Normative Constraints. According to the Capacity Account, what makes a risk harmful or wrong in its own right is the fact that it impedes our capability to secure our vulnerability from the facts that make the events at risk harmful or wrong. The facts that make the events at risk harmful or wrong are what impede the capability to secure our vulnerability, and so these facts are a

subset of the facts that make the imposition of risk respectively harmful or wrong. This account is basic, and even more so than the Buck-Passing Account, because it refers to a normative consideration at play in any instance of an event or action-type—a potential way for an event or action to be to affect us in some moral sense. Like other "buck-passing" approaches in normative philosophy,[90] the Capacity Account refers to the facts that make something harmful or wrong and their relation to our capabilities or capacity to secure our vulnerability from such facts to explain why risking such a thing is harmful or wrong as a risk. Unlike the Buck-Passing Account, however, the Capacity Account does not rely on the consideration that risks increase the probability of harm- or wrongness-making facts to explain why risks are harmful or wrong. This is unneeded precisely because capabilities and risks are modal notions that do not require an intermediary like probability to make sense of why a risk, as the potential for an unwanted event, can relate to a capability, as the potential way for something to be.

Like risk, capability is gradeable in the relevant respects—the riskier an unwanted event is, the less capable an individual is with respect to securing their life from that risk. Likewise, more severe risks correspond to more crucial capabilities. Finally, risks and capabilities are also scaleable; imposing equally probable and independent risks multiple times can affect our capabilities differently than if the risk is imposed once because part of what makes capabilities valuable is their multiple realizability. In other words, what makes a capability valuable is in part that it can be exercised *whenever* there is an affordance to do so that furthers the plan of a life; a single imposition of risk may be a setback to an exercise or

[90] *See supra* notes 68-9.

instance of that capability, but multiple impositions of risk can effectively be a setback to the capability *itself*.

Now, the second argument for the Capacity Account is an analogy between opportunities and fulfilling our lives as a component of well-being, on the one hand, and risk and securing our lives as a component of well-being, on the other. I take it that the claim that the opportunities we have affects our well-being whether they materialize, if true, translates to the claim that risks affect our well-being whether they materialize. To support this claim, I begin with a case of wasted potential described by philosopher Michael Masny:

> [C]onsider the case of Sophie Germain, a French mathematician of the early nineteenth century. She was born to a wealthy Parisian family and enjoyed a life rich in meaningful relationships, sophisticated pleasures, and important achievements. However, much of her exceptional academic talent was wasted because of the obstacles she faced as a woman. Early on, her parents tried to hinder her youthful fascination with mathematics. Later, she was barred from attending the Ecole Polytechnique and the meetings of the Paris Academy of Sciences, and both her manuscripts and published work were regularly ignored by her contemporaries.[91]

Michal Masny uses this case to argue for what he calls the "Dual Theory," which holds that how a good a life is for someone is determined jointly by their level of well-being and the degree to which they realize their potential.[92] For Masny, the actual goodness of Sophie Germain's life comes apart from the potential goodness of Sophie Germain's life if she had the resources, opportunities, and attention denied to her by the patriarchal and sexist social forces at the time. Using this distinction between well-being and realizing one's potential as two dimensions for assessing the goodness of a life, Masny explains why Sophie Germain's life evokes an attitude of what he calls "evaluative ambivalence."[93] On the one hand, Sophie's

[91] Michal Masny, *Wasted Potential: The Value of a Life and the Significance of What Could Have Been*, 51 PHI. & PUB. AFF. 6 (2023).
[92] *Id.* at 7.
[93] *Id.* at 6.

life was excellent by many standards of well-being, and yet at the same time, her life has a sense of tragedy owing to the fact that she could have achieved more but didn't for unjust reasons.[94] Such evaluative ambivalence, he suggests, cannot be accounted for by orthodox ethical theory, "on which the goodness of a life depends exclusively on the things that actually happened within it . . . ."[95] Instead, Masny suggests we must relativize our judgment that Sophie's life was impoverished despite the actual excellence of her life by appealing to her lack of self-actualization.[96]

A similar evaluative ambivalence is evoked with respect to why imposing a risk could ever be harmful or wrong if the risk does not materialize. Orthodox ethical theory cannot account for such ambivalence—on the one hand, the fact that an unjustified risk does not materialize is cause for celebration, and yet at the same time the fact that the risk was unjustifiably imposed supports a complaint against the risk-taker. If the impact on Sophie's self-actualization can explain why the wasted potential of Sophie's life evokes evaluative ambivalence, then it must be that the evaluative ambivalence of imposing a risk that fails to materialize can be similarly explained by appealing to some aspect of an agent's potential life. This follows because unmaterialized risks and unmaterialized opportunities are symmetrically related to an agent's potential life with respect to its goodness. They are symmetrically related because of the same kind of things such risks and opportunities are. That is, "risks" and "opportunities" refer to potentialities of events that implicate our plans for life. They are distinguished only by whether the events are unwanted because they set

[94] *Id.*
[95] *Id.* at 9.
[96] *Id.*

that plan back, as in a risk, or wanted because they move that plan forward, as in an opportunity.

If the opportunities available to an agent can impact the goodness of their life, as in Sophie's case of wasted potential, then this relationship should be symmetrically reflected between the risks that an agent faces and the goodness of their life. The Capacity Account explains this latter relationship by positing that agents have the capacity to secure their potential life from harm or wrongdoing, just as agents have the capacity for self-actualization by realizing their potential; and the reason why the capacity for self-actualization is relevant for determining the goodness of a life is mirrored by the reason why the capacity to secure our vulnerability from harm or wrongdoing is relevant for determining its goodness—the reason being that these capacities are essential to plan a life in accordance with our own evaluation of ends.

Masny's Dual Theory and my Capacity Account thus agree that the goodness of an agent's life can be determined by what could have happened, but the Dual Theory and Capacity Account are also different in important respects. First, the Dual Theory only focuses on how the goodness of an agent's life is impacted by what *good* things could have but didn't happen, whereas the Capacity Account also explains why the *bad* things that could have but didn't happen affect the goodness of an agent's life. Second, unlike the Dual Theory, the Capacity Account doesn't deconstruct the goodness of a life into two components, well-being and some other dimension involving our capacity to realize or secure our potential. The Dual Theory does so in order to relativize the seemingly incoherent judgments of "evaluative ambivalence" that Sophie's case evokes to explain why the ambivalence is justified. But the

Capacity Account explains why ambivalence is justified without positing more than well-being because it relativizes the ambivalence to different capacities that are taken to be elemental to well-being. Despite the various capacities and capabilities that Sophie actually realized in her rich life, her wasted potential is explained by the actual setbacks to her actual capacity for self-actualization. The Capacity Account is thus consistent with orthodox ethical theory, which determines well-being according to what actually happened to an agent. When a risk is imposed on an agent, whether it materializes, that is an actual impediment to the agent's actual capacity to secure her potential life from facts that make the unwanted event harmful or wrong. The impediment to that capacity arising from such facts explains why the risk is harmful or wrong.

In summary, the Capacity Account holds that what makes a risk harmful or wrong, whether it materializes, is that it impedes our capacity to secure our vulnerability against facts that make the event at risk harmful or wrong. The Capacity Account upholds the Grounding and Normative Constraints. Furthermore, the Capacity Account is also supported by a symmetry between opportunities and risks. If the goodness of a life is impacted by what good things could have but did not happen, then so too is it impacted by what bad things could have but did not happen. The Capacity Account provides a semantics for these key relations of well-being in terms of our capacity to secure or fulfill our potential life vis-à-vis risks and opportunities, respectively.

In the next Section, I bring the discussion back to the proposed tort of inflicting precarity. Against the background of the Capacity Account as a novel theory of harmful or wrongful risking, I argue that inflicting precarity—that is, putting someone in a heightened and

persistent state of vulnerability to risk—is harmful and socially undesirable conduct. If so, then there is a compelling case that infliction of precarity should be recognized as a novel right of action in tort law. To make this proposal realistic and timely, I present a recent real-world example of harmful risk in which the risks created, and the interests affected, exemplify infliction of precarity.

Infliction of Precarity As (Civil) Wrongdoing

At night, on February 3, 2023, a train operated by Norfolk Southern derailed in East Palestine, Ohio.[97] The train was carrying chemicals and combustible materials, including vinyl chloride, a toxic flammable gas.[98] Residents were ordered to evacuate in the event of an explosion.[99] The Environmental Protection Agency said that that various hazardous materials were released into the air, soil, and waters.[100] Although various agencies have reported that the toxic agents have been contained and are not detectable in the water supply,[101] findings from a survey carried out by the Ohio Department of Health showed that a majority of East Palestine Residents have experienced some symptoms plausibly linked to the toxic exposure.[102] The most common symptoms reported include headache, anxiety, coughing, fatigue, and irritation, pain, or burning of skin.[103] Recently released data shows soil in the Ohio town contains an abnormal amount of dioxins, which are "linked to cancer,

[97] Christine Hauser, *After the Ohio Train Derailment: Evacuations, Toxic Chemicals and Watter Worries*, N. Y. Times, (Mar. 6, 2023), https://www.nytimes.com/article/ohio-train-derailment.html.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id*.
[102] Ohio Emergency Management Agency, *East Palestine Update – 3/3/23* (Mar. 3, 2023), https://ema.ohio.gov/media-publications/news/030323-east-palestine-update
[103] *Id.*

diabetes, heart disease, nervous system disorders and other serious health problems."[104] Although the long-term health effects of this disaster on those exposed to toxins are unknown, the fact that some residents have been diagnosed with chemical bronchitis[105] suggests that chronic health complications linked to the toxic exposure should not be ruled out.

The derailment in East Palestine has put people in a persistent and heightened state of vulnerability to harm. Their vulnerability to harm arises from the fact that the derailment massively exposed toxic substances with potentially acute and chronic health effects into local air, soil, and waters. This vulnerability is persistent because toxins linked to the derailment are present at arguably dangerous levels in some of the most common routes of exposure, like the soil.[106] This vulnerability is heightened because the toxins have potentially chronic health effects, predated by symptoms of chronic disease already being experienced by the residents in the form of coughing, fatigue, skin complications, among other health concerns.[107] Because East Palestine residents exposed to the toxins released by the derailment are in a persistent and heightened state of vulnerability to chronic health complications, Norfolk Southern have arguably inflicted precarity on these residents.

Residents exposed to the toxic gases and substances that have likely contaminated soil, waters, and the like, face risks of health that impede their capacity to secure their potential

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[104] Tom Perkins, *Levels of Carcinogenic Chemicals Near Ohio Derailment Site Far Above Safe Limit*, The Guardian (Mar. 17, 2023), https://www.theguardian.com/us-news/2023/mar/17/norfolk-southern-derailment-east-palestine-ohio-carcinogenic-chemical-levels

[105] Aria Bendix & Alicia Victoria Lozano, *Residents near Ohio Train Derailment Diagnosed with Ailment Associated with Chemical Exposure, Including Bronchitis*, NBC News (Feb. 25, 2023), https://www.nbcnews.com/health/health-news/ohio-derailment-chemicals-people-diagnosed-bronchitis-rcna71839.

[106] Tom Perkins, *supra* note 104.

[107] Ohio Emergency Management Agency, *supra* note 102.

life from the various chronic and latent harms put at risk by the toxic exposure. According to the Capacity Account, risks are harmful to the extent that they impede the capacity to secure one's potential life from harm,[108] which is a capacity whose value is grounded in our capacity to plan a life in accordance with our own estimation of ends.[109] The risks that certain residents face include heightened risk of cancer, diabetes, nervous system disorders, and other serious health problems.[110] What makes these risks harmful is the fact that they impede our capabilities to secure our vulnerability from the facts that make those serious health problems harmful. Importantly, these risks give rise to a state of precarity precisely because of the kind of risks that they are. Unlike a risk of a car accident on a freeway, which ceases to exist when one is no longer driving or where no vehicles are being operated, the risk of serious health problems from toxic exposure persists even after the event that caused the toxic exposure has ended. Toxic exposure puts people at risk of developing health problems because the toxins continuously contaminate these people, whose bodies absorb the toxins. What makes these risks rise to the level of precarity, then, is the fact that the risks are, in some sense, internalized. In turn, what makes that precarity harmful is the fact that it comprises such harmful risks.

Given traditional law, the infliction of precarity that arises from the risks of toxic exposure is harmful. To recall, in tort law, "interest" is broadly defined as anything that is the object of human desire.[111] Here, the East Palestine residents' interest in securing their potential life from the various health problems at risk caused by the toxic exposure is an object of human

[108] *See* discussion *supra* Part I.B.
[109] *See* Nussbaum, *supra* note 89.
[110] *See* Perkins, *supra* note 104.
[111] *See supra* note 21.

desire. It is an object of human desire, in terms of the Capacity Account, because it is relevant to the capacity to plan our life in accordance with our own estimation of ends. In turn, harm to an interest is defined as loss or detriment in fact of any kind to that interest.[112] Here, following the Capacity Account, the risk of serious health problems caused by the toxic exposure is a loss or detriment in fact to the residents' capabilities to secure their potential life from the facts that make those serious health problems harmful and thus harms against those interests. Because these various capabilities are affected in a heightened and persistent way, the residents' *capacity* to secure their potential life from the harms at risk is, by extension, also harmed.

