

DEAD CHILDREN

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ABSTRACT

The recent media coverage of Disneyland's measles outbreak is one of many manifestations of a pervasive asymmetry. We care more about child lives than adult lives. This asymmetry is visible when legislators race to name bills after dead children and when reports of natural disasters, mass accidents, and war highlight the special tragedy of child deaths over and above mere adult deaths.

Drawing on an expansive body of empirical work—including bioethics research, contingent valuation studies, and analyses of consumer behavior—this Article systematically maps the pervasiveness and boundaries of that asymmetry and tracks its broad implications for tort law. As a prima facie matter, a deterrence-oriented tort system should impose duties of care that are twice as stringent for children as for adults, and award tort damages that are twice as high for child victims. This has important implications for case law, damage caps, lost consortium claims, risk-utility analyses, and many scholarly reform proposals. These insights—generated by focusing on deterrence—remain robust when we instead view tort law through the lenses of corrective justice and civil recourse. Drawing on moral philosophy and bioethics, this Article defends child premiums against challenges rooted in principles of equality, the expressive impact of child exceptionalism, and the potential injustices of “hidden-child” cases.

Moving beyond tort law, this Article translates its contributions to other systems focused on promoting safety, including administrative cost-benefit analysis, criminal sentencing, and civil orders of protection.

I. INTRODUCTION

The recent outbreak of measles at Disneyland ignited a media firestorm.¹ Newspapers and news programs fed the public's appetite for

1. See, e.g., Yasmeen Abutaleb, *Tougher Laws a Likely Legacy of the Disneyland Measles Outbreak*, REUTERS (Mar. 4, 2015, 3:27 AM), <http://www.reuters.com/article/us-usa-measles-vaccines-insight-idUSKBN0LZ15Q20150304>; Frank Bruni, *The Vaccine Lunacy*, N.Y. TIMES, Feb. 1, 2015, at SR3; Alejandro Lazo, *Two California Lawmakers Seek to End 'Personal Belief' Vaccination Exemption*, WALL ST. J. (Feb. 4, 2015, 8:01 PM), <http://www.wsj.com/articles/two-california-lawmakers-seek-to-end-personal-belief-vaccination-exemption-1423084770>; Betsy McKay & Jeanne Whalen, *Vaccine Skeptics on the Rise*, WALL ST. J. (Jan. 25, 2015, 7:34 PM), <http://www.wsj.com/articles/vaccine-skeptics-on-the-rise-1422232476>; Brendan Nyhan, *Spreading along with Measles: Polarization on a Hot-Button Issue*, N.Y. TIMES (Feb. 2, 2015), <http://www.nytimes.com/2015/02/03/upshot/spreading-along-with-measles-polarization-on-a-hot-button-issue.html>; Rachel Rabkin Peachman, *When Measles Spreads from Disneyland, It's a Small World After All*, N.Y. TIMES (Jan. 21, 2015, 4:50 PM), http://parenting.blogs.nytimes.com/2015/01/21/when-measles-spreads-from-disneyland-its-a-small-world-after-all/?_r=1; Caroline Porter, *School Officials Working to Stem Spread of Measles*, WALL ST. J. (Jan. 22, 2015, 7:35 PM),

statistics, pundits, and debate.² The outbreak held our attention in part because it brought into focus larger cultural conflicts over parental rights and the role of science in the formation of public policy. That media coverage also offers a useful lens through which to examine the status of children. Who got infected with measles? The media coverage overwhelmingly suggested that it was children. But more than half of infected people were over age 20.³ Who is at the greatest risk of side effects from measles? Again the media coverage focused on children. But there are plenty of others who face potentially severe side effects, including those with compromised immune systems from cancer treatments.⁴ When the media picked up on the vulnerability of cancer patients, they focused on *children* with cancer.⁵ One might dismiss this as media pandering—the equivalent of using kittens and puppies to get audiences’ attention—but the differential focus on children reveals something far more important. It is one manifestation of a pervasive asymmetry. We care more about child lives than adult lives.⁶ This asymmetry extends well beyond the context of measles. Legislators fall over themselves in races to name bills after dead children.⁷ Newspaper headlines about war, natural disasters, and mass accidents routinely highlight child deaths and the special tragedies that they create over and above mere adult deaths.⁸ This Article systematically maps the pervasiveness and boundaries of that asymmetry and tracks its broad implications for tort law.

People have strong, enduring, and justifiable preferences for treating children as a special class that deserves greater protection than adults. This is obviously true when children are at increased risk for the relevant

<http://www.wsj.com/articles/school-officials-working-to-stem-spread-of-measles-1421955621>; C.R., *Why James Wilson and The Economist Supported Compulsory Vaccination*, ECONOMIST (Feb. 24, 2015, 11:55 PM), <http://www.economist.com/blogs/freeexchange/2015/02/archives>; Liz Szabo, *Disneyland Measles Outbreak Spreads*, USA TODAY (Jan. 23, 2015, 3:44 PM), <http://www.usatoday.com/story/news/2015/01/23/measles-spreads-to-arizona/22214545/>; Julie Turkewitz & Damien Cave, *As Measles Cases Spread in U.S., So Does Anxiety*, N.Y. TIMES (Jan. 30, 2015), <http://www.nytimes.com/2015/01/31/us/as-measles-spreads-in-us-so-does-anxiety.html>.

2. See, e.g., Tara Haelle, *The Measles Outbreak Is Twice As Big As You Thought*, FORBES (Mar. 12, 2015, 8:01 AM), <http://www.forbes.com/sites/tarahaelle/2015/03/12/the-measles-outbreak-is-twice-as-big-as-you-thought/#e46ec685e56b>.

3. *Transcript for CDC Telebriefing: Measles in the United States, 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 29, 2015, 3:30 PM), <http://www.cdc.gov/media/releases/2015/t0129-measles.html>.

4. *Id.*

5. See, e.g., Elizabeth Cohen & Debra Goldschmidt, *Arizona Measles Exposure Worries Parents of at-Risk Kids*, CNN (Feb. 2, 2015, 9:02 AM), <http://www.cnn.com/2015/01/30/health/arizona-measles-vaccination-debate/>; Tamar Lewin, *Sick Child's Father Seeks Vaccination Requirement*, N.Y. TIMES, Jan. 29, 2015, at A16.

6. This is true of both pro- and anti-vaxers. Although they disagree about whether vaccines help or harm children, they both rely on arguments about child safety to defend their positions.

7. See *infra* note 41 and accompanying text.

8. See *infra* Part II.

harms—for example, children require special protection from a host of harms that they are too young to understand. But it turns out that our preferences for treating children as a special class are not limited to these situations. A diverse set of research—including bioethics studies, contingent valuation, and analyses of consumer behavior—all coalesce around the exact same asymmetry: people are willing to invest twice as many resources in protecting children as they are in protecting adults, even when each are equally vulnerable to the relevant risk. This pattern appears in the U.S. and Sweden, and appears again, unchanged, in the Philippines and rural Bangladesh.⁹ It appears for fatal risks and for harms as minor as the common cold.¹⁰ This pattern is not only empirically robust, it is also grounded in plausible and attractive moral theories that can justify differential treatment.¹¹

This Article is the first to explore the implications of this systematic asymmetry for tort law. It begins by adopting a deterrence-oriented view of torts.¹² It then expands its focus and re-analyzes the asymmetry from the perspective of tort law's compensatory norms¹³ and from the perspectives of corrective justice and civil recourse.¹⁴

From the perspective of deterrence, the asymmetric investment patterns suggest that, as a *prima facie* matter, duties of care should be twice as stringent when children rather than adults are at risk. Of course, many other factors affect a more complete deterrence analysis, such as whether regulatory agencies, market forces, or criminal liability already provide heightened deterrence of risk-taking behavior that disproportionately affects children,¹⁵ and whether the probability of detecting or suing tortfeasors differs depending on whether the victim is an adult or child.¹⁶ But courts rarely conduct such detailed analysis. Instead, they rely much more on intuition and common sense judgments. For example, the Texas Supreme Court's "cost-benefit analysis" of whether to allow parents to obtain lost consortium damages for the injury of their children occurred in the space of only one paragraph.¹⁷ The primary goal of this Article is to alter common sense judgments about the need for deterrence and create a new starting point for deterrence-oriented scholarship.

9. See *infra* Part II.B.

10. See *infra* Part II.A.

11. See *infra* Parts IV.A–B.

12. See *infra* Part III.

13. See *infra* Part III.B.3.

14. See *infra* Part IV.

15. See A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1438 (2010).

16. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998).

17. *Roberts v. Williamson*, 111 S.W.3d 113, 118–19 (Tex. 2003).

To motivate potential tortfeasors to take heightened levels of care, courts and legislatures should strive to move tort damages for children and adults toward a 2-to-1 ratio. They could do so by adopting existing reform proposals—such as scheduling damages—and modifying them to reflect the greater value we place on child safety. They could also move damages partially toward this ratio by modifying existing statutes and doctrines. For example, courts or legislatures could increase the probability that tortfeasors who injure children are found liable by asymmetrically altering statutes of limitations, affirmative defenses, or contingency fee regulations. They could also increase the amount that those tortfeasors pay by making asymmetric adjustments to collateral source rules, damage caps,¹⁸ punitive damage calculations, remittitur, or lost consortium claims.

To the extent that courts and legislatures wish to keep aggregate liability constant—perhaps because they do not want potential victims to pay for increased tort liability through their contractual relationships with tortfeasors or through higher insurance costs—they can increase child awards while making commensurate reductions in adult awards.

After establishing the case for these child premiums from the perspective of deterrence, this Article then turns its attention to other theories of tort law. It discusses the tension between compensation and deterrence, and argues that deterrence should take precedence. It then analyzes individual justice accounts of tort law. These accounts do not speak directly to allocation questions. That is a matter of distributive justice.¹⁹ Yet it is still useful to ask whether specific reforms—such as increasing damages for child victims through damage multipliers—are consistent with the three dominant individual justice accounts: allocative corrective justice, relational corrective justice, and civil recourse. If they are, that would count in their favor.

Increasing damages for child victims is consistent with corrective justice and civil recourse. It is consistent with civil recourse in a trivial sense because civil recourse theorists explicitly deny that civil recourse

18. Although other scholars have discussed the differential impact of damage caps on women, children, and the elderly, they have implicitly adopted a norm of formal equality rather than drawing on the relevant psychological and philosophical literature to defend deviations from formal equality. Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 959, 962, 963 (2008) (examining the disproportionate impact of caps on women and suggesting reforms that eliminated this discriminatory effect); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266, 1314 (2004) (identifying the disparate impacts of damage caps on women, the elderly, and fatally injured children).

19. See John Gardner, *What Is Tort Law For? Part 2: The Place of Distributive Justice* 4 (Univ. of Oxford, Legal Studies Research Paper No. 62/2013, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269615.

explains remedies.²⁰ More interestingly, it is also consistent with both major versions of corrective justice. These accounts impose a duty of repair on tortfeasors.²¹ They differ about what that duty entails. Allocative corrective justice imposes a duty to annul losses.²² Relational corrective justice imposes a duty to undo the wrong.²³ Increasing damages for child victims would be consistent with allocative corrective justice if we frame these increases as proxies for the secondary emotional harms of the child's parents. A child premium emerges from an asymmetry within the family. Parents feel their children's pain, but children don't necessarily feel their parents' pain. Parents feel responsible for the injuries that their children suffer, while children feel no reciprocal responsibility. This asymmetry causes injuries to children to reverberate upward to the parents more than injuries to parents reverberate downward to children. A child premium could reflect these asymmetrical secondary harms. Increasing damages for child victims fits even more comfortably within relational corrective justice. Because children trigger a heightened duty of care, negligence will tend to reflect a larger gap between what the tortfeasor did and what a reasonable person should have done. The greater the gap, the more egregious the wrong. The more egregious the wrong, the greater the remedy required to undo it. Although neither corrective justice account provides a way to precisely estimate the appropriate magnitude of a child premium, they each suggest that damages should be higher for child victims than for adult victims.

Overall, there is an exceptionally strong case—both empirically and philosophically—for implementing heightened duties of care and heightened damages for child victims within tort law. Although providing heightened security for children triggers several possible objections, none of them substantially weaken the case for child premiums. For example, child premiums are potentially in tension with principles of equality and equal respect because they treat adults and children differently. But this tension evaporates once we treat a person's entire lifespan as the appropriate unit of analysis for questions of distributive justice and equality, as Nagel, Rawls and Dworkin would.²⁴ Providing more security to children does not treat people differently than one another because all adults were once children. Child premiums shift safety resources *within* lives, but do not affect the distribution of safety resources *between* lives.

20. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 605 (2005).

21. JULES L. COLEMAN, RISKS AND WRONGS 318–24 (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 130–33 (1995).

22. COLEMAN, *supra* note 21, at 318–24.

23. WEINRIB, *supra* note 21, at 130, 131, 133.

24. *See infra* note 263.

Child premiums also reflect non-arbitrary distinctions, are unlikely to create expressive harms, and do not exacerbate problems of moral luck.

The remainder of the Article proceeds as follows. Part II outlines the relevant empirical work that explores both parental and societal preferences for investments in child safety. Part III lays out the implications of the parental and societal preferences introduced in Part II. In addition to discussing standards of care and damages generally, this part uses statutory damage caps and common law consortium claims to illustrate how legislatures and courts could move tort damages for children and adults toward a 2-to-1 ratio. Part IV argues that both heightened duties of care and increased damages for child victims are consistent with all three major individual justice accounts of tort law. Part V confronts various objections to providing heightened security for children. Part VI extends the discussion beyond tort law and explores the impact of child premiums on administrative cost-benefit analysis, criminal sentencing, and civil orders of protection.

II. ALLOCATING SAFETY RESOURCES

I am growing weary of having to debate on bills named after murdered children.

— Representative Sheila Jackson Lee of Texas²⁵

The public rhetoric surrounding children strongly suggests that their safety is more important than adult safety. In addition to the media coverage of the recent measles outbreak,²⁶ consider the following headlines that attempt to communicate the weight of various tragedies: “Fallen Bodies, Jet Parts and a Child’s Pink Book”;²⁷ “Palestinian death toll reached 205, including four children killed on a beach”;²⁸ “Typhoon Haiyan: In hard-hit Tacloban, children ripped from arms.”²⁹ Consider also the media coverage of the Syrian refugee crisis. Arguably the most talked-about photo related to that crisis was of a three-year old boy, laying lifeless, face-down in the surf.³⁰ By singling out child victims in these larger

25. 146 CONG. REC. 13749 (2000).

26. See *supra* note 1.

27. Sabrina Tavernise, *Fallen Bodies, Jet Parts and a Child’s Pink Book*, N.Y. TIMES, July 18, 2014, at A1.

28. Jodi Rudoren, *Israeli Invasion of Gaza Is Likely, Official Says; Brief Cease-Fire Is Set*, N.Y. TIMES, July 17, 2014, at A1.

29. Andrew Stevens & Paula Hancocks, *Typhoon Haiyan: In Hard-Hit Tacloban, Children Ripped from Arms*, CNN (Nov. 10, 2013, 11:37 AM), <http://www.cnn.com/2013/11/09/world/asia/philippines-tacloban/>.

30. Karen Miller Pensiero, *Aylan Kurdi and the Photos That Change History*, WALL ST. J. (Sept. 11, 2015, 4:16 pm), <http://www.wsj.com/articles/aylan-kurdi-and-the-photos-that-change-history-14420-02594> (“For years, the news media have published photos of Syrian refugees: images of the

tragedies, these and other media reports suggest that child deaths are a special tragedy, over and above the tragedy of mere adult death.³¹

This child-focused sentiment is also at play when politicians seek to solidify support for various laws. From 1997 to June of 1998, more than fifty laws passed that were named after child victims.³² This pattern is timeless. Megan's Law was inspired by a child who was abducted by a stranger, as were The Adam Walsh Act, The Jimmy Ryce Act, Jessica's Law, Stephanie's Law, Joan's Law, and Amber's Law.³³ Other laws respond to other risks. For example, Katie's Law affects the renewal of driver's licenses for elderly drivers, and was named after seventeen-year-old Katie Bolka, who was killed when a ninety-year-old woman ran a red light.³⁴ Shannon's Law was named after the fourteen-year-old victim of a stray bullet.³⁵ The Ricky Ray Hemophilia Relief Fund was named for a fifteen-year-old boy who was infected with HIV from contaminated blood.³⁶ Baylee's Law was named for a child victim of the Oklahoma City bombings.³⁷ As one commentator noted, Baylee's death was especially poignant despite the backdrop of a much larger tragedy: "At the mention of the Oklahoma City bombing, surely the first image that comes to mind is that of a fireman, carrying the bloodied, limp body of one-year-old Baylee

dead, wounded and displaced. But few of them seem to have made much of an impression—until last week, when people around the world saw photos of a 3-year-old boy named Aylan Kurdi, whose lifeless body had washed up on a Turkish beach."); Robert Mackey, *Brutal Images of Syrian Boy Drowned Off Turkey Must Be Seen, Activists Say*, N.Y. TIMES (Sept. 2, 2015), http://www.nytimes.com/2015/09/03/world/middleeast/brutal-images-of-syrian-boy-drowned-off-turkey-must-be-seen-activists-say.html?_r=0 ("Photographs and video of Aylan's lifeless body quickly spread across social networks in Turkey and then the rest of the world, posted by outraged observers, rights activists and reporters who suggested that the distressing images needed to be seen and could act as a catalyst for the international community to finally halt the war in Syria. . . . The images of the dead child were quickly absorbed into the vernacular of social media, used to create Photoshopped memes and tribute videos, with footage of the small body being removed from the beach that were difficult to watch.").

31. See also Mohsin Hamid, *The Great Divide*, N.Y. TIMES, Feb. 22, 2015, at MM100 ("massacre by the Pakistani Taliban of 150 people, including 134 children"); Ashley Southall, *Man Charged After 8 Members of Texas Family Are Found Dead*, N.Y. TIMES, Aug. 10, 2015, at A11 ("Eight members of a Texas family, including six children, were shot to death over the weekend . . ."); Karin Strohecker, *Children Among 71 Migrants Found Dead in Truck in Austria*, REUTERS (Aug 28, 2015, 5:20 PM), <http://www.reuters.com/article/us-europe-migrants-austria-police-idUSKCN0QX0Z920150828>.

