

THE LIMITS OF A NONCONSEQUENTIALIST APPROACH TO TORTS

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The nonconsequentialist revival in tort theory has focused almost exclusively on one issue: showing that the rules governing compensation for “wrongful” acts reflect corrective justice rather than welfarist norms. The literature either is silent on what makes an act wrongful in the first place or suggests criteria that seem indistinguishable from some version of cost/benefit analysis. As a result, cost/benefit analysis is currently the only game in town for determining appropriate standards of conduct for socially useful but risky acts. This is no small omission, and the failure of nonconsequentialists to acknowledge it or cure it can be traced to a number of recurring problems in the nonconsequentialist tort literature. Chief among them is the tendency to conflate prohibition and compensation, and to treat imposition of risk and imposition of harm as if they were distinct forms of conduct rather than the same conduct viewed from different temporal perspectives.

I. INTRODUCTION

How should we regulate socially productive activities that impose some risk of harm to others? The standard answer to that question in the modern administrative state has been some form of cost/benefit calculus: permit those activities in which the expected social benefits of the risky conduct exceed its expected social costs.

There is a vast and growing literature criticizing this practice on normative, conceptual, and administrative grounds. I focus here on the central objection registered in one form or another by nonconsequentialist critics: that its aggregative procedure, which sums costs and benefits across individuals,

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fails to respect the separateness of people.¹ The question I wish to explore here is: What is the alternative? In particular, have critics of aggregation offered an analytically coherent *substantive* decision rule for regulating risky conduct that does not itself boil down to some form of aggregation?²

The short answer is: I do not think so. This is such a large claim and trenches on such an enormous literature that I could not possibly do it justice here. Instead, I want to focus on the proposed decision rule that in one form or another is at the core of most nonconsequentialist proposals for treating harm to others: conduct is impermissible if (1) it results in (serious) harm to others (2) in a fashion that violates the actor's duty of care to those others.³ For these purposes, I define "harm" broadly to include all unconsented-to injuries to the interests of others. While the harms we typically worry about in regulating risk involve physical injuries to one's person or property, this broader definition would include psychological and other intangible injuries that cannot be fully redressed with monetary damages.⁴

The first requirement—(serious) harm to the interests of others—is generally taken to exclude the type of harm that motivated John Stuart Mill to articulate the harm principle in the first place: private conduct that does

1. For purposes of this paper, I use the term "nonconsequentialism" to refer generally to all roughly deontological principles (neo-Kantian, contractualist, liberal, and libertarian rights theory) that regard an individual's right to be free from serious harm as supplying a Razian "exclusionary reason" that trumps an aggregative solution. It is hard to draw clear distinctions among these theories for any purpose; for my purposes, the differences among them are indeterminate or immaterial.

2. I set to the side procedural solutions, which do offer a clear alternative to substantive decision rules, consequentialist and nonconsequentialist alike. See, e.g., Henry Richardson, *The Stupidity of the Cost Benefit Standard*, in *COST BENEFIT ANALYSIS* (Matthew Adler & Eric Posner eds., 2001); Henry Richardson, *Beyond Good and Right: Toward a Constructive Ethical Pragmatism*, 24 *PHIL. & PUB. AFF.* 108–141 (1995). I also set to the side the very strong possibility that a cost/benefit calculus or any other form of consequentialism cannot be operationalized without smuggling in policy-makers' own value judgments about what is worth optimizing.

3. Most nonconsequentialist accounts require that there be some threshold level of harm before an individual's right to be free from that harm trumps other desiderata, and the levels differ from account to account. For my purposes, those differences are immaterial. In contrast to all other nonconsequentialists, libertarians, it is frequently argued, regard harm to others as sufficient to create a prima facie case that the actor's conduct was wrongful without requiring any separate showing that the actor is "at fault" (point (2)). See, e.g., Jules Coleman, *Tort Law and Tort Theory*, in *PHILOSOPHY AND THE LAW OF TORTS* (Gerald Postema ed., 2001), at 201. Libertarians often characterize their own positions in such a fashion, as in Robert Nozick's famous metaphor of a "boundary crossing." ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974), at 71. But in fact, libertarian arguments always depend (and must depend) on some notion of fault; the fault criterion is simply implied rather than stated.

4. This use of the word "injury" glosses over a number of disagreements in the relevant literature, including whether failure to benefit another should be treated as an injury and how to treat causes that are not necessary to produce the harm in question (because it would have been produced in any event by independent, sufficient causes). For discussion of these and related issues, see Stephen Perry, *Harm, History, and Counterfactuals*, 40 *SAN DIEGO L. REV.* 1283 (2006); Seana Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117–148 (1999). For my purposes, these disagreements need not be resolved, as the problems with nonconsequentialist approaches cut across all of these more and less restrictive definitions of the relevant harm.

not compromise the interests of others (other than their nosy preferences about how their fellow citizens live their lives). But within the remaining universe of conduct that is (potentially) harmful to others, the requirement of harm to others cannot help distinguish good risk imposition from bad. The contrary view, I suggest, results from confusing *ex ante* and *ex post* perspectives on what is identical conduct.

In contrast, the second requirement—that the conduct in question must violate a “duty of care” toward others—is capable of differentiating among different forms of risky conduct. But to do so, it has to specify what sorts of conduct that duty requires, permits, or prohibits. Most nonconsequentialist accounts have left the answer to that question to another day. Where the duty has been given some content, it is not clearly distinct from some version of a cost/benefit calculus.

At the end of the day, then, I believe the “harm plus fault” test has provided either no answer to the question of what dangers it is permissible to expose others to or an answer that reduces to aggregation manqué. It *has*, however, answered a different question: When are you required to compensate the victims of your risky conduct for their losses? Much of the confusion in this literature, I believe, is traceable to the failure to distinguish between these two questions.

While I am limiting consideration here to the “harm plus fault” standard, I do not think the limitation rules out a lot, as most of the alternatives offered to aggregation are variants on this standard. But a full consideration of the problem would have to consider a number of other criteria that nonconsequentialists have treated as morally relevant to the permissibility of harmful conduct, including whether the harm results from an act or an omission; whether it is intended, in the strong sense; whether it is foreseeable even if not intended; whether the actor has specific or only statistical foresight of the possible harms and possible victims; whether harm is “certain” to result or merely probable; and whether (in neo-Kantian terms) the conduct reflects a regard for others as ends in themselves and not merely as means.

Rather than offering an exhaustive account of the nonconsequential literature on harm to others, I want to put on the table what seem to me the central, recurring problems in the literature that (I believe) have led it down a dead-end path in devising an alternative to aggregation to handle the vast majority of harm-producing conduct. It may be possible to come up with some other alternative that works, although, for reasons touched on briefly at the end of this article, I am skeptical. But I hope what follows helps to clarify what that would entail.

A few preliminary points of clarification. First, I am using the terms “cost/benefit calculus” (hereinafter CBC) and “aggregation” interchangeably to refer to all procedures that evaluate conduct based on its consequences and that value those consequences by aggregating interpersonally expected gains and losses. I do not mean to single out any particular method of aggregation (e.g., conventional methods of cost/benefit analysis) nor to

limit “costs” and “benefits” to ones conventionally counted in welfare analyses. In addition, for these purposes, I am treating decision rules that take distributive fairness into account in weighting outcomes as a form of aggregation. I realize this is a somewhat unconventional usage of the term aggregation. The reason for adopting it is that insofar as nonconsequentialists’ core objection is to procedures that fail to respect the separateness of persons, distributionally weighted outcomes are not clearly an improvement on unweighted ones. Distributional weights do treat individuals (or at least classes of individuals) as separate, in the sense that they respond to a particular class’s distinct claims to fair treatment. But unless the weights are large enough to function as deontological side constraints, they do not preclude the sorts of interpersonal trade-offs that lead nonconsequentialists to reject CBC.

Second, for these purposes, I mean “viable” in a very undemanding sense: have nonconsequentialists supplied criteria that, as an operational matter, are capable of differentiating among different forms of risky conduct? I do not reach the further question of whether such criteria, if they exist, dominate CBC on normative or practical grounds.

Third, I am interested here solely in the question of what (risky) conduct the state should permit or encourage to go forward and with what level of safety precautions, not the question of who should bear the costs of any harm that results from the conduct (whether permitted or not).⁵ While these questions are related, they are nonetheless distinct, and the failure of many deontologists to distinguish clearly between them is (as I discuss below) one of the central problems in this literature. To the extent deontologists have distinguished clearly between the two questions and addressed themselves only to latter—correcting wrongs—the literature is orthogonal to my main concern here, which is how we ought to decide what sorts of risky conduct are wrongful to begin with.

Finally, I focus only on conduct in which the (risk of) harm to others is an undesired but unavoidable consequence of pursuing other, socially useful ends. Thus I set to the side conduct that would typically fall within the purview of intentional torts or criminal law: conduct that is intended to inflict harm on others or that is pursued so recklessly as to be judged criminally negligent. I am limiting inquiry to the former category for two reasons. The tort system and administrative/regulatory system that regulate risky conduct are almost exclusively concerned with such conduct. Any theory of permissible (risks of) harm to others that cannot tell us what to do in this core case is of limited value. In addition, conduct that falls in the latter category (intentional torts or criminal negligence) is conduct that pretty

5. For the balance of this article, “conduct” or “act” should be understood to refer to a chosen activity undertaken *with a specified level of precaution against harm to others*. Thus, “driving at 50 m.p.h.” is one act; “driving at 65 m.p.h.” is a different one. When I speak of the state “prohibiting” or “permitting” an act, I therefore mean prohibiting or permitting a given activity when undertaken with the specified level of precaution.

much everyone—consequentialists and nonconsequentialists alike—agrees the world would be better off without. Insofar as there are disagreements among those groups, they concern how best to respond to its unwanted occurrence (e.g., retributive/compensatory versus deterrence views of punishment). In contrast, we cannot and would not want to eliminate all socially useful conduct that poses some irreducible risk of harm to others. The chief task of any theory of permissible harms to others is therefore to tell us where to draw the line.

II. EIGHT PROBLEMS WITH THE DEONTOLOGICAL LITERATURE ON REGULATING HARMFUL CONDUCT

A. The Dangers of an Immanent Critique

The last twenty-five years have seen the rise of a new (or arguably renewed) scholarly approach to evaluating the common law that might be termed the “immanent critique.”⁶ Rather than starting with an external metric of value—optimizing welfare, correcting wrongs, protecting specified rights, giving parties what they have (or would have) chosen for themselves—and assessing the goodness or badness of an existing legal regime in terms of it, proponents argue that we should start with existing law and work outward. That is to say, we should start by giving the best interpretation we can of existing practice and identifying the norms that are immanent in that practice, and then see whether those norms yield principles we would wish to judge the practice by.