Precarity is thus harmful in virtue of the fact that it is the result of persistent and heightened harm to the capacity to secure our vulnerability. Here, I have argued that the train derailment in East Palestine, Ohio, amounts to an infliction of precarity on the residents exposed to the toxins that the train was carrying and that have contaminated the soil, waters, and the like. The risks that they face impede their various capabilities to secure their potential life from various health problems and are harmful as such. To the extent that these harmed capabilities also set back their capacity to secure their potential life from such harms, the residents face precarity that is harmful by extension. Although precarity is harmful, inflicting precarity on others does not constitute an actionable injury in civil court unless the interests invaded by precarity are legally protected.[113] The fact that precarity is harmful is a necessary, but not a sufficient reason to make our capacity to secure our vulnerability the subject of a legally protected interest in tort.

[112] *See supra* note 22.
[113] *See supra* note 21.

Questioning whether conduct should be subjected to tort liability involves inquiring not only into whether the conduct is harmful so that it can further tort law's aim to compensate victims, but also whether the conduct is, in various senses, socially undesirable. Determining whether inflicting precarity is socially undesirable concerns an important aim of tort law: deterrence.[114] Following William Prosser, we know what a tort is by looking at what successful tort suits accomplish, which is discourage the undesirable conduct at issue and compensate the victims for its harms.[115] For Prosser, each tort must have "two poles or aspects: a *setback* (harm) aspect, and a *socially undesirable conduct* aspect."[116] As previously shown, precarity has a harm aspect in that it is a setback to an interest in the capacity to secure our vulnerability against the harmful events at risk. In what follows, I set out to show that inflicting precarity is socially undesirable conduct. Showing that infliction of precarity is consistent with these two aspects of courts shows its viability as a candidate tort.

The idea that tort law purports to deter socially undesirable behavior finds expression in various primary and secondary sources of law.[117] The deterrent effect of tort law is thought to come primarily from the normative message tort cases send to potential tortfeasors who will tailor their behavior to minimize sanctions.[118] One way of discerning socially undesirable

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[114] *See* DAN DOBBS ET AL., DOBBS' LAW OF TORTS § 10 (2d. ed. 2021) ("The most commonly mentioned aims of tort law are (1) compensation of the injured persons and (2) deterrence of undesirable behavior.").
[115] John C. P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 18 (2020) (citing William Prosser, Handbook of the Law of Torts (1941)).
[116] *Id.*
[117] *See* Walters v. Walters, 60 V.I. 768, 778 (Hawaii 2014) ("Tort law serves two fundamental purposes: 'deterrence and compensation.'") (citing *Dickhoff v. Green*, 836 N.W. 2d 321, 336 (Minn. 2013)). *See also Jackson v. Chandler*, 61 P.3d 17, 19 (Ariz. 2003) ("[T]he basic policies underlying tort law [are] to deter wrongful conduct and compensate victims."). *See generally* John W. Wade et Al., Prosser, Wade and Schwartz's Cases and Materials on Torts 511-19 (9th ed. 1994) (outlining the debate over the deterrent effect of tort law taken into account by judges, academics, legislators, and other important legal agents).
[118] Andrew Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181, 186 (2011) ("[T]here is nothing to challenge the common sense notion that humans learn by example or that people tailor behavior to

behavior is an economically-oriented approach to tort law that proposes weighing the cost of allowing an activity against that conduct's social costs to society and the cost of prevention to determine its social undesirability.[119] Another way to understand social undesirability is by reference to the perceived wrongfulness and social problems posed by conduct that could be subject to tort liability.[120] For example, the emergence of tort liability for pure emotional distress and of strict liability for manufacturing defects exemplifies how social undesirability drives the adoption of new torts.[121] Prior to the its adoption, for instance, courts denied recovery for pure emotional harm because the harm was too "idiosyncratic" and "speculative" so as to take the form of an actionable wrong whose damages can be quantified, and because it would "open up the floodgates of litigation."[122] However, the perceived wrongfulness of genuine emotional harm began to be taken more seriously by society, as evidenced by the professionalization of mental health specialists[123] and by the fact that damages from emotional harm could be quantified.[124]

Now, the question is whether precarity is sufficiently socially undesirable so as to justify imposing tort liability for inflicting precarity on others even in the event that the risks do not

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minimize sanction."); *see also* William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 11 (1987) ("[T]here is widespread agreement that the imposition of tort liability on professionals . . . and on business and other enterprises does affect behavior, does deter—some think too much!").

[119] Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 33 (1972) ("If . . . the benefits in accident avoidance exceed the cost of prevention, society is better off if those costs are incurred and the accident averted [by adopting] precautions in order to avoid a greater cost in tort judgments."). *See also* Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J. L & Econ. 255, 257 (1993). ("An act will be said to be socially undesirable if the expected harm it brings about exceeds the expected social benefits and socially desirable if the opposite is the case.").

[120] Abraham & White, *supra* note 53 at 2095.

[121] Id. *at 2096-97.*

[122] *Id.* (citing Dan B. Dobbs, The Law of Torts 822-24 (2000)).

[123] *Id.* at 2097 (citing G. Edward White, Tort Law in America: An Intellectual History 103 (expanded ed. 2003)).

[124] *Id.* (citing G. Edward White, Tort Law in America: An Intellectual History 105 (expanded ed. 2003)).

materialize. In one sense, inflicting precarity is already deemed socially undesirable because tort law holds all sorts of culpable actors liable for the whole damage caused by their risky activities. However, tort law currently draws the line of liability at cases where a culpable actor's risky activities do not lead to any material damages. But actors who culpably impose unrealized risks of material harm to others exhibit socially undesirable behavior just the same, especially when that imposition leads to precarity, that is, a heightened and persistent state of vulnerability to such risk. What makes inflicting precarity socially undesirable is that it is counterproductive to elemental values of society. One such elemental value is a standard of care in society that helps structure society to be a cooperative venture for mutual advantage that individuals can rely on in their dealings with each other despite their differential capabilities and vulnerabilities.

By "standards of care," I mean a rule of culpability that determines and explains whether someone is at fault for their action. Several rules of (criminal) culpability have been set forth in the literature: the defiance rule,[125] the capacity rule,[126] the character rule,[127] and the insufficient concern rule.[128] Although these rules concern *criminal* culpability, we can draw on these rules to understand different characterization of civil culpability that determine when an actor is at fault for their action in a way that deviates from the standard of care expected by a well-ordered society. What reinterpreting these rules to apply to civil liability

[125] Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 L. & Phil. 193, 194-95 (1993).
[126] H. L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 140 (2008)
[127] Anthony Duff, Criminal Attempts 176 (1996).
[128] Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 Cal. L. R. 931, 935 (2000).

reveals is that, even without going into detail, the act of inflicting precarity on others satisfies these rules of culpability whether the agent does so intentionally, recklessly, or negligently.

First, according to and reinterpreting the defiance rule,[129] if someone risks a harm actionable in tort, in doing so they undertake the risk in defiance of tort liability, and that defiance puts them at civil fault. Second, according to and reinterpreting the capacity rule,[130] if someone risk a harm actionable in tort, in doing so they undertake the risk despite their capacity to do otherwise than what the law makes actionable in tort, and that capacity to do otherwise puts them at civil fault. Third, according to and reinterpreting the character rule,[131] if someone risks a harm actionable in tort, in doing so they demonstrate an undesirable character trait. Finally, according to and reinterpreting the insufficient concern rule, if someone risks a harm actionable in tort, in doing so they show insufficient concern for the legally protected interests of others whose invasion would support a right of action in court.[132]

None of these rules of culpability that define a standard of care in tort law make essential reference to the consequences of the actor's risking a harm actionable in tort. Applying these rules of culpability to infliction of precarity, we see that infliction of precarity is socially undesirable because it involves deviating from these standards of care. For if an actor

[129] According to Horder, criminal culpability consists in intentionally or recklessly defying the law. *See* Horder, *supra* note 126 at 194-95.
[130] According to Hart, the capacity to do what the law requires determines whether an agent is criminally culpable for the consequences of their action. *See* Hart, *supra* note 127 at 154.
[131] According to Duff, culpability is grounded in the bad character of an agent whose actions warrant an inference to some undesirable character trait. *See* Duff, *supra* note 128 at 176.
[132] According to Alexander, the insufficient concern rule states: "choose only those acts for which the risks to others' interests—as you estimate those risks—are sufficiently low to be outweighed by the interests, to yourself and others, that you are attempting to advance . . . ." *See* Alexander, *supra* note 129, at 939.

imposes risk(s) of actionable harm in tort that put others at a persistent and heightened state of vulnerability to such harm, then in doing so they undertake the risk (1) in defiance of tort liability for the harm, (2) despite their capacity to do otherwise, (3) that demonstrates an undesirable character trait, such as indifference to the vulnerability of others, or (4) that shows insufficient concern for our interests against the harms put at risk. These rules outlined in the previous paragraph are satisfied whether the risk or series of risk that inflict precarity on others materialize into the harms at risk.

Whatever standard of care one adopts to determine and explain when an actor is at fault in tort, infliction of precarity involves deviating from that standard of care. Imposing risks of tortious harm on others is sufficient for tort liability for those harms, albeit insufficient for tort recovery—at it stands—if those harms do not occur. Deviating from the standard of care of a well-ordered society is socially undesirable, and thus infliction of precarity is socially undesirable for the same reasons that make tortious conduct resulting in material damages socially undesirable.

In sum, I have argued that infliction of precarity has some of the makings of a traditional tort—it is both harmful and socially undesirable conduct.[133] It is harmful because being put at a persistent and heightened state of vulnerability to harm impedes our capacity to secure our vulnerability from the harms at risk, in accordance with the Capacity Account of harmful risking set forth in Part I.B. In turn, it is socially undesirable for two reasons as explained above. First, it is counterproductive to society as a mutually advantageous venture by transforming identities of interest into conflicts of interests. Second, it involves deviating

[133] As previously discussed, torts typically have two aspects: a setback (harm) aspect, and a socially undesirable aspect. *See* Goldberg & Zipursky, *supra* note 115-16.

from or breaching standards of care that are elemental to a well-ordered society that determines and explains when an actor is at fault for their actions.

In Part II, I show that infliction of precarity has the making of a traditional tort for additional reasons. Not only is inflicting precarity harmful and socially undesirable, but the proposed tort also satisfies three other criteria of tort law that traditionally provide a basis for a lawsuit in American courts. These criteria, which includes harm and social undesirability, are taken from a general theory of the preconditions necessary to the adoption of new torts by Kenneth S. Abrahams and G. Edward White.[134] According to this theory, "there are four preconditions relevant to the establishment of a new tort."[135] These are (1) social salience and normative weight[136] (or what I call "harm" and "social undesirability"), (2) justiciability[137] (amenable to adjudication), (3) essentiality[138] (not effectively addressed by other sources of law), and (4) practicality[139] (sufficiently workable and compensable). Infliction of precarity meets all four criteria, or so I will argue.

Fitting Infliction of Precarity Into Tort Law

Calls to recognize novel causes of action in tort law are not unprecedented in the scholarly literature.[140] On the contrary, they have in some cases been significantly influential and successful, as in the call to recognize what is now the tort of intentional infliction of emotional distress.[141] In this connection, Prosser called for officially recognizing a separate tort of

[134] *See* Abrahams & White, *supra* note 53.
[135] *Id.*
[136] *Id.* at 2095-97.
[137] *Id.* at 2100-102.
[138] *Id.* at 2103-104.
[139] *Id.* at 2104-106.
[140] *See, e.g.*, Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 Tex. L. Rev. 1539 (1996-1997).
[141] Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum. L. Rev. 42 (1982) ("Academics, rather

intentional infliction of mental suffering—considered a "new tort" at the time— supported by a pattern of decisions by courts around the era,[142] now recognized as the intentional infliction of emotional distress.[143] Scholarship-driven tort activism has also made a significant difference to the formation, recognition and development in tort law of strict products liability,[144] invasion of privacy,[145] and wrongful discharge from employment.[146] Yet in this same respect, many proposals for new torts in the United States have not been so successful.[147] Jane Larson's proposed tort of sexual fraud,[148] for example, and Rory Lancman's proposed tort of suppression[149] have not been adopted at common law. In fact, it is thought that most new tort proposals will fail.[150]

According to Anita Bernstein, a significant difference between successful and unsuccessful new-tort proposals can be attributed to the different methodological approaches that their authors take to the challenge of conservatism in tort law.[151] On one approach, which characterizes successful tort proposals, conservatism in tort law is accommodated by framing the tort as being within the scope of preexisting common-law

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than courts, were the prime movers in the development of the tort of intentional infliction of severe emotional distress by outrageous conduct;").

[142] *Id.* (citing William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874 (1939)). *See also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936).

[143] *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965)

[144] *See* Restatement (Second) of Torts § 402A (1965)

[145] See Restatement (Second) of Torts § 652A-652I (1965)

[146] Bernstein*, supra* note 141, at 1541 ("All of these claims, though linked to past causes of action, have achieved the designation of new torts.")

[147] *See id.* at 1542-43.

[148] *See* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 Colum. L. Rev. 374, 453 (1993)

[149] *See* Rory Lancman, *Protecting Speech from Private Abridgement: Introducing the Tort of Suppression*, 25 Sw. L. Rev. 223, 245-55 (1996).

[150] Bernstein, *supra* note 141, at 1543-44.

