Vincent as a Negligence Case

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Vincent as A Negligence Case: A Justificational Analysis

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ABSTRACT

In a recent symposium, Professor Sugarman asks whether any account of Vincent v. Lake Erie Steamship Company provides a justification for the outcome that avoids doctrinal, conceptual question-begging or unexplained inconsistencies within tort doctrine. This article takes that challenge seriously by providing a justification for the decision that specifies the source of the defendant’s obligation to compensate the plaintiff.

Contrary to conventional wisdom, the outcome in Vincent v. Lake Erie Steamship Company is based on fault, not strict liability. Although the decision to stay at the dock was socially appropriate, the shipowner acted unreasonably by making that decision without simultaneously agreeing (implicitly) to compensate the dock owner for the damage. Negligence law says that an actor must pay for the cost of reasonable precautions, and the damage to the dock was the precaution that was needed to save the ship. Negligence law internalizes that cost for the same reason that negligence law internalizes the cost of harm when an actor has not invested in reasonable precautions—to make sure that the actor making the decisions matches social costs and benefits. In the normal negligence case, the defendant is required to internalize the cost of excessive harm so that the actor appropriately balances her interest in avoiding the time and effort of precautions against potential harm to others. In Vincent the cost is internalized so that the actor who avoids the harm appropriately balances the harm to others against the cost savings to herself. In both instances, the internalization conserves judicial resources by allowing private decision-making to maximize social value with a minimum of judicial intervention.
By integrating our understanding of Vincent into the law of fault and by using the tools of both law and economics and corrective justice to do so, this article demonstrates how justificational analysis can deepen our understanding of the law.

I want to change the way that we understand and interpret one of the chestnuts of tort law, Vincent v. Lake Erie Steamship Co.¹ In Vincent the defendant shipowner made the reasonable choice by lashing his ship to a dock during a storm, knowingly inflicting harm to the dock in order to avoid the greater expected harm to the ship if the ship had left the dock. Yet even though the choice minimized the social harm from the storm, the shipowner was nonetheless required to compensate the owner of the dock for damage to the dock. The puzzle presented by the case is to determine why compensation was required even though the act that led to the dock owner’s injury was a reasonable one. Although the outcome is commonly seen to be an instance of liability without fault, I argue that Vincent was, in fact, based on a principle of fault and that Vincent tells us a good deal about what we expect of the reasonable person.

Because Vincent is such a staple of the legal literature and is the subject of a symposium in Issues in Legal Scholarship² I assume that the reader has easy access to conventional accounts of the case. I therefore proceed straightforwardly. Section I frames the issue by stating the facts of the case (section A) and by characterizing the nature of the dispute and the difficulty of justifying the outcome (section B). Part II then presents my alternative justification.

However, a subtext lurks behind my analysis; it may help to identify that subtext here. Professor Sugarman’s significant contribution to this symposium³ is to question whether any existing understanding of Vincent has an adequate justificatory basis. His article presents a fundamental challenge to legal methodology and legal theory. We know that we need to understand why a case was decided one way rather than another before we really understand the case and

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¹ 124 N.W. 221 (1910).
apply it as precedent. Professor Sugarman asks what kind of arguments count as good justificatory arguments, and he finds existing justificatory analysis of Vincent to be inadequate. He systematically surveys existing commentary on Vincent and shows that it is deficient as an explanation of why the case came out the way it did.

Thus, according to Sugarman, Francis Bohlen “does not explain why it is ‘obviously just’ to make the [shipowner] pay”, the Restatement “offers no reason for the adoption of the duty of compensation”, and Keeton’s appeal to presumed public opinion “tells us nothing about why people might hold that opinion” and “it is by no means clear that he is correct in his surmise.” Similarly, he is “highly skeptical of the persuasiveness of Morris’ ‘cooperation’ justification for Vincent,” and says that “if there is some other reason to deem the defendant in Vincent ‘negligent without fault,’ I’d like to know what it is.” Of George Fletcher’s theory of reciprocity, he notes: “This is a conclusion, not an argument” and of Richard Epstein’s invocation of a “natural set of entitlements,” Sugarman notes that “calling them ‘natural’ avoids the problem.”

One by one, Professor Sugarman surveys the conventional justifications for the Vincent outcome and finds them to be inadequate.