During roughly the same period, moral philosophy has witnessed a similar development, with the rise of a kind of common-law method of moral reasoning about our duties to others. In place of the norms of legal practice, our intuitions about the “right” answers to hypothetical dilemmas function as the social facts that unconsciously embody moral wisdom, a proper understanding of which will lead us, by process of generalization and reconciliation, to a set of moral principles for handling harm to others.⁷

There is nothing inherently wrong with this approach. You can get to the same place whether you work from the inside out or the outside in (or, in Jules Coleman’s terms, “bottom up” or “top down”).⁸ Proponents of the immanent critique offer a number of plausible arguments for starting from the inside, including the impossibility of evaluating moral principles divorced from their applications and the fact that widely shared moral

6. Richard Craswell, discussing the same development, refers to the literature as “interpretive theories.” Richard Craswell, *In That Case, What Is the Question?*, 112 YALE L.J. 918 (2003). Recent expositors of an immanent critique of private law include Jules Coleman, Ernest Weinrib, Dennis Patterson, Peter Benson, Stephen A. Smith, Daniel Markovits, John Goldberg, and Benjamin Zipursky.

7. FRANCES KAMM, *INTRICATE ETHICS* (2007); JOHN MIKHAIL, *ELEMENTS OF MORAL COGNITION: RAWLS’ LINGUISTIC ANALOGY AND THE COGNITIVE SCIENCE OF MORAL AND LEGAL JUDGMENT* (2011).

8. Coleman, *supra* note 3, at 184.

intuitions are entitled to some presumption of moral correctness. Thus, starting with what *is*, understood in the most sympathetic light, may be the most reliable and expeditious route to what *ought to be*.

But there are obvious dangers in the immanent critique to which both the legal and the philosophical literature on harm to others (to my mind) fall prey. First, it is easy to misunderstand what you are looking at when you view it only from the inside. In seeking to give the “best” explanation of tort law as a freestanding institution, nonconsequentialists in law have committed themselves to the view that it can best be understood by staying within its own borders. But tort law is just one arm of the state’s regulatory apparatus for controlling harmful conduct. The decision to analyze tort law in isolation from the rest of that regulatory apparatus leads to a number of misconceptions about tort law itself, some of which I take up below.⁹

A similar problem, I believe, has limited the explanatory power of the non-legal philosophical literature on harm to others. To smoke out our moral intuitions about what sorts of harms to others we may or may not causally bring about, the literature focuses on an odd subset of hypotheticals (basically, trolley problems and other one-off rescue cases). Those hypotheticals typically share a number of unusual features, including the presence of identifiable victims, consequences that are deemed to be certain to occur and will occur “up close and personal,” alternative courses of action that fall out differently on the act/omission distinction, and costs of rescue that appear manageable only because the case is considered in isolation from a more general practice of rescue. I believe that, consciously or not, those features are driving most nonconsequentialists’ intuitive responses to the hypotheticals. When those features drop out, as they do in run-of-the-mill risk regulation cases, nonconsequentialists are generally left with no clear intuitions at all. That the deontological moral principles gleaned from rescue cases are useless in garden-variety cases of risk imposition not only limits dramatically the domain of human conduct to which such principles are relevant; it also suggests that even within that domain, nonconsequentialists may be misdiagnosing what facts our intuitions are snagging on.¹⁰

9. As noted above, I am limiting attention here to criteria for determining whether risky conduct is permitted or prohibited and thus have little to say about the compensation question. But it is worth at least noting that the “immanent critique” of tort law has worked mischief in that area as well. Focusing on tort law in isolation from other parts of the regulatory system invites the misconception that the only available source of compensation for the injured party is the injurer. It also insulates the corrective-justice approach from obvious criticisms that arise when one considers alternative compensation schemes (e.g., private or social insurance). For a critique of the corrective-justice approach for that limited vision, see Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387–408 (David G. Owen ed., 1995).

10. I pursue this and other observations about the nonlegal philosophical literature on duties not to harm others in more detail in Barbara Fried, *Can Contractualism Save Us from Aggregation?*, 16 *J. ETHICS* 1, 39–66 (2012); and Barbara Fried, *What Does Matter? The Case for Killing the Trolley Problem (or Letting It Die)*, 62 *PHIL. Q.* 505–529 (2012).

Second, it is easy to lose sight of the fact that *what is* is entitled at most to a presumption that it is right. It might be wrong. At some point, the presumption of rightness has to be defended in light of articulated norms. In my view, most of the deontological literature on tort law never gets to that last step. As a result, it often confuses convention for some external notion of morality and institutional designs adopted for pragmatic reasons for ones that reflect a deeper normative commitment. (Again, I take up examples below.)

The same limitation is evident in the philosophical literature on harm to others. Within the narrow set of rescue hypotheticals that dominate the literature, nonconsequentialists have identified with ever-increasing subtlety which intuitions about permissible conduct are robust and which are not.¹¹ What they have not done, in my view, is to establish that those intuitions are moral rather than emotional or psychological, and hence that we should look for general rules that explain them in the moral rather than the affective realm.¹²

B. Conflating Prohibition and Compensation

The state faces two decisions in regulating harmful conduct: (1) what risks to allow some citizens to impose on others; and (2) who should bear the costs of risky conduct? These are very different questions. In economic terms, the first is an allocative question: What conduct is optimal from a societal point of view? The second is a distributive one: How do we distribute the costs that result from permitting or prohibiting a given form of conduct? To put the difference in operational terms, the first asks, would we want to prohibit (risky) act X from ever occurring, if we could? The second asks, assuming act X has occurred, with or without legal permission, and it has resulted in actual harm to one or more persons, should the victims be compensated, either by the actor or by the state? Of course, how the state resolves the distributive question will indirectly affect the allocative decision by affecting the incentives actors have to engage in act X in the first place. But these are nonetheless separable questions, both analytically and operationally.

The distinction between the permissibility of conduct and the distribution of costs that arise from prohibiting or allowing it has been familiar to legal audiences at least since Guido Calabresi and A. Douglas Melamed's famous 1972 article spelling out the four possible resolutions of the

11. Mark Kelman, *Playing with Trolleys* (unpublished manuscript) (on file with the author); B. Fried, *What Does Matter?*, *supra* note 10.

12. See B. Fried, *Can Contractualism Save Us*, *supra* note 10; B. Fried, *What Does Matter?*, *supra* note 10. I do not mean to endorse the distinction between rational and emotional responses. But I take it to be basic in some form to what is meant by rationality in Kantian morality.

prohibition/compensation question.¹³ In the philosophical literature on harm to others, however, the two questions are frequently conflated. Within the legal academy, the confusion can be traced in large part to the fact that the literature comes at the problem through the lens of the tort system, which (in the case of torts that are not considered “strict liability”) conflates the two questions by design. That is to say, defendants who are found to have acted negligently—meaning to have violated the standard of due care we require of actors in their position—are also required to compensate the victims for the injuries they cause.

But this is not a natural feature of the world. It reflects a prior policy determination to link the two in the design of the negligence portion of the tort system. We can (and in other contexts do) decouple judgments about whether conduct is wrong, in the sense that we would have prohibited it if we could have, from judgments about whether, for sundry policy reasons (corrective justice, individual welfare, cost internalization, risk spreading, etc.), the victim should be compensated, and if so, whether the compensation should come from the person who caused the harm.

The failure to keep these questions separate is, I believe, the first casualty of the immanent critique of law. This point needs to be underscored. In the past, debates about the propriety of analyzing tort law in isolation from the rest of our risk-regulation apparatus have centered on whether tort law should be assumed to (or required to) cohere with the principles underlying the rest of the regulatory state. Why should it?, nonconsequentialists have argued. Why should it not follow its own logic of corrective justice?¹⁴ The problems with the interpretation of tort law as a freestanding institution that I press here are different. I am not worried that such a practice has encouraged people to ignore the differences (presumptively indefensible) between tort law and the regulatory state. I am worried that it has encouraged them to ignore the *similarities* and thereby misdescribe the tort system itself. Our tort system is not simply engaged in *ex post* corrective justice via compensation; it is engaged in *ex ante* risk regulation as well, via the standards of due care it generates to determine liability for negligence in the first place.¹⁵

Sometimes nonconsequentialists explicitly undertake to answer both the prohibition and the compensation question but, by conflating the two, answer neither.¹⁶ More often, what nonconsequentialists really seem to care

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

14. For a forceful argument to this effect, see JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001), at 36–38.

15. Once we focus attention on the latter function of tort law, I do think it becomes easier to explain why we might think tort law *ought* to cohere with the other institutions for risk regulation, at least with respect to standards of conduct. But that is not my immediate concern here.

16. Nozick’s treatment of the problem in the first part of NOZICK, *supra* note 3, is a particularly spectacular train wreck along these lines. For a more detailed analysis, see Barbara Fried, *Does*

about is defending the duty to compensate (the corrective justice aspect of the system) but—perhaps because they are not focusing on the prohibition question—they just assume it is resolved *pari passu* with the compensation question.

Others have acknowledged the distinction between the prohibition and compensation questions but have either postponed or explicitly disavowed the obligation to supply a nonconsequentialist solution to the prohibition question. That tack avoids confusion but at the cost of acknowledging the limited policy relevance of the nonconsequentialist literature on torts.¹⁷ To the extent the literature is concerned solely with the obligation to compensate others for harm one has done to them and has nothing to say about prohibition, it is simply orthogonal to the question on the table: whether there is a coherent alternative to aggregation for regulating risky conduct.

C. Treating Imposition of Risk and Imposition of Harm as Different Forms of Conduct

Closely related to the foregoing problem, a substantial strain in the non-consequentialist literature approaches the problem of harmful conduct by splitting it into two different categories: conduct that has already harmed another—or is absolutely certain to¹⁸—and conduct that imposes a risk of future harm.¹⁹ But imposition of risk and imposition of harm are not distinct forms of conduct. They are identical conduct viewed from an *ex ante* and *ex post* perspective, respectively.

Confusion on this point has (in my view) produced many of the most serious confusions in the nonconsequentialist literature, including (1) the belief that actual harm to others is both a necessary condition for culpability and a sufficient condition to create at least a presumption of culpability;

Nozick Have a Theory of Property Rights?, in CAMBRIDGE COMPANION TO NOZICK'S ANARCHY, STATE, AND UTOPIA (Ralf M. Bader & John Meadowcroft eds., 2011).

17. Those who appear to disavow the obligation include John Goldberg, Benjamin Zipursky, Ernest Weinrib, and, until recently, Jules Coleman.