[151] *Id.* at 1563-64.

actions. Prosser's work on infliction of mental suffering as a new tort and on privacy law as comprising four distinct kinds of invasions are signal examples of this approach, in which Prosser emphasizes the fact that such torts are already in play at common law before constructively elaborating on their nature and rules.[152] In contrast, unsuccessful new-tort proposals are characterized by a methodological approach that stresses the novelty or originality of the proposed causes of action in relation to the traditional tort paradigm. This approach attempts to justify the proposal without essentially appealing to a more traditional theory, such as contract, property, or dignity, that is already accepted in the traditional paradigm.[153]

My proposal for recognizing infliction of precarity is based on the former rather than latter methodological approach. It is argued that what makes inflicting precarity harmful and socially undesirable can be linked to the traditional tort paradigm in a way that recognizing the tort would not constitute a significant departure from that paradigm. Rather, it would be an appropriate extension of that paradigm that is both progressive and consistent with it. Below, in Section A, I aim to show that infliction of precarity can be fit into the traditional tort paradigm for two reasons. First, the call to recognize infliction of precarity satisfies Abraham and White's criteria for the establishment of a new tort. Apart from being harmful and socially undesirable, infliction of precarity is also justiciable, essential, and practical. Second, infliction of precarity is analogous to and shares affinities with some of the most basic

[152] *See* Prosser, *supra* note 143, at 874 ("It is time to recognize that the courts have created a new tort.") (implying that courts have already created the tort); *see also* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 386 (1960) ("At the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts.").
[153] *See generally* Bernstein, *supra* note 141, at 1547.

categories of offense in tort law, such as assault, false imprisonment, and offensive contact. I take it to be an essential feature of establishing a new tort that, despite redressing a category of wrong not already captured by already-existing torts, nevertheless that wrong does not radically depart from the scope of already-existing torts. This way, the new tort would be a progressive extension rather than an unprecedented invention of tort law.

Four Preconditions to Tort Liability

What it takes for a new form of tort liability to come into being can be discerned from some of the general preconditions to the imposition of tort liability in any case.[154] In other words, the emergence of a new tort depends in part on pre-existing factors for imposing tort liability. According to Abrahams and White, there are four preconditions relevant to the establishment of a new tort that can be gleaned from the emergence of recent "new" torts, such as intentional infliction of emotional distress or intrusion on seclusion.[155] The first precondition is "social salience and normative weight."[156] This precondition is based on a connection between the perceived wrongfulness of conduct outside the legal system, or the social recognition of conduct as a social problem for courts to solve, and the actual weight of the wrong that would justify court intervention because it is highly blameworthy conduct.[157] The second precondition is "justiciability," which means the tort is amenable to adjudication.[158] To be so amenable, the tort must satisfy two features of justiciability.

[154] Abrahams & White, *supra* note 53, at 2095.
[155] *Id.*
[156] *Id.*
[157] *Id.* at 2096-98.
[158] *Id.* at 2100.

First, the elements of the tort must be discrete, concrete, and specific so that the rules can be easily applied to a core set of routine facts.[159] Second, the damages potentially awarded for the tort must be cognizable in the sense that the alleged losses would not raise essentially speculative questions.[160] Next, the third precondition is "essentiality," meaning that liability for the new tort is not already effectively addressed by other sources of law, such as some statutory or regulatory regime.[161] Finally, the fourth precondition is "practicality," which refers to the frequency of potential cases involving the new tort and lawyers' incentives to bring such cases, like the prospects of a sufficient award of damages. In the following four Subsections, I briefly explain how infliction of precarity meets the preconditions of social salience and normative weight, justiciability, essentiality, and practicality.

Social Salience and Normative Weight

Precarity as an economic, social, political, and psychological condition that negatively affects our well-being is gaining social salience and normative weight.[162] Philosophically, I have argued that precarity is an inherently disvaluable condition of well-being because it is the state in which our capacity to secure our vulnerability from various harms at risk is significantly diminished.[163] The diminishment of this capacity indicates harm to our well-being because that capacity is integral to directing our life in accordance with our own ends that is constitutive of our equal worth as human beings.[164] This suggests that the theory of

[159] *Id.*
[160] *Id.* at 2101-103.
[161] *Id.* at 2103-104.
[162] *See supra* notes 34-40.
[163] *See* Part I.B.
[164] *See* Nussbaum, *supra* note 89.

harm underlying an infliction of precarity claim is harm based on a dignitary interest grounded in our equal worth as human beings.

The normative weightiness of precarity also stems from its social undesirability. First, it is counterproductive to society as a mutually advantageous venture by transforming identities of interest into conflicts of interests. Second, it involves deviating from or breaching standards of care that are elemental to a well-ordered society that determines and explains when an actor is at fault for their actions. As I argued above,[165] putting others in a state of precarity is equally as culpable—at least for moral or criminal law purposes—as it would be to actually cause the harms that characterize the precarious agent's vulnerability. It is culpable because it involves deviating from standards of care used by well-ordered and well-functioning societies to determine and explain when an actor is at fault for their conduct and to maintain the identities of interests between members of society.

Justiciability

Infliction of precarity is amenable to adjudication because it has discrete, concrete, and specific elements that allow for a consistent application of its rules to a routine set of facts. Here, I claim that to prove a *prima facie* infliction of precarity claim, a plaintiff must show four things:

(a) The defendant's acts or omissions created a persistent risk of harm.
(b) The defendant's acts or omissions created a heightened risk of harm.
(c) The defendant's acts or omissions would cause reasonable apprehension in others that they are vulnerable to the harmful outcomes at risk.
(d) The defendant was intentionally, recklessly, or negligently concerned in the creation of the risk.

[165] *See supra* pp. 26-27.

I elaborate on the foregoing elements as follows. First, a persistent risk of harm can be created in either one of two ways. First, the risk of harm can be persistent because it is *continuing*, in the sense that the victim of the exposure to risk continues to face that risk even after the initial exposure event has ended. A patient who faces increased risk of cancer due to significant exposure to carcinogens negligently caused by a company's illegal pollution will continue to be at greater risk of cancer because of the effects that exposure had on their body. In contrast, someone who is exposed to a risk of a car accident caused by drunk driving is no longer at risk of that accident when the reckless driver is pulled over. Rather, such a risk is what I call "terminated," in the sense that the victim of the exposure no longer faces the risk after the initial exposure event has ended. However, such terminated risks can constitute a persistent risk of harm if they are sufficiently repeated. To illustrate, imagine that a bus driver on a certain route in a mid-sized city has been getting buzzed while driving by drinking beer from a concealed container throughout their shifts. Although the bus passengers are not exposed to the risk when they are not taking the bus, the passengers who are regularly taking the bus over a sufficient span of time are being repeatedly exposed to the risks created by the bus driver's drinking problem. By being repeatedly exposed to those risks, without intervention, some of the bus passengers are at persistent risk of harm because they continue to face the same risk in subsequent exposures to the risk.

Second, a defendant's actions or omission causes a *heightened* risk of harm when their acts or omissions imposes a risk greater than the risks that are an inherent part of the activities. For example, the risk of a car accident created by an inebriated driver is a heightened risk of the same risk of harm that any driver faces and assumes when operating

a motor vehicle. Likewise, an employee on the production floor of a chemical manufacturing company likely faces the risk of occupation exposure to hazardous substances in the usual course of their employment. Yet suppose that a manager at the company recklessly directed, against policy and law, an uncertified and inexperienced employee to work on a task on the production floor that involves potential exposure to hazardous substances. Let us imagine that this employee is usually not exposed to such hazards in their usual course of employment. By virtue of the fact that the employee now faces such risk, which is much less than would be faced by an experienced worker, they are by definition at heightened risk of harm.

Third, the defendant's actions or omissions would cause reasonable apprehension in the victim that they are vulnerable to harmful outcomes at persistent and heightened risk. This is an objective criterion in the sense that the persistent and heightened risk is of such a nature and degree so as to cause apprehension of being vulnerable to a reasonable person.

The final criterion concerns the actor's fault. An actor who inflicts precarity is intentionally concerned in their act if (a) they act with the desire to cause persistent and heightened risk that would cause reasonable apprehension in the victim of their vulnerability to the harmful outcomes at risk or (b) so acts in the belief that such precarity is substantially certain to result.[166] The actor is recklessly concerned in their act if (a) the actor realizes, or should realize, that there is a strong probability that their act inflicts such precarity on others but (b) consciously disregards the likelihood of inflicting precarity others

[166] *See* Restatement (Second) of Torts § 8A ("The word 'intent' is used throughout . . . to denote that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

in choosing to act as such.[167] Finally, the actor is negligently concerned in their act of inflicting precarity if (a) the actor's conduct falls below the standard established by law for the protection of others against unreasonable risk of harm which they have a duty not to create and (b) the unreasonable risk of harm within the scope of the conduct is persistent, heightened, and causes reasonable apprehension in the victim that they are vulnerable to the harmful outcomes at risk.[168]

Essentiality

Whether a new tort is needed depends on whether there is an existing statutory or regulatory regime that provides and defines the contour of redress and relief for some civil wrong.[169] Courts are likely to decline creating a new tort to deal with wrongful acts that are already addressed by other sources of law.[170] Here, infliction of precarity is not addressed by other sources of law. Liability for imposing risks of harms on others that do not materialize, even if that imposition would shock the conscience or be offensive to any reasonable person, has not been addressed by a statutory or regulatory regime. Instead, courts are inching closer to recognizing such a cause of action through caselaw concerning pre-manifestation claims. A new tort redressing the wrong that falls within the scope of pre-manifestation claims—that of being put in a precarious state due to persistent and heightened risk of harm—would thus meet the criterion of essentiality precisely because it is not effectively addressed by a source of law outside the common law of torts.

[167] *See generally* Restatement (Second) of Torts § 500 (defining recklessness).
[168] *See* Restatement (Second) of Torts § 281-83 (defining negligence, its elements, and the standard of care).
[169] Abrahams and White, *supra* note 53, at 2103-104.
[170] *Id.* at 2103.

That being said, state and federal law does regulate many kinds of risks—environmental, health, workplace and product safety, among many other. But when an relevant actor violates those regulations, those who are directly affected by the risk are not always invested with a private right of action against the entity that created the risk. Instead, such law usually gives actors a private right of action that enforces the law and subjects the defendant to liability for breaking it. Infliction of precarity would be, in contrast, a private right of action for a wrong committed specifically against the person bringing the action as a result of the violations.

Practicality

Tort law is meant to address recurring patterns of misconduct that, owing in part to their social salience and pervasiveness, warrant legal intervention through a rule of liability.[171] To articulate and contour the legal standard governing a potential new tort such as infliction of precarity, there would need to be enough cases arising from a recurrent pattern of facts. In part, for there to be enough cases, the potential new tort must involve sufficient damages to encourage prospective plaintiffs to file suit in tort inflicting precarity. These would be some of the practical prerequisites to establishing infliction of precarity as a new tort.

First, infliction of precarity is likely to recur across a range of cases.. One such set of cases—pre-manifestation claims—have already been described in detail in the Introduction and Part I.[172] These claims, based on facts that might support claims for inflicting precarity because they involve persistent and heightened risk of future harm, include toxic tort cases[173]

[171] *Id.* at 2105 ("Actions in tort are typically perceived as addressing recurring patterns of misconduct that, precisely because they recur, warrant legal intervention.").
[172] *See supra* Introduction, Part I.
[173] *See* Alan T. Slagel, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 Ind. L. J. 849 (1988)

as well as cases arising from unsafe workplace conditions.[174] Indeed, based on data collected by the Environmental Protection Agency, chemical accidents in the United States shows that chemical accidents—whether through train derailments, truck crashes, pipeline ruptures or industrial plant leaks and spills—are occurring, on average, every two days.[175] Given the relative frequency of these sorts of accidents that can pose risk of future harm as a consequence, it is plausible to generalize that the potential frequency of infliction of precarity claims approximates or correlates to the potential frequency of toxic tort cases and workplace negligence actions, as well as other kinds of cases in which the harms realized were preceded by impositions of persistent and heightened risk.

Second, although an inquiry into the sufficiency of damages for inflicting precarity involves some degree of speculation, there is a compelling case that courts would award enough damages to incentivize plaintiffs to bring suit for being put in a persistent and heightened state of vulnerability. Although the theory of harm underlying an infliction of precarity claim is not emotional distress, pecuniary costs for medical surveillance or other treatment, or for the anticipated harms that characterize precarity that may or may not materialize, these harms could nevertheless form part of the damages owed to the victim. In other words, although the general damages for an infliction of precarity claim would not have a set monetary cost because it involves an intangible loss to one's capacity to secure one's life against potential harm, consequential damages could be available that are more

[174] *See* Barbara J. Tucker, *Tort Liability for Employers Who Create Workplace Conditions "'Substantially Certain" to Cause Injury or Death*, 50 Mont. L. Rev. (1989)
[175] *See* Carey Gillam, *Revealed: The US is Averaging One Chemical Accident Every Two Days*, The Guardian (Feb. 25, 2023), https://www.theguardian.com/us-news/2023/feb/25/revealed-us-chemical-accidents-one-every-two-days-average.

ascertainable if the injury resulted in such costs. In U.S. civil trials, determining general damages for intangible losses is left to the factfinder, either the judge or the jury.[176] Consider the representative California Model Jury Instruction for pain and suffering damages arising from physical injury:

> No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. . . . In making an award for pain and suffering you should exercise your authority with calm and reasonable judgment and the damages you fix must be just and reasonable in light of the evidence.[177]

Intangible damages are also provided in recovery for long-standing intentional torts such as assault and false imprisonment. The theory of harm underlying the intentional tort of assault is fear, or apprehension alone, of physical injury.[178] In general, damages for such harm are left to the factfinder to determine.[179] Likewise, the theory of harm underlying the intentional tort of false imprisonment is based on the interest in freedom from confinement.[180] Damages for such harm, including punitive damages, are also left to the factfinder to determine.[181] In sum, although these long-standing torts, among others, sometimes involve intangible harm that factfinders must assess for determining adequate

[176] Valerie P. Hans, *Dignity Takings, Dignity Restoration: A Tort Law Perspective*, 92 Chi.-Kent L. Rev. 715, 719 (2018).
[177] *See* Robert L. Rabin, *Intangible Damages in American Tort Law: A Roadmap*, Stanford Public Law Working Paper No. 2727885 1, 3 (2016) (citing BAJI 14.13 (2014) (alteration in original)), https://law.stanford.edu/wp-content/uploads/2016/07/R.L.RABIN-SSRN-Rotterdam-Conf-paper-revised-for-ssrn-2727885-Intangible-Damages-in-American-Tort-Law.pdf.
[178] *Id.* at 12.
[179] *See, e.g.*, Hanley Robinson, Alaska Court System, The Alaska Civil Pattern Jury Instructions, Article 12.09 Assault or Battery - Damages (2017), https://courts.alaska.gov/CVPJI/docs/12.09.docx.
[180] *See* Restatement (Second) of Torts §35 (1965).
[181] *See, e.g.*, The Florida Bar, Civil Jury Instructions, Section 400, Section 407.10, False Imprisonment Damages (Mar. 2, 2023), https://www-media.floridabar.org/uploads/2022/04/407.10.rtf.

compensation, this fact is not a barrier to the practicality of these torts.[182] Neither would it be a barrier to viewing infliction of precarity, which involves intangible loss, as practicable.