32. See Dale Russakoff, *Out of Grief Comes a Legislative Force*, WASH. POST (June 15, 1998), <https://www.washingtonpost.com/archive/politics/1998/06/15/out-of-grief-comes-a-legislative-force/da09bca6-11af-401a-b4f5-8a3148bb1533/>.

33. *Id.*

34. Jim Vertuno, "Katie's Law" Another Hurdle for Senior Texas Drivers, HOUSTON CHRON. (Sept 1, 2007, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Katie-s-Law-another-hurdle-for-senior-Texas-1815404.php>.

35. Amy B. Wang, *Out of Tragedy, Father Led Crusade for 'Shannon's Law'*, AZ CENTRAL (Jan. 30 2015, 4:12 PM), <http://www.azcentral.com/story/news/local/phoenix/2015/01/30/tragedy-father-led-crusade-shannons-law/22570107/>.

36. See Ricky Ray Hemophilia Relief Fund Act of 1998, Pub. L. 105-369, 112 Stat. 3368 (1998) (codified as amended at 42 U.S.C. § 300c-22 (2012)).

37. See Baylee's Law, H.R. 4519, 106th Cong. (2000).

Almon-Kok from the rubble.”³⁸ CJ’s Home Protection Act was named after a two-year-old who died in a tornado.³⁹ Again, this one child’s death was singled out as a special tragedy above and beyond the twenty-one of CJ’s family and neighbors who also died the night a tornado ripped through their mobile home park.⁴⁰ Overall, there is a staggering difference between the number of laws named after child victims and the number of laws named after adult victims.⁴¹ Only rarely are laws named after adult victims.⁴² This pattern suggests that we place disproportionate weight on protecting children.

The remainder of this part explores more rigorous examinations of this sentiment and introduces a set of studies that attempt to quantify its strength. A host of studies find that people prefer to allocate health and safety resources to children rather than adults. People consistently allocate organs,⁴³ vaccines,⁴⁴ and other medical treatments⁴⁵ in ways that favor

38. Susan E. Wills, *Federal Funding of Human Embryonic Stem Cell Research - Illegal, Unethical and Unnecessary*, 18 J. CONTEMP. HEALTH L. & POL’Y 95, 143–44 (2001).

39. See CJ’s Home Protection Act of 2011, H.R. 1751, 112th Cong. (2011).

40. Dana Beyerle, *Bachus Plans Bill Requiring Weather Radios in New Mobile Homes*, GADSDEN TIMES (May 3, 2011, 10:39 PM), <http://www.gadsdentimes.com/article/20110503/news/110509899>.

41. Over the past twenty years, Congress has passed twenty-two laws named after children who were murdered or fatally injured in an accident. It has passed an additional ten laws named after victims aged eighteen to twenty-two (the vast majority of whom were female college students). Yet it only passed five laws named after adult victims from the general population. Congress also passed two laws named after soldiers, two laws named after police officers, and one law in honor of Christopher Reeve. I have excluded those from my tabulation of laws named after adults because the child premium concerns everyday tradeoffs between parents and children. Soldiers and police are at heightened risk of death, and present a special case. Christopher Reeve is also a special case, for obvious reasons.

42. The rare state laws named after adult victims include Kendra’s Law, which was named for a thirty-two-year-old woman who was thrown in front of a subway by a mentally ill homeless man; Sally’s Law, which was named after a nursing home patient; Penny’s Law, which was named after a thirty-nine-year-old victim; Rebecca’s Law, which was named for an adult victim of domestic violence; and Kate’s Law, which was named after a twenty-five-year-old Peace Corps volunteer who was murdered. *In re Manhattan Psychiatric Ctr.*, 728 N.Y.S.2d 37, 39 (N.Y. App. Div. 2001) (discussing Kendra’s Law); Altman & Altman LLP, *Boston Nursing Home Negligence: Sally’s Law Would Require Massachusetts Nursing Homes To Provide Copy of Patients’ Rights*, BOSTON INJURY LAWYER BLOG (July 9, 2009), http://www.bostoninjurylawyerblog.com/2009/07/boston_nursing_home_negligence.html (Sally’s Law); N.Y. PENAL LAW § 60.10 (McKinney 2009) (Penny’s Law); Todd Wilson & Sam Roe, *Illinois Senate Backs Stiffer Penalties for Torture*, CHI. TRIB. (May 17, 2011), http://articles.chicagotribune.com/2011-05-17/news/ct-met-illinois-legislature-0518-20110517_1_stiffer-penalties-nursing-homes-admissions-at-troubled-facilities (Rebecca’s Law); Angela M. Hill & Randy Kreider, *Obama Signs Kate Puzey Peace Corps Volunteer Protection Act*, ABC NEWS (Nov. 21, 2011), <http://abcnews.go.com/Blotter/obama-sign-kate-puzey-peace-corps-volunteer-protection/story?id=14998236> (Kate’s Law).

43. Paul Dolan et al., *Effect of Discussion and Deliberation on the Public’s Views of Priority Setting in Health Care: Focus Group Study*, 318 BRIT. MED. J. 916, 918 (1999); James Neuberger et al., *Assessing Priorities for Allocation of Donor Liver Grafts*, 317 BRIT. MED. J. 172, 172–73 (1998); Julie Ratcliffe, *Public Preferences for the Allocation of Donor Liver Grafts for Transplantation*, 9 HEALTH ECON. 137, 144–45 (2000).

44. U.S. DEP’T OF HEALTH & HUMAN SERVS. & U.S. DEP’T OF HOMELAND SEC., GUIDANCE ON ALLOCATING AND TARGETING PANDEMIC INFLUENZA VACCINE (2007) [hereinafter PANDEMIC FLU

children. Fourteen studies go beyond merely discovering this preference by seeking to quantify its strength. These studies take one of two general forms. The first set of studies interviews parents and asks them how they allocate safety resources between themselves and their children. The second set of studies asks respondents to play the role of a social planner. These studies offer insights into how citizens think that their governments should allocate health and safety resources. These two perspectives yield remarkably consistent results. They each suggest that people value child safety approximately twice as highly as adult safety.

A. *The Parental Perspective*

Beginning in 2000, nine studies have been conducted that compare how parents make health- and safety-related investments for themselves and for their children. Three of these studies examine real-world parental behavior. Six rely on parental responses to hypothetical questions about their willingness to pay (WTP) for enhanced safety that benefits either them or their child.⁴⁶ These studies examine fatal and non-fatal harms, and both risky and riskless choices. Despite this study diversity, all nine find a child premium. Estimates for the child premium are roughly consistent, ranging from 1.3 to 2.6, with a median of 1.8.

The three published revealed-preference studies found child premiums between 32% and 80%. The first study analyzed health utilization data for 6,557 U.S. households⁴⁷ and found that households were more likely to seek out healthcare for children than adults, controlling for the parent's self-assessment of the severity of the health issue.⁴⁸ Overall, the researchers found an 80% child premium.⁴⁹ The second study examined the relationship between a mother's cigarette use and her and her child's health and estimated that mothers value their children's health 58% higher than

GUIDANCE], <http://www.flu.gov/images/reports/PI%20vaccine%20allocation%20guidance.pdf>; DOROTHY E. VAWTER ET AL., FOR THE GOOD OF US ALL: ETHICALLY RATIONING HEALTH RESOURCES IN MINNESOTA IN A SEVERE INFLUENZA PANDEMIC (2010), <http://www.health.state.mn.us/divs/idepc/ethics/ethics.pdf>; Meng Li et al., *How Do People Value Life?*, 21 PSYCHOL. SCI. 163 (2005).

45. Dolan et al., *supra* note 43, at 918; Aki Tsuchiya et al., *Measuring People's Preferences Regarding Ageism in Health: Some Methodological Issues and Some Fresh Evidence*, 57 SOC. SCI. & MED. 687, 693 tbl.4 (2003).

46. Comparing these two figures reveals the existence and magnitude of the child premium.

47. Mark D. Agee & Thomas D. Crocker, *Does Parents' Valuation of Children's Health Mimic Their Valuation of Own Health?*, 21 J. POPULATION ECON. 231, 231 (2008).

48. *Id.* at 246.

49. *Id.* at 244.

their own.⁵⁰ The third study compared the use of seat belts to the use of child safety seats.⁵¹ The authors found a 32% child premium.⁵²

The six published stated-preference studies support the findings of the revealed-preference studies.⁵³ Child premiums appear in two recent studies of fatal risks. In 2010, researchers asked parents about their WTP to reduce the risk of a fatal food-borne disease.⁵⁴ They were asked about both themselves and one target child.⁵⁵ The results suggest an 80% child premium.⁵⁶ A similar child premium emerged from a 2011 study about tradeoffs between more effective asthma medications and small risks of fatal side effects.⁵⁷ It found a 103% child premium.⁵⁸ Two additional studies examined the child premium in the context of risks that presented the possibility of both illness and death. In one, subjects were informed about the risk of food-borne illnesses that could, in some cases, lead to death.⁵⁹ Parents were willing to pay 1.7 to 2.6 times more to reduce the probability that their child would contract one of these diseases.⁶⁰ In the second study, subjects were asked about their WTP for sunscreens that

50. Mark D. Agee & Thomas D. Crocker, *Children's Health Benefits of Reducing Environmental Tobacco Smoke Exposure: Evidence from Parents Who Smoke*, 32 EMPIRICAL ECON. 217, 218–19, 223, 234 (2007).

51. Glenn C. Blomquist et al., *Values of Risk Reduction Implied by Motorist Use of Protection Equipment: New Evidence from Different Populations*, 30 J. TRANSP. ECON. & POL'Y 55, 59–62 (1996).

52. Glenn C. Blomquist, *Self-Protection and Averting Behavior, Values of Statistical Lives, and Benefit Cost Analysis of Environmental Policy*, 2 REV. ECON. HOUSEHOLD 89, 102 (2004) (interpreting data from Blomquist, *supra* note 51). I excluded one revealed preference study—Robin R. Jenkins et al., *Valuing Reduced Risks to Children: The Case of Bicycle Safety Helmets*, 19 CONTEMP. ECON. POL'Y 397 (2001)—because it could only estimate the lower bound of a child premium.

53. I excluded two published stated-preferences studies that could not make clear predictions about a child premium because they were insufficiently clear about the relative risks that children and adults faced: Henrik Andersson & Gunnar Lindberg, *Benevolence and the Value of Road Safety*, 41 ACCIDENT ANALYSIS & PREVENTION 286, 288 (2009); Joanne Leung & Jagadish Guria, *Value of Statistical Life: Adults Versus Children*, 38 ACCIDENT ANALYSIS & PREVENTION 1208, 1210 (2006).

54. James K. Hammitt & Kevin Haninger, *Valuing Fatal Risks to Children and Adults: Effects of Disease, Latency, and Risk Aversion*, 40 J. RISK & UNCERTAINTY 57, 63–65 (2010).

55. *Id.* at 63.

56. *Id.* at 81. This study contained features that mitigate common concerns about hypothetical studies, including the use of visual aids to assist in the communication of risk information and controlling for the parents' subjective risk assessments. *Id.* at 63–67, 72, 80.

57. Glenn C. Blomquist et al., *Willingness to Pay for Improving Fatality Risks and Asthma Symptoms: Values for Children and Adults of All Ages*, 33 RESOURCE & ENERGY ECON. 410, 413–14 (2011). Like the 2010 study, this study contained features that mitigate common concerns about stated-preference surveys. See Sean Hannon Williams, *Statistical Children*, 30 YALE J. ON REG. 63, 77 (2013) for a full discussion.

58. Blomquist, *supra* note 57, at 423–24.

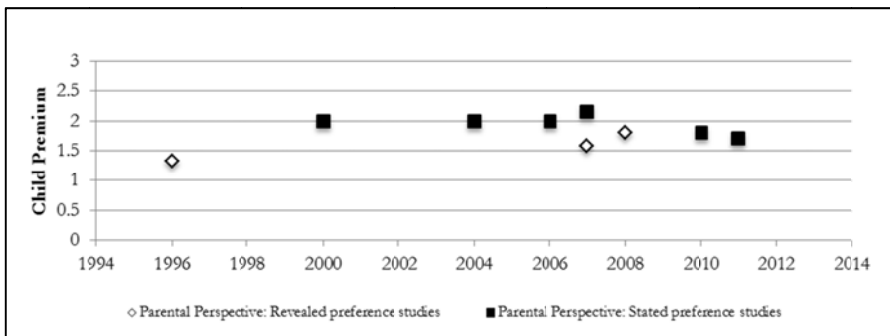
59. James K. Hammitt & Kevin Haninger, *Willingness to Pay for Food Safety: Sensitivity to Duration and Severity of Illness*, 89 AM. J. AGRIC. ECON. 1170, 1170–71 (2007).

60. *Id.* at 1175.

would reduce skin cancer risks.⁶¹ Parents again exhibited a 2x child premium.⁶² Parents also exhibit a child premium when making decisions about alleviating symptoms of a child's non-fatal illness. In one study, parents were willing to pay twice as much to relieve bronchitis symptoms in their children as they were to relieve those same symptoms in themselves.⁶³ Similarly, an earlier study in Taiwan found a near 2x child premium for preventing colds.⁶⁴ One notable aspect of these two studies is that each presents parents with *riskless* choices. Parents are asked their WTP to avoid symptoms from an inevitable future cold. This suggests that the numerous errors that people make when dealing with low probability events cannot explain the child premium.⁶⁵

Figure A summarizes the nine studies of parental preferences, by year of publication.

Figure A: The Parental Perspective.



B. The Societal Perspective

Bioethics researchers have explored common intuitions about a host of allocation issues related to health and healthcare. The studies that examine allocations between children and adults uniformly find preferences to allocate health resources to children. People give priority to children when allocating livers,⁶⁶ flu vaccines,⁶⁷ traffic safety dollars,⁶⁸ and unidentified

61. Mark Dickie & Shelby Gerking, *Valuing Children's Health: Parental Perspectives*, in ECONOMIC VALUATION OF ENVIRONMENTAL HEALTH RISKS TO CHILDREN 121, 137–40 (Pascale Scapecchi ed., 2006).

62. *Id.* at 144.

63. Mark Dickie & Victoria L. Messman, *Parental Altruism and the Value of Avoiding Acute Illness: Are Kids Worth More Than Parents?*, 48 J. ENVTL. ECON. & MGMT. 1146, 1156 (2004).

64. Jin-Tan Liu et al., *Mother's Willingness to Pay for Her Own and Her Child's Health: A Contingent Valuation Study in Taiwan*, 9 HEALTH ECON. 319, 319 (2000).

65. For a fuller discussion, see Williams, *supra* note 57, at 90–103.

66. Neuberger et. al., *supra* note 43, at 172–73; Ratcliffe, *supra* note 43, at 144–45.

life-saving treatments.⁶⁹ This is true of parents and adults without children, and both older and younger respondents.⁷⁰ This is also true in actual pandemic flu response plans.⁷¹ Again, children get priority over adults.

Five studies attempt to quantify the strength of this preference. One Swedish study asked adults to choose between traffic-safety programs that had different effects on different age groups.⁷² (For example, placing a pedestrian bridge by a school rather than by an office building would disproportionately benefit children.) Subjects valued five- to fifteen-year-old pedestrians 50% higher than twenty-five- to thirty-five-year-old pedestrians, and 94% higher than forty-five- to fifty-five-year-old pedestrians.⁷³ Another Swedish study found similar results: saving one five- to fifteen-year-old was equivalent to saving 1.4 thirty-five- to forty-five-year-olds, and 3.3 sixty-five- to seventy-five-year-olds.⁷⁴ Extrapolating beyond these discrete age groups, the studies suggest a 2.07x and 1.99x child premium respectively. Studies in the Philippines and Bangladesh produced similar results. Adults there exhibited child premiums between 1.3 and 2.3 (depending on the model and subsample).⁷⁵ A recent study in the U.S. that compared children to the elderly found even more extreme results; American subjects were indifferent between programs that saved 1 ten-year-old and 10 sixty-year-olds.⁷⁶ This pattern held for programs that prevented illnesses rather than fatalities and held even for older subjects.⁷⁷

Figure B summarizes the four studies that compared children to parent-aged adults.

67. Tsuchiya et al., *supra* note 45, at 693 tbl.4.

68. Olof Johansson-Stenman & Peter Martinsson, *Are Some Lives More Valuable? An Ethical Preferences Approach*, 27 J. HEALTH ECON. 739, 744 (2008).

69. Tsuchiya et al., *supra* note 45, at 693.

70. Johansson-Stenman & Martinsson, *supra* note 68, at 746.

71. PANDEMIC FLU GUIDANCE *supra* note 44.

72. Johansson-Stenman & Martinsson, *supra* note 68, at 744.

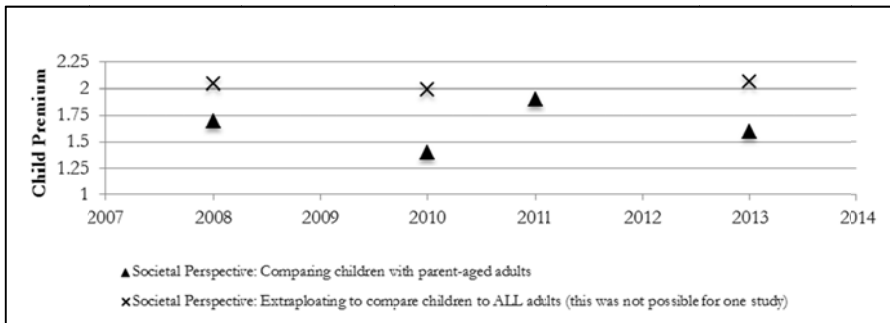
73. *See id.* at 744, 746, 747.

74. Fredrik Carlsson et al., *Preferences for Lives, Injuries, and Age: A Stated Preference Survey*, 42 ACCIDENT ANALYSIS & PREVENTION 1814, 1814 (2010).

75. Rosalina Palanca-Tan, *Age Preferences for Life-Saving Programs: Using Choice Modeling to Measure the Relative Values of Statistical Life*, 58 SING. ECON. REV. 1, 1 (2013) (Philippines); Olof Johansson-Stenman, Minhaj Mahmud, & Peter Martinsson, *Saving Lives Versus Life-Years in Rural Bangladesh*, 20 HEALTH ECON. 723, 729 (Bangladesh).

76. Daniel Eisenberg et al., *Valuing Health at Different Ages: Evidence from a Nationally Representative Survey in the US*, 9 APPLIED HEALTH ECON. & HEALTH POL'Y 149, 149, 152–53 (2011).