18. Some argue that harm that is certain to occur should be treated as morally equivalent to harm that has occurred, with the implication that the conduct that will produce it may be prohibited notwithstanding the absence of completed harm. *See, e.g.*, JUDITH JARVIS THOMSON, *Imposing Risks*, in RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY (1986), at 161 (concluding that B has a right to act, for example, by breaking A's arm or locking A up, to prevent A from engaging in conduct that will infringe B's rights, but only if B "knows that A will infringe a right of B's unless B prevents A from infringing that right") (emphasis added). But for present purposes, this is not a significant extension of the requirement of actual harm. In either case—harm certain to occur or harm that has already occurred—we are required to suspend judgment about conduct until we know for an absolute certainty that it will eventuate in harm to identified persons. It just happens that in some cases we know that *ex ante*.

19. *See, e.g.*, Thomson's argument that if risky conduct is morally problematic notwithstanding the absence of completed harm, "then risk imposition does generate an independent problem for moral theory. For there is a further question which then arises, beyond the question what harms we may or may not cause in what circumstances, namely, the question what risks of what harms we may or may not impose in what circumstances." *Id.* at 185.

and (2) the belief that we can coherently judge completed harms under nonconsequentialist criteria while ceding risky conduct to some form of aggregation. Finally, confusion on this point has spurred an entire literature trying to solve a nonexistent problem: how risky conduct that has not yet resulted in harm can be deemed wrongful. I take up each of these in turn.

D. Completed Harm Is Necessary for Culpability

Those rights theorists who start with the intuition that the proper way to think about the wrong of harm is from an expected utility framework have no difficulty recognizing that the problem of risk *is* the problem of harm, viewed from an *ex ante* rather than *ex post* perspective.²⁰ They are the exception, however. Most rights theorists start with the presupposition that until we have actually harmed others, we have done nothing wrong, leading to the following dilemma: “On what grounds can a rights-based political theory justify prohibiting risky actions” that have not yet ripened into material harm?²¹

Within the legal academy, Ernest Weinrib is the strongest defender of the view that actual injury is necessary for culpability.²² But he is hardly alone in that view. Consider this from John Goldberg and Benjamin Zipursky: “The wronging of one person by another is the very essence of the enterprise, and until such an event happens, there is no occasion to inquire whether an actor can or should be held to have acted wrongfully by violating a moral or legal obligation of conduct.”²³ Or this, from Judith Thomson:

Suppose I play Russian roulette on you. (Gun with six chambers, one bullet.) And suppose that nothing happens: the bullet was not under the firing pin when I fired. Suppose I did this without your knowledge, so that you were caused no fear. Did I infringe a right of yours? It does not seem obvious that I did.²⁴

The same concern is expressed by numerous others and drives their search for alternative principles to explain the wrong of risk.²⁵

20. See Section II.E.1 *infra*.

21. Kenneth Rogerson, *Rights at Risk*, 1 SW. PHIL. REV. (1984).

22. See, e.g., ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995), at 153; Ernest Weinrib, *The Disintegration of Duty*, in *EXPLORING TORT LAW*, 143–186 (M.S. Madden ed., 2005), at 149–157.

23. John Goldberg & Benjamin Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007), at 1138. See also John Goldberg & Benjamin Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625–1719 (2002), at 1689 (“A claim for heightened risk—even if that risk is intelligible as a harm—does not invoke the sort of harm that defendants have a duty to take care to avoid causing.”); *id.* at 1634 (“The duties typically recognized within the law of negligence are duties to take care not to cause ‘ultimate’ . . . harms, such as bodily harm or illness. By contrast, negligence law does not treat the ‘intermediate’ or ‘unripened’ harm of heightened risk as actionable injury.”).

24. THOMSON, *supra* note 18, at 163.

25. See Section II.E.3 *infra*.

The apparently widespread conviction that we cannot condemn conduct until we know its consequences is surely one of the more perplexing features of the nonconsequentialist literature on harm to others. The view that “results should count a lot” is obviously tangled up with the epistemological difficulties of guessing exactly what risks a given course of conduct poses *ex ante*. But nonconsequentialists’ attachment to the *ex post* perspective clearly goes beyond anything that can be explained by such concerns.

Within the legal literature, I think attachment to the *ex post* perspective is explained in large part by the fact that nonconsequentialists have generally approached the problem of harm to others through the lens of the private-law tort system. Here, then, is the second casualty of the immanent critique: only by viewing the tort system in isolation rather than as an integral part of the state’s regulatory apparatus would one be led to conclude that no conduct can be judged impermissible until it has resulted in harm to others.²⁶

The United States, like most Western countries, divides the task of regulating harmful conduct between the private-law tort system (which adjudicates only those cases in which there is an identifiable plaintiff with standing to sue) and the public regulatory system (which can intervene at any point, with or without identifiable victims). It is true that the tort system is generally called upon to judge conduct only after such conduct has resulted in harm to identifiable others. But this feature does not reflect deep moral principle; it reflects administrative expediency. The only parties with standing to bring a tort suit are those who have been harmed by the conduct or who are put at a heightened risk of harm.

In theory, one can seek an (*ex ante*) injunction to prohibit conduct that will put one at heightened risk of serious harm. But to get an injunction, a plaintiff must show that she is likely to be seriously harmed and that compensatory damages will not provide an adequate remedy.²⁷ In addition, she would have to know about the risk in time to get into court before the act in question has been completed. Only rarely are all these criteria met. As a result, it is rare for a plaintiff to seek, let alone get, an injunction.²⁸ Thus almost all tort suits come up in an *ex post* posture, in which the remedy

26. One finds a similarly persistent hindsight bias in the nonlegal philosophical literature on harm to others. It is attributable in part, I believe, to the same tendency to assess the permissibility of risky conduct from an *ex post* perspective. But there is another, more powerful factor at work in the philosophical literature: the literature focuses almost exclusively on one-off hypotheticals in which the harmful consequences of acting or not acting are deemed to be certain *ex ante*. The consequence of this single-minded focus on “certain” harms is to drive the problem of risk to the margins of philosophical inquiry. For further discussion of this point, see Fried, *What Does Matter?*, *supra* note 10.

27. DAN B. DOBBS, 2 LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (2d ed. 1993), sec. 8.10, at 535.

28. Goldberg and Zipursky, themselves strong defenders of the notion that an already-completed harm is essential to the very notion of tortious conduct, provide a nice counterexample: cases where defendant’s negligent conduct results in a heightened risk of contracting a disease in the future. In such cases, they argue, the plaintiff should be entitled to an injunction allowing him to recoup the medical costs of monitoring the progress of the disease going

the plaintiff seeks is not to prevent the harm (which by hypothesis it is too late to do) but to be compensated for it. Hence actual harm is a necessary element of most tort suits. *But that is because of the remedy sought, not the scope of the right.*

While the tort system operates largely *ex post*, much of the rest of the enormous state apparatus for regulating harmful conduct does not. Criminal codes routinely punish conduct that puts others at extreme risk of injury (drunk driving, criminally negligent violation of safety standards, etc.) without requiring that the conduct results in injury first. In the civil sphere, environmental regulations, health and safety regulations (building codes, product standards, workplace regulations, licensing requirements for high-risk jobs), securities regulation, and so on, all operate *ex ante*. Sometimes *ex ante* enforcement takes the form of requiring preclearance to demonstrate compliance with regulatory standards (e.g., you cannot market a new drug without FDA approval). Sometimes it takes the form of penalties for violating those standards whether or not actual harm ensues.²⁹ Outside the United States, these and other regulatory regimes swamp the tort system in social and economic importance. Even in the United States, which is alone among industrialized democratic countries in its attachment to the “adversarial legalism” of the tort system, regulatory regimes are an increasingly important part of harm regulation and have subsumed many functions that used to be performed by the tort system.³⁰ They not only operate *ex ante*; they are *designed* to operate *ex ante* in order to prevent harm from occurring in the first place.

Whatever its source, the belief that actual harm is necessary for conduct to be judged culpable has a number of curious implications. First, it requires us to suspend moral judgment of an act until it is too late to act otherwise, thereby relegating rights-holders to (at best) *ex post* compensation for the involuntary loss of their rights. That result is surely ironic, given the

forward—not as compensation for a “completed wrong” but as a prophylactic measure to avoid any wrong (tortious harm) in the first place. Goldberg & Zipursky, *Unrealized Torts*, *supra* note 23, at 1709, 1711. Their example presents one of the few instances in which *ex ante* prevention is a plausible remedy for a plaintiff put at risk of harm by defendant’s conduct—plausible only because of the odd happenstance that there is a long lag time between when the party put at risk of injury is first identified (and hence has standing and motive to sue) and when harm to him will first materialize, if it does.

29. A deontologist might be tempted to respond that the latter case does involve completed harm—the harm of violating mandated safety standards. But that act is not a moral wrong in itself. There’s nothing intrinsically immoral about driving 70 m.p.h. or putting a handrail at the height of three feet rather than two feet off the ground. Such acts are prohibited only because they are thought to create a risk of harm to others (that is to say, they are *malum prohibitum* rather than *malum in se*). That ultimate harm to others, not the violation of safety standards meant to prevent it, is the only harm we care about here.

30. ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001). In the years 1990–2010, the costs of the U.S. tort system ranged from 1.78% to 2.24% of gross domestic product. U.S. TORT COSTS: 2011 UPDATE (2011), at 5. The private tort system plays a much smaller role in the rest of the developed world. *See TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE* (Tillinghast, 1992), at 14.

conception of rights with which most deontologists start. The classic liberal view of a rights violation as an unconsented-to boundary crossing implies that an *ex post* remedy in the form of cash compensation for the injury is always a second-best solution. The first-best is to prevent the boundary crossing to begin with by formulating required standards of conduct, through injunctive relief, and so on. How can it be that the just state is prohibited from taking the only sort of action that would fully prevent injustice?