Finally, it is also worth considering the common knowledge that several causes of action can be brought in a complaint, and so the likelihood that a claim for infliction of precarity will be brought in addition or in parallel to other causes of action is relevant to its practicality. To reiterate, infliction of precarity involves being in a persistent and heightened state of vulnerability to threat of harm generated by others' conduct or activities. Being put in such a state and having a claim for infliction of precarity does not exclude the possibility that one has also suffered other legal wrongs preceding, in the course of, or subsequent to the events that led to such precarity. This inclusiveness matters because it signals that an infliction of precarity claim would not involve costly externalities to litigants and the legal system if they are also incentivized to bring claims in courts with sufficient damage awards that would only be further supplemented by damages for inflicting precarity.[183]

A Tort Among Torts: Some Analogies

This section proposes various analogies between infliction of precarity and other legal injuries in tort that traditionally provide a basis for lawsuit in American courts. The purpose of these analogies is two-fold: Firstly, to show that infliction of precarity redresses a category of wrong that, although not yet captured in tort law, does not radically depart from the scope of presently existing torts—specifically, pre-manifestation torts; and to show, secondly, that

[182] *See* Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359 (2006).
[183] I highlight this practicable feature in the two working example cases. *See infra*, Section C.

infliction of precarity shares significant affinities with various other torts of both ancient and contemporary pedigree.

Although infliction of precarity is not based on the same theories of harm as the pre-manifestation claims of fear of disease or illness, medical monitoring, and enhanced risk, infliction of precarity redresses a harm that falls within the scope of these pre-manifestation claims. Within the scope of a successful pre-manifestation claim, there is some sort of causal relation between the risks involved in the case and the subsequent consequences that the risk had on the victim that led to the damages the victim could recover as a result.[184] Although what courts redress in fear of disease, medical monitoring, and enhanced risk claims is not the harm of the risk in its own right but rather the harms flowing from the creation and apprehension of that risk, what courts have done by making such harms compensable is recognizing risk as an appropriate *legal cause* of the emotional, pecuniary, and anticipated harms whose recovery they have permitted.[185]

Likewise, within the scope of a would-be successful infliction of precarity claim, the persistent and heightened risk imposed by an actor would be the legal cause of inflicting precarity on others. Pre-manifestation claims that are already recognized in tort, on the one hand, and an infliction of precarity claim, redress different categories of wrong but are constituted in part by legal causes of the same or similar nature. Whereas pre-manifestation theories of recovery are based on redressing the emotional, pecuniary, or anticipated

[184] *See supra* note 18.
[185] *See supra* notes 12-16 (citing cases in which plaintiffs recovered for emotional or pecuniary harm legally caused by the risks involved), 26. *See also* Howard Ross Feldman, *Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk*, 17 Uni. Balt. L.R. 139, 153 fn. 100 (1987) (collecting cases in which courts allowed recovery for increased risk claims).

physical harm of premature or unrealized risk, the theory of recovery for infliction of precarity is based on redressing the independent harm of being put in a persistent and heightened state of vulnerability, which is both harmful to well-being and socially undesirable in its own right.[186]

In sum, pre-manifestation claims in tort law overlap with infliction of precarity because the legal cause in pre-manifestation cases falls within the same scope of the legal cause of an infliction of precarity claim. In contrast, pre-manifestation claims and infliction of precarity depend on different theories of harm or recovery that provide the standard for recovering damages for risk of harm. In emotional distress cases involving the risk of future illness, the theory of harm and recovery is just emotional harm and damages;[187] in medical surveillance cases, the theory of harm and recovery is just pecuniary harm and damages;[188] and in enhanced risk cases, perhaps uniquely, the theory of harm and recovery depends on estimations of the anticipated harms at risk.[189] Yet for infliction of precarity, the theory of harm and recovery depends on estimating the harm to our well-being resulting from the precarity that was inflicted. Estimating that harm depends not only on the nature and degree

[186] This theory implies that, in some cases, it is and should be possible to recover not only for the infliction of precarity manifested by impositions of sufficient risk of harm, but also for some or all of the resultant harms in the event that the risks are realized. Some will object that this is double-counting, but what is counted by an infliction of precarity claim is a kind of harm that is not counted by recovery for the realized risk, which is recovery for the resultant harms rather than their relation to our dignity interest. In other words, it is not necessarily a defense against infliction of precarity that the risks constitutive of that precarity eventually occurred. A claim for infliction of precarity would thus not preclude or exclude claims for injuries that eventually result from the risk-generating activities that can inflict precarity.
[187] *See supra* note 11.
[188] *See supra* note 13.
[189] *See supra* notes 15, 186.

of the persistent and heightened risk that characterizes that precarity, but also the nature and degree of the precarious subject's vulnerability to that risk.[190]

Although the harm of inflicting precarity is not based on the traditional categories of physical, emotional, or pecuniary harm, it shares significant affinities with many traditional torts that cannot be so easily reduced into any of the three categories.[191] Specifically, I argue that the harm of inflicting precarity—which consists in its interference with our capacity to be secure in our potential life—is analogous to the dignitary harms recognized in tort and remedies by such actions as assault, offensive battery, and false imprisonment. For example, in an action for offensive battery, offense to dignity is considered the essential setback (harm) to the victim.[192] In turn, the tort of false imprisonment—once described as a "close cousin" of assault[193]—protects interests akin to the interested protected by assault and battery claims.[194] The interests involved in the dignitary torts finds expression in *Union P.R. Co. v. Botsford*, an early case in which the Supreme Court addressed the question whether a

[190] For example, a persistent and heightened risk of future illness that requires not only expensive medical monitoring, but also expensive treatment if the illness materializes, would be equal in nature and degree whether the subject of that risk was rich or poor. However, the rich subject of the risk is less vulnerable than the poor subject because the former has resources that can mitigate the risk and financially cope in the event of its materialization, whereas likely the poor subject of the risk lacks such resources. Despite the parity between the risks faced by the rich and poor subject in this thought experiment, their differential vulnerability to this risk suggests that greater damages would be owed to the more vulnerable subject.

[191] *See* Kenneth S. Abraham and Edward White, *The Puzzle of the Dignitary Torts*, 104 Cornell L. Rev. 317, 319 (2019) ("Tort liability is imposed not only to protect against and compensate for bodily injury, damage to property, emotional distress, and economic loss, but also to protect individual dignity of various sorts and compensate for invasions of individual dignity.")

[192] Restatement (Second) of Torts, § 18 cmt. c (1965) ("the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done . . . it is not necessary that the plaintiff's actual body be disturbed.").

[193] Fermino v. Fedco, Inc., 872 P.2d 559, 571 (1994) (citing 1 Harper et al., Law of Torts § 3.9, 296 (2d ed. 1986).

[194] *See id; see also* 3 Joseph D. Zamore, Business Torts § 25.01 (2023)

defendant can be made to submit to surgical examination for the extent of the injury alleged and proscribed such an order on dignitary grounds:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass;[195]

This excerpt gives expression to the fact that, at the heart of various torts such as assault and trespass, lies the notion of dignity and, more abstractly, the "inviolability of the person." Indeed, this latter phrase and dignity as a foundation of our rights resonates throughout influential legal scholarship , such as *The Right to Privacy* by Samuel D. Warren and Louis D. Brandeis, in which the term "inviolability of the person" figures crucially in the privacy interest that Warren and Brandeis describe and carve out in their article.[196]

Dignity and the inviolability of the person connote abstract, moral and perhaps spiritual ideas that contrast sharply against the specific definitions and traceable pattern of caselaw governing the dignitary and other torts.[197] With respect to such notions in legal scholarship and practice, commentators have argued that there is no singular and unified conception of dignity and cognate values that can provide a uniform theory covering assault, offensive battery, false imprisonment, privacy, and the like.[198] Rather, these causes of actions involve different but overlapping interests that do not equally relate to the notions of dignity or

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[195] Union P.R. Co. v. Botsford, 141 U.S. 250, 251-252 (1891).
[196] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, Harv. L. R. 193, 205 (1890).
[197] *See* Abraham & White, *supra* note 92 at 320 ("The term 'dignity,' as it used in passages referring to an unspecified set of torts, appears to us to be a particular placeholder for an inchoate but unarticulated idea.").
[198] *See id.*, *supra* note 92 at 329-32.

inviolability of the person across all cases.[199] Despite the underspecified roles that the value of dignity and cognate notions have played in the history and future of tort law, nevertheless we can conclude that the traditional tort law paradigm has made space for abstract and moral values as a guiding principle for the imposition of tort liability even though the category of dignity and like values—including liberty, autonomy, or inviolability of the person—is vague, abstract, and moralized.

Infliction of precarity is not meant to be another example of the putative category of the dignitary tort. Rather, redress for harm to our capacity to secure our vulnerability from persistent and heightened risks that cause apprehension of our vulnerability is based on an array of interests that overlap with such interests as dignity or inviolability of the person. At the heart of a claim for infliction of precarity is our interest in planning our life in accordance with our own evaluation of ends that constitutes our equal worth as essentially rational human beings. This interest is setback by impositions of heightened and persistent risk that put us in a corresponding state of vulnerability to potential harms. And this interest, as I have set out to argue, has a place in the traditional tort paradigm given its affinities to dignity, inviolability of the person, and the like. It is an interest supporting a right of action that bears a strong conceptual resemblance to "the right of every individual to the possession and control of his own person . . . ."[200] It is based on a theory of harm that bears a strong conceptual resemblance to the theory of harm underlying such offenses as assault, offensive battery, or false imprison, in which the grievance does not necessarily depend on any actual harm or disturbance done to our physical integrity.

[199] *See id.*, *supra* note 92 at 374-79.
[200] Union P.R. Co., *supra* note 197 at 251.

In sum, infliction of precarity would be a tort among torts. First, it redresses a category of wrong—wrong because, as argued in Part I, it is harmful and socially undesirable—that is not captured in tort law but falls within the scope of the pre-manifestation torts. To the extent that persistent and heightened risks of harm are treated by courts as the legal causes of emotional, pecuniary, and anticipated harms redressable in court, we can infer that such risks can also be treated as the legal cause of the harm of inflicting precarity. Second, infliction of precarity shares relevant affinities with an overlapping set of actions in tort law that implicate intangible interests affected by intangible harms that have traditionally been related to each other with reference to the notions of dignity or inviolability of the person. Based on these strong affinities, there is a compelling case that infliction of precarity does not constitute a significant departure from the traditional bases for a lawsuit in American courts and can be fit into the traditional tort law paradigm.