I take Professor Sugarman’s justificatory challenge seriously, and provide an explanation of why Vincent was correctly decided that fully meets the

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4 Id. at 3 (“Either [the justifications] are simply unconvincing or else they are too sweeping and imply a very different state of the law on all other sorts of issues as well”).
5 Id. at 11.
6 Id. at 15.
7 Id. at 19.
8 Id.
9 Id. at 22. Morris had conjectured that as long as the obligation to pay the dock owner was clear, the dock owner would accept the damage to the dock and not cast the ship off. The problem with this justification is that because the ship was privileged to stay at the dock the dock owner would have been liable for casting the ship off, making the need for an additional inducement in the form of compensation problematic. Moreover, if the law needs to add a payment to induce an actor to do what the law requires, then the law would require compensation in the case of public necessity (where a public official uses another’s property for social benefit), but in cases of public necessity compensation is not required. Id. at 24. Although Morris’ justification does not work in the way he suggested, I have built a consideration of the dynamics of decision-making into my own justification for the Vincent outcome. See text accompanying note 60.
10 Id. at 24.
11 Id. at 31.
12 Id. at 33.
13 Professor Sugarman surveys and critiques a far broader range of commentary, both legal and philosophical, than these excerpts indicate. I rely on the insights of these critiques at several points in this paper. For example, Professor Sugarman shows why neither traditional efficiency analysis nor traditional distributive analysis help us to determine how the loss in Vincent should be distributed; I integrate these ideas into my own analysis. See infra, text accompanying notes 29 to 35.
justificatory standards he demands (even as it rejects his own rationale for the opposite result). My explanation depends on neither an unexplained argument about the result’s fairness or justice, nor on a starting point in legal doctrine that is itself unjustified. Instead, I construct an explanation of the result that builds from an understanding of the problems of human interaction with which the court was dealing and that uses well-known tools of tort analysis to understand the social and moral consequences of the intervention choice the court had to make.

To be sure, my analysis draws from, and intersects with, conventional rationales for the decision. References to our prior understanding about Vincent run throughout the article. In retrospect, this is not surprising. The legal giants who have previously commented on Vincent were on to something, and we need not toss out all the wisdom of those commentators in order to improve our understanding of Vincent. But, in my view, the extant understandings of Vincent reflect an underdeveloped appreciation of the justificatory enterprise.

Therefore, in this article I not only offer a reinterpretation of Vincent and an enhanced understanding of the reasonable person standard, I also explore the methodology of good justificatory analysis. In a short concluding section (Part III), I compare my approach to Vincent with more conventional approaches in order to reflect on the nature of the justificatory analysis that I have undertaken.

I. Framing the Issues

A. The Facts

The steamship Reynolds was moored to plaintiff’s dock, unloading cargo, when a storm came up. The Reynolds finished its unloading even as the storm rose, but was unable to leave the dock because no tugboat was available. Rather than loosening the lines that connected the boat to the dock and drifting away, the ship captain kept the boat firmly lashed to the dock during the storm, replacing the lines when they wore thin and sometimes substituting stronger ones. As a result, the dock suffered $500 damage. The court found the defendant liable for that amount.

The case presents a puzzle. On the one hand, the defendant deliberately chose to inflict damage on the dock. On the other hand, the defendant was privileged to do so because the defendant’s actions were entirely reasonable. “[T]he character of the storm”\(^{14}\) was such that it would have been unreasonable to leave the dock or to have permitted the Reynolds to drift away. Moreover, “the record of the case fully sustains the contention of the [defendant] that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and

\(^{14}\) Id. at 223
prudent seamanship.”

15 It would have been unreasonable to leave the dock, and remaining at the dock was both reasonable and reasonably done. The defendant was in the right location doing the right thing (albeit, given the storm, at an inopportune time).

In addition, the defendant was privileged to stay at the dock in order to prevent the greater harm to the ship and its crew; the doctrine of necessity justified that conduct and made the dock owner liable for damages had the dock owner cast the ship back into the lake.18 Yet despite the defendant’s reasonable conduct and the privilege to stay at the dock, the defendant was liable for the damages it inflicted on the dock. Liability seemingly was imposed without negligence. This prompts the justificatory issue: why was liability imposed?

Was this a case of strict liability, of intentional tort, or of trespass?19

15 Id.
16 The reference to the location of the activity reflects the now-accepted notion that courts should use the strict liability standard when the plaintiff is questioning the location of the defendant’s activity rather than the quality of defendant’s conduct. See e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 193-199 (2004). In Vincent there was nothing unreasonable about the location of defendant’s activity—indeed the unloading was taking place pursuant to contract and therefore (presumptively) at an efficient and reasonable location for that activity. This suggests that a standard justification for applying the strict liability standard would not justify strict liability in this case.