77. *Id.* at 152 (finding that 64% of older subjects without children under eighteen chose to save 100 ten-year-olds over 1000 sixty-year-olds).

Figure B: The Societal Perspective.

C. The Puzzle of Political Inaction: “If We Love Children So Much Then Why Is Ketchup a Vegetable?”

Of course, surveys are not the only potential source of information about societal preferences. Perhaps actions speak louder than words. Numerous sociologists and demographers have pointed out a persistent contradiction in our treatment and rhetoric surrounding children in the United States. On the one hand, parents generally think of their children as priceless. This view of children is also evident in public discourse. We say that children are our most precious resource.⁷⁸ On the other hand, many people have argued that we radically underinvest in children.⁷⁹ We cut education budgets, we define ketchup as a vegetable in school lunches, and we reduce spending on low-income housing that benefits children.⁸⁰ This pattern reveals a “persistently baffling contradiction[] between the private sentimentalization of our own children and the collective indifference to other people’s children.”⁸¹ Given this contradiction, it is fair to question whether the studies above accurately reflect societal preferences.

78. See e.g., FIRST FOCUS, CHILDREN’S BUDGET 2013 at 4 (citing polls indicating that even those who generally favor cutting government programs oppose cutting many programs aimed at benefitting children).

79. FIRST FOCUS, AMERICA’S REPORT CARD 2012: CHILDREN IN THE U.S. 3 (2012) (“Our political representatives often use rhetoric that suggests children are a legislative priority. Yet programs benefiting children have continually been put on the chopping block, and reauthorization of many important programs is slow to come.”).

80. JULIA ISAACS ET AL., URBAN INST., KIDS’ SHARE 2013: FEDERAL EXPENDITURES ON CHILDREN IN 2012 AND FUTURE PREDICTIONS 4 (2013) (describing the shrinking federal funds dedicated to child welfare and noting “[s]teep declines . . . in early education and care (12 percent), health (6 percent), and housing (6 percent)”).

81. VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN xii–xiii, 216–17 (1985); see also Doug Imig, *Building a Social Movement for America’s Children*, 12 J. CHILDREN & POV. 21, 30 (2006) (noting the paradox of widespread public support for children, but the absence of any political movements on their behalf).

The above studies provide an accurate assessment of societal preferences regarding investments in *safety*, even if they may not provide an accurate assessment of preferences regarding investments in the more expansive category of *child welfare*. Critics of U.S. policy toward children point to a broad array of programs that either don't exist or are underfunded.⁸² These programs implicate a complex web of interests and cultural meanings, not all of which are relevant to questions regarding the physical safety of children. People are generally in favor of shifting resources to children.⁸³ But many people bristle at the idea of big government. Many people are also averse to government interference in areas related to the family.⁸⁴ These commitments are sometimes in conflict to greater or lesser degrees. Consider expenditures on early childhood education. These would cost taxpayers money, increase the size of government, and threaten the idea that parents should be primarily responsible for raising their children. Early childhood education has also largely been framed as an anti-poverty issue, and many people do not see poor people as deserving government assistance.⁸⁵ Because of these conflicting commitments, societal preferences about early education programs are likely to be poor proxies for societal preferences about other areas where we might be called upon to balance the interests of children and adults. In the context of tort policy, there are no direct government expenditures that taxpayers must shoulder,⁸⁶ the tort system reduces the need for government regulation rather than increasing the size of government,⁸⁷ and tort liability is difficult to frame as an anti-poverty issue; tort law protects all children, not just poor children. Accordingly, pro-child sentiments face fewer counter-pressures in the area of tort policy than they do in other areas.

Tort law is also less likely to provide fertile ground for debates about who should be responsible for child welfare: governments or parents. These debates are most salient when some parents can control the relevant risks and can therefore judge other parents negatively for failing to do so. For example, in recent debates over whether the government should play a

82. See, e.g., ELIZABETH PALLEY & COREY S. SHDAIMAH, IN OUR HANDS: THE STRUGGLE FOR U.S. CHILD CARE POLICY 201–02 (2014).

83. See FIRST FOCUS, *supra* note 79, at 4.

84. Imig, *supra* note 81, at 24, 30 (arguing that many debates about government spending on children are entangled with debates about whether parents or the government should shoulder responsibility for child outcomes).

85. PALLEY & SHDAIMAH, *supra* note 82, at 202.

86. Citizens respond much more strongly to direct taxes than to government programs that merely increase the cost of consumer products. See George Loewenstein, Deborah A. Small, & Jeff Strnad, *Statistical, Identifiable, and Iconic Victims*, in BEHAVIORAL PUBLIC FINANCE 32, 38–39 (Edward J. McCaffery and Joel Slemrod eds., 2006) (discussing hidden taxes).

87. See *infra* Part III.C.

more active role in preventing parents from leaving children in hot cars, one person explained: “I would hate to have the government intervene on such basic parenting skills . . . I can bet \$1 million that parents remember to grab their cell phones, purses and such, but how the heck can they forget a human being they claim to love?”⁸⁸ The tension between parental and governmental responsibility is greatly reduced in the context of tort law. Tort law addresses many risks that parents—regardless of whether they are rich or poor, attentive or not—do not have sufficient information or capacity to protect against. Truck drivers who have not slept for twenty-four hours threaten everyone’s children as do product manufacturers who continue to sell products that their own testing reveals as dangerous.⁸⁹ Of course, for some set of risks, parents can do things to make their children substantially safer. Tort law already has a built-in safety valve to deal with instances where parents should have exercised greater care: comparative fault.⁹⁰ Because many tort risks are relatively hard even for “good” parents to control, and because tort law already has a tool to deal with negligent parents, tort policy preferences are unlikely to be as affected by debates about government versus parental responsibility as other areas of potential government involvement in child welfare.

If the arguments above are correct, and there are fewer contradictions among people’s commitments in the context of tort policy than in other areas of government intervention, then there should be smaller differences between private and public preferences about physical safety than about other aspects of child welfare. There are. For broader issues of child welfare, “[t]he saccharine myth of America as child-centered society, whose children are its most precious natural resources, has in practice been falsified by our hostility to other people’s children and our unwillingness to support them.”⁹¹ But in the realm of physical safety, the gap between private preferences about one’s own children and public preferences about other people’s children is negligible. In fact there is remarkable consistency between the public and private preferences elicited by the studies in Part

88. Kelly Wallace, *Should the Government Step in to Prevent Hot Car Deaths?*, CNN (July 15, 2014, 2:52 PM), <http://www.cnn.com/2014/07/10/living/hot-car-death-prevention-technology-parents/>.

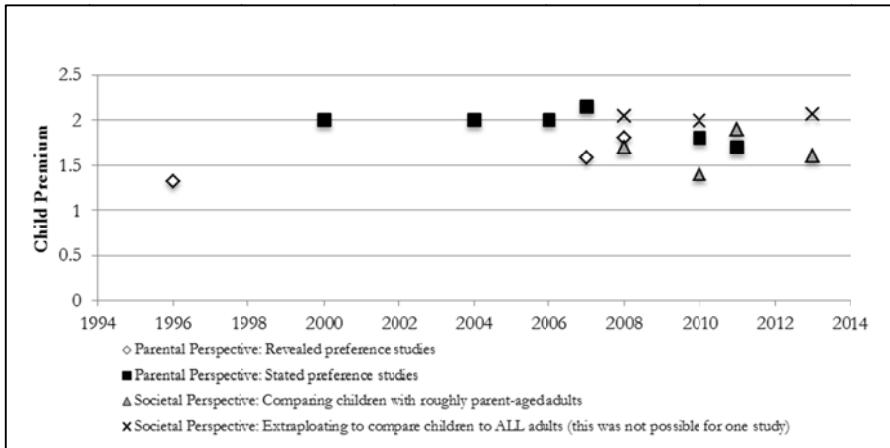
89. Justin Bachman, *Tracy Morgan Sues Wal-Mart Over I-95 Crash*, BLOOMBERG BUS.: BUSINESSWEEK (July 14, 2014), <http://www.bloomberg.com/bw/articles/2014-07-14/tracy-morgan-sues-wal-mart-over-i-95-crash>; Michael A. Fletcher, *GM Releases Results of Ignition-Switch Probe*, WASH. POST (June 5, 2014), https://www.washingtonpost.com/business/economy/gm-to-release-results-of-ignition-switch-probe/2014/06/05/31c09d90-ec3b-11e3-9f5c-9075d5508f0a_story.html.

90. There are variations among the states in how they incorporate parental negligence into their comparative fault schemes. The modern trend allows juries to take parental fault into account when determining damages for injured children. 2 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 358, at 429–33 (2d. ed. 2011).

91. W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN* 85 (1st ed. 1982).

II.⁹² Figure C combines the data from both sets of studies. These multiple estimates from multiple sources all converge on the same roughly 2-to-1 ratio.

Figure C: Parental and Societal Perspectives Combined.



D. The Puzzle of Jury Behavior

Given the consistency of preferences regarding allocating safety resources to children, one might wonder whether jurors have already imported de facto child premiums into tort law.⁹³ They have not. The easiest way to evaluate this claim is to examine damage awards. In the context of damages, existing evidence points to child discounts or inadequate child premiums.⁹⁴ One might then wonder whether jury awards are a more accurate way of gauging general preferences about children than the studies above. They are not. The child discounts and low child premiums that emerge from aggregated jury verdicts are the result of two features of jury trials. First, jurors are one time decision-makers who are

92. Agee & Crocker, *supra* note 47, at 244; Agee & Crocker, *supra* note 50, at 234; Blomquist et al., *supra* note 52, at 102; Blomquist et al., *supra* note 57, at 423–24; Carlsson et al., *supra* note 74, at 1814; Dickie & Gerking, *supra* note 61, at 144; Dickie & Messman, *supra* note 63, at 1156; Hammitt & Haninger, *supra* note 54, at 81; Hammitt & Haninger, *supra* note 59, at 1175; Liu et al., *supra* note 64, at 319; Johansson-Stenman & Martinsson, *supra* note 68, at 744, 746, 747; Johansson-Stenman, Mahmud, & Martinsson, *supra* note 75, at 729; Palanca-Tan, *supra* note 75, at 135008-1.

93. Jury sympathy could create child premiums that are too high from the perspective of deterrence. If tort liability were routinely ten times higher for children than for adults, then the studies in Part II would put downward pressure on payouts to children and/or upward pressure on payouts to adults.

94. See *infra* notes 95–98.

not given an opportunity to set damages in multiple cases at once. Second, they are constrained by specific jury instructions.

Back-of-the-envelope calculations from multiple sources suggest that tort law's existing child premium is either non-existent or too low. For wrongful death, Texas data suggest a 30% child discount.⁹⁵ Data from Jury Verdict Research (JVR) reports confirm this child discount.⁹⁶ Using mean verdict and settlement amounts for wrongful death, a 10% child discount emerges when comparing children to adult victims aged twenty-five to fifty; using medians instead of means, a 40% child discount emerges.⁹⁷ JVR data can also help estimate child premiums for permanent injuries. For quadriplegia and a wider range of paralysis injuries, a child premium of 20–25% emerges.⁹⁸

Practitioner treatises can provide indirect evidence about whether juries create de facto child premiums. The evidence is indirect because the telling aspect of practitioner treatises is that they systematically *fail to mention* the possibility that children do or should obtain larger awards than adults for equivalent injuries.⁹⁹ The only references to age in these treatises occurs

95. Frank Cross & Charles Silver, *In Texas, Life Is Cheap*, 59 VAND. L. REV. 1875, 1899, 1905 (2006).

96. These reports help attorneys and researchers estimate the value of various cases. *Jury Verdicts on Thomson Reuters Westlaw*, THOMSON REUTERS, <http://legalsolutions.thomsonreuters.com/law-products/westlaw-legal-research/litigator/jury-verdicts> (last visited February 20, 2016); see also Mark A. Cohen & Ted R. Miller, "Willingness to Award" *Nonmonetary Damages and the Implied Value of Life from Jury Awards*, 23 INT'L REV. L. & ECON. 165, 170–71 (2003) (using JVR data and citing other researchers who have used it).

97. See JURY VERDICT RESEARCH SERIES PERSONAL INJURY VALUATION HANDBOOK Nos. 4.10.7, 4.20.7 (2014). The JVR data is quite rough. For fatalities, it reports verdicts and settlements by age categories of 0–17, 18–24, 25–29, 30–34, 35–39, 40–44, 45–49, etc. The data do not show the number of cases within each group. For purposes of the calculations in the text, I assumed that each adult age group contained the same number of cases. The same limitation is present in JVR's paralysis data, but that section uses adult age categories of 18–29, 30–39, 40–49, etc. For the paralysis data, I compared the child payouts with the payouts for adults aged 25–49. Not much changes in the basic patterns with a wider definition of adult. For both fatality and paralysis data, JVR reports verdicts and settlement means and medians, but does not give the number of settlements or verdicts. Based on other research, I assumed that 75% of payouts would be settlements, and 25% would be verdicts. Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 130 (2009). This allowed me to make joint settlement/verdict estimates for tortfeasors. Using a settlement rate of 90% would eliminate the child premium. Using a settlement rate of 50% would increase the child premium to 30–40%.

98. See JURY VERDICT RESEARCH SERIES, *supra* note 97, No. 4.30.7. There is some evidence supporting an adequate child premium, but only for infants. Insurance companies appear to settle cases involving infant victims for more money than other victims; some have hypothesized that this is due both to potentially sympathetic juries and to actually sympathetic insurance agents. David M. Studdert & Michelle M. Mello, *When Tort Resolutions Are "Wrong": Predictors of Discordant Outcomes in Medical Malpractice Litigation*, 36 J. LEGAL STUD. S47, S62, S72–73 (2007).

99. Some practitioner materials ignore age altogether. See, e.g., Gail M. Richman, *Current Trends in Products Liability Verdicts and Settlements*, in 550 LITIGATION COURSE HANDBOOK SERIES: LITIGATION RISK ASSESSMENT FOR INSURANCE COUNSEL 45 (Practising Law Inst. 1996). Others suggest that children are not a special case. 2 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 12:1 (3d ed. 2008) ("The elements of damages which enter into the fixing of fair compensation for

when they note that damages for permanently injured children can be higher than comparably injured adults because, of course, children have more life-years ahead to live with pain and incur medical costs.¹⁰⁰ Again, these treatises do not indicate that damages for children are normally higher than damages for adults for equivalent injuries. This silence suggests that neither courts nor juries place a great deal of importance on whether the victim was a child.

The absence of a *de facto* child premium should not be a surprise given what the tort system asks juries to do. Jurors hear only one case. They do not generally have the opportunity to make judgments about the ratio of damages between two types of victims. Juries also answer a constrained set of questions.

For fatal accidents, jurors are asked to award damages based on the economic contributions that the decedent would have made to her surviving relatives.¹⁰¹ Adults make substantial economic contributions to children. Hence, awards that respond to the death of a parent can be high. But children do not generally contribute financially to the family. Even when they do, jury instructions require that damage awards be reduced by the amount of money that the parents saved by not having to raise the child.¹⁰² This leads to predictable child discounts in wrongful death cases.

For non-fatal accidents, we should again expect insufficient child premiums. For temporary injuries, juries might produce child discounts.

personal injuries to children are the same as those to be considered in cases where the injuries are to adults.”); 1 Bruce H. STERN & JEFFREY A. BROWN, *LITIGATING BRAIN INJURIES* § 2:9 (2008) (arguing that child brain injuries create similar problems as adult brain injuries); Richard D. Lawrence, *Maximizing Damages—Damages for the Grief and Bereavement of the Next of Kin—Death of a Child—Newborn and Very Young Children; Adult Children*, in 2 *LITIGATING TORT CASES* § 26:28 (2015) (opining that parents feel similar anguish upon the loss of their child regardless of whether the child was an infant at the time of death, a teenager, or a 35-year-old); see also Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 *DEPAUL L. REV.* 769, 791 (2003) (noting that noneconomic compensation under the plan was set at \$250,000 per victim with an identical increased benefit of \$100,000 per partner or child). Other treatises note that applying the same damage formulas to children tends to lower their awards. 2 *DOBBS ET AL.*, *supra* note 90, § 375, at 514 (“[A] limitation of damages to pecuniary losses results in virtual denial of recovery when the decedent is a child, a retired person or any person not in the labor market.”). To the extent that treatises discuss children separately, it is because they are often more vulnerable. *Id.* § 263, at 34–35 (“[O]perators of school buses . . . may owe special care proportioned to the children’s ‘inability to foresee and avoid the perils which they may encounter.’”); *id.* § 277, at 94 (“[W]hat counts as reasonable care with a child invitee may be different, since children may overlook dangers that adults would avoid.”).

100. See, e.g., Candice Singer Ram, *Elements of Damages*, in 465 *LITIGATION COURSE HANDBOOK SERIES: PROVING AND DEFENDING AGAINST DAMAGES IN PERSONAL INJURY LITIGATION* 1993 23, 30 (Practising Law Inst. 1993).

101. Sean Hannon Williams, *Lost Life and Life Projects*, 87 *IND. L.J.* 1745, 1751–53 (2012).

102. See, e.g., 2 *ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CAL., CIVIL JURY INSTRUCTIONS [CACI] 3922* (spring ed. 2015).

After all, children heal faster and are highly adaptable.¹⁰³ For permanent injuries, jury instructions often lead jurors to award damages in proportion to the victim's remaining life-years.¹⁰⁴ For these injuries, a major part of the award is future medical expenses. Because children live longer, this portion of the award will be higher for children than for equivalently injured adults. However, increasing damages in proportion to the number of life-years that victims have left would not result in a 2-to-1 ratio of damages. A five-year-old has seventy-four life-years left. A thirty-five-year-old has forty-five life-years left. If monetary damages for future medical costs and suffering are discounted at 3%, then basing damages on life-years would create a 21% child premium. Depending on the particular ages of the child and the parent-aged adult, a child premium rooted solely in life-years would be, roughly speaking, between 15 and 30%.¹⁰⁵ These are consistent with JVR data and far below the premium that emerges from the studies in Part II.¹⁰⁶

III. IMPLICATIONS FOR DETERRENCE

The studies in Part II revealed a child premium. In the context of tort law, this translates into child premiums—one embedded in damages calculations and one embedded within the standard of care. This part illustrates these implications by examining case law, scholarly tort reform proposals, and existing tort rules.