Second, as others have noted, a moral theory that cannot judge whether actions are wrongful until they are completed is not a theory of action at all. If we conclude *ex ante* that it is permissible for someone to drive down the street at twenty-five miles an hour because on balance the activity is socially useful even if it poses an irreducible risk of harm to others; but conclude *ex post*, after someone is hurt, that it was wrong after all, for reasons not fully captured by a utilitarian calculus, we have created a paradox. That paradox is economically encapsulated in the common practice of describing the wrongfulness of *conduct* by reference to its *actual consequences*. Thus Thomson describes the job of moral theory to be to answer the question “what harms we may or may not *cause* in what circumstance.”³¹ Tony Honoré describes the “conduct” for which one may incur tort liability as including “actions, omissions, and *causing untoward consequences* [by] conduct of a potentially dangerous sort.”³² Goldberg and Zipursky characterize tort law as prohibiting “[t]he *doing of realized wrongs*,” not “the doing of unrealized. . . wrongs,” and imposing a “*a duty to not injure*, rather than a duty to not engage in injurious conduct.”³³

The paradox created by insisting that we suspend final judgment of conduct until its consequences are known is, of course, the paradox of moral luck: We decide what course of action is morally required of us *ex ante*, on the basis of expected outcomes, but conclude we made the wrong choice *ex post*, when things turn out badly through no fault of our own. These time-inconsistent judgments create a paradox, however, only if they purport to answer the same question. Often, they do not. Consider, for example, a variant on Bernard Williams’s famous hypothetical of Gauguin, viewed from the perspective of what Gauguin owes to his family.³⁴ When Gauguin states *ex ante* that, all things considered, it is right for him to choose his art over his family, he is proposing a theory of rational (moral) action. When he states

31. THOMSON, *supra* note 18, at 185 (emphasis added).

32. Tony Honoré, *The Morality of Tort Law—Questions and Answers*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73–95 (David G. Owen ed., 1995), at 75 (emphasis added).

33. Goldberg & Zipursky, *Unrealized Torts*, *supra* note 23, at 1652 (emphasis added). For other formulations of the same point, see *id.* at 1698 (“A[] . . . very difficult question is whether the duty to be vigilant of causing a threat of HIV infection involves a duty not to cause *actual* exposure to HIV or a duty not to cause *possible* exposure through a medically possible means of transmission.”). Jules Coleman similarly describes our duty under strict liability law as a “duty-not-to-harm-by-blasting” and our duty under negligence law as a “duty-not-to-harm-by-faultily-motoring.” Jules Coleman, *Theories of Tort Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/entries/tort-theories>.

34. BERNARD WILLIAMS, *Moral Luck*, in MORAL LUCK 20–39 (1981).

ex post, after he has failed as an artist, that he regrets his earlier choice, he is expressing his emotional response (regret, remorse, etc.) to a choice that turned out badly. Our propensity to feel remorse for bad consequences of (all things considered) prudent choices may be unfortunate, in the sense that it guarantees much unhappiness in life to no good purpose. But it is not paradoxical. It simply reflects the fact that our rational and emotional lives operate on different planes and respond to different stimuli.

The same cautionary point holds here. If what nonconsequentialists really mean by a “duty not to injure” is that we have duty to compensate for any injury that results from our conduct—if, that is, they are really proposing a standard for compensation and not conduct—then the duty they propose does not create a paradox. It simply amounts to a version of strict liability (you broke it; you fix it) for conduct that is judged culpable on other, unstated grounds. It may be harder than advocates think to come up with an unmoralized notion of “broke” or to defend a strict liability compensation scheme on moralistic grounds, but the proposed regime is not paradoxical.

If, on the other hand, the “duty not to injure” is intended to prescribe a standard of conduct with respect to the action that resulted in harm to others—you have a duty to act in a fashion that will not cause X consequences, by which we mean that we will prohibit any actions that will turn out to have caused X—it *is* a paradox and has to be resolved in practice by choosing one temporal perspective or the other. Given that we go through life in only one (temporal) direction, if that duty is meant to provide a standard for conduct, it must be based on information available to the actor *ex ante*. That information, by necessity, must be about the expected, not actual, consequences of the act under consideration.

Of course, even hardcore adherents to the view that harm is necessary for culpability agree that *something* is wrong with pointing a loaded gun at someone’s head and firing what turns out to be (through no virtue of the shooter’s) a blank or brandishing a loaded gun carelessly in a crowded downtown area, whether or not it accidentally goes off. The question is: What exactly is wrong, and does it sound in deontological principles? Non-consequentialists have split on this question (see Sections II.E and II.F below).

E. The Wrong of Risk Can Be Explained by Deontological Principles

Several possibilities have been floated for explaining the wrong of risk in deontological terms.

1. Harm Includes Expected Harm

The most straightforward possibility is to redefine harm to include having one’s prospects statistically worsened. Thus David McCarthy supplants the traditional liberal harm theory with what he calls “risk liability theory,” which

holds that X is liable to Y “if X performs an action that she knows or ought to know will impose a risk of harm on Y,” provided there is no excuse for it (“excuses aside”).³⁵ Similarly, Joel Feinberg argues that culpability for risky conduct should be judged as a function of the probability and magnitude of expected harm.³⁶

The shift to an *ex ante* (expected harm) perspective provides an answer to the question posed by Thomson: If harm is necessary for culpability, how can the mere act of imposing a *risk* of future harm be wrong under the harm principle? But it does so at the cost of highlighting a second and more serious problem. Judged *ex ante*, almost all conduct poses a risk of harm to others. If that is sufficient to make conduct culpable, then almost all action is culpable. If it is not sufficient, then something else is doing all the work in differentiating permissible from impermissible conduct. I take up this problem in Section II.H below.

2. Risk Creation Is a Completed Harm

Others argue that imposing risk on others *is* a completed harm. Richard Epstein gestures in that direction in arguing that in creating dangerous situations, we create a “store of energy” that is released into a harm-causing force—a view that invites us to view risk creation as just the first step in a continuous, multipart act of harming others, like shooting an arrow from a bow aimed right at someone’s heart.³⁷ Others go further and argue that imposition of risk is not the first step toward completed harm, but the last. In the case of risks that have run their course and result in no injury, the completed harm imposed by the risk itself could be psychological trauma from a near-miss. In the case of ongoing risks (e.g., exposure to toxic substances that impose a risk of later disease), it could be long-term anxiety about whether the harm will materialize or out-of-pocket monitoring costs to detect it as soon as it does materialize.³⁸

This solution does not seem to have much to recommend it beyond expediency. The mere imposition of risk may well constitute a completed harm whether or not the principal threatened harm comes to pass. Knowing that a gun is pointed at your head is surely an injury in itself, with lasting psychological consequences even if the gun never goes off. But our widespread—indeed, universal—intuition that there is something wrong

35. David McCarthy, *Liability and Risk*, 25 PHIL. & PUB. AFF. 238–262 (1995), at 251.

36. JOEL FEINBERG, *HARM TO OTHERS* (1984), at 190–193.

37. Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151–204 (1973). The argument might be thought to be question-begging. Either Epstein intends risky conduct to be tortious whether the force released actually causes harm or not—in which case all action is tortious; or he intends it to be tortious only when the force released actually causes harm—in which case he has not succeeded in making risk creation itself tortious.

38. Goldberg & Zipursky, *Unrealized Torts*, *supra* note 23; Christopher Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990); Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113 (1990); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990). Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963 (2003) (arguing that imposition of risk is itself a psychological injury).

with imposing some forms of risk on others does not seem to depend on the presence of such completed harm nor to track its severity. The victim of an attempted murder need not know the attempt has been made for us to conclude that the attempt was wrongful. We need either to shed those intuitions or to come up with a better explanation for them.

3. Risk Creation Violates a Different Right from the Right to Be Free from Harm

Others concede that risk imposition falls outside the reach of the antiharm principle but argue that it violates *other* interests of the would-be victims that sound broadly in deontological principles. Several people identify that supplemental right as a right not to be subjected to conduct that expresses contempt for (or otherwise impermissibly devalues) its potential victims. Thus Jean Hampton argues that the reason attempted murder is wrong, even if the attempt fails, is because of what the attempt “conveys about the intended victim’s worth.”³⁹ Rahul Kumar describes the wrong as “[t]he denial of the value of one’s humanity” by “culpably failing to comply with [one’s] legitimate expectations.”⁴⁰ The same principle would presumably apply to Russian roulette, criminal negligence, and so on.

Stephen Perry identifies that supplemental right as a “second order interest recursively derived from [one’s] first order interest in not being physically injured.” So “I can have a right that you not *try* to physically injure me, even though a violation of that right which did not cause me physical injury would not itself be a harm.”⁴¹ Others locate it in an independent, countervailing “right to self-defense” that permits one to take preventive action to forestall injury even when no wrong has yet been committed.⁴²

39. Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659–1702, 1681 (1992).

40. Rahul Kumar, *Who Can Be Wronged?*, 31 PHIL. & PUB. AFF. 2, 99–118 (2003), at 109.

41. Perry, *supra* note 4, at 1307 (emphasis added).

42. Dennis McKerlie, *Rights and Risk*, 16 CANADIAN J. PHIL. 239–252 (1986), at 241; Samuel C. Wheeler III, *Self-Defense: Rights and Coerced Risk-Acceptance*, 11 PUB. AFF. Q. 431–443 (1997) (arguing for the right to carry (and use) handguns for self-defense purposes, as consistent with the classic libertarian account of rights). THOMSON, *supra* note 18, at 160–161, enlists the right of self-defense to fashion an intermediate position that seems, if anything, even harder to defend: The individual right of self-defense permits the state to levy a penalty on top of compensatory damages in the event of actual *ex post* harm, as a means of “indirect prevention,” but apparently would not permit it to levy penalties on risky conduct for the same purpose in the absence of any as-yet materialized harm. Why should we encourage the state to do indirectly (and imperfectly) what we will not permit it to do directly?

There is a second and related problem with fitting risk under contractualist or deontological principles: how to deal with what Rahul Kumar calls the “individual reasons restriction,” meaning that the wrong of the conduct resides not just in what the actor did (including his mental state) but in what it did to the victim, “the force of which needs to be accounted for in light of the implications for *her* life.” Kumar, *supra* note 40, at 109. That is to say, a wrong requires an imaginary complainant. But if one takes an identifiable individual victim to be a prerequisite for wrongful conduct, we have a serious problem in dealing with unintentional harms. Some intermediate cases seem easy to subsume into the requirement of an individual, identifiable victim: wrongful birth; a drunk driver careening down the street on which person X is walking (*see id.*). But in the typical unintentional harm case, the characterization of the

All of these efforts to handle risk under supplementary deontological principles seem similarly unsatisfying. Hampton's supplementary right to be free of "expressive harms," like the argument that the imposition of risk is an *ex post* harm, is wildly underinclusive. The contempt for others expressed by certain acts may seem to give a reason to condemn the most egregious forms of risky behavior. But it does not explain why we might want to prohibit or otherwise regulate garden-variety behavior that imposes an excessive risk of loss on others but hardly rises to the level of *malum in se* conduct (e.g., driving 45 m.p.h. through a crowded city street with a posted 30 m.p.h. speed limit).