17 The case does not suggest that the defendant could (or should) have foreseen the approaching storm and taken steps to avoid having to damage either the ship or the dock. It was not negligent for choosing to unload when it did.


What was the role of the deliberate choice to inflict harm on the dock by the ship? Was this a contract case, dealing with a law-supplied default provision about the rental fee that the shipowner would pay if the shipowner could not leave the dock? Or was this a case of unjust enrichment or restitution? Was it an example of corrective justice? Or should we attach Vincent to a new category called conditional fault or incomplete privilege?

B. Characterizing the Dispute: The Justificatory Challenge

We can profitably begin to address these questions by understanding the nature of the intervention choice that the court must make in a case like Vincent. I highlight several characteristics of the problem that the court addressed.

First, under the facts as we understand them, neither the dock owner nor the shipowner was at fault for causing the damage to the dock. Neither party could have reasonably anticipated the storm and neither party could have taken any action to reasonably reduce the damage that occurred when the storm arose at the same time that the ship was at the dock. The dock owner is not charged with having built a dock that was unreasonably flimsy and the shipowner is not charged with failing to do something that could have minimized damage to the dock or to its ship. The decision of the ship captain to intentionally replace the dock, at least as of the time that they finished unloading the ore and the contractual permission to stay there expired. But as either intentional tortfeasors or trespassers, the defendants were privileged to stay at the dock in order to prevent the greater harm to themselves; the doctrine of necessity justifies that conduct.

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25 Robert Keeton, Conditional Fault in the Law of Torts, 72 HARV. L. REV. 401 (159). This doctrine suggests that staying at the dock is faulty until the condition of payment has been met. This doctrine is descriptive without explaining why the fault is found if the condition of payment is not met.

26 See e.g., DAN B. DOBBS, THE LAW OF TORTS, 249 (2000), Francis Bohlen, Incomplete Privileges to Inflict Intentional Invasions of Interests of Property and Personality, 39 HARV. L. REV. 307 (1926). The doctrine of incomplete privilege suggests that the privilege to stay at the dock is not complete until the defendant pays for the use of the dock. This notion is descriptively accurate, but does not tell us why the privilege is incomplete.
ropes that bound the ship to the dock, knowing of the risk of damage to the dock, was not faulty because it was the reasonable choice to make.

In other words, even though the defendant made a deliberate choice to allow the harm to the dock to occur, the predicament resulted not from human agency but from an act of nature. In that sense, the case raises the issue of which party – the dock owner or the shipowner – should bear the losses that arise from acts of nature when neither actor contributes in an unreasonable way to those losses. To put the matter another way, the case deals with allocating the losses from the bad luck of the dock owner and the shipowner.

Second, the choice that the court must make is a zero-sum choice. Either the dock owner or the shipowner must bear the loss, and the allocation of the loss to one party is a benefit (in not having to absorb the loss) of exactly the same amount to the other party. The difference could be split, of course, and the parties could share the loss, but every dollar of loss that is given to one party represents an equal benefit to the other party. In other words, allocating the loss to one of the parties cannot be justified on the ground that it decreases the total amount of the loss or otherwise maximizes the joint welfare of the parties. It must be justified on some other basis.

Third, we want the shipowner to stay at the dock, for that imposes the fewest costs on society. Accordingly, we would not want the court to intervene in any way that would inhibit the shipowner from staying at the dock and minimizing costs.

Fourth, the Vincent problem has not yet proven to be susceptible to the usual analysis derived from an economic approach to tort law. This is not a case where the intervention is designed to minimize the social costs of the activity (at least not directly), for the shipowner minimized the social cost by acting reasonably and staying at the dock. Nor does a focus on production incentives get us very far in justifying one outcome over another. To be sure, as Landes and Posner argue, if the loss is allowed to fall on the dock owner, there may be less investment in docks. However, as Bob Sugarman has countered, if the loss is

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27 It is certainly accurate to point out that the shipowner made a choice in the sense of having made a deliberate decision. Glanville Williams, *The Defense of Necessity*, 6 CURR. LEGAL PROB. 216 (1953). But here the English language defeats us. The shipowner did not choose to put himself in the position where he would have to choose the lesser of two damaging outcomes. What made it necessary to choose – and thereby created the necessity behind the doctrine of necessity – was beyond any possible choice by the shipowner –namely, a powerful and unexpected storm.