A. *General Implications: Standards of Care and Damages*

The studies in Part II have two straightforward implications for a deterrence-oriented tort system.¹⁰⁷ First, tort law should allocate liability in

103. David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1239 (1995) (“A toddler who lost an arm may be temporarily unhappy about and will emotionally suffer from an inability to tie her shoes, feed herself, or play with a ball that requires two hands, but the unpleasant feeling will generally pass as the child moves on to other activities.”); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 758–59 (2007) (discussing ways that juries and judges can disagree about the importance of this adaptability for purposes of setting and remitting damages).

104. Baldus et al., *supra* note 103, at 1164–65.

105. Williams, *supra* note 57, at 84.

106. Why do people exhibit this extra premium? Perhaps because they think that children have not had their “fair innings” yet. *See infra* Part V.B.

107. Deterrence-oriented tort theory tends to be welfarist and tends to define welfare in terms of satisfying preferences. For more detail on how satisfying parental and public preferences for child safety investments increases welfare, see Williams, *supra* note 57, at 85–100. Even outside the welfarist framework, parental and societal preferences have implications for tort law because the root of democratic theory is a connection between citizen preferences and government policy. Guy-Uriel E.

such a way that it produces a 2-to-1 ratio of damages for child and adult victims respectively. One mechanism for moving tort damages in that direction would be to apply a 2x multiplier to damages when the victim was a child.¹⁰⁸ This child premium would apply to negligence cases regardless of whether the victim and the tortfeasor are linked by a contractual relationship (e.g., medical malpractice) or are strangers (e.g., auto accidents). It would also apply in the context of strict liability. Second, in negligence cases courts should endorse heightened duties of care toward children and should require approximately twice as much care when children are among the class of foreseeable victims.¹⁰⁹

Two clarifications are in order. First, this part frames these discussions as ways to increase awards and levels of care for child victims, rather than the other viable alternative: decreasing awards and levels of care for adult victims. It does so in part for ease of exposition and in part because the studies themselves suggest that people are applying a child premium rather than an adult discount.¹¹⁰ Second, the analysis in this part does not apply to children as tortfeasors. This Article brackets questions of whether children

Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 611 (2007); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 320–23 (2014).

108. There are subtle differences between using a 2x multiplier and trying to achieve a 2-to-1 ratio directly. The studies in Part II focused on injuries that were arguably identical for both the child and the adult. For example, both the adult and the child might be exposed a risk of having seven days of cold symptoms, spending one year in the hospital, or death. (This assumes that death affects us all in the same way, which is a debatable proposition. For a fuller discussion of this philosophical thicket, see Williams, *supra* note 101, at 1762–63.) For these (arguably) equivalent injuries, a 2x child premium emerged. But tort law also deals with permanent injuries. For permanent injuries, children and adults do not suffer equivalent harm. A permanent injury might cause seventy years of harm to a child, but only thirty-five years of harm to an adult. This harm is twice as large for children (ignoring discounting of future years) regardless of any child premium. One might wonder whether parents would both take into account the greater harms *and* apply a child premium, perhaps leading to a WTP that was four times higher for children than for adults. This is possible and would support a 2x damage multiplier. However, the studies in Part II do not directly address the issue. A lot may depend on how we resolve the relevant philosophical questions about death. If death harms children *more* than adults, then the results from the studies in Part II would seem to apply to permanent injuries as well. This would suggest that policymakers should favor the ratio over a multiplier. If death affects us all in the same way, then the studies in Part II do not speak to permanent injuries even by analogy, and we might reason that a multiplier is more appropriate. This Article will not resolve those philosophical debates and will use examples of both multipliers and ratios throughout.

109. Efficiency concerns suggest that the standard of care and the damages be “aligned.” Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 84 (2011). That is, higher value victims (assuming any deviation from equal respect is justified) should be protected by a higher level of care such that the Hand formula still defines negligence. *Id.* at 97–99 (discussing the different way that tort law values rich and poor victims). Misalignments tend to cause underdeterrence. *Id.* at 134–36.

110. Hammitt & Haninger, *supra* note 54, at 70 tbl.2 (finding a VSL of \$7.5 million for parents and \$14 million for children); W. Kip Viscusi, *The Heterogeneity of the Value of Statistical Life: Introduction and Overview*, 40 J. RISK & UNCERTAINTY 1, 1 (2010) (noting that the VSL for adult workers is between \$7 million and \$8 million).

should be subject to heightened duties of care and heightened damages for their conduct toward other children.¹¹¹

1. *Standards of Care*

Regardless of whether the standard of care is determined under the traditional law and economics framework or under a more capacious and vague notion of reasonableness, the result is the same. Tortfeasors owe a heightened level of care to children. Although courts already ask jurors to consider heightened duties of care in some cases involving children,¹¹² they do so in fewer cases than they should, and in those cases where they have adjusted the level of care, they have not adjusted it sufficiently upward.

Under the traditional law and economics analysis, reasonableness is defined by the Hand formula as the level of care that is cost-justified considering the probability and magnitude of the harms.¹¹³ Determining the magnitude of harm for physical injuries (where almost no amount of money would make the victim indifferent between the compensation and the injury) is particularly problematic. To solve this problem, law and economics scholars shift their focus to the ex ante perspective and extrapolate from information about what victims would pay to reduce the relevant risk.¹¹⁴ For example, if the victim was willing to pay \$5 to reduce a risk of a non-pecuniary harm by 1 in 10,000, then the proper level of care should be determined by presuming that the magnitude of the harm was \$50,000.¹¹⁵ The ex ante perspective ensures that tort liability would “bring about the level of accidents and safety that the market would bring about if transactions were feasible.”¹¹⁶

Under this traditional account, at least as a prima facie matter,¹¹⁷ the level of care should be twice as high for children as for adults.¹¹⁸ This is so regardless of whether the accident occurs in a contractual or non-contractual setting.

111. Children owe a standard of care in accord with a child of the same age, intelligence, and experience. 1 DOBBS ET AL., *supra* note 90, §§ 134, 136–137. I doubt that children appreciate the extra protection that children deserve. If this is right, then children would owe the same duties of care to adults and other children.

112. 57A AM. JUR. 2D *Negligence* § 189 (2004).

113. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 178, 182 (2004).

114. *Id.* at 274.

115. *Id.*; RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 198 (7th ed. 2007).

116. Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 37 (1972).

117. See *infra* notes 142–145 and accompanying text for issues that might affect a more complete analysis.

118. This is so when both adults and children face similar harms.

In contractual settings like medical malpractice the standard of care should be a function of well-informed consumers' willingness to pay for safety.¹¹⁹ The studies in Part II.A provide that information.¹²⁰ They show that parents—the people who would be paying for increased safety for either themselves or their children—are willing to pay twice as much to reduce childhood risks. For purposes of quantifying the proper standard of care under the Hand formula, courts should therefore presume that the magnitudes of the harms are twice as high for children. All else being equal, the duty of care owed to children would then be twice as stringent as the duty of care owed to adults.¹²¹

Of course, consumer preferences are not the sole relevant factor in setting liability even in contractual settings. Two overlapping societal concerns generally increase the value of child safety: accounting for positive externalities and supporting beneficial parental norms. Children create positive externalities.¹²² For example, the predictable emergence of future taxpayers allows governments to borrow money. If parents underinvest in child safety because they do not consider the public benefits that children provide, then policymakers might want to increase child safety above and beyond what parents might prefer. Governments may also have an interest in expressing moral norms through law. Strengthening norms of child protection might, for example, lower government costs stemming from child protective services.¹²³ Again, societal interests might

119. There are caveats. Even well-informed consumers cannot avoid market failures caused by the possibility of adverse selection, and cannot avoid collective action problems caused by the need to incentivize injurers to develop safety systems that are public goods. When these market failures are present, tort law might impose a mandatory regime. But what should that regime look like? Here, consumer preferences matter again. Parents want a two-tier system of safety. For a discussion of these market failures, see Jennifer Arlen, *Contracting over Liability: Medical Malpractice and the Cost of Choice*, 158 U. PA. L. REV. 957, 963, 1010 (2010). For debates about whether consumers are well-informed enough to allow them to freely contract regarding tort liability, compare RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 209–16 (2008), with Tom Baker & Timothy D. Lytton, *Allowing Patients to Waive the Right to Sue for Medical Malpractice: A Response to Thaler and Sunstein*, 104 NW. U. L. REV. 233, 235–36 (2010).

120. The structure of the studies makes it very unlikely that their results were skewed by biases. Examining the ratio of two WTP estimates—which is how the child premium is calculated in stated-preference studies—substantially mitigates hypothetical question biases, wealth effects, framing effects, scope insensitivity, social desirability bias, and misperceptions of risk. For example, if people give systematically larger responses to hypothetical questions, they will give systematically higher responses for both of their WTP estimates. Taking the ratio of the two is likely to cancel out the biased elements of each. For a fuller discussion, see Williams, *supra* note 57, at 87–96.

121. See *supra* note 119 for a brief discussion of whether tort law is needed for deterrence in contractual settings.

122. Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 200 (1999); S. Philip Morgan & Rosalind Berkowitz King, *Why Have Children in the 21st Century? Biological Predisposition, Social Coercion, Rational Choice*, 17 EUR. J. POPULATION 3, 15 (2001).

123. See Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1128, 1135 (2010) (discussing ways that the state tries to influence family decisions through expressive legislation).

justify forcing parents to spend more on child safety than they would prefer.¹²⁴ The studies in Part II.B help shed light on this possibility. Those studies showed a slightly higher child premium,¹²⁵ but overall suggest that a 2x premium is in line with both the parental and societal perspective.

In non-contractual settings, the studies in Part II.B again provide guidance. Those studies did not elicit willingness to pay figures.¹²⁶ But for present purposes we do not need them. All we need is the ratio of two willingness to pay figures. That ratio tells us the proper *relative* levels of care for children and adults, even if it cannot tell us how high the *absolute* levels of care should be. The studies in Part II.B effectively provide us with that ratio. They reveal that people—whether old or young, parents or not—want to invest about twice as much in child safety as adult safety. Again, this means that, all else being equal, the level of care for children should be twice as high as the level of care for adults.¹²⁷

Adopting a broader conception of reasonableness does not change these results. As discussed above, the standard law and economics account defines reasonable precautions as cost-effective precautions. But jury instructions have not incorporated this definition.¹²⁸ They have instead allowed jurors wide discretion to interpret reasonableness in light of their own moral intuitions.¹²⁹ Those intuitions are likely consistent with the studies in Part II.

Although our intuitions may not tell us precisely how much more stringent the standard of care should be for children, they do confirm that

124. Early studies of parental spending behavior were misinterpreted to suggest that parents spend less on child safety than adult safety. Williams, *supra* note 57, at 74 n.61. In response to this possibility, the federal agency that oversees cost-benefit analyses moved quickly to ensure that child safety was valued at least as highly as adult safety, regardless of parents' actual preferences. Notably, this agency recommended valuing risk reductions to all people equally, with one exception: children. It recommended that child safety be valued at least as highly as adult safety, but left open the possibility that child safety could be more valuable. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 31 (2003) [hereinafter OMB A-4] https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf.

125. The median child premium among the studies of parental preferences was 1.8; the median for the studies of societal preferences was 2.

126. In non-contractual cases, the proper measure would be willingness to accept rather than willingness to pay. *See infra* note 156. But there are reasons to predict that the differences between the two measures would be eliminated once we take the ratio of two willingness to pay figures or the ratio of two willingness to accept figures. *See supra* note 120.

127. Standards of care that are generated by deterrence concerns should take account of the foreseeable number of adult and child victims. Reasonable people would handle a loaded gun with great care if they were in a crowd. They would handle a grenade with even more care, because it is capable of hurting more people. For activities that endanger both adults and children, the standard of care should reflect both the number of foreseeable victims and the proportion of them that are children.

128. Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 815 (2001).

129. *Id.* at 814; Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 640 (2003).

we owe heightened duties of care when our actions foreseeably endanger children. Consider two scenarios. In the first, you are driving down a street and see a tandem bicycle ahead. There are two adults riding it. In the second, there is one difference: a five-year-old is on the back of the tandem bike. Would you slow down more for the bike with the child? Would you attempt to provide more space between your car and the bike as you pass? I suspect the answer to both of these questions is yes. And this is true even though the child's position in the rear of a tandem bike makes it impossible for him to steer the bike and potentially veer into the road. Our intuitions here respond to the extra value we place on child safety.

Courts have so far failed to recognize the extra value we place on child safety. When discussing heightened duties of care owed to children, courts rely solely on the idea that children are more vulnerable than adults. Children run out into traffic, they are attracted to deserted buildings, etc.¹³⁰ For example, in *Foulke v. Beogher*, a motorist noticed an ice cream truck parked on the side of the road.¹³¹ The court held that this was sufficient to trigger a heightened duty of care.¹³² The court further held that this heightened duty was “proportional to the child’s age, experience, and inability to foresee and avoid perils.”¹³³ This grounds the heightened duty of care in a child’s increased vulnerability.¹³⁴ Similarly, the doctrine of attractive nuisance invokes a heightened level of care for children, but only because “children, due to their immaturity, have a natural propensity to touch, manipulate, explore, and climb dangerous things that pique their curiosity.”¹³⁵ Again, the court’s focus is on vulnerability.¹³⁶

The studies in Part II—which control for differences in vulnerability—show that children are more valuable regardless of whether they are more vulnerable. This suggests that courts have not adjusted the duty of care sufficiently upward in those cases where they have recognized heightened

130. See, e.g., *Bennett v. Stanley*, 748 N.E.2d 41, 48 (Ohio 2001) (“Despite our societal changes, children are still children. They still learn through their curiosity. They still have developing senses of judgment. They still do not always appreciate danger. They still need protection by adults.”).

131. *Foulke v. Beogher*, 850 N.E.2d 1269, 1273 (Ohio Ct. App. 2006).

132. *Id.* at 1275.

133. *Id.* at 1273.

134. The court’s discussion offers no evidence that it meant “age” to signal anything other than a forgivable lack of experience and judgment.

135. *Cobb ex rel. Knight v. Town of Blowing Rock*, 713 S.E.2d 732, 739 (N.C. Ct. App. 2011), *rev’d*, 722 S.E.2d 479 (N.C. 2012).

136. See also WEST’S COMMITTEE ON CALIFORNIA CIVIL JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS: CIVIL [BAJI] 3.38 (spring ed. 2015) (“The fact that children usually do not exercise the same degree of prudence for their own safety as adults, or that they often are *thoughtless and impulsive*, imposes a duty to exercise a proportional vigilance and caution on those dealing with children . . .” (emphasis added)); 1 DOBBS ET AL., *supra* note 90, § 141, at 443 (“The driver who sees children playing near the road must exercise care commensurate with the recognized danger that children *may dart out* into the road . . .” (emphasis added)).

duties of care. When children are both more valuable and more vulnerable, the standard of care should reflect both.

Courts should also impose heightened duties of care in those cases where children are not particularly vulnerable. For example, both adults and children are equally vulnerable to nurses who administer the wrong dose of medication.¹³⁷ Despite this equal vulnerability, pediatric hospitals should be investing more than other hospitals in preventing these potential tragedies.¹³⁸ Courts could facilitate this by increasing the level of care owed to children regardless of whether they are particularly vulnerable. Courts could make similar changes in products liability cases. In *Toups v. Sears, Roebuck & Co.*, the court applied a risk–utility test to determine whether the manufacturer of a hot water heater had a duty to warn of the dangers of storing flammable liquids nearby.¹³⁹ The court made no mention of the fact that the victim was a child, or that it was foreseeable that children would be at risk.¹⁴⁰ Again, the studies in Part II suggest that the foreseeability of child victims matters, and one way to translate this insight into tort law would be to alter the risk–utility test to account for the greater value given to protecting children.

2. Damages

In order to motivate differential levels of care under both negligence and strict liability regimes, courts should award greater damages in cases involving child victims. In its simplest form, courts could implement a 2x damage multiplier when the victim was a child.¹⁴¹ Of course, this is only the starting point of a more complete deterrence-based analysis. The more complete analysis would require a great deal of information that we currently lack, such as (just to highlight a few) the amount of deterrence achieved outside of the tort system through regulations and market pressures,¹⁴² the base rates for actionable injuries in both the child and adult

137. *Mother-of-Four Dies After Blundering Nurse Administers TEN Times Drug Overdose*, DAILYMAIL.COM (Feb. 23, 2011, 4:58 PM), <http://www.dailymail.co.uk/health/article-1359778/Mother-dies-nurse-administers-TEN-times-prescribed-drug.html> (describing a nurse accidentally killing an eighty-year-old by giving her ten times the proper dose of medication); JoNel Aleccia, *Nurse's Suicide Highlight Twin Tragedies of Medical Errors*, NBC NEWS (June 27, 2011, 8:39 AM), http://www.nbcnews.com/id/43529641/ns/health-health_care/t/nurses-suicide-highlights-twin-tragedies-medical-errors/#.VoyZVoQ-D-Y (same, but victim was eight months old).

138. Of course, policy concerns about access to healthcare and other issues are also relevant to any complete analysis.

139. 507 So. 2d 809 (La. 1987).

140. *Id.* at 819.

141. Multipliers yield slightly different results than reforms that seek to move the ratio of tort liability between children and adults to a 2-to-1 ratio. *See supra* note 108.

142. Polinsky & Shavell, *supra* note 15, at 1438.

populations, the corresponding claims rates and success rates,¹⁴³ and the relative strength of substitution effects¹⁴⁴ and risk compensation¹⁴⁵ in the adult and child populations. Policy concerns outside of deterrence are also relevant to any complete analysis. This Article does not attempt the impossible. Rather, it seeks to alter the starting point of any deterrence-oriented discussion. This, in turn, can influence common sense judgments about the need for deterrence that are likely to carry the day in the absence of an impossible-to-achieve complete account of deterrence.

A 2x multiplier is consistent with a recent reform proposal offered by Bob Cooter. He sought to define the proper level of wrongful death damages.¹⁴⁶ To understand his proposal, one first has to understand a bit more about the Hand formula. In *United States v. Carroll Towing Co.*, Judge Hand sought to develop a formula for determining when a defendant acts negligently.¹⁴⁷ He noted that defendants should be liable when the costs of taking the precaution (B) are less than the expected costs of the accident, determined by the product of the probability of loss (P) and the magnitude of loss (L).¹⁴⁸ Hence, the Hand formula defines negligence as instances where $B < PL$. Cooter reorganizes this formula by changing the unknown. He begins by asking: what safety investments would reasonable people require?¹⁴⁹ This can be derived from custom or it could be put to a jury as it is currently.¹⁵⁰ He then plugs this standard of care into the Hand formula, along with the probability of harm, to solve for damages (L).¹⁵¹

143. See Polinsky & Shavell, *supra* note 16, at 873–74 (discussing punitive damages and the probability that a tortfeasor will escape liability).