CONCLUSION

Risk is a crucial figure around which contemporary life turns. The industrial, scientific, and technological progress that characterize our contemporary society in recent centuries is counterbalanced by the economic, environmental, political, medical, and social risks that have proliferated in kind and in degree as much as other and overlapping risks have, by the same token, been abated.[201] A paradigmatic example is the COVID-19 global pandemic. Throughout that period, the risk of infection and transmission of COVID-19 strained, restructured, and transformed medical, economic, international, social, political, and ethical

[201] Ulrich Beck, *Living in The World Risk Society* 329, 332 (2006) (Modern society has become a risk society in the sense that it is increasingly occupied with debating, preventing and managing risks that it itself has produced.").

relations within and across societies.[202] The pandemic also had a profound impact on legal doctrine and relations, especially judicial review of public health powers in the civil and criminal context.[203] The pandemic thus helped make explicit how risk production, risk aversion, and risk allocation characterize, challenge, and are addressed by various structures and institutions of societies. Yet already in contemporary legal thought, risk and the allocation of risk are recognized as key organizing principles of substantive, procedural, and administrative law,[204] specifically tort and contract law[205] and criminal law.[206]

Against the foregoing background, this Article has proposed that tort liability for special cases of risk creation *in its own right* should be another key mechanism through which to allocate risk between parties. In a sense, such tort liability already exists because tort law permits fear of future disease claims, medical monitoring claims, and enhanced risk claims, although such claims are based on theories of emotional, pecuniary, and anticipated harm. Yet latent within such claims is the supposition that the imposition of risk can constitute an invasion of a legally protected interest apart from the emotional, pecuniary, and anticipated harms of the risk. In this connection, I have argued that actors who impose or expose others to persistent and heightened risk of harm should face tort liability for what I call "infliction

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[202] *See generally* Matteo Bonotti & Steven T. Zech, *The Human, Economic, Social, and Political Costs of COVID-19*, *in* RECOVERING CIVILITY DURING COVID-19 1 (Matteo Bonotti & Steven T. Zech eds., 2021).
[203] *See generally* Wendy E. Parmet & Faith Khalik, *Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications*, 113 American J. Pub. Health 280 (2023).
[204] Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 Bost. U. L.R. 171, 172 (2012) ("Formal risk analysis has become more and more commonplace in recent years. Legislators and regulators have enlisted risk analysis as a tool in protecting public health and safety, perhaps especially in the area of environmental law.").
[205] *See, e.g.*, Joost Blom, "Tort, Contract and the Allocation of Risk, 17 Sup. Ct. L. Rev. 289, 291 (2002) ("[T]ort and contract law are both mechanisms for the allocation of risk. Tort deals with risk after the fact . . . . Contract – or, more accurately, the parties who make contracts – deal with risk in advance.").
[206] *See, e.g.*, Nash, *supra* note 212 at 173 ("[C]riminal law's natural affinity for risk analysis has emerged in the Supreme Court's treatment of some aspects of criminal law.").

of precarity." This term describes the act of putting others in a persistent and heightened state of vulnerability to harm that would be tortious if the harm materialized as a result of the actor's conduct.

The theory of harm underlying infliction of precarity is that it is a dignitary harm that affects our interest in our capacity to secure our vulnerability from interpersonal harm. Attending to the philosophical literature on the ethics of risk, I have argued that our interest in our capacity to secure our vulnerability from interpersonal harm is grounded in the fact that this capacity is a measure of our well-being, and that putting others at any kind of risk is harmful to the extent that it affects our capabilities to secure our vulnerability from the harms at risk. In cases of persistent and heightened risk of harm, which can take the form of an internalized risk or a pattern of externalized risks, individuals experience harm to their capacity to secure their potential life at a greater scale that constitutes a dignitary harm that should be actionable in tort.

At that scale, the individual exists in a persistent and heightened state of vulnerability. Such vulnerability results from not only harmful but also socially undesirable conduct that, like other conduct subject to tort liability, can provide a traditional basis for suit in American courts. Indeed, I have also argued that infliction of precarity is a tort among torts. After all, I have suggested that infliction of precarity is latent, in some sense, within the set of "pre-manifestation" claims seen in tort law. Yet the case for its fit within the traditional tort paradigm is also supported by its satisfaction of four criteria viewed as necessary preconditions for the development of a new tort. Moreover, it shares many natural affinities to some of the most basic categories of tort law, including assault, offensive battery, and false

imprisonment. Although there are relevant dissimilarities, the theory of harm underlying a claim for infliction of precarity is analogous to the various theories of harm underlying assault, offensive battery, and false imprisonment.

Finally, I have also set out to describe an infliction of precarity claim using discrete, concrete, and specific elements that make it amenable to adjudication. In turn, I presented a hypothetical example featuring a pattern of facts that might give rise to an infliction of precarity claim. This example, which borrows heavily from toxic tort litigation, highlights the social salience and normative weight of infliction of precarity. Infliction of precarity matters because it describes what is wrong when others impose risks on us that, even if the risks do not materialize into the harms at risk, put us in reasonable apprehension of our persistent and heightened vulnerability. Motivating this article is the fact that, at least in our moral practices, people are not excused of their reckless conduct because, for whatever reason, the risks did not materialize. Conceiving society as a cooperative venture for mutual advantage, we hold ourselves and each other to a standard of care that addresses the fact that we are differentially vulnerable beings who are dependent on each other to take care against the potential to cause interpersonal harm. By making infliction of precarity actionable in tort, we give expression and respect for that standard of care, for our differential vulnerabilities to risk, and to the moral significance of risk in its own right.

CHAPTER THREE:

The Moral Difference of Differential Punishment

Introduction

Criminal attempts are inchoate offenses that involve trying to bring about the intended offense.[207] In the United States, they are committed by taking substantial steps that would culminate in the intended offense with the requisite culpability for that offense.[208] In practice, the penalty for a criminal attempt is significantly less than the penalty for the intended offense.[209] This practice is called "differential punishment."

Moral and legal philosophers have rejected differential punishment, claiming that the penalties for a criminal attempt and the intended offense should be the same.[210] According to one line of reasoning, whether or not a criminal attempt culminates in the intended offense, the attempt demonstrates an equally dangerous and wicked mind, which calls for an equal quantum of punishment despite the outcome.[211] According to another, because success

[207] *See* MODEL PENAL CODE § 5.01.
[208] MODEL PENAL CODE § 5.01
[209] *See* Russel Christopher, *Does Attempted Murder Deserve Greater Punishment Than Murder? Moral Luck and the Duty to Prevent Harm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004) ("Almost every jurisdiction world-wide punishes the attempt that succeeds more severely than the attempt that fails.") (citations omitted). However, the Model Penal Code has moved towards equalizing the punishment for attempted and completed crimes in the United States. *See* MODEL PENAL CODE § 5.05(1).
[210] *See, e.g.*, Joel Feinberg, *Equal Punishment for Failed Attempts*, *in* Problems at the Roots of Law: Essays in Legal and Political Theory 77 (2003). *See also* Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. Crim. L. & Criminology 679 (1994). However, many legal philosophers accept differential punishment. *See* Kenneth W. Simons, *Is Strict Criminal Liability in the Grading of Offenses Consistent with Retributive Desert?* 32 Oxford J. L. Stud. 445, 458 (2012) (Many retributivist theorists, and almost all real-world legislators, believe that it is proper for the criminal law to [differentially] punish . . . .").
[211] H. L. A. Hart, *Intention and Punishment, in* Punishment and Responsibility: Essays in the Philosophy of Law 113, 131 (2008) ("Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?").

or failure can be decided by lucky or incidental happenings, which are irrelevant to moral blameworthiness, differential punishment is not justified by a relevant moral difference.[212]

Philosophical opposition to differential punishment typically involves thought experiments comparing similarly-situated offenders who equally attempt the crime of murder but unequally succeed due to luck or other happenings outside their control,[213] as in the following case.

> Suppose that Alice shoots Bruce in the chest. Due to heavy traffic, the ambulance takes a long time to arrive at the crime scene, and Bruce dies. Alice is charged with murder. Suppose that Charlie shoots Dora in the chest, in precisely the same way in which Alice shot Bruce. Fortunately, the ambulance arrives in time to save Dora. Charlie is convicted of attempted murder and given a considerably more lenient sentence than Alice. Since the difference in the two outcomes results wholly from factors outside the criminals' control, however, there seems to be no reason to punish them differently. Indeed, on the face of it, most prominent theories of punishment seem to oppose differential punishment for successes and failures.[214]

I will show that differential punishment is justified using premises that moral and legal philosophers implicitly accept in their objections to differential punishment. This justification requires taking a new perspective on differential punishment, which locates the relevant moral difference of differential punishment in a very simple fact: a successful criminal attempt at an intended offense culminates in two crimes, whereas a failed criminal

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[212] For more information on this line of reasoning as well a relevant bibliography of the debate, *see* Dana K. Nelkin, *Moral Luck*, Stan. Encyclopedia of Phil. (Apr. 19, 2019), https://plato.stanford.edu/entries/moral-luck/#JusLawPun.

[213] Thomas Bittner, *Punishment for Criminal Attempts: A Legal Perspective on the Problem of Moral Luck*, 38 Can. J. Phil. 51, 54-55 (2008) ("The chain of reasoning that supports equal sentencing for criminal attempts often begins with discussion of an imaginary pair of crimes which are exactly alike except that in one case the criminal succeeds in harming his victim and in the other case luck steps in . . . ."

[214] Jason Hanna, *Getting Lucky, Getting Even, or Getting Away with (Attempted) Murder: The Punishment of Failed Attempts*, 21 Pub. Affairs Q. 109, 109-110 (2007). I set aside the controversial claim that most theories of punishment oppose differential punishment. For a contrary view, *see* Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 Van. L. Rev. 1499 (2017) (Arguing that victim-facing theories of punishment support differential punishment in limited cases).

attempt at the same culminates in only one. Because any two crimes call for more punishment than either one of those crimes alone (all else equal), differential punishment would be justified on the grounds that it is the practice of punishing an offender more for doing more crime. The relevant moral difference, then, is located in the multiplicity of crime that characterizes a realized criminal attempt and differentiates it from the singularity of crime that characterizes an unrealized criminal attempt. However, this perspective involves rejecting a longstanding doctrine in criminal law called the "merger doctrine."[215] In the criminal attempt context, this doctrine mandates "merging" the criminal attempt and the intended crime if the attempt is completed: "[I]f a person commits the target offense, she may *not* be convicted of both it and the criminal attempt. . . . the criminal attempt 'merges' with the substantive crime; the lesser offense of attempt is absorbed by the greater one."[216]

I argue that the merger doctrine should not apply attempted murder, so offenders who attempt murder, and whose attempt culminates in the intended offense, should be punished for each crime. By being punished for each crime, the offender will face more punishment than if they had only unsuccessfully committed the attempt, even if the failure was a matter of luck or accident, just as an offender who commits both burglary and kidnapping should face more punishment than if they committed only burglary or only kidnapping, even if the failure to commit both was due to a matter of luck or accident.

I. DIFFERENTIAL PUNISHMENT

Differential punishment has been characterized by moral and legal philosophers as the practice of punishing offenders differently according to the success or failure of their

[215] Nancy Ehrenreich, *Attempt, Merger, and Transferred Intent*, 82 Brook. L. Rev. 51, 52 (2016).
[216] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 381 (5th ed. 2009)).

criminal attempt.[217] As philosophical opposition to differential punishment highlights, however, the success or failure of a criminal attempt can be decided by morally irrelevant factors, such as outcome luck,[218] so the difference fails to justify the gross disparity between the penalties.

My justification of differential punishment involves taking a new perspective on the moral difference that grounds differential punishment. First, consider burglary and kidnapping. If an offender commits both, they should be punished more than an offender who commits only one of the two, all else equal. Likewise, I suggest that if an offender is guilty of a criminal attempt, and the attempt culminates in the intended offense, they should be punished more than an offender who commits only one of the two, all else equal.

Taking this perspective, the moral difference of differential punishment is located in the difference between committing more rather than fewer crimes. This perspective requires seeing the attempt to complete a crime as sufficiently criminally and punitively distinct from the intended or "underlying" offense, in the sense that burglary, for example, is criminally and punitively distinct from kidnapping so as to warrant punishing an offender for both if they are guilty of both. If committing both burglary and kidnapping means being punished for both, then the idea of this paper is that committing both a criminal attempt and the intended offense should also mean being punished for both. To support this reasoning and analogy, I develop and defend the following principle.

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[217] *See, e.g.*, Andrew C. Khoury, *Criminal Attempts and the Penal Lottery*, 96 Australasian J. Phi. 779, 779-80 (2018).

[218] For further discussion on the relationship between outcome luck and its moral relevance in terms of blameworthiness or desert, *see* Mitchell N. Berman, *Blameworthiness, Desert, and Luck*, 57 Noûs 370 (2021).

> **Multiple Violation Principle (MVP)**: When the same intent and conduct brings about multiple crimes that violate categorically different legal interests, then there is a morally relevant difference that justifies punishing the offender for each crime.

In my view, the attempt to complete a crime injures legal interests in its own right, which grounds its criminalization and punishment. This injury is not made redundant by the injury of the intended offense. Attempted murder, for instance, is too criminally serious in its own right to be made criminally and punitively redundant, so to speak, by the crime and punishment of murder. As such, in paradigmatic cases of murder, I take it that the murderer should face punishment for both the attempt and for the murder. This punishment would be greater than the punishment had the murderer failed, but not because a criminal attempt is less criminally serious than the intended offense. Note that my view is not committed to the claim that the crime of an attempt should carry more, less, or the same penalty as the intended offense.

Rather, my view is that a successful criminal attempt culminates in more crime, contrary to the merger doctrine, and more crime than otherwise justifies more punishment than otherwise. Indeed, suppose there is a jurisdiction that imposes equal punishment for a criminal attempt and for its intended offense, setting the maximum punishment for each at 20 years in prison, as urged by philosophers and legal scholars who oppose differential punishment. On my view, a criminal attempt that culminates in the intended offense would mean that, possibly, the offender could be sentenced to up to 40 years in prison. This asymmetry—between the fact that attempted murder and murder can carry equal penalties but that murderers can be penalized more than attempted murderer in paradigmatic cases—

is justified because the relevant moral difference of differential punishment is not located in the nature of the crimes themselves but in the nature of punishment.

My argument for the foregoing view is based on two claims. First, with respect to attempted murder and murder, criminal law seems to reject applying the doctrine of merger to them in exceptional but not infrequent cases governed by statutory law and common law. These exceptions show that criminal liability for attempted murder can come apart from liability for murder, at least in the United States. This would strengthen the foregoing analogy to burglary and kidnapping, or other pairs of crimes that come apart, where offenders face punishment for each crime despite circumstantial or inherent affinities between those crimes. Second, these exceptions validate MVP, revealing that the criminalization and punishment of attempted murder and of murder are based on different evaluations of the same criminal elements that serve as the basis for punishment. Yet in paradigmatic cases of murder, MVP would be as justified as it is in the exceptional cases where it applies. Thus if it is justified to punish an offender for the attempt or the intended offense in their own right in those exceptional cases, then it is justified in paradigmatic cases as well.