Moreover, even as to the most egregious forms of behavior, the right to be free from "expressive harms," like the recharacterization of risk as an *ex post* harm, seems to miss the point of what is really wrong about such behavior. Surely most people would think that the central wrong entailed in someone's pointing a loaded gun at your head and attempting to fire it is not the contempt the would-be killer thereby expresses for your worth as a person, or the transitory anxiety he causes you, but the fact that he actually could have killed you and failed to do so through no 'fault' of his own. It is hard to see how deontologists can avoid the conclusion that what is wrong with risky conduct, finally, is the risk of *ex post* harm it poses. At least, it is hard to see how, if (as I believe) most would conclude that what is wrong with actually killing someone, finally, is not the contempt it expresses for the victim or the transitory anxiety it imposes on its about-to-be-killed victim but the killing itself.

Indeed, it is hard to see how ostensibly freestanding principles like "a right to self-defense" or a "right to be free from expressive harms" can be other than parasitic on the judgment that the conduct in question poses *ex ante* too great a risk of *ex post* harm to be tolerated. Why else is the expression of contempt in this particular form—brandishing a loaded gun with the intent to shoot—prohibited, when its expression in most other forms is not? Why else do we have a supervening right of self-defense that allows us to prevent certain forms of conduct from occurring even in the absence of any demonstrated harm?

If what is wrong with risky conduct, finally, is the risk of *ex post* harm it poses, then such "supplementary" principles do not supplement the anti-harm principle as conventionally interpreted (that is, to require *ex post* harm). They quietly eviscerate it by disguising as an unrelated right what is in fact an *ex ante* judgment on the permissibility of imposing certain risks.

wronged person as an identifiable individual is either a form of hindsight bias or just a rhetorical trick. Kumar, for example, bridges the "temporal" gap in a wrongful-death case by imagining the individual wronged party to be a "type" (the would-be natural child of the careless parent) that is a placeholder for the "token" of the type that will eventually surface. *Id.* at 114. That move, however, appears to be without limit. For example, one could describe the individual wronged by a drunk driver at the moment of driving as the "type" of those persons who find themselves in a geographical place where they are put at risk. But it is not clear to me what real problem that could be deemed an adequate solution to.

Perry's strategy—characterizing the right to be free from *risk* of harm as a second-order right derived recursively from the first-order right to be free from harm—forthrightly acknowledges that parasitic relationship, raising a different puzzle: What, operationally, turns on bifurcating these interests into primary and secondary ones?

Finally, it is hard to escape the sense that all of these efforts to handle risk under the antiharm principle, notwithstanding the absence of (*ex post*) harm, like the decision to kick it out and resolve it under other principles, have an ad hoc, jerry-rigged quality to them. What is the metatheory that tells us when we trigger a right to self-defense or a right to be treated with respect and how we are to trade off those supplementary rights against the core (antiharm) principle that the would-be injurer has a right to do what she wishes with herself and her property unless and until she harms another? In most cases, that question is unanswered, again leaving us in doubt what the real criteria for judging the permissibility of conduct are and whether in the end they amount to something distinct from some form of CBC.

F. Risk Should Be Ceded to Welfarism, Keeping (Completed) Harm in the Deontological Fold

Many nonconsequentialists, however, reluctantly conclude that the problem of risk cannot be resolved by nonconsequentialist principles. Consider this lament from Robert Nozick: “It is difficult to imagine a principled way in which the natural-rights tradition can draw the line to fix which probabilities imposed unacceptably great risks upon others. This means that it is difficult to see how, in these cases, the natural-rights tradition draws the boundaries it focuses upon.”⁴³

Instead of contorting rights theory to handle risk, they cede the problem of risk regulation to some form of CBC.

Often the concession is implicit, with the move to aggregation couched in the language of rights. One common move is to impose on all risky actors a duty to take reasonable precautions, which duty is cashed out in terms that seem indistinguishable from CBC (I return to this issue below). Others resort to what Nozick at one point disparagingly refers to as a “utilitarianism of rights.”⁴⁴ Nozick himself adopts this approach in deriving the just minimal state from mutually risk-imposing proto-states, concluding that faced with warring threats to rights, we should adopt the solution that minimizes the “total (weighted) amount of the violation of rights in the society,” with weighting apparently to be in accordance with the social importance of the rights to their holders.⁴⁵

43. NOZICK, *supra* note 3, at 75.

44. *Id.* at 14.

45. *Id.* at 28, 146.

Charles Fried concedes as much with respect to his announced standard that “it is wrong to expose the person or property of another to undue risk of harm, but what risk is undue is a function of the good to be attained and the likelihood and magnitude of harm.”⁴⁶ While acknowledging that the standard seems indistinguishable from CBC, Fried gamely tries to keep it in the deontological fold by enshrining its aggregative solution as itself a categorical right: once “the weighing has been done, then it is also absolutely wrong to go against the conclusion of that process.”⁴⁷ (In other words, in return for being willing to rename their welfarist policy recommendation a “right,” welfarists get to specify the content of that right. This is a version of rights theory one imagines any welfarist can live with.)

One can find other implicitly welfarist solutions to the problem of risk, similarly couched in the language of rights, throughout the deontological literature.⁴⁸

At other times, nonconsequentialists are more forthright about ceding risk regulation to CBC. Joel Feinberg, for example, argues that the culpability of an actor should turn on three factors: the probability of expected harm, the magnitude of expected harm, and the independent value of the risky act to the actor himself and to society at large.⁴⁹ Dennis McKerlie suggests that it should be determined based on the social utility of the conduct and whether it is an “ordinary and important part of people’s lives”—the latter, one would think, merely a different way of putting the former.⁵⁰ Jules Coleman suggests that while the dyadic, corrective justice model adopted by tort law may make sense within its domain for reasons of institutional competence, both “epistemic and normative,” outside that domain, risk regulation perhaps should be governed by other (apparently welfarist) principles.⁵¹

But as emphasized above, the problem of risk *is* the problem of harm to others, judged from an *ex ante* rather than *ex post* perspective. Once we recognize that we are talking about the same conduct judged from different temporal perspectives, the problem with the proposed division of labor becomes obvious. It requires the state to judge the permissibility of the same conduct twice and under different standards.

46. CHARLES FRIED, *RIGHT AND WRONG* (1978), at 12.

47. *Id.* at 12.

48. See, e.g., Wheeler, *supra* note 42, at 432–433 (whether a given right “survives” its encounter with a conflicting right “depends on the relative strength of the rights”). Thus I have a right to drive at 30 m.p.h. but Pedestrian Jones has right-of-way even if I am going at only 30 m.p.h.: “In this case, when Jones is in the cross-walk, his right to be there erases my right to drive down the road at 30 m.p.h. I have to slow down or stop.” “I cannot operate a nuclear reactor on my property if the existence of that poses enough of a threat to my neighbors. In such cases, I do not have a right which persists in the face of the countervailing right.” *Id.* at 432 (emphasis added).

49. Feinberg, *supra* note 36, at 190–193.

50. McKerlie, *supra* note 42, at 240–241.

51. JULES COLEMAN, *RISKS AND WRONGS* (2002), at 210. See also Heidi Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249 (1996), at 264, 272.

Take the hypothetical case of a new vaccine with the potential to prevent AIDS but carrying some low risk of death from adverse reactions to the vaccine. Suppose the arm of the administrative/regulatory state charged with regulating drug safety (the FDA) reviews the vaccine under some version of CBC and approves it for distribution. The vaccine is widely distributed, resulting in one death and an estimated thousands of lives saved by the end of the first year. The surviving family of the one victim files a tort claim, arguing that the drug company violated its duty of care in selling a defective product.

The court must determine as a threshold matter whether the drug company did in fact violate a duty of care in distributing the vaccine. If—as it routinely does—the court adopts the same standard of due care as the government, either in the course of reviewing the negligence question *de novo* or in concluding that regulatory safety standards, where they exist, *define* the level of care required, then the two stages of review present no problem.⁵² But then the court is simply importing CBC into the common law, not adopting a different standard.

But suppose the court decides to impose a different and tougher standard—say, a “duty not to injure”—which duty the court concludes the drug company violated as of the moment that someone died from the vaccine. Now what? Once again, if what the court really means by a “duty not to injure” is not that the company should not have marketed the drug but that it has a duty to compensate victims for any injuries that result, there is no contradiction. The two stages of review are simply answering different questions. The FDA decides the question of prohibition under a CBC and leaves it to the courts to decide the question of compensation under whatever standard they wish.

But if the “duty not to injure” in fact means what it purports to mean—that the company should not have distributed the vaccine in the first place, given that its distribution (as it turned out) resulted in injury—the company (along with the rest of us) has a real problem. Recognizing that continued distribution is likely to result in further deaths, should the company continue to distribute the vaccine or should it not? Do we want it to or do we not?⁵³ Assuming someone had the standing to request the court to enjoin future distribution of the vaccine, should the court grant the injunction?

52. Consider, for example, a tort suit based on a claim of negligent driving. Negligence will in fact be determined by looking at whether the driver has complied with the rules (e.g., speed limits, right of way) and standards (e.g., exercising caution in a crowded intersection) of “safe driving” devised by the administrative state. This is true more generally of negligence. It generally mirrors regulatory standards to the extent they speak to the relevant conduct.

53. For further discussion of this issue, see B. Fried, *Can Contractualism Save Us*, *supra* note 10.

G. Harm Is Sufficient to Create at Least a Presumption of Wrongful Conduct

Few scholars have advocated what one might call an “absolute liability” position: that the mere fact of harm (at least when it was foreseeable *ex ante* that it could result) is sufficient to condemn the conduct that caused it.⁵⁴ Many, however, have treated the fact that harm resulted from a given act as sufficient to create a strong presumption that the act was wrongful, acknowledging that in most cases an additional factor—generally, some version of fault—may be required to establish culpability conclusively.

As noted above, the presence of harm is a necessary precondition to establish a right to compensation, since without harm of some sort, there is no loss to be compensated for. But it cannot help determine whether the conduct that caused it is impermissible (by which I mean that we would have prohibited it *ex ante* if we could). From an *ex ante* perspective—the only perspective from which we can judge the permissibility of conduct without creating the paradox of moral luck—virtually all conduct poses some risk of harm to others, but (by definition) none of those risks has yet eventuated in actual harm. If “harm to others” is defined to include imposing a risk of harm on others, then virtually all conduct is harmful *ex ante*. If it is defined to include only completed harms, then no conduct is harmful *ex ante*. Either way, the requirement of “harm” cannot help to differentiate conduct we wish to prohibit from conduct we wish to permit. Something else must be doing all the work.