144. For example, increasing the cost of child bike helmets may cause fewer parents to buy them, decreasing child safety overall. I suspect, contrary to this prediction, that there is relatively little elasticity in the demand for child safety. To the extent that child bike helmets become more expensive, parents are likely to still buy the child a helmet, but to forgo one themselves. Of course, this effect would need to be accounted for in any complete deterrence analysis. But it is potentially less important because parents have other ways of producing safety for themselves like riding more carefully.

145. John Adams & Mayer Hillman, *The Risk Compensation Theory and Bicycle Helmets*, 7 INJURY PREVENTION 89 (2001). For example, if parents know that their child's bike helmet is more protective, they might allow her to ride faster or in more dangerous conditions. But the pressures that tort law creates often motivate manufacturers to implement invisible safety enhancements. Parents are unlikely to see, by visible inspection, that one bike helmet is safer than another. If tort law moves the entire industry, then there may not be gains for a manufacturer to advertise the enhanced safety because it will not differentiate its product from its competitors' products.

146. Robert Cooter, *Hand Rule Damages for Incompensable Losses*, 40 SAN DIEGO L. REV. 1097, 1099, 1115–20 (2003) (justifying Hand rule damages primarily on deterrence grounds, but also attempting to make a more controversial argument that they are consistent with fairness and corrective justice).

147. 159 F.2d 169, 173 (2d Cir. 1947).

148. *Id.*

149. Cooter, *supra* note 146, at 1099.

150. *Id.* at 1112.

151. *Id.* at 1112–13.

Under these so-called Hand rule damages, we must ask whether reasonable people believe that there should be a heightened duty of care when the potential victims are children. One way of getting at this would be to ask about a reasonable person's preferences for allocating risk-reducing resources between adults and children. The studies in Part II do just that. They show that people invest twice as much in child safety as adult safety, even when the risks they face are identical. This suggests that the standard of care is twice as stringent for children. Plugging this into Cooter's formula, the damages for child victims should be twice as high as for adult victims.

Child premiums are also consistent with a set of proposals built around willingness to pay figures. Eric Posner, Cass Sunstein, Joni Hersch, and Kip Viscusi have suggested importing the value of a statistical life (VSL) from administrative law to tort damages.¹⁵² The VSL is used by federal agencies to value reductions in fatality risks and is derived from studies that examine people's willingness to pay for safety enhancements.¹⁵³ Because it is rooted in willingness to pay, the studies in Part II.A suggest that the VSL should be twice as high for children as for adults.¹⁵⁴ Accordingly, using the VSL as a measure of tort damages could have an even greater impact than its proponents have realized: it could result in differential damages for adults and children. In a similar vein, Mark Geistfeld has suggested relying on willingness to pay judgments when setting non-economic damages.¹⁵⁵ Modifying Geistfeld's proposal slightly, the jury should be asked: "What is the minimum amount of money that a reasonable *parent* would have been willing to pay in exchange for eliminating a risk of 1 in 10,000 of *their child* ending up with" the amount of pain and suffering that the child experienced?¹⁵⁶ Damages would be that

152. Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 587–90 (2005); Joni Hersch & W. Kip Viscusi, *Saving Lives Through Punitive Damages*, 83 S. CAL. L. REV. 229, 239–40 (2010). Of course, their suggestions differ in subtle ways. *Id.* at 240–42.

153. Williams, *supra* note 57, at 70.

154. See *id.* at 64–106 for a full defense.

155. Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 805, 818–19 (1995).

156. *Id.* at 818–19. I have altered Geistfeld's formulation slightly to clarify that the relevant WTP relates solely to avoiding the pain and suffering and not the entire injury. Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 107–08 (2006). This modification of Geistfeld's jury instruction bundles multiple harms together, including the child's pain and suffering and various harms that the parent suffers such as mental anguish in seeing her child suffer and her loss of consortium. Presumably, all of these costs are incorporated into a parent's WTP. A state that relied on a parental perspective would then be implicitly accepting claims of mental anguish and filial consortium. This is problematic to the extent that state policy might reject these forms of damages. However, courts that reject mental anguish and filial consortium claims often do so because of evidentiary concerns, measurement concerns, and fears of runaway liability. See *infra* Part III.B.2. None of these arguments are convincing when applied to this context. No one doubts that parents suffer mental distress when

amount, multiplied by 10,000.¹⁵⁷ The studies in Part II show that this question will yield larger damage awards than the corresponding question that asks about the parent's willingness to pay for her own safety. Hence, Geistfeld's proposal—like the proposals of Posner, Sunstein, Hersch, and Viscusi—would generate child premiums when properly understood.

Other reform proposals require other alterations to accommodate child premiums. Several scholars have sought to create damage schedules for non-economic damages.¹⁵⁸ To the extent that such schedules currently rely on age, it is only to reflect life-years.¹⁵⁹ But this is insufficient. Any damage schedule should also reflect the extra value we place on child safety.

Because judges and legislators may not feel that they can simply implement a child multiplier or one of the other reforms mentioned above, the next subpart discusses how judges and legislators can make asymmetric adjustments to existing doctrine to increase damages for child victims.

B. Specific Implications: Caps and Consortium

In the absence of a wholesale redesign of tort damages, judges and legislators are left with a host of doctrinal tools that they can use to increase tort liability in cases where the victim was a child. For example, courts or legislatures could asymmetrically alter statutes of limitations, affirmative defenses, contingency fee regulations, collateral source rules, damage caps, punitive damage calculations, remittitur, or lost consortium claims. This section uses damage caps and lost consortium claims to illustrate pathways for implementing child premiums.

their child suffers pain, so evidentiary concerns about fraud are largely absent. Further, using the parental perspective within Geistfeld's formula *solves* measurement problems rather than creating them. Finally, the studies in Part II suggest that the extra tort liability is not merely wasteful, but produces the deterrence that parents demand.

Geistfeld prefers to use willingness to accept (WTA) rather than WTP in non-contractual settings. I ignore this complication here for ease of exposition. For purpose of the child premium, it should not matter whether preferences are measured as WTA or WTP as long as the same measure is used for both child and parent. *See supra* note 126.

157. Geistfeld, *supra* note 155.

158. Avraham, *supra* note 156, at 101–106; James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 *YALE J. ON REG.* 171, 177–88 (1991); Patricia M. Danzon, *Medical Malpractice Liability*, in *LIABILITY: PERSPECTIVES AND POLICY* 101, 121–24 (Robert E. Litan & Clifford Winston eds., 1988); Peter A. Ubel & George Loewenstein, *Pain and Suffering Awards: They Shouldn't Be (Just) About Pain and Suffering*, 37 *J. LEGAL STUD.* S195, S208 (2008); W. Kip Viscusi, *Empirical Analysis of Tort Damages*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS* 460 (Jennifer Arlen ed., 2014) (discussing schedules for non-economic damages).

159. Avraham, *supra* note 156, at 95, 111; Baldus et al., *supra* note 103, at 1164–65, 1239.

1. *Statutory Damage Caps*

Caps on damages take three major forms. They can cap total damages, non-economic damages, or punitive damages.¹⁶⁰ Caps are blunt tools that tend to hurt the neediest victims most.¹⁶¹ This section is not meant to endorse or reject such caps. Rather its goal is to argue that, to the extent we have caps, they should be higher for child victims than for adult victims.

Legislators can craft caps that shift liability away from adult victims and toward child victims. For example, legislators could enact two caps, one for children and one for adults. For caps on total damages, a good starting place would be to enact a cap for children that is twice as high as the cap for adults. Of course, this is only a starting point, and is likely to be a floor. Because damage caps are imprecise tools for controlling liability, we should not be surprised to find that they cannot precisely create a 2-to-1 ratio of damages. Only caps that were stringent enough to capture all cases would make tort payouts conform to this ratio. As caps become less stringent, more and more cases are unaffected by them, and a cap that on its face reflected a 2-to-1 ratio would only partially push actual payouts toward that ratio. This suggests that as total damage caps become less stringent, the difference between the child and adult caps should increase to exacerbate the effect of caps on those cases that the caps reach. Similarly, greater ratios would be required for caps that only affect part of the award—such as caps on non-economic damages and caps on punitive damages.¹⁶²

Currently, damage caps do not even reflect a 2-to-1 ratio on their face. The vast majority of caps apply equally to adults and children.¹⁶³ But there are exceptions. In New Hampshire, some caps allow higher awards when the victim was an adult. There, lost consortium claims for wrongful death

160. Ronen Avraham, *Database of State Tort Law Reforms (5th)* (Univ. of Tex. at Austin – Sch. of Law, Law and Econ Research Paper No. e555, 2014).

161. Finley, *supra* note 18, at 1292–93; Shepherd, *supra* note 18, at 962; Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 153–54 (2014); Charles Silver & David A. Hyman, *Access to Justice in a World Without Lawyers: Evidence from Texas Bodily Injury Claims*, 37 FORDHAM URB. L.J. 357, 380 (2010).

162. Each of these caps also requires special attention because they may affect children and adults differently. For example, caps on non-economic damages are likely to have little effect on payouts for permanently disabled children, but very large effects on payouts for children who die from their injuries. Finley, *supra* note 18, at 1292–93 (finding that only 14% of the total tort award for disabled children was for non-economic damages, but that awards for dead children were 98% non-economic damages). Caps on punitive damages may affect child victims more, if juries are more likely to award punitive damages for child victims. Of course, other factors affect the ultimate analysis. For example, caps may affect the location of doctors and availability of medical care. The primary goal of this paper is to add the child premium to those nuanced discussions.

163. See, e.g., FLA. STAT. ANN. § 768.73 (West 2011); IND. CODE ANN. § 34-18-14-3 (West 2011); VA. CODE ANN. § 8.01-38.1 (2015).

are capped at \$150,000 for a dead spouse and \$50,000 for a dead child.¹⁶⁴ Even among the caps that provide more damages in response to child injuries, the ratios appear too low. Wisconsin's caps are closest to the 2-to-1 ratio—at least nominally. Wisconsin caps lost consortium damages stemming from a fatally injured child at \$500,000 and caps lost consortium damages for fatally injured adults at \$350,000.¹⁶⁵ This reflects a 43% child premium. However, this premium is likely swamped once we account for the fact that consortium damages are only part of the overall liability award. The economic portion of damages in these cases is likely to be zero for dead children, but could be substantial for dead adults who were gainfully employed.¹⁶⁶ The combined effect of capped consortium damages and uncapped economic damages might well result in much lower awards in cases with child victims. A former Ohio statute provided a cap on non-economic damages of \$35,000 for each year that the victim could be expected to live.¹⁶⁷ But, as discussed above, treating all life-years equally produces only a 15–30% child premium.¹⁶⁸

At a minimum, caps should reflect a 2-to-1 ratio on their face. Although this would only partially move overall liability toward such a ratio, it is difficult to expect much more from a tool as blunt as damage caps. Enacting such caps may also have useful expressive value.¹⁶⁹ Such caps could signal that children deserve special protection. In this way, caps could reinforce and make more explicit the common intuitions reflected in the studies in Part II.¹⁷⁰

2. *Common Law Loss of Consortium Claims*

Loss of consortium claims seek compensation for the harm that third parties suffer when they lose the victim's society and companionship. Spousal consortium claims are the most widely accepted.¹⁷¹ Parental and filial consortium claims are more controversial.¹⁷² A court that recognizes filial consortium allows parents to recover when their child is injured or

164. N.H. REV. STAT. ANN. § 556:12 (LexisNexis 2014).

165. WIS. STAT. ANN. § 895.04 (West 2006).

166. Williams, *supra* note 101, at 1751–53.

167. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092–93 (Ohio 1999).

168. See *supra* note 105 and accompanying text.

169. This suggests an intriguing tension between signaling and incentives. Caps that create the correct signal (that children should get twice the protection as adults) might create inadequate incentives to achieve this result.

170. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 407–408 (1997).

171. 2 DOBBS ET AL., *supra* note 90, § 392.

172. *Id.*; Vitro v. Mihelcic, 806 N.E.2d 632, 635–36 (Ill. 2004).

killed.¹⁷³ A court that recognizes parental consortium allows children to recover when their parent is injured or killed.¹⁷⁴ These complementary consortium claims normally stand or fall together in wrongful death cases but are treated separately for non-fatal injuries.¹⁷⁵ There, consortium claims are governed by common law.¹⁷⁶ Courts have relied heavily on intuition and common sense judgments when crafting common law consortium policy. For example, although the Texas Supreme Court purportedly conducted a cost-benefit analysis of filial consortium, its discussion occurred in the space of only one paragraph.¹⁷⁷

The discussion in Part III provides fresh insights into debates about filial consortium and suggests that current judicial trends are moving in the wrong direction. The arguments presented above should help adjust judicial common sense by lending additional support for filial consortium while simultaneously eroding support for parental consortium. This cuts against current trends. The high courts of California, Ohio, and Florida have held that parental and filial consortium claims implicate the same policy concerns and hence should stand or fall together.¹⁷⁸ But they do not—and should not. There is a widespread consensus that child safety is significantly more valuable than adult safety. Shifting liability from parental consortium to filial consortium will better align tort law with the deterrence-related preferences of parents and non-parents alike.

The studies in Part II also suggest revisions to arguments commonly lodged against filial consortium.¹⁷⁹ The four most common arguments are, first, that like all non-economic harms, filial consortium claims present measurement problems;¹⁸⁰ second, that filial consortium will create the risk of double recovery;¹⁸¹ third, that allowing filial consortium will open the floodgates of litigation and lead many other relatives and friends to seek lost consortium;¹⁸² and fourth, that filial consortium claims, like any new

173. Richard E. Kaye, *Loss of Consortium in Parent-Child Relationship*, in 131 AM. JUR. 3D *Proof of Facts* 187 § 2 (2013).

174. *Id.* § 5.

175. *Elgin v. Bartlett*, 994 P.2d 411, 417 (Colo. 1999).

176. *Id.*

177. *Roberts v. Williamson*, 111 S.W.3d 113, 117 (Tex. 2003).

178. *Cruz v. Broward Cnty. Sch. Bd.*, 800 So.2d 213, 213 (Fla. 2001); *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052, 1061 (Ohio 1993); *Baxter v. Superior Court*, 563 P.2d 871, 872 (Cal. 1977).

179. A fifth reason is sometimes given by courts: namely, that the legislature should decide. *See, e.g., Elgin*, 994 P.2d at 420. This final reason merely shifts the audience of this Article from courts to legislatures.

180. For a summary of these arguments, see Kaye, *supra* note 173, §§ 2, 5.

181. *Id.* Although each of the first two critiques is equally true for spousal consortium claims—which the vast majority of courts allow—some courts are wary of adding even more of such claims. *Id.*

182. *Id.*

liability, will increase insurance premiums.¹⁸³ The studies in Part II do not offer an easy way to solve the first problem (although some of the reform proposals from Part III do). The fourth problem implicates any increase in liability, not just increases from filial consortium, so I will delay discussing that problem until the next section. The remainder of this section will focus on arguments two and three: double recovery and floodgates.

Contrary to what several courts have argued, the possibility of “double recovery” would be a positive rather than a negative aspect of filial consortium claims. Consider a stylized example. A perfectly functioning jury would award the child \$70,000 for her pain and suffering and award the parents \$30,000 for their lost consortium. Courts worry that jurors will not be able to differentiate the parents’ harms from the child’s harms.¹⁸⁴ More specifically, courts worry that part of the child’s non-economic damages reflect the disruption of the parent-child relationship, and juries might award this portion of damages to both the child under the heading of pain and suffering and again to the parents under a filial consortium claim.¹⁸⁵ In the above hypothetical, jurors might award \$140,000 (\$70,000+\$70,000) rather than \$100,000 (\$70,000+\$30,000). This worst-case scenario could actually be a positive development because it inflates awards for child victims, but does no more than double them.¹⁸⁶ In cases where non-economic harms dominate (as when children die)¹⁸⁷ the erring jury may double awards.¹⁸⁸ In cases where economic harms dominate (as when children are injured)¹⁸⁹ an erring jury would increase awards for children, but would not go so far as to double them. Either way, damages would have moved closer to a 2-to-1 ratio.

To combat the possibility of open floodgates, some courts have sought to draw clear, non-arbitrary lines between relatives who can recover for lost consortium and those who cannot. The studies in Part II do not suggest a particular line, but they do offer a rebuke of one common line: dependence. Several courts have used dependence as their touchstone, allowing dependent children to recover for the death of a parent, but not allowing

183. *Id.*

184. *He v. Litchfield Cnty. Obstetrics & Gynecology, P.C.*, No. LLICV1060025458, 2012 WL 1003779 (Conn. Super. Ct. Feb. 29, 2012); *Elgin*, 994 P.2d at 418; *Baxter v. Superior Court*, 563 P.2d 871, 873 (Cal. 1977).

185. *Sizemore v. Smock*, 422 N.W.2d 666, 672 (Mich. 1988); *Russell v. Salem Transp. Co.*, 295 A.2d 862, 864 (N.J. 1972) (discussing double recovery in parental consortium).

186. This is a positive from the perspective of deterrence. However, it might be objectionable on compensatory grounds.

187. *Finley*, *supra* note 18, at 1284–87, 1292–93.

188. Overall awards would only be doubled if the parents suffered no emotional harms in reality, but the erring jury assumed that they suffered the same amount of pain as their child.

189. *Finley*, *supra* note 18, at 1284–87, 1292–93.

parents to recover for the death of a child.¹⁹⁰ Dependence is a particularly poor dividing line. It shifts deterrence resources from child victims to parental victims in direct opposition to the preferences of both parents and non-parents.

3. *Navigating the Tension Between Compensation and Deterrence*

Lost consortium claims provide a useful context to explore the tension between compensation and deterrence. Children are sympathetic figures. Providing parental consortium shifts money to living children. Filial consortium merely benefits living parents, who are perhaps not as sympathetic as an orphaned or near-orphaned child. To the extent that judges value compensation, they might favor parental consortium over filial consortium. Judges may view compensation as equally important or even more important than deterrence even though the Third Restatement rejects compensation as a goal of tort law.¹⁹¹ Instead it views the central goals of tort law as generating deterrence and providing redress for wrongs.¹⁹²

We should value deterrence over compensation. Suppose we must choose between allowing a child to die and allowing that child to become destitute (because, perhaps, we refuse to compensate the child for the death of his parents and he has no means to support himself). Unless the destitute child's life is not worth living, he is better off being alive than dead.¹⁹³ For the same reason, it is better, from the child's perspective, to expose him to a risk of becoming destitute than to an equivalent risk of death. Even if courts focus solely on child welfare, they should favor deterrence over compensation.