II. THE MERGER DOCTRINE

In the United States, the merger doctrine dictates that when the same criminal act supports multiple criminal charges, but the elements of the one is wholly part of those of the other, then the lesser charge merges into the greater charge.[219] For example, in many jurisdictions, a defendant who commits burglary and also steals property during its

[219] *See* People v. Ireland, 450 P.2d 580, 590 (Cal. 1969) (explaining that "merger" occurs when the lesser offense is an "integral part" of the greater offense); *see also* Merger Doctrine. *Legal Information Institute*, Cornell U Law School, https://www.law.cornell.edu/wex/merger_doctrine.

commission can be convicted of either burglary or theft but not both.[220] In other words, some lesser crimes are included or nested within greater crimes. If so, then an offender cannot be convicted of both the included offense and the greater offense. In philosophy, how many crimes one has committed, and related issues of double jeopardy, is a challenging and controversial question.[221] But in law, the prevailing rationale for the merger doctrine in the context of criminal attempts is that the doctrine prohibits double conviction for the same conduct and intent because the "successful commission of the target crime logically includes an attempt to commit it."[222] The same reasoning applies to other multiple crimes, such as burglary and trespassing, where committing burglary involves trespassing.[223]

However, criminal law assigns liability for murder and for attempted murder in ways and on grounds that undercut the foregoing rational for applying the merger doctrine to these kinds of crimes. I draw on three sources of criminal law to support this observation: (1) the felony-murder rule, (2) the transferred-intent doctrine, and (3) liability for criminal attempts despite factual impossibility. These sources, among many others including depraved-heart murder or murder by perjury,[224] indicate that the crime of attempted murder is neither essential to nor dependent on the crime of murder. Yet this indicates a relevant

[220] *See, e.g.*, Ohio v. Ramunas, 2021-Ohio-391 WL 4192794.
[221] *See, e.g.*, Gideon Yaffe, Moore in Jeopardy, Again, *in* Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore (Kimberly Kessler Ferzan & Stephen J. Morse, eds. 2016) 111-124.
[222] *See* Dressler, *supra* note 10, at 381.
[223] *See* Burglary. *Legal Information Institute*, Cornell U Law School, https://www.law.cornell.edu/wex/burglary; *see also* Trespass. *Legal Information Institute*, Cornell U Law School, https://www.law.cornell.edu/wex/trespass.
[224] Indeed, in many jurisdictions, attempted murder has a heightened *mens rea* as compared to liability for first-degree murder, as in cases of depraved-heart murder or murder by perjury. For depraved heart murder, *see, e.g.*, Model Penal Code § 210.2(1)(b), and for murder by perjury, *see, e.g.*, Cal. Pen. Code § 128.

difference between these crimes that justifies not merging them at conviction and sentencing, or so I will argue.

A. The Felony-Murder Rule

The rule on the books in the United States is simple: "a felony + a killing = murder."[225] For example, where it is a felony to rob a bank, and during that crime the felon accidentally killed someone, the felon can be charged with murder, even though they lacked the intent to kill. In the abstract, the rule states that a killing in furtherance or consequence of a felonious enterprise can constitute the crime of murder. In practice, however, the felony-murder rule is fragmented.[226] Most jurisdictions have limited it in some way.[227] Some have legislated it out.[228] In most jurisdictions, the felony-murder rule applies only to a limited class of felonies.[229] In most, the rule also applies only to killings caused by the offender,[230] but there are other jurisdictions in which killings caused by third parties are enough to trigger the rule.[231]

The rationale for the felony-murder rule can be broken down into two parts. First, murder is essentially killing with malice aforethought.[232] Second, committing a felony inherently dangerous to life implies the requisite malice for murder.[233] When an offender

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[225] James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 Wash. & Lee L. Rev. 1429, 1430 (1994).
[226] *See Id.* at 1433-434 nn.16-20.
[227] *Id.* at 1433 n.17.
[228] *Id.* at 1434 n.19 (citing statutes in Hawaii and Kentucky, and a case in Michigan, that abolish the felony-murder rule).
[229] These felonies are either "enumerated" felonies set by statute or felonies viewed as inherently dangerous to life. *See id.* at 1434 n.20.
[230] *Id.*.
[231] *See, e.g.*, Martin Litjmaer, *The Felony Murder Rule in Illinois: The Injustice of the Proximate Cause Theory Explored via Research in Cognitive Psychology*, 98 J. Crim. L. & Criminology 621 (2007-2008).
[232] Tomkovicz, *supra* note 15, at 1439 n.38.
[233] *Id.* at 1433 n.15.

commits a felony and someone is killed, murder occurs because the requisite malice is implied by the felony, which brought about the killing.

The logic of the felony-murder rule implies that liability for attempted murder comes apart from liability for murder. Assume that we are in a jurisdiction that applies the felony-murder rule to kidnapping. Now, suppose that Alice and Bob have kidnapped an infant, Charlie, who is in their van. While Alice is driving, Charlie is crying loudly in the car. Bob is spiraling and cannot tolerate the crying, so he aggressively shakes Charlie for an instant. Unexpectedly, the force kills Charlie. Alice and Bob are eventually stopped and subdued. They are both charged with murdering Charlie. Because the kidnapping implies the requisite malice for murder, and Charlie was killed, both are on the hook for his murder.

If it were that murder logically includes liability for attempted murder, as the putative justification for the merger doctrine supposes, then it would follow that Alice and Bob should be charged for attempted murder even if Charlie survived. After all, the kidnapping implies the requisite malice for murder. Alice and Bob took substantial steps that made progress on that requisite malice by committing a felony inherently dangerous to life. Since they have the requisite intent to murder, and substantial steps were taken that corroborate the requisite malice for murder, then assuming that Charlie did not die and was uninjured, Alice and Bob should be charged for attempting to murder Charlie However, only a minority of jurisdictions—such as Florida—would hold Alice and Bob liable for attempted murder for committing a felony that qualifies under the felony-murder rule.[234]

[234] *See, e.g.*, Fl. CPC § 782.051(1) & (2)

Assuming that committing a felony should not automatically generate an attempted murder charge,[235] a premise in the foregoing reasoning must be rejected. There are only three such premises to reject: (1) the premise that a qualifying felony implies the requisite malice for murder, (2) that conduct in furtherance of that felony can satisfy the physical elements of murder, and (3) liability for murder logically implies liability for attempted murder. Premises (1) and (2) are equivalent to the felony-murder rule, so they cannot be rejected. The only premise whose rejection would be consistent with the felony murder rule and would avoid the conclusion of the reasoning above is premise (3). In the next subsection, I show that we can draw a parallel conclusion from another source of criminal law.

B. The Transferred-Intent Doctrine

Suppose that Alice attempts to kill Bob by shooting at him. Alice misses but hits Bob's son, Charlie, killing him instead. Here, Anglo-American jurisdictions would charge Alice with murder,[236] whose intent to kill Charlie is supplied by Alice's intent to kill Bob. That is the transferred-intent doctrine: "The intention follows the bullet."[237] To be clear, the "transferred intent" postulated by the doctrine is a legal fiction. It is used to reach what is thought to be the right judgment, which is that Alice deserves as much punishment for accidentally killing Charlie as she would for purposefully killing Bob.[238] Recently, courts have expanded the

[235] Some legal scholars suggest that it should. *See, e.g.*, Kenneth W. Simons, Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay, 81 The J. of Crim. L. and Criminology 447, 478-80 (1990).
[236] Most jurisdictions would hold Alice guilty of murder, but there are some exceptions. German law rejects the transferred intent doctrine, for example. *See* Douglas N. Husak, *Transferred Intent*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 65 n.1-4 (1996)
[237] State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936). *See also* People v. Matthews, 154 Cal. Rptr. 628, 631 (Ct. App. 1979)("[O]ne's criminal intent follows the corresponding criminal act to its unintended consequences."
[238] Husak, *supra* note 25, at 65 (citing People v. Czahara, 250 Cal. Rptr. 836, 839 (Ct. App. 1988)("Transferred intent is . . . used to reach what is regarded with virtual unanimity as a just result.")).

transferred-intent doctrine.[239] In particular, the expansion allows for imposing attempted murder liability as to the intended target in addition to murder liability as to the unintended but killed target.[240] So, Alice would be charged with two crimes for the same criminal conduct and intent: attempted murder, relative to Bob, and then murder, relative to Charlie. This doctrinal expansion raises two points that are relevant to my argument for justifying differential punishment based on MVP.

First, the expanded transferred-intent doctrine illustrates how MVP would work. It shows how a double criminal injury can occur from the same criminal conduct and intent, and where it is justified to punish an offender for the attempt and the intended offense in its own right, although the attempt in that instance was a necessary and essential part of the intended offense. Alice criminally injures Bob by attempting to kill him; Alice also criminally injures Charlie by killing him by attempting to kill Bob. As a result, Alice is punished for both the attempt and for the murder, contrary to the merger doctrine.

This exception to the merger doctrine seems to be justified by the fact that the crimes victimize or endanger different and more people. But it is highly doubtful that this is *the* relevant moral difference that explains why Alice should face punishment for each crime in a multiple-victim case but not a single-victim case that is paradigmatic of murder. Suppose that Alice successfully killed Bob, as she intended, and she falsely believed that Charlie might also be killed by her actions because Charlie was in the same area as Bob. Nothing about her conduct and intent would have changed, and the outcome would be essentially the same. In either a multiple-victim or single-victim case, Alice (1) intentionally shoots at someone and

[239] *See* Ehrenreich, *supra* note 9, at 51, 64.
[240] *Id.*

thus (2) causes someone to die. The fact that there is only one victim does not seem to make a difference to the nature of her conduct, her intent, and the outcome, but these three things are all that there is to Alice's punishment. Thus if Alice should be punished for both the attempt and the intended offense in its own right in a case of transferred intent, then she should be punished in the same way—for each crime—in a single victim case, where nothing relevant to the nature of the criminal conduct, intent, and outcome would be different.

Second, the transferred-intent doctrine indicates how liability for the two crimes can come apart, which strengthens the case that attempted murder and murder violate categorically different legal interests. Suppose that Alice shoots at Bob, misses, but almost hits Charlie. If the bullet killed Charlie, Alice would be liable for murdering him based on the transferred-intent doctrine. Yet if the bullet does not kill Charlie, and liability for murder logically includes liability for attempted murder, then Alice should be liable for attempting to murder Charlie because she is liable for murdering Charlie. But that is a highly counterintuitive inference and, in many jurisdictions, is contraindicated by the law.[241] Even though Alice would be liable for murder had she accidentally killed Charlie because her intent to kill Bob is duplicated, it would not follow that she attempted to murder Charlie were Charlie unharmed.

The intent to kill seems to only be "duplicated" if there is an accidental injury, like a killing, resulting from the attempt at the intended offense. It is not duplicated by the fact that the attempt *almost* injured someone else than the intended target. However, jurisdictions are

[241] *See, e.g.*, People v. Bland, 48 P.3d 1107, 1117 (Cal. 2002) ("Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others").

split as to whether attempted murder charges as to the target can be duplicated or transferred onto untargeted victims if the original criminal attempt accidentally injures the latter.[242] In jurisdictions finding transferred intent applies in attempted murder cases, the unintended victim must be physically injured in some way that is rationally connected to the intent and conduct of the original murder attempt.[243] In these jurisdictions, then, liability for murder and attempted murder *do not* diverge under the transferred intent doctrine. But the fact that there are jurisdictions in which they diverge for principled reasons is enough to show that a rational exception to the merger doctrine exists.[244] In jurisdictions that do not apply the transferred intent doctrine to attempted murder cases, courts show a pattern of finding transferred intent insufficient to constitute the specific intent required for attempted murder.[245]

In sum, the transferred-intent doctrine shows how there can be liability for murder as to an unintended victim without entailing liability for attempted murder as to that same victim. Because of this, there is a compelling case that liability for murder does not logically include liability for attempted murder. At the same time, the transferred-intent doctrine illustrates the application of MVP, where the offender is punished for the attempt and for the

[242] State v. Geter, 864 S.E. 2d 569, 573 (S. C. App. 2021) ("Jurisdictions are split over whether transferred intent can be applied in attempted murder cases.").
[243] *See People v. Ephraim*, 753 N.E. 2d 486, 496 (3rd. App. Ct. 2001) ("It is well established that in Illinois, the doctrine of transferred intent is applicable to attempted murder cases where an unintended victim is injured."); State v. Ross, 115 So. 3d 616, 621 (La. App. 2013) ("Applying the doctrine of transferred intent to the facts of this case, Mr. Ross's specific intent to shoot Ms. Cloud was transferred when he accidentally also shot Ms. Peters and Mr. Newman.").
[244] There are many jurisdictions that do not apply transferred intent to attempted murder cases, including Alabama, Alaska, California, Maryland, and South Carolina. State v. Geter, *supra* note 33 at 574.
[245] *Id.* at 575 ("So long as attempted murder is a specific intent crime, transferring the intent to kill does not satisfy the necessary mens rea to convict a defendant of the attempted murder of an unintended victim.").

intended offense. These two points suggest the possibility of a robust moral difference between criminal attempts and their culmination in the intended offense that can figure into the justification of differential punishment. Before bringing out that difference in more substantive detail, I turn to one last exception to the merger doctrine that informs my argument. This exception is based on the fact that an offender can still be liable for a criminal attempt even in circumstances where it is factually impossible to complete the attempt.