Once again, I believe that rights theorists reach the contrary (erroneous) conclusion because they approach the problem through the lens of the tort system—the third casualty of the immanent critique. The reason for this is simple. Whatever risks an act may pose *ex ante*, few of those risks ripen into *ex post* harm. As a consequence, a rule that treats harm to others as *prima facie* culpable, whatever its other shortcomings, at least seems not to force us to condemn all action. Goldberg and Zipursky appear to offer exactly this justification for the *ex post* harm requirement in the following passage, suggesting that tort law’s tolerance of moral luck may be at root not a tolerance of luck at all, but instead a defense of liberty. The passage is worth quoting at length:

[A] system that recognized as actionable not only duties not to cause physical injury, but also duties not to cause various increments of risk of physical

54. For an argument verging on that position, see Lisa Heinzerling, *Knowing Killing and Environmental Law*, 14 N.Y.U. ENVTL. L.J. 521–534 (2006). Again, if we read Heinzerling’s condemnation as a demand for compensation, not prohibition (and set aside the Coasian problem of determining which of the “joint causes” of a given social cost “caused” it and which was the victim of it), it is a perfectly coherent (if not practical or morally attractive) requirement. It just amounts to a strict liability standard. But if it is meant as a theory of action—that is, is meant to prohibit any conduct that may lead to serious harm—it appears to condemn virtually all action.

injury would potentially create undue de facto burdens on citizens' freedom of action. . . . It may be that, from certain moral perspectives, identical acts of careless driving, one of which ripens into a tort, the other of which does not, are equally deserving of sanction. Hence from those perspectives, there is an element of arbitrariness as to when tort liability attaches. But viewed from the standpoint of liberal political theory, the insistence on realization is not arbitrary. Rather, it harnesses chance to create a kind of buffer zone for free action: Unless and until injurious conduct actually causes an ultimate harm, it is not subject to sanction through a privately commenced lawsuit. In this regard, the employment of duties of non-injury in tort is akin to the rule against prior restraint of speech: It serves as a prophylactic by permitting a certain amount of undesirable conduct in order to ensure that liberty is preserved. Experientially, this appears intuitive: Most people take advantage of the buffer zone created in part by the requirement of ultimate harm at one time or another, for example, by occasionally driving unreasonably.⁵⁵

The authors back away from the more radical implications of this justification in the paragraph that follows, suggesting that perhaps all they are policing against is potential abuse of process by private plaintiffs, along with the administrative burden from the multiplicity of lawsuits that would ensue if we made all risky behavior subject to private causes of action by potentially harmed parties. But taking them at their word, the quoted passage (inadvertently) puts its finger on the moral luck paradox buried in the *ex post* view. Suspending judgment on the permissibility of conduct until we know its consequences does not, contra the authors, "permit[] a certain amount of undesirable conduct." It permits it all, relegating the victims to *ex post* compensation under a (roughly) strict liability standard.⁵⁶

As the authors note, this is precisely the effect of our presumption against prior restraints on speech in the context of the First Amendment. We generally refuse to prohibit speech *ex ante*; potential victims must wait until the speech in question has been shown to have wronged them (because it is slanderous, libelous, etc.). But by that point, generally the only recourse the injured party has is a suit for compensation. We live with the resulting higher level of harm in the context of the First Amendment because we attach a uniquely high value to freedom of speech. We could follow the same procedure in the context of risky conduct, permitting it all and relegating victims to *ex post* compensation. Thus, for example, we refuse to judge whether a scaffolding has been put up safely until we see whether it collapses and kills someone.⁵⁷ I seriously doubt this is the result that the

55. Goldberg & Zipursky, *Unrealized Torts*, *supra* note 23, at 1654.

56. Alternatively, if we read this standard to mean that anything that could turn out *ex post* to harm others is impermissible, it prohibits virtually all conduct.

57. The knowledge that the actor (speaker) will have to compensate for any (*ex post*) harm will indirectly chill risky conduct (risky speech) by increasing its expected cost. But that consequence is unintended, presumably undesired (if we take the authors at their word about the value of freedom), and unlikely to deter the same conduct we would choose to prohibit *ex ante* on the basis of expected harm.

authors want. But that is the result they will get—a fact that is easy to miss when looking at the problem from the *ex post* perspective of the tort system. It is easy to miss because courts, judging conduct *ex post*, are not called upon to decide whether they would have prohibited the conduct if they could have. That horse is out of the barn. The only decision they are called upon to make is whether compensation is required. And since they do not have to answer the prohibition question, it is easy to think that in answering the compensation question, they have somehow answered the prohibition question as well.

H. “Fault” plus Harm Makes Conduct Wrongful

As noted above, the fact that it resulted in harm is generally taken to create only a presumption that the conduct in question was culpable. Rights theorists acknowledge that in most cases, something more is required to establish culpability conclusively. That “something more” most often reduces to a requirement that the conduct in question be “wrongful.”⁵⁸

Sometimes the requirement of wrongfulness is unconsciously smuggled into the definition of harm-in-fact, like the “benevolent definition of a sou as a small coin to be given to the poor.”⁵⁹ Thus Thomson, after starting with an apparently very broad, unmoralized notion of harm as “unwanted outcomes,” silently accommodates her intuition that many unwanted outcomes in the world are not (and should not be) actionable, by refining the definition of “unwanted outcomes” to state, roughly, that “to cause a person [an unwanted] outcome . . . is to infringe a right of his.”⁶⁰ Goldberg and Zipursky, likewise starting with a very broad notion of our duty of care under negligence law—“to take reasonable care not to cause [a physical] injury through affirmative conduct”—restate it as a duty not to cause “physical injuries [*through one’s*] *misfeasance*.”⁶¹

More often, the requirement of wrongfulness is explicitly layered on top of the requirement of harm-in-fact. Thus, to be culpable, conduct must not only cause harm; the harm must also be “wrongful.” The requirement of wrongfulness is phrased in a variety of ways: The conduct must “violate [a]

58. On the centrality of fault to a moral conception of tort, see, e.g., David Owen, *The Fault Pit*, 26 GA. L. REV. 703–724 (1992), at 710: “[T]he dominance of fault in the law of torts is a moral inevitability. Fault lies at the very heart of tort law and provides it with a meaningful, moral definition.”

59. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201–220 (1931), at 203.

60. THOMSON, *supra* note 18, at 173–174. Thomson’s examples here include actions that inflict physical pain but no lasting injury (pinching someone’s nose), and actions that amount to aesthetic nuisances (a neighbor puts unsightly plastic geese on his lawn). These injuries may be relatively trivial or transitory, or easily avoidable; for this and other reasons, we may wish to decide, as a normative matter, that the actions should be privileged. But if the question is whether, as a matter of fact, they inflict an unwanted outcome on the victim, the answer is yes.

61. Goldberg & Zipursky, *Unrealized Torts*, *supra* note 23, at 1697.

right⁶² or a “legitimate” or “protected” interest,⁶³ fail to give people what they are “due,”⁶⁴ violate a “duty of care,”⁶⁵ constitute a “wrong”⁶⁶ or “improper treatment of the victim,”⁶⁷ be “not excused,”⁶⁸ be unreasonable,⁶⁹ be a harm with respect to which the actor is “at fault”⁷⁰ or “acted faultily,”⁷¹ or be inflicted “negligently,” “unjustifiably,” or “impermissibly.”⁷² For legal purposes, some of these verbal differences may imply a difference in the types and levels of proof required. But for current purposes, the differences are irrelevant. Each formulation, like Thomson’s silently moralized definition of harm itself, boils down to an assertion that culpable harms are all those harms-in-fact that we have a right to be free from.⁷³ As a result, we are

62. COLEMAN, RISKS AND WRONGS, *supra* note 51, at 335 (“invasive of a right”).

63. Peter Birks, *The Concept of a Civil Wrong*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 31–51 (David G. Owen ed., 1995), at 40; THOMSON, *supra* note 18, at 174–175: “unwanted outcomes” include only those outcomes that are both unwanted in fact and “infringe a [legal] right”—that is, are treated as legal wrongs; Coleman, *Risks and Wrongs*, *supra* note 51, at 331; Kumar, *supra* note 40, at 107 (“the wrongdoer has, without adequate excuse or justification, violated certain legitimate expectations with which the wronged party was entitled, in virtue of her value as a person, to have expected her to comply.”).

64. Joseph Raz, *Autonomy, Toleration, and the Harm Principle*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 329 (Ruth Gavison ed., 1987).

65. Goldberg & Zipursky, *Unrealized Torts*, *supra* note 23, at 1652.

66. Feinberg, *supra* note 36, at 36.

67. Owen, *supra* note 58, at 717.

68. McCarthy, *supra* note 35, at 250: X is liable “if X performs an action that she knows or ought to know will impose . . . harm on Y,” provided there is no excuse for it (“excuses aside”). See also Julie Tannenbaum, *Emotional Expressions of Moral Value*, 132 PHIL. STUD. 43–57 (2007), at 47 (you must never kill another unless “the other’s right to life is overridden, forfeited, or waived.”).

69. Gregory Keating, *A Social Contract Conception of the Tort Law of Accidents*, in PHILOSOPHY AND THE LAW OF TORTS 22–71 (Gerald Postema ed., 2001).

70. Feinberg, *supra* note 36, at 36; Owen, *supra* note 58.

71. Stephen Perry, *On the Relationship between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237–238 (4th ser., Jeremy Horder ed., 2000).

72. JUDITH JARVIS THOMSON, *Some Questions about Government Regulation of Behavior*, in RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 154–172 (1986), at 167; COLEMAN, RISKS AND WRONGS, *supra* note 51, at 332; Stephen Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72–130 (Gerald Postema ed., 2001), at 112–115; Martin Stone, *The Significance of Doing and Suffering*, in PHILOSOPHY AND THE LAW OF TORTS 131–182 (Gerald Postema ed., 2001), at 161–162; Arthur Ripstein & Benjamin Zipursky, *Corrective Justice in an Age of Mass Torts*, in PHILOSOPHY AND THE LAW OF TORTS 214–249 (Gerald Postema ed., 2001), at 219–220; Richard W. Wright, *Right, Justice and Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, 159–182 (David G. Owen ed., 1995), at 169–170; David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, 201–228 (David G. Owen ed., 1995), at 219–220, 224–225; Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989), at 518–519; Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987), at 448–449 (“prima facie, the obvious candidate [for a morally plausible general statement about what might constitute rights-violating behavior] is that one ought not to cause harm (at least without justification).”).