C. *The Specter of Increased Insurance Premiums*

Judges and legislators have been particularly sensitive to the effect of extra tort liability on insurance premiums.¹⁹⁴ Increased tort damages—whether from filial consortium, higher damage caps, or any other doctrinal change that increases the amount or probability of liability—potentially

190. See, e.g., *Roberts v. Williamson*, 111 S.W.3d 113, 117 (Tex. 2003); *Norman v. Mass. Bay Transp. Auth.*, 529 N.E.2d 139, 141 (Mass. 1988).

191. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 6 cmt. d (AM. LAW INST. 2010).

192. *Id.*

193. This conclusion assumes answers to thorny philosophical questions about whether one can be harmed by death, and hence, whether one can compare the harms of death to other harms. For a discussion of those debates, see Williams, *supra* note 101, at 1762–63.

194. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1523 (1987); see also *Elgin v. Bartlett*, 994 P.2d 411, 418 (Colo. 1999).

drive up insurance premiums. But there are reasons to question whether implementing child premiums will invariably increase aggregate liability, and reasons to question whether increased liability will increase insurance premiums. Even if insurance premiums do increase, they are likely to provide insureds with a benefit that they find worth paying for: increased safety for children.

The arguments in Part III.A spoke only to the allocation of liability, not its total amount. Therefore, courts could redistribute rather than increase liability. For example, in a state that recognized parental consortium, courts could simultaneously reject parental consortium and recognize filial consortium. If aggregate liability stays relatively constant then so too should aggregate insurance premiums.¹⁹⁵

Insurance companies have a similar option. Because insurers offer a multifaceted product, they can adjust coverage amounts or exclusions rather than adjusting the price of premiums. They could respond to increased liability for child victims by reducing their liability for adult victims. They could do so by, for example, offering different coverage limits for harms to adult and child victims. This would keep premiums stable and re-allocate liability to better reflect the studies in Part II.

Insurance companies have two additional ways to reduce the effect of increased liability on premiums, and competitive pressures create incentives to use them. First, insurance companies can reduce their overall liability by using their unique knowledge to encourage safer behavior among insureds. Second, they can use their unique leverage to lobby for legislation that improves safety.¹⁹⁶ Both strategies allow them to offer less expensive premiums.¹⁹⁷ Insurance companies have a large monetary stake in reducing many types of accidents.¹⁹⁸ They also collect massive amounts of data on losses and employ professional risk assessors.¹⁹⁹ Although individuals may not have sufficient information or mathematical ability to calculate the cost-effectiveness of erecting a three-foot fence versus a five-foot fence around a pool, insurance companies have such know-how.²⁰⁰ They can then use this knowledge to influence the behavior of insureds. They can—and do—refuse coverage or increase premiums for insureds

195. Of course, insurance premiums might rise for some people (e.g., those whose activities create more risk for children than for adults) and fall for others (e.g., those whose activities create more risk for adults than for children). These effects might be objectionable under a fuller analysis. For example, it is possible that increased day care costs could price out some parents, and force them to use potentially more dangerous unregulated care options.

196. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 206, 210, 224 (2012).

197. *Id.* at 219–31.

198. *Id.*

199. *Id.*

200. *Id.*

who do not comply with various safety measures.²⁰¹ For example, a homeowner's insurance policy might give substantial discounts for the installation of smoke detectors and fire extinguishers.²⁰² Insurance companies can thereby create private safety codes that can be stricter than the relevant government requirements and that can be applied to insureds in a more nuanced manner.²⁰³ When more uniform codes are appropriate, insurers can and do lobby governments to adopt safety measures like air bags, restricted driver's licenses for teens, and building codes.²⁰⁴ This regulatory role of insurance companies partially mitigates courts' concerns about insurance premiums. In the short term, increased tort liability for child victims may increase insurance rates. But as insurance companies sponsor laws to protect children and encourage effective preventative strategies through discounts, the price of insurance may fall again.

Of course, there is always the possibility that insurance premiums will remain elevated in response to increased liability for child victims. But this risk must be balanced against the potential benefits of increased liability. Namely, such liability harnesses the regulatory power of insurance companies to significantly increase childhood safety.

D. Summary

Parents and non-parents alike allocate twice as many safety resources to children compared to adults. This has direct implications for what constitutes reasonable care in tort law: duties of care should be twice as stringent when children rather than adults are put at risk. To motivate potential tortfeasors to take this heightened level of care, courts and legislatures should strive to move tort damages in negligence cases toward a 2-to-1 ratio. In the realm of strict liability, potential tortfeasors should be investing about twice as much in protecting child victims. This again suggests that courts and legislatures should strive to move tort damages toward a 2-to-1 ratio. They could do so by adopting versions of existing reform proposals that are modified to reflect the greater value we place on child safety. They could also move partially toward this ratio by creating separate (and higher) damage caps for child victims or asymmetrically adjusting consortium claims. To the extent that courts and legislatures wish to keep aggregate liability constant, they can increase child awards while making commensurate reductions in adult awards.

201. *Id.*

202. *Id.* at 224.

203. *Id.* at 212, 231.

204. *Id.* at 223–24.

IV. CONSISTENCY WITH INDIVIDUAL JUSTICE ACCOUNTS

This part extends the discussion beyond deterrence. It explores how the three leading individual justice accounts of tort law—allocative corrective justice, relational corrective justice, and civil recourse—can assist policymakers in assessing allocation questions. Although, these accounts do not directly speak to allocation questions, they can help assess specific reforms such as increasing the level of care and damages for children. These reforms are consistent with individual justice accounts.

A. *Introduction to Corrective Justice and Civil Recourse*

Corrective justice is the dominant non-economic account of tort law. Jules Coleman and Ernest Weinrib are its leading proponents.²⁰⁵ Corrective justice imposes duties of repair on the wrongdoer.²⁰⁶ These duties arise from the fact that the victim and wrongdoer are linked as the doer and sufferer of harm.²⁰⁷ In common parlance a driver might say: “You need to fix my fender because the accident was your fault.” This statement invokes a duty of repair and grounds it in the special relationship that the drivers have by virtue of the fact one is the sufferer and one is the doer of harm. Weinrib and Coleman’s accounts of corrective justice differ regarding what the duty of repair entails. Coleman argued for an allocative account of corrective justice that used damages to annul losses.²⁰⁸ Weinrib argued for a relational account that used damages to undo wrongs.²⁰⁹

Looking at disgorgement as a tort remedy helps clarify the difference between allocative and relational corrective justice.²¹⁰ Suppose that, unbeknownst to you, your neighbor rents out your house on Airbnb while you are away at Disneyland. Tort law currently allows disgorgement; that is, you can reclaim the profits that your neighbor made off the rental.²¹¹ Disgorgement is inconsistent with allocative accounts of corrective justice because you have not suffered any losses—you would not have used the house anyway and the renters did not break anything. But you have suffered a wrong. Because relational accounts focus on rectifying wrongs

205. Gregory C. Keating, *Is Tort a Remedial Institution?* 17 (Univ. of S. Cal. Law Sch., USC Law Legal Studies Paper No. 10-10, 2010), <http://dx.doi.org/10.2139/ssrn.1633687>.

206. Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 110 (2001).

207. *Id.*

208. COLEMAN, *supra* note 21, at 318–23, 432.

209. *Id.* at 318–23; WEINRIB, *supra* note 21, at 130, 131, 133.

210. COLEMAN, *supra* note 21, at 198. I borrow the terms “allocative” and “relational” from Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013, 3020 (2007).

211. DAN B. DOBBS, DOBBS LAW OF REMEDIES § 5.4, at 747–48 (2d ed. 1993).

rather than annulling losses, disgorgement is an appropriate remedy. It undoes the injustice of using another person's property without their consent.²¹²

Civil recourse offers an alternative justice-based account of tort law.²¹³ Civil recourse has much in common with relational corrective justice. For example, both put wrongs rather than losses at the center of tort law.²¹⁴ But there are two key differences. First, under civil recourse theory, wrongs trigger a plaintiff's power to seek redress rather than a defendant's duty to repair.²¹⁵ This difference seeks to explain why the plaintiff has the option to sue²¹⁶ and why the defendant's duty only arises after a successful lawsuit.²¹⁷ Second, civil recourse does not seek to explain tort remedies.²¹⁸ For civil recourse, unlike corrective justice, the nature and gravity of the wrong are not directly linked to the choice of remedy.²¹⁹ Instead, it views tort remedies as governed by a pluralistic host of policy concerns that are too variable for any one descriptive theory to capture.²²⁰

The standard accounts of corrective justice and civil recourse do not speak to allocation questions.²²¹ These individual justice accounts focus on the relationship between an individual victim and an individual tortfeasor and the rights and obligations that might flow from that dyadic relationship. They do not step back and ask about the relationship between different dyads.²²² This should not be a surprise. Principles of distributive justice, not corrective justice, seek to answer allocation questions.²²³ Following the lead of Aristotle,²²⁴ modern corrective justice theorists introduce corrective justice by contrasting it with distributive justice.²²⁵ Weinrib even goes so

212. WEINRIB, *supra* note 21, at 141–42.

213. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 697–98 (2003).

214. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 (2010); WEINRIB, *supra* note 21, at 131.

215. See H.L.A. HART, *THE CONCEPT OF LAW* 26–33 (2d ed. 1997) (distinguishing between powers and duties).

216. Zipursky, *supra* note 213, at 733–34.

217. Goldberg, *supra* note 20, at 605.

218. Goldberg & Zipursky, *supra* note 214, at 962.

219. *Id.*; Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1963 (2007).

220. Goldberg & Zipursky, *supra* note 214, at 962.

221. See Gardner, *supra* note 19, at 4.

222. Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 29 (1995).

223. Gardner, *supra* note 19, at 8–10.

224. *Id.* at 12.

225. WEINRIB, *supra* note 21, at 75; Steven Walt, *Eliminating Corrective Justice*, 92 VA. L. REV. 1311, 1311 (2006) (canvassing debates about the relationship between corrective justice and distributive justice).

far as to claim that distributive justice concerns are alien to tort law,²²⁶ although others disagree.²²⁷

The standard accounts of corrective justice and civil recourse have some normative force in evaluating various tort reforms, but it is limited.²²⁸ They seek to identify a coherent principle that is consistent with the core features of the common law of torts, such as the case-by-case adjudication of claims, the fact that plaintiffs can only sue particular defendants, and the fact that plaintiffs argue that the defendant was responsible for their injuries rather than, for example, that the defendant was the cheapest cost avoider.²²⁹ The proponents of corrective justice and civil recourse each identify differing explanatory principles, but they all avoid providing a full normative defense of those principles. Instead, they are staunchly descriptive.²³⁰ At best, these proponents claim that their animating principles are plausibly worthwhile at least under some circumstances.²³¹ Explanatory accounts can only illuminate whether particular tort reforms would be consistent or cohere together with the core of tort law.²³² Without a first order defense of corrective justice or civil recourse—that is, without a defense of why it is worthwhile to have them—these explanatory accounts are relevant only if we value coherence for its own sake. But even if consistency has some intrinsic value, which is far from clear,²³³ it does not have sufficient weight to trump many other concerns.²³⁴

Faced with the limited normative force of corrective justice as an explanatory account of tort law, many scholars have simply assumed that achieving corrective justice is a worthy goal.²³⁵ This is not a particularly jarring assumption; the concept of corrective justice has a good deal of

226. WEINRIB, *supra* note 21, at 7, 163.

227. Gardner, *supra* note 19, at 18.

228. Benjamin C. Zipursky, *Coming Down to Earth: Why Rights-Based Theories of Tort Can and Must Address Cost-Based Proposals for Damages Reform*, 55 DEPAUL L. REV. 469, 470–71 (2006) (noting that the corrective justice theorist has “nothing whatsoever to offer” current debates about damage caps, but arguing that a more general rights-based theorist does).

229. WEINRIB, *supra* note 21, at 9–10; COLEMAN, *supra* note 21, at 168.

230. WEINRIB, *supra* note 21, at 3–5; Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, in PHILOSOPHY AND THE LAW OF TORTS 183, 183–84 (Gerald J. Postema ed., 2001); John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341, 346 (2011).

231. John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 L. & PHIL. 1, 3–5 (2011).

232. Zipursky, *supra* note 228, at 470, 472.

233. Gardner, *supra* note 19, at 5 n.11 (“Weinribian unity . . . is not, in my eyes, any kind of plus. Reality, including moral reality, is fragmentary.”).

234. Zipursky, *supra* note 228, at 474 (noting that treating coherence as dispositive or paramount in tort law debates would be a form of “fetishism”).

235. See, e.g., Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 712 (2005); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 449–51 (1990).

intuitive appeal. Under this assumption, if a particular doctrine or reform expresses corrective justice that would count in its favor.

Some civil recourse scholars have mounted a more explicit defense of their explanatory account.²³⁶ They have argued that granting victims the power to seek redress for legal wrongs promotes notions of equality and equal respect.²³⁷

Armed with these extensions to the standard explanatory accounts, we can ask whether a tort reform is consistent with corrective justice or civil recourse. If so, this would count in its favor. If not, then the case for the reform must rest elsewhere.²³⁸

Heightened duties of care are consistent with both corrective justice and civil recourse. Individual justice accounts focus on remedying wrongs or providing opportunities to redress those wrongs. They do not define those wrongs, but rather assume a set of legal wrongs.²³⁹ The standard of care is part of what defines this set of legal wrongs. While individual justice accounts claim that negligently harming another is one type of wrong, they do not attempt any nuanced analysis of the appropriate level of care. Rather, they generally endorse the flexible standard of care embedded within negligence doctrine. The arguments in Part III work within that doctrine by defining what constitutes reasonable care when children are among the foreseeable victims. The principles of equality and equal respect that civil recourse scholars have marshaled to distance it from mere vengeance might conflict with differential levels of care. But those principles may create side constraints on tort law regardless of whether tort law should be viewed as a system of civil redress, a system of corrective justice, or a vehicle for maximizing deterrence. Accordingly, I will delay

236. For a full discussion, see Williams, *supra* note 101, at 1780–86.

237. Goldberg, *supra* note 20, at 596, 606–609 (noting that providing a right of redress “affirms agency” by treating people as agents who are responsible for their actions, “instantiates a notion of equality,” “affirms [our] status as persons who are entitled not to be mistreated by others,” and “demonstrates to citizens that the government has a certain level of concern for their lives”); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 Nw. U. L. REV. 1765, 1790–91, 1808–10 (2009) (arguing that civil recourse is normatively plausible because it “reinforces,” “underscores,” and “affirms” the notion that we are accountable to one another because we are all owed equal respect). These are not the purposes of a tort system reflecting civil recourse, but they are favorable side effects that can help justify such a system. Although these defenses were designed to support civil recourse, which itself says nothing about remedies, they spill over and affect remedies as well. It would be odd to put significant weight on equal respect in defending the power to hold others accountable for wrongs, but to ignore equal respect when defining the proper remedy. If we broaden their influence further such that equality and equal respect take center stage, we would have to ask whether tort law was the best way to instantiate and affirm those values.

238. For example, punitive damages are often thought to be inconsistent with corrective justice, but they can be justified by other concerns. Williams, *supra* note 101, at 1762.

239. Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143, 153 (1990).

my discussion of those principles until the next part, which addresses a series of general objections to child exceptionalism within tort law.

Heightened damages present a more complex issue than heightened duties of care. The remainder of this section asks whether awarding more damages in response to child victims is consistent with individual justice accounts of tort law.

B. Allocative Corrective Justice and the Orphan Problem

For non-fatal injuries, allocative corrective justice is consistent with a child premium even though allocative corrective justice cannot precisely define the magnitude of that premium. The child premium plausibly reflects injuries to both the child as the primary victim and to her parents as secondary victims. This premium emerges because an injury to a child causes more non-economic harms to a family than an injury to a parent. Parents feel their children's pain, while children do not necessarily feel their parents' pain. Parents experience significant mental anguish when their children experience reductions in their capabilities. But the reverse is not as true. Young children cannot even understand their parents' injuries, and older children do not feel responsible for their parents in the way that parents feel responsible for their children. Parents often say "I could not live with myself if something happened to my child," and would experience crushing guilt if they failed to protect their child.²⁴⁰ Children rarely mirror these feelings. This creates an asymmetry. An injury to a child reverberates upward to the parents more than an injury to the parent reverberates downward to the child. Although this analysis does not provide a way to determine a precise child premium, it does show that some child premium is consistent with allocative corrective justice.

Under this defense of the child premium, it is a shortcut for measuring the parents' mental anguish and filial consortium claims. Allocative corrective justice is consistent with providing remedies to these secondary victims.²⁴¹ It is also consistent with bright-line rules for measuring the harms to these secondary victims. For example, tort law could measure the

240. FRANK FÜREDI, *PARANOID PARENTING: WHY IGNORING THE EXPERTS MAY BE BEST FOR YOUR CHILD* 111 (2001).

241. A tortfeasor could commit two legal wrongs in one accident. This is clearly the case when the tortfeasor causes physical injury to two victims—for example, to two passengers in a car. But it is also the case in consortium and other derivative claims. This does not disturb the relational character of corrective justice. The tortfeasor is just locked in two different binary relationships stemming from a single accident, much the same way that he would be if he hit a car and injured both of its passengers. The tortfeasor would owe duties of repair to each. In contrast, civil recourse theorists might argue that expanding the number of victims in the way that consortium does is inconsistent with tort law's substantive standing requirements, which allow only a subset of foreseeable victims to sue. John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *CORNELL L. REV.* 1123, 1137 (2007).

parents' harms indirectly by assuming that they feel their child's pain; the measure of the child's pain and suffering would then be used to value the parents' mental anguish and filial consortium claims.²⁴²

But this way of understanding the child premium would come with drawbacks. For example, it would not justify heightened awards for injured orphans²⁴³ and might justify smaller premiums for child victims with only one parent.²⁴⁴ It is also unclear whether this understanding would justify child premiums in cases of fatal accidents.²⁴⁵ These are not decisive critiques. Principles outside of allocative corrective justice could fill those gaps. For example, distributive justice or equality norms might require that orphans receive at least the same level of damages as children with two living parents, and some notions of fairness mandate that killing a child not be cheaper than injuring her.