C. Factual Impossibility

It is not a defense to a criminal attempt that circumstances made it factually impossible for the offender to complete the crime.[246] For example, suppose that Alice, who is the target of a conspiracy to murder, is being treated for a coma at a hospital. Bob, who is part of that conspiracy, finds her and attempts to kill her by unplugging her life support. However, Alice was braindead shortly before Bob unplugged her life support. The fact that Alice was braindead entails that it was factually impossible for Bob to murder Alice. To kill her, Alice needed to be alive. Nevertheless, Bob is still liable for attempted murder because, according to law, if the situation were as Bob believed it to be, then he would have completed either the underlying offense or the actus reus of the attempt.[247]

This shows that possibly completing the intended offense is not essential grounds for criminalizing the attempt at the same and prosecuting or punishing offenders for it. Instead, what this source of law indicates is that attempt liability only requires of an offender to

[246] *See, e.g.*, United States v. Williams, 553 U.S. 285, 300 (2008) ("As with other inchoate crimes—attempt and conspiracy, for example—impossibility of completing the crime because the facts were not as the defendant believed is not a defense.").
[247] *Id.* at 455 n.16. *See also* Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction*, 3 Crim. L. & Phil. 213, 214-15 (2009).

believe that his actions would constitute the crime. An offender charged with attempt is thus not essentially prosecuted for potentially completing the underlying offense because, in some cases, they can be prosecuted despite the factual impossibility of their attempt.

In contrast, to be liable for murder in many jurisdictions, it is enough that one risk killing another by acting in ways that manifest an intent deemed as culpable as the intent to kill. Given the felony-murder rule, offenders can be charged with and prosecuted for murder because they intend to commit a qualifying felony and realized its risk to bring about a fatality. Likewise, given the transferred-intent doctrine, they can be charged with and prosecuted for murdering an unintended victim because their attempt realized its inherent risk of killing third-parties. Other doctrines in criminal law not discussed here—such as the Pinkerton Doctrine—imply the same with respect to murder.[248]

This source of criminal law indicates that the crimes of attempted murder and murder have significantly different scopes that relate to the different grounds for their criminalization and punishment. Attempted murder is criminalized and punished not because it could culminate in the crime of murder. However, merging the attempt with the intended offense flattens this important distinction between the two with respect to their separate liability.

In conclusion, I have tried to show using three different sources of law that the merger doctrine is rejected by criminal law, where liability for murder comes apart from liability for

[248] According to the Pinkerton Doctrine, offenders who agree to commit some crimes are liable for all other foreseeable crimes that are committed in furtherance of the conspiracy by any member of the conspiracy. *See* Matthew A. Pauley, *The Pinkertron Doctrine and Murder*, 4 Pierce L. Rev. 1 (2005). This would mean that an offender can be charged and prosecuted for murder—despite not intending to kill or believing that a killing would occur—in the foreseeable event that their co-conspirator murdered someone during the commission of the conspiracy.

attempted murder. Showing this is important because it shows that the original justification of the merger doctrine in the context of criminal attempts is not robust. In turn, this helps strengthen the analogy of attempted murder and murder to other pairs of crimes that not merged and thereby additively punished.

III. MULTIPLE VIOLATION PRINCIPLE

According to MVP, when the same intent and conduct brings about multiple crimes that violate categorically different legal interests, then there is a morally relevant difference that justifies punishing the offender for each crime. Previously, I claimed that differential punishment could be justified based on premises accepted by those who oppose it on philosophical grounds. More specifically, those premises are the following.

The first premise is that, in paradigmatic cases of murder, the offender is liable for and guilty of two crimes: attempted murder and murder. In the previous section, I showed that despite the high degree of correlation between the mental and physical elements of these two crimes, liability for either crime is neither necessary nor essential to liability for the other. But this line of reasoning is not necessary to prove the first premise, but it does undermine the original justification for applying the merger doctrine found in criminal law, which is based on the idea that the intended offense entails the criminal attempt.

Instead, the first premise is presupposed by the initial set up of the philosophical puzzle. When Alice purposefully shoots at Bob, she is guilty of attempted murder. The question of success or failure is irrelevant, as my discussion of factual impossibility above demonstrates, to settle the question of whether she is guilty of that crime. Yet if she succeeds, she is then guilty of murder, a distinct crime. Thus, comparing a failed criminal attempt to a

successful criminal attempt—regardless of moral luck—entails comparing an offender who is guilty of committing one crime to an offender who is guilty of committing that same crime and also guilty of committing an additional crime.

The second premise builds on the first and is based on MVP: It is justified to punish an offender more for committing more rather than fewer crimes, all else equal, given that those crimes violate categorically different legal interests. For example, suppose that an offender has hijacked a 90's red Chrysler van, where a sleeping toddler was tucked in the farthest backseat, unknown to the carjacker. Once the carjacker learned of the toddler's presence, he continued to drive until the police presence dissipated. Then, the offender dropped off the toddler—still sleeping—safely with random people at a diner before escaping. According to criminal law, the offender would be guilty of two crimes: carjacking and kidnapping.[249] Moreover, the offender should get more punishment for committing both crimes than if they committed only the carjacking or only the kidnapping, all else equal.

The third premise is the most descriptive: In paradigmatic cases of murder and attempted murder, differential punishment is the practice of punishing an offender more for a successful criminal attempt than punishing an offender for a failed criminal attempt.

Together these premises entail that, in paradigmatic cases, differential punishment of attempted murder and of murder would be justified. The first premise cannot be rejected because it is presupposed by the setup of the relevant cases: a mere attempted murderer is guilty of fewer crimes than a murderer. To distinguish between the two offenders requires

[249] *See, e.g.*, People v. Hill 3 P.3d 898, 900-903 (2000) (Supporting a conviction for carjacking and, most importantly, kidnapping of an infant despite its lack of free will or apprehension of the use of fear or force to transport it).

taking the intended offense to be separate and in addition to the criminal attempt. The third premise cannot be rejected because it is a mere generalization of differential punishment in terms of its effects on the offender. It is one of many definitions of the practice of differential punishment. This leaves only the second premise—basically, MVP—whose defense I take up in the next section.

A. Crime and Punishment

My argument that differential punishment would be justified, outlined above, crucially turns on the second premise, which is based on MVP:

> **Multiple Violation Principle (MVP)**: When the same intent and conduct brings about multiple crimes that violate categorically different legal interests, then there is a morally relevant difference that justifies punishing the offender for each crime.

Consider, for example, hate crimes. Hate crimes occur when an offender commits a specified crime, such as assault or stalking, and does so because of their beliefs or perceptions about some legally protected characteristic of the person. The same intent and conduct that satisfy the elements of the specified crime can also bring about the hate crime because of the causal role that prejudice played in bringing about the mental and physical elements of the specified crime. To be specific, in this legal context, the specified crime and the hate crime are not merged, as the hate crime enhances the punishment for the specified crime by subjecting the offender to additional punishment. In this case, although the elements of the specified crime and the hate crime can be satisfied by the same intent and conduct, these crimes violate categorically different legal interests. Assault, for example, violates a person's legal interest in being free from threat of physical harm, whereas a hate

crime violates a person's legal interest against bias-motivated violence. Despite their affinities, these legal interests are categorically different, such that their violation would justify punishing the offender for each crime. In effect, the elevated punishment triggered by a finding of a hate crime achieves just that result.

In a similar vein, in paradigmatic cases of murder, there is a morally relevant difference between the attempt and the murder located in the categorically different legal interests that these crimes violate. To bring out those categorically different legal interests, I offer partial descriptions of the grounds that make attempted murder and murder criminal and punishable offenses that are neutral with respect to theories of punishment. These descriptions are motivated by and based on liability for attempted murder and murder as surveyed above. They are not only informed by and consistent with how offenders in the United States are actually prosecuted for such crimes, but they are meant to be accurate philosophical generalizations of part of what such offenders are prosecuted for given the sources of law surveyed thus far. In this sense, I am offering an interpretation of existing doctrine that supports MVP.

For attempted murder, I claim that its criminalization and punishment are grounded essentially in the offender's *extreme indifference* to a person's interest in not being killed, which is manifested by taking affirmative steps to take that person's life. This legal interest, I claim, is person-relative, meaning that a full specification of this interest cannot be given without reference to the person who has the interest. And violating it is sufficient in a variety of cases to be held liable for attempted murder.

With respect to murder, I contend that its criminalization and punishment are grounded essentially in the offender's *reckless indifference* to the occurrence of a killing during the commission of a crime in which risking a killing is an inherent part of the crime. This description of the grounds for criminalizing and punishing murder captures both paradigmatic cases, in which an offender attempts murder and successfully so, and also cases that are governed by the felony-murder doctrine, transferred-intent doctrine, and many other exceptional cases of murder. Crucially, unlike attempted murder, the crime of murder essentially injures a person-neutral legal interest; this means that its full specification can be given without reference to a particular bearer of that interest. The legal interest that murder violates concerns the impersonal interest against killings that occur during the commission of crimes that inherently put others at risk of being killed.

Because the distinction between person-relative and person-neutral legal interests is crucial to my defense of the second premise, it is important to understand what this distinction amounts to and how I am repurposing it in my defense of that premise. The key idea behind this particular use of the distinction, for which there are multiple formal accounts,[250] is that some crimes or sentencing enhancements depend essentially on violations of legal interests that give different duties to different agents, whereas other crimes essentially depend on violations of legal interests that give the same duties to the same agents.

The crime of attempted murder, I claim, depends essentially on violating legal interests that impose on me a duty that I do not try to kill the person with the legal interest

[250] *See, e.g.*, Matthew Hammerton, Distinguishing Agent-Relativity from Agent Neutrality. Australasian J. of Phi. 1, 3 (2018).

and imposes on you a different duty that you do not try to kill that same person. In contrast, the crime of murder does not essentially depend on breaches of different duties to different agents, as various sources of criminal law indicate. Instead, liability for murder—accounting for all the ways one can be held liable for murder in the United States—essentially depends on violating legal interests that impose the same duties to the same agents. In transferred intent cases, for example, the offender is prosecuted for breaching not only the duty that they themselves not try to kill the person who generates that duty for them, but also the duty to prevent killings during the commission of criminal conduct in which risking killings is an inherent part of that conduct. This latter duty, unlike the former, is not generated by anyone in particular over another, but anyone who is within or exposed to the inherent risk of being killed as part of the criminal conduct.

In transferred-intent cases, it is that distinction between different kinds of duties generated by person-relative and person-neutral legal interests that explains and justifies why it would be appropriate to punish that offender not only for attempted murder relative to the intended victim but also for murder relative to the unintended victim. Even though the offender did not violate the duty owed specifically to the unintended victim not to try to kill them, they did violate the duty owed to any unintended victim not to kill them under criminally culpable circumstances. Of course, when a person is murdered in a paradigmatic case, their person-relative legal interest against being killed is violated. But this person-relative legal interest is not essential to be liable for the murder of that person, as the transferred-intent case—among other kinds of cases—show. All that is required for such liability to exist is that, during certain kinds of crime—including attempted murder—the

offender violates the person-neutral legal interest against realizing a killing during the culpable commission of crimes in which risking a killing is part of and a foreseeable consequence of that commission.

By bringing out the categorically different legal interests essentially violated by the crimes of attempted murder and murder, I aim to show that the punishment for these crimes responds to different essential grounds, a difference that justifies *not* merging them. By not punishing for both when an offender has committed both, criminal law inappropriately undercounts violations of legal interests that warrant criminalizing and punishing those violations.

Gideon Yaffe's view regarding the relationship between criminalizing an attempt and the intended offense helps put the descriptions I have offered into further perspective.[251] According to Yaffe, attempting a crime should be criminalized for the structurally same reason that warrants criminalizing the underlying crime. However, Yaffe rejects the explanation that attempting a crime should be criminalized simply on the grounds that it creates the potential to complete and bring about the intended crime. Instead, Yaffe thinks that attempts sufficiently reflect the same kind of corruption in the modes of recognition and responses to reasons manifested by an offender who brings about the intended crime.[252] In this connection, I have described attempting to murder as reflecting a corruption in the modes of recognition and responses to reasons as to the person-relative legal interest that people have against attempted murderers. Likewise, I have described murder as reflecting a

[251] *See* GIDEON YAFFE, ATTEMPTS: IN THE PHILOSOPHY OF ACTIONS AND THE CRIMINAL LAW 5, 14-16 (2010).
[252] *Id.*

similar corruption in recognition of and response to reasons as to the person-neutral legal interest that all have against killings occurring during the commission of certain crimes.

Although my description gives a parallel structure to the modes of corruption involved in attempted murder and murder, the corruptions are not about the same things. First, the corruption that characterizes the crime of murder does not necessarily depend on failing to recognize and respond to reasons given by the person-relative legal interest that others do not act with the intent to take our life. After all, one can be charged with murder but not liable for attempting to murder them under the felony-murder rule or transferred-intent doctrine. Instead, the range of cases in which an offender is liable for murder demonstrates that the corruption in modes of recognition and response to reasons essentially depends more minimally on the violation of a personal-neutral or impersonal legal interest.