73. The dangers of slipping into tautology come to the fore in efforts to create a unified theory of duty in tort law that can explain both strict liability and negligence. Consider the following example:

The conventional understanding of the difference between fault and strict liability goes astray precisely because it distinguishes the breach of the duty from the fault requirement. The better view is that the difference between fault and strict liability is a difference in the content of the underlying duty of care. To see this, consider the cases of blasting, on

left with a scheme that essentially says: *ex post* harm to others' interests gives rise to liability, except when it does not.⁷⁴

Some rights theorists acknowledge that "fault" is just a placeholder for a standard of permissible conduct yet to be articulated. In the past, Jules Coleman and others have defended that silence by arguing that it is simply not the job of corrective justice theory to answer the question: What duties do we owe others? That job, Coleman suggests, belongs to some other branch of moral philosophy. Its job is, rather, to answer the question: What are the consequences of failing to meet those duties, *whatever they might be*?⁷⁵

the one hand, and motoring on the other. In a case like blasting—an activity traditionally falling under strict liability—the blaster has a duty-not-to-harm-by-blasting. This is the content of the duty of care blasters owe those whom their blasting puts in danger. On the other hand, in the case of motoring—a familiar example of an activity covered fault liability—the motorist is thought to have a duty-not-to-harm-by-faultily-motoring. That these duties have different content is illustrated by their respective success and failure conditions. A blaster fails to discharge his duty when his blasting, regardless of the care he takes, injures someone to whom he owes the duty. A motorist fails to discharge his duty when he harms another negligently, recklessly or intentionally through his driving. The blaster can satisfy his obligations only by not harming another. The motorist can meet hers either by not harming anyone or, in the event she harms someone, by not having done so negligently, recklessly or intentionally. And this is just another way of saying that the contents of the respective duties differ. The fault requirement is thus an aspect of the underlying duty, not a reflection on the character of the defendant's action.

Coleman, *Theories of Tort Law*, *supra* note 33. For a similar argument subsuming strict liability into a fault-based tort system, see Peter Birks, *The Concept of a Civil Wrong*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 29–52 (David G. Owen ed., 1995), at 44–45. That formulation of "fault"—in which our moral duty to others is defined as the duty not to do whatever is proscribed by law—does not rest on any independent moral theory of what we owe to others. It is simply a cumbersome way of saying that whatever the law holds you responsible for, you *are* responsible for.

74. Scholarship in criminal law has (not surprisingly) generated the same problems in defining the class of harmful conduct that is criminally wrongful. The MODEL PENAL CODE, for example, defines it as conduct that "unjustifiably and inexcusably inflicts or threatens substantial harm." See also Feinberg, *supra* note 36, at 31–36; Antony Duff, *Theories of Criminal Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/archives/fall2008/entries/criminal-law/>.

While the matter is beyond the scope of this paper, I believe that similar problems arise with other deontological principles (autonomy, sovereignty, self-ownership, treating others as ends and not means) that are frequently offered as an alternative to the harm principle for determining what conduct to prohibit. For example, Rahul Kumar describes the wrong of imposing an unreasonable risk as "deny[ing] the value of [another's] humanity," by "culpably failing to comply with the legitimate expectations of another." Kumar, *supra* note 40, at 109. See also Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215–245 (2006). But the actions that will be deemed to have "denied the humanity" of another depend on the content we give "legitimate" expectations and its complement, "culpably failing to comply" with them.

75. See, e.g., Coleman, *Theories of Tort Law*, *supra* note 33.

It is not the burden of corrective justice to explain the content of our duties not to harm others or to determine their scope. It is instead a principle that grounds some of the duties we incur in the event that we fail to comply with our duties not to harm others. . . . In any case, these underlying duties are not themselves duties of repair; they are duties of care. It is not a burden of corrective justice to identify or ground them. Quite the contrary, in fact. Once we have concrete requirements to take the interests of others into account in this or that way in regulating our own affairs, we face the altogether different question of

Fair enough. But that is just to acknowledge that the principles of corrective justice speak only to the compensation question and have nothing to say about required levels of conduct. Until nonconsequentialists articulate their position on required levels of conduct, it is impossible to say whether nonconsequentialist principles can supply a coherent alternative to some form of aggregation for distinguishing permissible from impermissible risk imposition.

Where rights theorists try to flesh out a standard for permissible conduct, the criteria they suggest often seem vanishingly close to CBC. Consider, for example, this formulation of our duty of care:

The force the interests of others imposes on our duty to moderate our behavior varies with the circumstances. Sometimes, the likelihood or magnitude of harm to others is so great that the duty we have to others is not to harm them as a result of the actions we choose to undertake. At other times, the balance of interests indicates that we need to take reasonable precautions to guard against harm to others, and no more. Understood in this way, the problem is familiar and not in the least unique to tort law. It is a matter of ordinary morality that the content of our duties to others varies as a consequence of a range of familiar factors.⁷⁶

Or this one, which the author acknowledges reduces to “a calculus of costs and benefits . . . to the actor and other persons”:⁷⁷

By definition, an accident diminishes the quality (and perhaps quantity) of a victim’s life and other goods, which produces suffering for the victim. We may assume that human suffering is undesirable and so should be avoided, *ex ante*, or remedied, *ex post*. [Fn: Unless the cost of such avoidance or remedy is, by some fair measure, excessive.] Moreover, because accidents consume human and other social resources, society suffers harm to its aggregate stock of goods

whether, and in what ways, the breach of these duties impacts the normative relationships between the parties. What, in other words, are the normative consequences of a breach? Here is where the principle of corrective justice makes its claim.

More recently, Coleman acknowledges the obligation of corrective justice to explain the content of our duty of care but defers its undertaking to another day. Jules Coleman, *Epilogue to Risks and Wrongs: Second Edition*, Yale Law School Public Law Working Paper No. 218 (2010), available at Social Science Research Network, <http://ssrn.com/abstract=1679554>, at 26.

76. Coleman, *Theories of Tort Law*, *supra* note 33. Defending a “corrective justice” view of tort law from Richard Posner’s charge that since the duties we owe to others are unspecified, we cannot rule out the possibility that those duties are dictated by instrumental (welfarist) considerations, Coleman states that: “While corrective justice is not a theory of the wrongs it rectifies, it can only make sense of tort law if in general the kinds of wrongs identified in torts are ones that must *as a matter of justice* [rather than for instrumental purposes] be repaired.” *Id.* But my argument here is different from Posner’s: it is that the content of justice (at least in the case of negligence) turns out to be supplied by such instrumental goals, buried in the intended meaning of the words “due care.”

77. Owen, *Fault Pit*, *supra* note 58, at 716.

by accidents. [Fn: Unless the conduct that caused the accident generated more goods than it consumed.]⁷⁸

Or this:

A rough account of why [a] drunk driver has wronged [a] pedestrian [he has put at risk] ought to appeal to the failure to comply with the pedestrian's legitimate expectations of the driver that she operate her vehicle in a manner conducive to keeping the risk at which others are put as a result of her activity within certain acceptable limits.⁷⁹

Either way, rights theorists do not offer a coherent alternative to aggregation for regulating risks—in the first case, because they cede the problem to others (possibly welfarists themselves), and in the second, because they appear implicitly to adopt the welfarist solution as their own.⁸⁰

78. *Id.* at 722–723. Owen, who—unlike Coleman—has sought to defend a moralistic view of “fault,” tries to climb back from the limb he has put himself out on here by arguing that his motives for embracing the utilitarian solution are moralistic—in particular, a Dworkinian “‘equality of concern and respect’ for the interests of other persons.” But he goes on to define acts that are “morally justifiable in terms of equality” as those that are “likely to achieve a good for the actor and others that is greater than any harm foreseeably risked to the victim and others” (*id.* at 721)—that is to say, as those that would be recommended by CBC.

Alternatively, Owen defends his resort to utilitarianism as just a backstop/default principle, to be used when “[p]rinciples of freedom and vested rights alone frequently are unable to resolve the complex questions of accountability.” *Id.* at 722. But he goes on to suggest that the category of cases that deontological principles may be unable to resolve includes all accidental (as contrasted with intentional) harm—in his words, cases where “an actor’s choice of action involves only a risk of harm to others, necessary and incidental to the pursuit of some proper goal not harmful in itself.” *Id.* at 721. If that is the scope of his “default” principle, it is the whole ballgame.

79. Kumar, *supra* note 40, at 107. Similarly, it is hard to distinguish from CBC Scanlon’s requirement that we adopt “reasonable precautions,” with “reasonableness” to be determined by weighing the risk of serious harms to some individuals against the benefits that will be realized by others if the activity goes forward. THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* (1998), at 236–237, 263–265. I do not mean to suggest that any or all of these formulations will cash out to a pure CBC. Most are insufficiently specified to answer that question with confidence. My claim is rather that their core commitments seem indistinguishable from CBC, and hence it seems not unreasonable to put the burden on nonaggregationists to offer an interpretation that makes clear it is something other than CBC. For further discussion, see B. Fried, *Can Contractualism Save Us*, *supra* note 10.

80. Examples offered to prove that “wrongful harm to others” does not reduce to welfarism seem to me similarly unpersuasive. Consider here Coleman’s argument that Calabresi’s “cheapest cost-avoider” criterion for assigning responsibility cannot be subsumed under Coleman’s rule of corrective justice: that “one has [a duty] to repair the wrongful losses for which one is responsible.” Coleman considers and dismisses as unpersuasive the attempt to collapse the former into the latter by defining the “responsible party” as the cheapest cost-avoider. But the far more plausible point of vulnerability in Coleman’s argument, it seems to me, lies in the word “wrongful.” If “wrongful” reduces to “unreasonable,” and “unreasonable” includes (in general) failure to take reasonable (meaning cost-justified) precautions, then Coleman’s universe of “wrongdoers” may in fact include Calabresi’s “cheapest cost-avoider” who failed to avoid the problem. Again, the point here is not to argue that Coleman’s and others’ definition of “wrong” is indistinguishable from some version of CBC. It is rather to argue that nothing said to date rules out that possibility in most cases.

III. CAN WE RESOLVE THE QUESTION OF WHAT RISKY CONDUCT TO PROHIBIT AND WHAT TO ALLOW UNDER OTHER NONCONSEQUENTIALIST PRINCIPLES?

As stated at the outset, I am limiting consideration here to whether the criteria of “harm” plus “fault” can yield a coherent decision rule for determining what risky conduct to prohibit that does not itself just reduce to some version of CBC. I do not think the limitation rules out a lot, as most of the nonconsequentialist literature on regulating risky conduct in fact revolves around these two criteria. But as I state at the outset, a full treatment of the problem would have to consider other criteria deemed relevant in distinguishing permissible from impermissible harmful conduct, including whether harm will result from an act or an omission; whether the harm is intended, in the strong sense; whether the harm is foreseeable even if not intended; whether the actor has specific or only statistical foresight of the possible harms and possible victims; and whether harm is “certain” to result or is merely possible or probable.

A full consideration of the relevance of each of these criteria to risk regulation is far beyond the scope of this essay. But I want to suggest the possibility that whatever moral traction each of these criteria may have in trolley problems and the other one-off, individual-choice scenarios that dominate the philosophical literature on harm to others (again, I offer no view on that question here), they are irrelevant to large-scale risk regulation.⁸¹ Here are some of the reasons to think this may be so.