C. Relational Corrective Justice and Ranking Wrongs

Under relational corrective justice, the remedy undoes the wrong. There is no way to translate this into precise guidance on remedies, but greater wrongs will require greater remedies.²⁴⁶ So we can ask whether it is a greater wrong to negligently injure a child compared to negligently injuring an adult. The answer is yes. Without a theory of wrongs (corrective justice theorists have never provided one)²⁴⁷ we will have to rely on our intuitions to substantiate this claim.

242. Although this interpretation of the child premium uses the child's losses to estimate the parents' losses, the *justification* for awarding the extra damages is the parents' own welfare losses. This is all corrective justice requires; it constrains the set of justifications available to make sense of why defendants pay damages to plaintiffs, but it does not constrain the set of ways that the tort system might go about measuring those damages. WEINRIB, *supra* note 21, at 142–43; COLEMAN, *supra* note 21, at 367–69.

243. Because an orphan's parents are already dead or have severed ties with her, they may not suffer mental harms from the child's injury. Thus, if the child premium is merely a proxy for the mental harms of parents, we might not impose heightened damages when orphans are injured.

244. It is possible that a single parent's amount of suffering in response to an injured child is lower than the aggregated suffering felt by multiple parents. But this is far from clear. It may be that multiple parents can rely on one another for emotional support, thereby reducing their harms. It may also be that the emotional harms that befall parents are proportional to the degree of responsibility that they feel for the safety of their child. Single parents, shouldering more responsibility, may have to shoulder a particularly large emotional burden when the child is injured.

245. It is hard to say with confidence that the death of one's child causes more grief than the loss of a parent during one's childhood. True, parents may feel responsible for the child's safety in a way that children do not feel responsible for the safety of their parents. But children have longer to live with the scars and less emotional maturity to deal with the tragic event. Overall, the asymmetry mentioned above may hold for fatal injuries, but it may not.

246. The term "greater" here is meant to indicate the flexible nature of remedies. If monetary remedies are the only ones available, then "greater" will translate into "larger."

247. Schroeder, *supra* note 239, at 153.

Consider two tortfeasors: Dan and Carl. Each stores oxygen tanks in his backyard shed (perhaps because they sell medical supplies and plan to deliver them to clients the next day). Suppose there is a sufficient risk of explosion that storing the tanks in one's backyard would constitute negligence if the explosion hurt someone. Dan lives next to a day care facility, which normally has ten children playing in the adjoining yard. Carl lives next to a CrossFit studio, where normally ten adults are working out on their outdoor obstacle course. The oxygen tanks explode, injuring everyone nearby. Has Dan committed a greater wrong than Carl? I think the answer is yes.

One way to systematize this intuition is to consider the arguments above about the duties of care that we owe children and adults.²⁴⁸ The studies in Part II support the intuition that we owe a greater duty of care toward children. If this is right, then Dan's breach is more wrongful.²⁴⁹ For Dan, there was a greater gap between the care he took and the care he owed his victims. The larger the gap, the more egregious the wrong. The more egregious the wrong, the greater the remedy needed to undo it. When money is the sole currency of undoing the wrong, redressing more egregious wrongs will require larger sums of money.

This view is partially in tension with current doctrine. Tortfeasors pay the same compensatory damages regardless of whether they were slightly negligent or grotesquely negligent. In this way, the degree of wrongfulness is irrelevant to damages (except for purposes of comparative fault and assessing punitive damages).²⁵⁰ This tension would be troubling if this section was using relational corrective justice as an explanatory tool. But it is not. It is using corrective justice as a moral guide to what tort law should be, not as an explanatory tool to illuminate what tort law is. Tort law would better align with the moral norm of relational corrective justice if it recognized gradations of negligence for purposes of crafting remedies, and this would lead to a child premium.

D. Civil Recourse and the Proportionality Constraint

Higher damages for child victims are as consistent with civil recourse as any other remedy. Civil recourse theorists explicitly deny that civil recourse explains damages.²⁵¹ Remedies are external to their explanatory theory.²⁵² The choice of remedies is governed by other principles.

248. See *supra* Part III.A.1. (describing a hypothetical case with tandem bicycles).

249. 1 DOBBS ET AL., *supra* note 90, § 138, at 433 (“If the probability or magnitude of harm is higher, we can think of the defendant as ‘more’ negligent.”).

250. *Id.* § 138, at 434.

251. Goldberg & Zipursky, *supra* note 214, at 955.

252. *Id.*

The only constraint on remedies internal to civil recourse is that remedies must make victims of legal wrongs feel that their claims have been taken seriously.²⁵³ The precise contours of this constraint are unclear. But civil recourse theorists have offered some touchstones. Goldberg has argued that merely offering a framed certificate of injury would be insufficient.²⁵⁴ Solomon has argued that a genuine apology might be sufficient.²⁵⁵ Although civil recourse theorists have not discussed the issue, it is also possible that people would rely in part on comparative judgments to determine whether the tort system was taking their claims seriously. That is, the “take seriously” constraint might have a proportionality component. A tort system that offered \$10,000 for a broken leg might seem to take the injury seriously when viewed in isolation. But if broken toes yield \$1 million, then it’s no longer clear that the system takes broken legs seriously.

Even if there is such a proportionality constraint, a child premium is unlikely to violate it. A child premium will not create a sufficient disparity in damages to indicate that adults’ injuries are not taken seriously. If children receive \$20,000 for broken legs and adults receive \$10,000, it is likely that people would feel that both claims were taken seriously. Even if people notice the differential damages, the ubiquity of child exceptionalism within the law—children must attend school, cannot consume alcohol, have restricted driving privileges, etc.²⁵⁶—suggests that people would not be surprised if tort law treated children differently. If adults view children as a special class, then they are unlikely to compare their case to the case of a child for purposes evaluating whether the state has taken their claims seriously.

E. Summary

Individual justice accounts do not speak directly to allocation questions—that is a matter of distributive justice. But it is still useful to ask whether specific reforms are consistent with corrective justice and civil recourse. If they are, that would count in their favor. Both heightened duties of care and heightened damages are consistent with corrective justice. Increasing damages for child victims would be consistent with allocative corrective justice if we frame those damages as annulling the losses of both the child and her parents. This framing, however, would not

253. Goldberg & Zipursky, *supra* note 241, at 1142.

254. *Id.*

255. Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 267 (2011).

256. Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1111 (2012).

lead to a child premium for all child victims in all circumstances. Child premiums are more straightforwardly consistent with relational corrective justice. Negligently injuring a child is a greater wrong calling for a greater remedy. Heightened damages are consistent with civil recourse as well, simply because civil recourse allows for a plurality of policy concerns to affect remedies. Whether heightened damages and heightened duties of care for children are consistent with the normative defenses of civil recourse remains to be seen. The next part addresses that question and confronts three other objections.

V. OBJECTIONS

This part addresses four objections to child premiums. First, they may violate principles of equality and equal respect by offering more security to children than adults. Second, they may reflect an arbitrary distinction between persons. Third, even if they are non-arbitrary and consistent with the best versions of equality and equal respect, people might nonetheless believe that they promote inequality and express disrespect. This objection is rooted in an empirical claim about human psychology and cultural meaning. Finally, defendants might complain that heightened damages exacerbate problems of moral luck. None of these objections are particularly strong.

A. *Principles of Equality and Equal Respect*

Equal respect for all moral agents is a bedrock principle of contemporary moral and political philosophy.²⁵⁷ Equal respect leads to a presumption that persons should be treated equally.²⁵⁸ But notions of equality and equal respect are not self-defining. There are multiple competing conceptions of equality and multiple ways of expressing equal respect.²⁵⁹ Tort theorists understand this, and view tort law as giving concrete content to these and other abstract principles.²⁶⁰ To the extent that principles of equality and equal respect are consistent with multiple tort doctrines, tort law could affirm equality and promote equal respect regardless of which of those doctrines were adopted. This section adopts security as the currency of equality and argues that providing more security

257. *Equality* § 2.3, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (spring ed. 2011) [hereinafter SEP], <http://plato.stanford.edu/archives/spr2011/entries/equality/>.

258. For a discussion of the relationships between principles of equality and equal respect, see *id.* § 5.1.

259. *Id.* §§ 1, 4.

260. Solomon, *supra* note 237, at 1810–11.

to children is consistent with plausible and attractive principles of equality and equal respect.²⁶¹

It is common to flesh out the principle of equality by saying that people who are alike in normatively relevant respects should be treated similarly. But the key question is then which respects are normatively relevant?²⁶² More specifically for purposes of this Article, is the distinction between adults and children a relevant consideration when determining how much security to provide?

The argument in support of differential security is both concise and compelling. Briefly stated, child premiums treat persons equally once we consider their entire *lifespans*. The vast majority of philosophers—including Nagel, Dworkin, and Rawls—treat a person’s entire lifespan as the proper focus for purposes of evaluating principles of equality, equal respect, and distributive justice.²⁶³ Child premiums affect the distribution of security across one’s life, but do not offer differential levels of security to different people. All adults were once children. Across their lifetimes, all potential victims are treated the same.²⁶⁴ They are granted heightened protection while children, and lesser protection while adults.

261. I examine the negative constraints that may flow from principles of equality and equal respect. I take no position on whether the best view of equal respect requires positive duties to facilitate a child’s flourishing.

262. SEP, *supra* note 257, § 2.1.

263. THOMAS NAGEL, EQUALITY AND PARTIALITY 69 (1991); JOHN RAWLS, A THEORY OF JUSTICE 78, 178 (1971); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHILOSOPHY & PUB. AFF. 283, 304–05 (1981). For many, taking a lifetime view will seem obvious. But it may help to compare it to the alternative: a time-slice view. Only a small number of philosophers argue that time-slices have independent normative significance for purposes of evaluating equality and equal respect. *E.g.*, Dennis McKerlie, *Equality and Time*, 99 ETHICS 475, 479 (1989) (discussing the dominant “complete-lives” view). Dennis McKerlie, for example, has suggested that we have egalitarian impulses against a society where people are either peasants or nobles, and they switch positions each year. *Id.* Such a society might be objectionable, but it is not clear that it is objectionable on grounds that persons are being treated differently than one another. First, our intuitions may also be rooted in concerns about subordination. That societal scheme may never engender the value of equal respect because at all times some persons are subordinated. Second, our intuitions may be rooted in welfarism. We may think that the peasants’ losses are normally larger than the nobles’ gains, and hence that welfare could be maximized by reducing the disparity between persons in each period. Matthew Adler asks us to instead consider a world in which some people do chores on Saturday and have leisure time on Sunday, and others do chores on Sunday and have leisure time on Saturday. Matthew D. Adler, *Well-Being, Inequality and Time: The Time-Slice Problem and Its Policy Implications* (Univ. of Penn. Law Sch., Public Law Research Paper No. 07-30, 2007), <http://ssrn.com/abstract=1006871>. This example avoids issues of subordination and welfarism and substantially reduces intuitive objections to the resulting differences.

264. NORMAN DANIELS, AM I MY PARENTS’ KEEPER? AN ESSAY ON JUSTICE BETWEEN THE YOUNG AND THE OLD 41 (1988) (“An institution that treats the young and the old differently will, over time, still treat people equally.”); Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205, 220 (2004) (same).

B. *Arbitrariness and the “Rule of Threes”*

Providing heightened security to children could be attacked as arbitrary. This critique is distinct from concerns rooted in equality. We could treat all people equally by subjecting them all to the same rule, but if that rule is arbitrary, then this is a reason to reject it. For example, skeptics may frame child premiums as the equivalent of offering heightened security to victims who happened to be injured when their ages were divisible by three without a remainder (3, 6, 9, etc.). This Rule of Threes treats people equally across the span of their lifetime, but does so in an arbitrary way. That is, the Rule of Threes distinguishes between cases in a way that is not linked to reasons or principles.

Unlike the Rule of Threes, the distinction between children and adults is not arbitrary. This section discusses two alternate and reinforcing rationales for offering some persons more security than others, and doing so through the lumpy categories of child and adult.

First, we have strong preferences to offer additional protection to children. It is doubtful that people would systematically favor government policies that invested more in protecting persons whose ages were divisible by three without a remainder. But people do systematically prefer programs that favor child safety. This alone provides a reason supporting child premiums.²⁶⁵ This is especially clear under democratic theories that view government actors as delegates who should enact the policy preferences of the people.²⁶⁶ Preferences also provide a justification for government action under welfarist theories where a person’s welfare is increased by satisfying those preferences.²⁶⁷ Preferences also provide a justification for using the lumpy categories of child and adult. Those categories require a dividing line—for many legal consequences, the relevant dividing line is age eighteen. While drawing that line may sometimes be arbitrary, it is not arbitrary if, as here, the dividing line is defined by reference to people’s preferences. If people’s preferences track lumpy categories—and they

265. Although preferences do not necessarily provide decisive reasons (as evidenced by the discussion of equality in the previous part), they do undercut critiques of arbitrariness.

266. Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 215 (2009) (detailing differences between trustee and delegate theories). Child premiums are likely also justified under trustee theories—where representatives should take citizen preferences into account but still exercise their own independent judgment. The rest of the section offers reasons why such a trustee might, in their independent judgment, favor a child premium independently from its widespread appeal.

267. MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 19 (2006). Increasing welfare is a non-arbitrary reason to support one rule over another. Of course, there is considerable debate about whether satisfying any preference increases welfare, or whether satisfying only well-informed or justifiable preferences should count as increasing welfare. *Id.* at 19–21. The remainder of this section therefore defends the view that these preferences are justifiable.

do²⁶⁸—then this provides a reason (although of course not a decisive one) for using those categories.²⁶⁹

Second, there are plausible ethical theories that justify the widespread preferences in favor of offering more protection to those within the lumpy category of child. Child premiums are plausibly rooted in “fair innings” arguments developed in debates about distributing health care resources.²⁷⁰ Fair innings arguments assert that people who have had their fair innings—people who have surpassed the average life expectancy—have a weaker claim to health care resources than those who have not yet had their fair innings.²⁷¹ This argument is used to decrease the weight given to saving the elderly.²⁷² But one can apply it to children as well. Children have certainly not had their fair innings yet. But since the baseball analogy does not offer a way to make meaningful distinctions between two innings and three, it is better to think in terms of *milestones*. Everyone deserves a chance to hit important milestones in their life. All children deserve a chance to grow up, to fall in love (at least once), to be “cool,” or to have children of their own. I suspect that these claims have a good deal of intuitive force.²⁷³ Because many important milestones occur during adolescence, they provide non-arbitrary reasons to favor child safety over adult safety.

C. Expressive Harms and “Death Discounts”

Although the preference for child safety is non-arbitrary and consistent with plausible principles of equality and equal respect, people may nonetheless hear a different message from a tort system that favors

268. When asked to allocate a scarce life-saving treatment to either an eight-year-old or a two-year-old, almost half of respondents simply refused to do so. M.C. Charny et al., *Choosing Who Shall Not Be Treated in the NHS*, 28 SOC. SCI. & MED. 1331, 1334 (1989). Other studies confirm this resistance to ranking children against one another. See, e.g., Erik Nord et al., *Maximizing Health Benefits vs Egalitarianism: An Australian Survey of Health Issues*, 41 SOC. SCI. & MED. 1429, 1433 (1995). Vaccine distribution plans show both this resistance to ranking members of the same lumpy age category, and the corresponding ease of giving priority to those in the category of child over those in the category of adult. PANDEMIC FLU GUIDANCE, *supra* note 44, at 6.

269. It is worth noting that line drawing is far less objectionable here than in other areas. For example, courts could conduct individual inquiries into the maturity of a child for purposes of driving, drinking, etc. But in the context of tort law, individual inquiries are not possible. Most potential tortfeasors can only respond to the characteristics of potential victims that are readily knowable from casual observation. Drivers need to slow down when children are playing near the street. They cannot stop to interview the children to ascertain their level of maturity and decide on an appropriate level of care. So the standard of care (and measures of damages that are designed to incentivize people to take that level of care) will normally have to respond to lumpy categories like child and adult.

270. Williams, *supra* note 57, at 103.

271. Erik Nord, *Concerns for the Worse Off: Fair Innings Versus Severity*, 60 SOC. SCI. & MED. 257, 258 (2005).

272. *Id.*

273. Emanuella Grinberg, *Parents Welcome, Say Goodbye to Baby for Whom They Created Bucket List*, CNN (Oct. 13, 2014, 12:36 PM), <http://www.cnn.com/2014/10/09/living/bucket-list-baby/>.

children. They may believe that such a system affirms difference rather than equality and offers special treatment rather than equal respect. Consider the case of the “senior death discount.”²⁷⁴ In 2002, a federal cost-benefit analysis included two measures of the value of the Clear Skies Initiative.²⁷⁵ First, it assigned the same value to protecting all persons.²⁷⁶ In the alternative, it partially adjusted the value of protecting people to account for the fact that some people have fewer life-years left to live.²⁷⁷ This lowered the value of protecting the elderly.²⁷⁸ Thus, it created a senior discount. This differential treatment of the elderly is not a violation of equality on the lifespan view, and yet it generated immense controversy.²⁷⁹ The Environmental Protection Agency was forced to backpedal and affirm its commitment to treating the interests of the elderly and other adults equally.²⁸⁰ Although we cannot know the precise reasons why so many people objected to the senior discount and why those objections seemed to resonate with others,²⁸¹ a large part of it is likely that the policy appeared unequal at first blush.²⁸²

In contrast to the senior discount, a child premium is less likely to be perceived as a violation of equality. The senior discount was surprising in part because in most contexts we treat the elderly in the same manner as we treat other adults. For example, both can vote and have the same contract rights. But in the context of children, difference rather than sameness is the norm. We support differential treatment of children in a broad set of domains. Children must attend school, cannot consume alcohol or smoke, have restricted driving privileges, and many of them cannot consent to sex.²⁸³ Given this widespread background of child exceptionalism, it is exceedingly doubtful that people will see child exceptionalism in tort law as undermining notions of equality and equal respect.

274. Williams, *supra* note 57, at 116.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. See, e.g., Cindy Skrzycki, *Under Fire, EPA Drops the ‘Senior Death Discount’*, WASH. POST, May 13, 2003, at E1.

280. Williams, *supra* note 57, at 116.

281. One could tell a public choice story where a powerful voting bloc simply demanded that its preferences be implemented. But this would not explain why the complaints were couched in terms of equality.