To be sure, in paradigmatic cases of murder, the corruption that characterizes the murder and the corruption that characterizes the attempted murder will co-manifest from the same intent and conduct. But each form of corruption manifests from different features of the same intent and conduct in their relation to a person-relative interest essentially violated by attempted murder and a person-neutral interest essentially violated by murder. On the one hand, then, my description of the grounds for criminalizing and punishing attempted murder and for murder gives them a parallel structure. On the other hand, the descriptions do not give them the same intension.

Now, one constraint on state punishment defended by jurists and legal philosophers alike is that punishing an offender to the extent that they deserve should be proportional to

how serious the crimes are.[253] This constraint is relevant to my argument because it clarifies why attempted murder and murder are not equally serious offenses, in the sense that an offender who commits both should be punished for each crime in its own right. In this connection, Douglas Husak has repeatedly urged that the seriousness of the crime—to which punishment must be proportionate—is a function of two variables: culpability and harm.[254] Other criminal theorists who deny that luck should be factored into such an assessment would not include resultant harm into that assessment,[255] which motivates philosophical skepticism against differential punishment. Whatever assessment is used, my description of the distinct grounds that warrant criminalizing and punishing attempted murder and murder entails that they are unequally serious offenses in the sense that the grounds are not equivalent; that is, they pick out different features that justify punishing each offense in its own right.

Moreover, my descriptions are neutral between different schools of thought that address questions of proportionality according to retributivist or consequentialist principles.[256] If the class of reasons relevant to justifying punishment for a crime is limited only to culpability or blameworthiness for that crime, or to the benefits or harm of punishing that crime, my descriptions entail that attempted murder and murder are differentially

[253] Almost without exception, criminal theorists hold that punishment should not be disproportionately harmful relative to the crime in virtue of the reasons that crime gives us to punish the offender for it. *See* Douglas Husak, Overcriminalization: The Limits of Criminal Law 81 (2008).
[254] *See* Douglas Husak, *"Already Punished Enough"*, 18 Philosophical Topics 77, 83 (1990); Husak, *supra* note 11.
[255] *See, e.g.*, Larry Alexander and Kimberly Kessler Ferzan, Crime and Culpability: A Theory of Criminal Law (2009).
[256] *See* Ian P. Farrel, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality and the Eighth Amendment*, 55 Vill. L. Rev. 321 (2010) (discussing retributivist and consequentialist approaches to the principle of proportionality).

related to those variables such that it would be rational not to merge them.[257] Indeed, even if it is thought that culpability is the sole determinant and harm is irrelevant, the culpability of attempted murder and of murder come apart in kind because these crimes are related to different interests that they essentially violate. For attempted murder, culpability manifests from an indifference to the person-relative legal interest that others do not act with the intent to take their life. For murder, the requisite culpability manifests more minimally from indifference to the occurrence of a killing during criminal activities in which that killing was risked in furtherance of the crimes. Although the culpability for both involves acting with indifference in general and relative to a specific life, the disregard for each crime that is essential to its criminalization and punishment is differentially related to those person-relative and person-neutral legal interests. This moral difference, I claim, is enough to justify not merging the crimes at conviction and sentencing.

B. Culpability and Harm

According to my view of differential punishment, it would be justified to punish an offender more harshly for attempting a crime and, despite luck, completing it, at least in paradigmatic cases of murder. First of all, this justification is based on taking a new perspective on differential punishment that locates the relevant moral difference in the multiplicity of criminal wrongdoing caused by a successful criminal attempt, as opposed to the singularity that characterizes the failed criminal attempt.

[257] To illustrate what I mean, compare the crime of theft to the crime of robbery. A thief may demonstrate the same culpability as a robber because both are willing and expected to use or threaten force to take property, but due to luck, the thief was unable to do so. But the use or threat of force is not an essential part of the internal content of the crime of theft. Even if the thief is as culpable as a robber, it is rational to treat theft and robbery as unequally serious offenses in kind. Still, it could be that it is also rational to punish the thief as one would punish a robber because they are as culpable as a robber.

The multiplicity of criminal wrongdoing was, in turn, based on two arguments: that liability for attempted murder comes apart from murder based on three sources of law, and that these crimes violate categorically different legal interests essentially. Because those crimes are distinguishable as such, then it follows from MVP that an offender who attempts murder and commits murder should be punished for both. Because offenders who commit two crimes deserve more punishment than an offender who commits either one alone, differential punishment would be justified as the practice of punishing an offender more for a successful criminal attempt than a failed attempt—just as one would punish an offender more for committing two crimes rather than one of the crimes.

To illustrate this idea, imagine that Alice attempts to kill Bob. In doing so, Alice shows indifference to Bob's legal interest against Alice trying to take his life. Now, Alice shoots Bob and Bob dies. By that act and with such intent, Alice has paradigmatically murdered Bob. By murdering Bob, Alice shows indifference to the person-neutral interest against the occurrence of a killing arising from the risk of a killing created by her murder attempt. In the foregoing example, there are two criminal injuries, two interests whose violation is essential to each crime, and those essential interests are categorically different. Each violation is necessary and sufficient to justify prosecuting and punishing Alice for both the attempted murder charge and the murder charge. However, seeing differential punishment in this new light requires rejecting the merger doctrine, which mandates merging criminal attempts with the substantive offense if completed. I have argued that we should not apply the merger doctrine at least to attempted murder and murder because liability for the one comes apart

from liability for the other, and how they come apart indicates that these crimes injure categorically different legal interests.

In the last leg of this section, I focus on the factors that are thought to be the most important in the literature to criminalization and punishment: namely, culpability and harm. In doing so, I aim to show how justifying differential punishment according to my view of differential punishment compares to different theories of criminal liability that address differential punishment. In the literature, we can discern three families of views regarding the relationship between culpability and harm to criminalization and punishment. The first is an outcome-insensitive view, according to which crimes should not be defined with reference to outcomes, and so the criminal seriousness of conduct and extent of its punishment depends solely on one's culpability for that conduct.[258] The second is an outcome-sensitive view, according to which some crimes should be defined with reference to their outcomes, and so the criminal seriousness of conduct and extent of its punishment can depend on it outcome.[259] Finally, there is a hybrid view: some crimes should be defined with reference to their outcomes, because doing so would accurately reflect why such crimes are prosecuted and punished, but how criminally serious one's conduct is—and thus how much to punish an offender for it—depends solely on one's culpability for that conduct.[260]

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[258] *See, e.g.*, Andrew Ashford, *Taking the Consequences, in* Action and Value in Criminal Law 107-124 (Stephen Shute et. al. eds., 1993) Perhaps the most popular version of this view is the insufficient regard theory of criminal culpability—the view that the punishment an offender deserves for a crime depends on the amount of insufficient regard for the legally protected interests of others that the offender manifested through their actions. See LARRY ALEXANDER & KIMBERLY FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 67-68 (2009); see also ALEXANDER SARCH, CRIMINALLY IGNORANT 27-64 (2019).
[259] *See, e.g.*, Husak, *supra* note 11.
[260] James Edward & Andrew Simester, *Crime, Blameworthiness, and Outcomes*, 39 Oxford J. Legal Stud. 50, 70 (2019).

My view of differential punishment does not sit squarely within any of these three views. The view is least compatible with the outcome-insensitive view and most compatible with the outcome-sensitive view. Both the outcome-insensitive view and the hybrid view entail that differential punishment is unjustified, albeit for different reasons. The outcome-insensitive view rejects differential punishment because it denies the fact that realizing a killing is relevant to the criminalization and criminal seriousness of conduct. The hybrid view rejects differential punishment because it denies that realizing a killing is relevant to the criminal seriousness of conduct, although it is relevant to criminalizing that conduct. The outcome-sensitive view entails that differential punishment is justified, but for very different reasons my view. According to the outcome-sensitive view, regardless of luck, the crime of murder should always be punished more harshly than the crime of attempted murder because it is always a more harmful crime.

But my view of differential punishment affirms only a weaker claim: whether attempted murder and murder are equally harmful crimes or involve the same kind of criminal culpability, they are not equally serious crimes offenses in the sense that they are equivalent crimes. To make sense of this weaker claim, one needs to distinguish between two different domains of evaluation for punishment. The first domain of evaluation for punishment relates to the crimes themselves. For example, murder should be punished more harshly than burglary. The second domain of evaluation for punishment relates to offenders. For example, a murderer who also commits burglary should be punished more than either a murderer or a burglar alone, all else equal.

My view of differential punishment presents a justification that is based on the second domain of evaluation, not the first. In contrast, the three views outlined above are based on the first domain of evaluation. This is why my view is not an extension or version of these three views. Because my view of differential punishment relates to the second and not first domain of evaluation, it would be consistent to treat a criminal attempt and the underlying offense as equally punishable offenses relative to the first domain of evaluation. But relative to the second domain of evaluation, an offender who commits both the attempt and the underlying offense can and should be punished more than an offender who commits only either alone. To see the novelty of this idea, suppose that the punishment for each crime is, equally, twenty years in prison. By not applying the merger doctrine, an offender who commits both would serve forty years, as opposed to a similarly-situated offender who attempts murder but fails as a matter of luck.

Because the merger doctrine does not apply, the original charge that it is unfair to punish a murderer more than an attempted murder if the outcome was a matter of luck or not within their control does not hold—the punishment for murder is the same as the punishment for attempted murder. But the offender is punished for both. The only reply available to those who oppose differential punishment would then be that it would be unfair to charge the killer with murder because the killing was a matter of luck. Yet this alternative position proves too much for the skeptic. It would be, in effect, the position that an attempted murderer who also kills their victim as a matter of luck should not be charged with murder. But that is a much stronger and counterintuitive position than the skeptic originally put themselves in because murder just is killing with malice aforethought. The upshot is that the

opposition would hold the untenable position that murder only occurs in very limited circumstances, in which the killing and outcome was entirely within the control of the offender, and not in most circumstances, as in long-range shootings, in felony-murder cases, or in transferred-intent cases.

CONCLUSION

I have argued that the merger doctrine should not apply in all cases, at least not to attempted murder. In those cases, the criminal attempt and its underlying offense are constituted by injuries to different legally protected interests. By not applying the merger doctrine to those cases, offenders who criminally attempt but complete the underlying offense would have to be treated like offenders who commit two crimes than either crime alone. In effect, it would be fair to punish offenders more for completed criminal attempts because they would have committed more criminal injuries, each of which deserves punishment in its own right. In support of my view, I drew on various sources of criminal law that suggest that criminal liability for attempted murder comes apart from criminal liability for murder. Studying those sources of criminal law closely, I offered a description of the distinct grounds that make attempted murder and murder justifiably criminal and punishable. Under those descriptions, the grounds have a parallel structure but are based on violations of categorically distinct legal interests. By merging attempted murder with murder, thereby treating it as "lesser offense" to be absorbed by the "greater offense," the merger doctrine flattens important distinctions between the justifications for their criminalization and punishment. The fact that one can be criminally liable for attempted murder even when murder is factually impossible suggests that, on the contrary, we

criminalize and punish attempted murder for reasons intrinsic to the very act of trying apart from its potential to be completed. An offender guilty of both should be punished separately for each.

Finally, it is important to distinguish my argument for rejecting the merger doctrine in some cases, which is normative, from the preliminary claim that differential punishment would be justified without the merger doctrine, which is a weaker claim about relations between ideas. This weaker claim is a novel contribution to the debate concerning differential punishment; it can be likened to David Lewis' argument that differential punishment would be justified by a penal system that functions like a lottery.[261] Our penal system does not and should not function like a lottery, but if it did, differential punishment would be justified, or so Lewis argued, because that would make differential punishment a matter of luck just as whether or not an offender completes a criminal attempt is subject to luck. Likewise, our penal system does not lack the merger doctrine, but if it did, differential punishment would be justified, or so I will argue, as the practice of punishing offenders more for committing two crimes punishable according to the different legal interests that they violate. If so, that would at least be a valid response to a "'deep, unresolved issue in the theory of criminal liability'"[262] on which supposedly "'little progress has been made . . . in the last two hundred years.'"[263]

[261] David Lewis, *The Punishment that Leaves Something to Chance*, 18 Phil. & Pub. Aff. 53 (1989).
[262] George P. Fletcher, Rethinking Criminal Law 473-74 (1978)
[263] Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?* 1986 B.Y.U L. Rev. 553, 556 (1986).

CONCLUSION

My dissertation, "Ways to Reform the Law," contains three proposals that concretely address three issues raised by existing legal doctrine and practice. The first chapter suggests ways to achieve greater fairness in civil litigation despite wealth inequality through an intervention in civil procedure and the law of remedies that promotes distributive and corrective justice. The second chapter explains why we ought to impose tort liability for putting others at risk of harm even if the risks do not materialize. It grounds that liability in a constitutive feature of social and moral progress, namely, showing sufficient concern for the vulnerabilities of others. The last chapter argues against the philosophical position that supports punishing a criminal attempt as severely as the corresponding completed crime. In my view, rejecting the merger doctrine in criminal sentencing uncovers a substantive moral difference between unrealized and realized criminal attempts that justifies the legal practice of punishing them differently.

What makes these three chapters unified is the idea that substantive legal reform is an inherent theme of legal philosophy. The chapters are threaded together by the fact that answers to theoretical and practical problems raised by the law can be discerned by applying the method of analytic philosophy to existing legal doctrine and practice in order to reveal those answers. A rigorous engagement with legal doctrine and practice enriches that philosophical method, which is tasked with addressing issues and questions by proposing, for instance, solutions to them that are based on examining the metaphysical and ethical dimensions of the things that constitute those issues and questions. A proper examination of

that metaphysical and ethical dimension in the legal context requires working closely with the sorts of facts that determine legal content.