The state is a collective entity, not a real person; unlike private parties, it has an affirmative duty to aid its citizens; and in dispatching that obligation in the regulatory context, it typically articulates rules to govern private conduct rather than acting directly itself. All of these factors may make moot many, if not all, of the agent-centered prerogatives that are taken to support the act/omission distinction.⁸²

In addition, the acts I am concerned with here—socially useful conduct that carries some risk of harm to others—are for the most part identically situated *ex ante* with respect to intentionality, foreseeability of harm, certainty of harm, and identifiability of the type of harm and the likely victim(s). Harm is never intentional, in the strong sense of desired; it is always an unwanted byproduct of conduct pursued for other reasons. Typically, harm is foreseeable as a probabilistic matter; in some cases the frequency and extent of harm is foreseeable to something approaching a statistical certainty. But exactly when and to whom it will occur is not foreseeable, and since no

81. For more detailed discussion of the issues touched on here, see B. Fried, *What Does Matter?*, *supra* note 10; B. Fried, *Can Contractualism Save Us*, *supra* note 10.

82. See, e.g., Michael Otsuka, *Risking Life and Limb* (2011) (unpublished manuscript), n.7, arguing that shifting “focus from private duties of beneficence to public obligations regarding the distribution of risks and harms” renders all agent-relative preferences irrelevant.

individual instance of harm is certain to occur, it is theoretically possible (although, in many cases, exceedingly improbable) that no harm will result.

Because most socially useful but risky conduct falls out the same way with respect to each of these factors, the factors are incapable of differentiating good risks from bad. If conduct is wrongful whenever it is statistically certain to result in death or serious injury to *someone* if repeated enough times, then the state would be obliged to prohibit most of the activities we take for granted in our daily lives (administering mandatory vaccinations, constructing roads, bridges, and buildings, performing routine operations, manufacturing automobiles, etc.) On the other hand, if conduct is wrongful only when it is absolutely (not merely statistically) certain to result in harm or when the victims are identifiable *ex ante*, then virtually no risky conduct of the sort at issue here—socially useful activity that produces unintended harms—is wrongful. In either case, the criteria cannot help us distinguish acceptable from unacceptable risks.

Contractualist approaches to the problem of harm to others are a more complicated case.⁸³ I do think they can provide a morally meaningful, non-consequentialist justification for picking one scheme of risk regulation over another and for choosing one that deviates from standard, unweighted aggregation—for example, one that is sensitive to distributive concerns, measured either *ex ante* or *ex post*, or gives greater weight to certain outcomes than individuals themselves might give in choosing for themselves, or makes no attempt to quantify the incommensurate values being weighed in the balance. But at the end of the day, I believe all of the plausible schemes from which to choose will necessarily be aggregative in one form or another.

IV. WHY SHOULD WE CARE?

Millions of decisions are made every day that pose uncertain risks of potentially serious harm to unidentified others. Every time we get in a car, market a new drug, decide whether or not to recall a product, decide what level of precautions to take against earthquakes and other natural disasters or against potential terrorist attacks, we are taking our own and others' lives into our hands. How we ought to go about making those decisions is of enormous social importance.

There are many reasons to be skeptical of CBC as commonly deployed, and it may be that at the end of the day we would be better off just letting the political process muddle along with some procedural safeguards in place rather than signing on to the false scientism of CBC. But nonconsequentialists reject CBC because they reject on principle the interpersonal aggregation of costs and benefits—the notion that costs to me can be offset by benefits to you. Here, I think it is fair to say that you cannot beat a bad

83. For further discussion, see B. Fried, *Can Contractualism Save Us*, *supra* note 10.

candidate with no candidate, and in my view nonconsequentialists do not offer a viable candidate. That failure, I believe, is masked by the odd perspective from which both the legal and philosophical literature come at the problem of harm to others.

For different reasons, both focus on cases in which consequences are fixed. The philosophical literature focuses on an oddball set of rescue hypotheticals in which the consequences are stipulated to be known with certainty *ex ante*.⁸⁴ The legal-philosophical literature comes at the problem from the *ex post* perspective of the tort system. By the time virtually all tort cases land in the court system, the consequences *are* fixed with certainty; the only decision left for the courts is whether to compel compensation or not. The compensation decision is important, but it suppresses the problem of interpersonal trade-offs between presumptively innocent parties, because what is at stake in the compensation decision is a zero-sum income transfer in which a (presumptive) wrongdoer is simply making whole the victim of his wrong.

In contrast, viewing the problem of potentially harmful conduct from an *ex ante* perspective pushes to the fore the problem of scarcity, and with it the inevitability of interpersonal trade-offs. Because virtually everything we do (or, acting as the state, permit others to do) carries some irreducible risk of serious harm to others, virtually everything we do (or permit others to do) entails interpersonal trade-offs. That reality is easy to overlook in our individual decision-making capacities, because the one-off nature of individual choices means that most low-probability risks we run will never ripen into harm. This is not the case in the public-policy realm, where we are typically choosing rules that will govern millions or hundreds of millions of events over the long term. As a result, even very-low-probability harms are overwhelmingly likely to occur at some point. If we parole enough prisoners, one of them will turn out to be Willie Horton. If we develop a vaccine for AIDS that has a one out of a million chance of triggering a fatal reaction and administer it to enough people, someone is going to die from it.

We can often reduce those risks by greater precautions. But at a certain point such precautions become prohibitively costly—either in dollars spent relative to the reduction in risk achieved or in new risks the precautions themselves create.⁸⁵ And generally speaking, no amount of precaution will eliminate all risk. If the world's most conscientious child welfare agency

84. See B. Fried, *What Does Matter?*, *supra* note 10.

85. One tragic example of the latter arose in the wake of the Haitian earthquake. Responding to one sketchy relief effort by a group of American Baptists, the authorities halted all evacuations of sick and injured children as relief workers scrambled to obtain documentation that would prove they were not taking the children out of the country illegally. The NEW YORK TIMES reported that in the first week alone, an estimated ten Haitian children died or became seriously ill as a result of not being able to be airlifted out of Haiti. Ian Urbina, *Paperwork Hinders Airlifts of Ill Haitian Children*, N.Y. TIMES, Feb. 8, 2010, available at <http://www.nytimes.com/2010/02/09/world/americas/09airlift.html?scp=1&sq=haiti%20children%20airlift&st=cse>. For another widely discussed example of the seeming perversity of many risk reduction efforts, see Jonathan Wolff, *Risk, Fear, Blame and Shame: The Regulation*

has to supervise thousands of children from dysfunctional families, over the long run some child under its watch is going to die from abuse or neglect.

The question is, how should we understand and respond to those bad outcomes when they inevitably come to pass? If their mere occurrence is enough to condemn the actions that produced them, then there is virtually nothing we may as a society do. If it is not enough, then we are acknowledging that interpersonal trade-offs have to be made and that in those trade-offs the numbers will inevitably count.

Deliberately or not, nonconsequentialists' conviction that we can somehow avoid such trade-offs has reinforced the average citizen's response to bad outcomes: You (government officials) had a duty not to harm anyone, or a duty to keep us safe, and you failed to do so. (As one commentator dryly remarks, "Seldom do we hear a company that was responsible for a deadly accident justify the loss of lives by saying that it was the result of a decision which, in terms of its [expected?] effects, produced far more good than harm.")⁸⁶ And politicians and policy-makers know how the average citizen will respond. The result is to drive politicians and other public employees to channel enormous resources into preventing the high-visibility bad outcomes for which they know they will be held responsible.

Three years ago, negotiations to ease California's budget crisis and prison overcrowding by early release of nonviolent offenders fell apart over exactly this problem. As one Republican legislator acknowledged with refreshing candor: "If we let someone out early, and that man commits a crime, the Assembly members are worried that that will come back to haunt them like the old famous Willie Horton ads."⁸⁷ Similar concerns explain why child welfare agencies responded to the rash of high-visibility deaths of children in foster care in the 1990s by directing almost all of their resources to children they think might be at some risk of death, ignoring the thousands of others that are facing serious but (they believe) nonlethal threats of abuse and neglect.

The same desire to avoid *ex post* blame in the public and private sector drives a substantial portion of our health care expenditures, investments in "homeland security," and countless other major public-policy decisions. It may be that our propensity to think that bad outcomes from our choices imply bad choices is immune to reason, and the only way policy-makers

of Public Safety, 22 *ECON. & PHIL.* 409–427 (2006) (on the United Kingdom's decision, in the wake of a railway accident, to check all of the tracks for safety, an effort that in all likelihood produced a much higher number of deaths when disruptions in service caused commuters to switch to driving than it prevented for future rail travelers). The point is not to argue that responses such as these are irrational (although if the end goal is protecting lives, they surely are) but to illustrate the fact that any decision we make about harm prevention involves trade-offs, whether we acknowledge them or not.

86. Sven Ove Hansson, *Risk and Ethics*, in *RISK: PHILOSOPHICAL PERSPECTIVES* 21–35 (T. Lewens ed., 2007), at 32.

87. Carol Pogash & Solomon Moore, *California Officials Fear Abduction Case May Hurt Efforts on Parole*, *N.Y. TIMES*, Aug. 30, 2009, available at <http://www.nytimes.com/2009/08/31/us/31abduct.html>.

can curb its influence is to manipulate the psychological salience of bad outcomes. But surely, before we reach that question, we should answer the question of whether it *ought* to be curbed—whether, that is, nonconsequentialists' intuition that we can somehow avoid inflicting seriously bad outcomes on some individuals as the price of benefiting many more is in fact plausible.

The full-blown consequentialist will say: of course it is not. It is tragic when reasonable actions have bad consequences, but it is nobody's fault. In a world of scarcity (in the broad sense), whatever we do has potential costs to someone. The best we can do is to act in a way that minimizes aggregate costs relative to aggregate benefits, however we calculate or weight them, and, if the costs to individual victims are serious enough, to remediate them *ex post* on welfarist grounds.

If there is a viable alternative, it needs to be put on the table so that it can become part of the public debate over risk regulation and be assessed relative to cost-benefit analysis and other versions of aggregation. If there is not, then nonconsequentialists have a moral obligation to acknowledge that, rather than lending the imprimatur of morality to what amounts to nothing more than hindsight bias. We may not be able to change the widespread intuition that bad consequences imply bad conduct; it may be an irreducible part of what it means to be human and may need to be accommodated in some fashion in public policy simply in virtue of that fact. But if the intuition is wrong, philosophers ought to be the ones saying so most clearly and doing what they can to counteract the pernicious public-policy consequences of all of us at least half-believing otherwise.