282. Less plausibly, people may have objected to the senior death discount because they thought that the absolute levels of security that would result from the EPA’s new numbers would fall below some critical threshold. This would not be an issue for premiums.

283. Todres, *supra* note 256, at 1111.

D. Moral Luck and “Hidden-Child” Cases

Shifting perspectives from potential victims to potential defendants, a different objection appears. Defendants might claim that they are exposed to different liability based on potentially unforeseeable features of the plaintiff. This is often discussed under the heading of moral luck, although it is more accurately described as consequential legal luck.²⁸⁴ Most first-year law students are introduced to it with an example of two equally careless drivers, only one of whom injures someone,²⁸⁵ or an example in which only one of two tortfeasors injures a victim with an unforeseeably thin skull.²⁸⁶ These forms of consequential legal luck are embedded within the very heart of tort law. Only the careless driver who injures someone is subject to a tort suit, and the careless driver who happens to injure the victim with the thin skull may be subject to much higher damages. The child premium does not create any new or special problems in this area. In fact, it is consistent with tort law’s implicit stance on consequential legal luck. The only plausible argument against the child premium in this context is that this core feature of tort law is flawed, and even if practical constraints prevent tort law’s wholesale restructuring, we should not expand the influence of consequential legal luck without some good reason for doing so.²⁸⁷

As an initial matter it is useful to note that complaints rooted in consequential legal luck only apply to a small number of “hidden-child” cases. The extra damages generated by a child premium are potentially objectionable where the defendant’s actions foreseeably endangered adults but not children, and yet those actions harm a child. These hidden-child cases will be rare. Twenty-four percent of the U.S. population is under age 18.²⁸⁸ There are few places where one could not foreseeably expect to encounter children. For example, infants often go wherever their parents go, including the front rows of Brad Paisley concerts.²⁸⁹ As those parents will soon learn, more mobile children will go anywhere and everywhere. Given the rarity of hidden-child cases, successful complaints rooted in

284. David Enoch, *Moral Luck and the Law*, 5 PHIL. COMPASS 42, 43 (2010).

285. Goldberg & Zipursky, *supra* note 241, at 1125.

286. *Id.* at 1140.

287. *Id.* at 1131–33 (describing the discomfort that legal luck creates and the critiques of tort law that stem from it).

288. LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

289. Carolyn Pesce, *Mom Says Cops Kicked Her Out of Concert for Breastfeeding*, USA TODAY (July 12, 2014, 7:19 PM), <http://www.usatoday.com/story/news/nation/2014/07/12/police-boot-breastfeeding-mom/12567443/> (discussing mother who brought her infant into the front “pit” area of a large concert).

consequential legal luck will, at most, mildly reduce the scope of the child premium.

Even if we focus solely on the small number of hidden-child cases, the injustices of consequential legal luck are greatly attenuated by the ubiquity of third-party insurance.²⁹⁰ Insured defendants pay only for the ex ante expected harm that their activities create, not for the (by hypothesis) unforeseeably large amount of harm that they actually caused. Of course, not all defendants will be insured. But attorneys rarely seek to recover amounts in excess of policy limits from insured individuals and are unlikely to sue people who are uninsured.²⁹¹ When corporations elect to self-insure it is normally because their activities are broad enough and their financial holdings large enough that they are not concerned with the outcome of particular cases. Rather, they only care about their aggregate liability across the run of cases. Because surprisingly high damage awards in some cases will be offset by surprisingly low liability in others, this aggregate view drastically reduces concerns about consequential legal luck.

The complaints rooted in consequential legal luck are also at least partially offset by the potential role of heightened damages in ensuring adequate deterrence. Consider the thin-skull rule. Traditional law and economics scholarship on tort law favors the thin-skull rule.²⁹² Although a victim's unforeseeable vulnerability does not alter the standard of care,²⁹³ assigning all of resulting damages to negligent defendants ensures that they will internalize the full social costs of their behavior. This incentivizes them to alter their behavior in the future.²⁹⁴ Thus, our potential discomfort with consequential legal luck must be weighed against the potential deterrence gains of either the thin-skull rule or the hidden-child rule.

290. Tom Baker, *Liability Insurance, Moral Luck, and Auto Accidents*, 9 THEORETICAL INQ. L. 165, 166–67 (2008).

291. Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC'Y REV. 275, 282 (2001).

292. There is some ambiguity about this point within the literature. Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375, 395 (2013) (noting that the mainstream view among law and economics scholars is that tortfeasors should internalize the full costs of their accidents); SHAVELL, *supra* note 113, at 236, 239 (favoring the thin-skull rule but noting that awarding the extra damages stemming from the victims hidden vulnerability is not required by deterrence if defendants would have ignored the risk because it was so slight).

293. W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 955–59 (2005).

294. Including all of the harms in the calculation of damages would incentivize the defendant to conduct its own analysis of the proper standard of care in the future. To the extent that defendants may be better at determining the proper standard than judges and juries—which would be the case if judges and juries use the Hand formula and the particular defendant is an insurance company or other repeat player—tort law should incentivize them to do so. If those repeat players cannot ensure that they will escape liability by complying with a court's potentially-too-lenient standard of care because of errors in adjudication, then they will have incentives to use the proper standard of care.

To the extent that concerns of consequential legal luck are insufficiently mitigated by the rarity of hidden-child cases, the prevalence of third-party insurance, and the deterrence benefits of heightened damages, courts could decline to apply a child premium in those cases where it was not foreseeable that children would be among the class of persons harmed. This would eliminate defendants' complaints rooted in consequential legal luck. Courts could sensibly do this even if they have already embraced the thin-skull rule. The thin-skull rule is not only (or perhaps even primarily) a result of deterrence-oriented policymaking. It is also supported by some views of fairness and by compensatory norms within tort law. The fairness claim is that, if a loss must be allocated, it might be fairer to allocate it to the wrongdoer.²⁹⁵ These rationales provide lesser support for the hidden-child rule. Both rules can be framed as compensatory, but the compensatory account of the child premium is solely rooted in its ability to serve as a proxy for non-economic damages such as the parents' mental anguish. To the extent that damages for non-economic harms are less compensatory,²⁹⁶ the thin-skull rule may be more consistent with compensatory norms than the hidden-child rule.²⁹⁷ Similarly, the notion of fairness described above seems designed for economic harms—where losses can truly be re-allocated—not non-economic harms. Accordingly, judges who wish to balance deterrence concerns against concerns of consequential legal luck in hidden-child cases could reasonably endorse the thin-skull rule while simultaneously rejecting the hidden-child rule.

E. Summary

None of the objections to providing more security to children carries much weight. Because all adults were once children, favoring child safety treats all people equally. Favoring children also non-arbitrarily reflects the greater value we place on giving people the opportunity to reach certain milestones in life—such as falling in love, being cool, developing a sense

295. Dennis Klimchuk, *Causation, Thin Skulls and Equality*, 11 CAN. J. L. & JURIS. 115, 132 (1998).

296. *Sizemore v. Smock*, 422 N.W.2d 666, 671 (Mich. 1988) (“Initially, we question the wisdom of awarding monetary damages to compensate one for a loss of the intangible and sentimental elements of the consortium claim. The efficacy of such an award to . . . adequately redress the loss suffered is highly questionable.”). *But see* PETER CANE, *ATIYAH’S ACCIDENTS, COMPENSATION AND THE LAW* 413 (7th ed. 2006) (discussing non-economic damages as providing solace, which he frames as a form of compensation).

297. This does not imply that the thin-skull rule never applies to mental harm. It applies to both economic and non-economic harms. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 31 (AM. LAW INST. 2010). In contrast, the hidden-child rule would *solely* compensate for non-economic harms.

of self-worth, and having the opportunity to have children of one's own—many of which occur during adolescence. The ubiquity of child exceptionalism in the law makes it unlikely that child exceptionalism in tort law would create expressive harms. Finally, moral luck concerns are substantially mitigated by the rarity of hidden-child cases, the prevalence of third-party insurance, and the deterrence benefits of heightened damages.

VI. EXTENSIONS

In addition to shedding light on tort law, the studies in Part II have important implications for other systems designed to promote safety—most notably regulation, criminal law, and civil protective orders. A full discussion of any of these other areas is beyond the scope of this Article. Nonetheless, I offer a brief sketch of each below in order to illustrate the productive potential of both the studies in Part II and the various justifications for providing more security to children than to adults.

A. Regulatory Cost–Benefit Analysis

Regulatory cost–benefit analysis (CBA) measures the benefits of risk reductions by soliciting information about people's preferences for those risk reductions.²⁹⁸ More specifically, CBA measures trade-offs between risk and wealth.²⁹⁹ The Environmental Protection Agency, for example, uses twenty-six studies to value risk reductions.³⁰⁰ Most of them examine the trade-offs workers make between wages and on-the-job risks.³⁰¹ Others calculate people's willingness to pay to reduce a certain risk in a certain context.³⁰² Agencies average results from these types of studies and come up with a value for mortality risk reductions called the value of a statistical life (VSL).³⁰³

The studies in Part II have direct implications for the VSL that agencies should use for child victims.³⁰⁴ Studies of the parental perspective measure willingness to pay directly and find that parents are willing to pay about twice as much to reduce risks to children.³⁰⁵ Studies of the societal perspective do not elicit willingness to pay estimates, but they nonetheless

298. ADLER & POSNER, *supra* note 267, at 72.

299. *Id.* at 12, 19.

300. NAT'L CTR. FOR ENVTL. ECON., ENVTL. PROT. AGENCY, GUIDELINES FOR PREPARING ECONOMIC ANALYSES app. B at B-2 tbl.B.1 (2014).

301. *Id.*

302. *Id.*

303. *See, e.g., id.*

304. For further elaborations on these arguments, see Williams, *supra* note 57, at 6–20.

305. *See supra* Part II.A.

speak to the ratio of safety resources that citizens want the government to invest in children and adults respectively. Again, that ratio is 2-to-1.³⁰⁶ This suggests that the VSL that agencies use to measure the benefits of risk reducing regulations should be twice as high for children as for adults.³⁰⁷ Because the Office of Management and Budget often blocks or delays regulations that do not pass a cost–benefit test, increasing the size of the VSL for children could have significant impacts on regulations that benefit non-negligible numbers of children.³⁰⁸

B. Criminal Sentencing

The federal sentencing guidelines currently include an enhancement when the victim was unusually vulnerable.³⁰⁹ The resulting enhancement applies when the defendant knew or should have known that a victim was “unusually vulnerable due to age, physical or mental condition, or who [was] otherwise particularly susceptible to the criminal conduct.”³¹⁰ Several states have similar provisions.³¹¹ Federal courts have applied the vulnerable victim enhancement to the elderly in the context of financial fraud, to infertile couples in the context of adoption fraud, to homeless children in the context of sexual abuse, to young children in the context of child pornography, and to many other victims.³¹² The purpose of the enhancement appears to be rooted in deterrence.³¹³ But it also resonates with retributivist theories of punishment.³¹⁴

The studies in Part II suggest that the vulnerable victim enhancement might be incomplete from a deterrence standpoint. Children and the elderly may both be equally vulnerable to the risk of certain criminal behaviors, but vulnerability is only one relevant feature of these victims. Their age matters as well. People want to protect children and exhibit substantial child premiums when comparing children with the elderly, even when they

306. See *supra* Part II.B.

307. Williams, *supra* note 57, at 2–3.

308. *Id.* at 47–48.

309. U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 3A1.1 cmt. 2 (2013), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf.

310. *Id.*

311. See, e.g., ARK. CODE ANN. § 16-90-804(c)(2)(B) (2006); FLA. STAT. ANN. § 921.141(5)(m) (West 2015); OR. REV. STAT. § 137.085 (2003).

312. *United States v. Pol-Flores*, 644 F.3d 1, 4 (1st Cir. 2011) (elderly victim of Ponzi scheme); *United States v. Christiansen*, 594 F.3d 571, 575–76 (7th Cir. 2010) (adoption fraud); *United States v. Irving*, 554 F.3d 64, 75 (2d Cir. 2009) (homeless children); *United States v. Jenkins*, 712 F.3d 209, 214 (5th Cir. 2013) (young children and child pornography).

313. *United States v. Castellanos*, 81 F.3d 108, 110–11 (9th Cir. 1996) (citing deterrence).

314. *United States v. Stover*, 93 F.3d 1379, 1387 (8th Cir. 1996) (discussing both “the need for societal protection, and the inference of heightened criminal depravity”).

are both equally vulnerable.³¹⁵ This suggests that, to the extent that the guidelines are animated by deterrence, they should have a separate enhancement based on age alone.³¹⁶

Of course, even people who would determine punishment solely by its deterrent effects might treat punishment decisions differently than decisions about where to build pedestrian crossings, who to allocate medical treatment to, and how much they are willing to spend on low pesticide food for children. None of the studies in Part II examined investments designed to protect against *criminal* harms. It is possible that parents, non-parents, or both would have different opinions about allocating safety resources in those situations. But the studies are at least suggestive. If child safety is worth more than adult safety in the context of accidental harms, then we should explore our intuitions about whether this pattern extends to criminal harms. I suspect it does. The justifications for those intuitions also extend to cases of criminal harms. If we value a child's opportunity to reach certain milestones, or even if we only value a child's capacity to live longer with the scars of violence, then we have reasons to value child safety more highly than adult safety. This suggests that the sentencing guidelines should recognize the special status of children, regardless of whether or not they are especially vulnerable.

C. Civil Protection Orders

Civil orders of protection originated in New York in 1962 as a response to domestic violence.³¹⁷ By 1994, all states had statutory schemes that governed orders of protection.³¹⁸ Typically, those schemes begin by defining a set of protected persons. In New York and Virginia, protective orders are available to the alleged perpetrator's "[f]amily or household."³¹⁹ Those persons are then able to seek a protective order if the perpetrator has engaged in a defined class of behaviors. In Texas and California, a protected class member can get a protective order if it is likely that the perpetrator will commit acts intended to cause bodily injury or is likely to

315. Eisenberg et al., *supra* note 76, at 152 (finding that most respondents chose to save 100 ten-year-olds over 1000 sixty-year-olds).

316. The state could also provide children more protection by leaving sentences as they are while investing more in the detection and prosecution of crimes against children.

317. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 98 (2005).

318. *Id.* at 100.

319. N.Y. Fam. Ct. Act § 812 (McKinney 2009); VA. CODE ANN. §§ 16.1-228, 16.1-253.1 (2015). A few states cover all persons, at least against a subset of actions. 740 ILL. COMP. STAT. ANN. 22/201 (West 2010) (covering "any victim of non-consensual sexual conduct"); ARIZ. REV. STAT. ANN. § 12-1809 (2003) (covering any person who was the victim of harassment).

make threats that place a reasonable person in fear of such harms.³²⁰ Remedies are often discretionary and potentially quite broad.³²¹ Perpetrators can be barred from contacting potential victims, going near potential victims' places of business, and possessing any firearm or ammunition.³²² They can also be ordered to attend battering intervention programs, to refrain from drinking, and to leave the family residence.³²³ Punishments for violating those protective orders range from misdemeanors to mandatory jail time.³²⁴

These schemes offer similar but not identical protection to adult and child victims. The only differences offer more protection to adult victims. While thirty-six states have expanded the traditional protections to adults within a dating relationship, only seventeen states protect minors within dating relationships.³²⁵ In Texas, the children of only some protected adults are covered.³²⁶ In Missouri, the default length of a protective order is shorter for children than for adults.³²⁷ Some of these disparities are just unconscious oversights, others reflect a determination that adults are more susceptible to the relevant harms or that children may be harmed by the prolonged absence of even a potentially violent parent. Regardless, those disparities are exceedingly *unlikely* to reflect a judgment that minors should receive less protection from violence than adults.

The studies in Part II suggest that we value child safety more highly than adult safety, all else being equal. As discussed in the previous subpart, those studies are most relevant in the context of accidental harms. It is possible that parents, non-parents, or both would have different opinions about allocating safety resources designed to prevent *intentional* harms. But the studies are, at the very least, highly suggestive.

There are a number of asymmetric alterations to civil protection orders that could offer greater security to children. For example, the amount of harm necessary to trigger the relevant protections could be lower for children or the minimum punishments for violations of protective orders could be more severe. Even without legislative reforms, judges could be

320. TEX. FAM. CODE ANN. §§ 71.0021, 71.003, 71.004, 82.002 (West 2014); CAL. FAM. CODE § 6203 (West 2013).

321. Smith, *supra* note 317, at 100–02.

322. See, e.g., ARIZ. REV. STAT. ANN. § 13-3602 (West 2001) (discretion to ban possession of firearm).

323. See, e.g., KAN. STAT. ANN. § 60-3107 (2005) (counseling and kick-out orders); CAL. FAM. CODE § 6322 (West 2013) (allowing court to include “specified behavior . . . necessary to effectuate orders”).

324. Smith, *supra* note 317, at 101; Allie Meiers, Comment, *Civil Orders of Protection: A Tool to Keep Children Safe*, 19 J. AM. ACAD. MATRIM. LAW. 373, 380 (2005).

325. Smith, *supra* note 317, at 104; Meiers, *supra* note 324, at 385.

326. TEX. FAM. CODE ANN. §§ 71.0021, 71.004.

327. MO. ANN. STAT. § 455.020 (West 2014).

encouraged to provide more protection to child victims, either by providing more discretionary protections in their orders, or by punishing violations of those orders more severely. Each of these reforms would help align the law surrounding protective orders with our commitments to child safety.

VII. CONCLUSION

Both anecdotal evidence and rigorous empirical analyses show that we consistently value child safety more than adult safety. Legislators fall over themselves to name bills after dead children. Reporters covering war, mass accidents, natural disasters, and measles outbreaks routinely highlight the special tragedy of child fatalities. This Article systematically mapped the boundaries of this asymmetry by synthesizing an expansive empirical literature. That synthesis revealed that people are willing to invest twice as many resources in protecting children as they are in protecting adults. As a *prima facie* matter, tort law should reflect this asymmetry. Duties of care should be twice as stringent when children rather than adults are at risk, and damages should be twice as high for child victims. This has important implications for case law, damage caps, lost consortium claims, risk–utility analyses, and numerous scholarly reform efforts. These insights—generated by focusing solely on deterrence—remain robust when we instead view tort law through the lenses of corrective justice and civil recourse. Child premiums also survive a series of challenges rooted in principles of equality and equal respect, complaints of arbitrariness, the potential expressive harms of child exceptionalism, and moral luck. Overall, the initial case for embedding child premiums within tort law is overwhelming.