28 The fact that the origin of the harm in this case was bad luck does not eliminate the need for the court to consider whether it should intervene. Nor does it take away the need to understand the justificatory basis for either intervention or non-intervention. To avoid a decision about whether to reallocate the bad luck loss is to make a decision that the loss should lie where it falls, which is, of course, an interventionist decision.

shifted to the shipowner, there may be less investment in ships.\textsuperscript{30} There is no \textit{a priori} incentive basis for believing that a loss of investment incentive in docks is more or less advantageous than a loss of investment incentive in ships, and therefore no way of favoring one outcome over another. Therefore production incentives cannot provide a basis for the choice that must be made.\textsuperscript{31} The allocation of the loss will surely influence the allocation of resources, but the efficient allocation of resources cannot help us determine how to allocate the loss. Rather, we determine what allocation of resources we favor (and therefore which allocation we will call efficient) by determining where the loss \textit{should} fall.\textsuperscript{32}

Fifth, non-efficiency, distributive methods of allocating losses are also not helpful in deciding how the law should respond to this loss. The arguments that losses should be allocated to those who can best insure against the risk,\textsuperscript{33} or to those who can spread the losses among many customers or shareholders\textsuperscript{34} do not

\textsuperscript{30}Sugarman, Failure of Tort Theory, \textit{supra} note 3 at 29.

\textsuperscript{31}Other considerations that are normally associated with efficiency analysis are also inapplicable in this case. Awarding the rights to avoid the damage to the dock to one party rather than the other will not reduce transactions costs or facilitate bargaining between the parties over the rights. Once the storm came up, of course, bargaining was impossible because decisions had to be made without the possibility of a face-to-face meeting, and because the emergency conditions would have skewed the bargaining positions of the parties. Although the parties were in a bargaining relationship when the ship asked to use the dock space, we can recognize that the dock owner and shipowner had neither the incentive nor the ability to bargain over the risks from a storm. Although the possibility of a storm was foreseeable, it is unlikely that the parties had sufficient incentive to address that risk because the nature and effect of the storm was not foreseeable. Remembering that the shipowner had the right to stay at the dock in the event of an emergency, we can approach this case by asking what terms the parties would have bargained over if they had been able to agree on the nature of the risk that they faced. That approach, however, provides a framework for thinking about the problem but does not help us decide what terms the parties would have agreed to. The best we can do is to find a justificatory basis for determining who \textit{should} bear the risk of the storm’s damage to the dock and then use that outcome to understand how to define the default term that we think that parties would have reached had they bargained over the risk. The analysis that I provide below explains why both the dock owner and the shipowner would have agreed that the shipowner should bear the risk of this loss.

\textsuperscript{32}This is not to deny that economic or instrumental analysis is helpful to understand the \textit{Vincent} problem. Indeed, my analysis of the problem incorporates an analysis of the incentives of decision-making. Below I show how in this case the law allocates the loss in order to influence the decisions that the ship’s captain must make (\textit{see infra} text following note 60). This analysis sees the law as influencing the nature of the decisions that must be made in order to align those decisions with the socially appropriate outcome. This might be thought of as a kind of efficiency function (minimizing social harm given the constraints on conscripting another’s labor), but it must be understood that this efficiency function is to align private decisions with socially appropriate division of responsibility between shipowner and dock owner, and does not seek to influence the allocation of investment resources to either docks or ships.


help us decide whether the loss should be borne by the dock owner or the
shipowner. Because the loss distribution rationales could be applied equally well
to either the dock owner or the shipowner, there is no \textit{a priori} distributional
reason to prefer shipowners to dock owners as the entity that can redistribute the
loss.\textsuperscript{35} Under any loss distribution rationale, sometimes the best distributional
agent will be the shipowner and at other times the dock owner, depending on the
comparative ability of each to pass the costs on.

The characteristics of the problem that \textit{Vincent} addresses make any
justificatory understanding of \textit{Vincent’s} outcome particularly difficult. Once we
have ruled out both traditional efficiency justifications and traditional distributive
justifications, we are left with little to work with. What methodology allows us to
determine how losses should be distributed in zero sum situations when we cannot
rely on either existing legal categories or undefined concepts of justice and
fairness to assign the rights? What arguments count as a sufficient justification?

Professor Sugarman’s significant contribution to this symposium focuses
our attention on this methodological question. As he argues, we cannot justify a
choice about which party should bear the loss from bad luck by appealing to some
preexisting right to be free from interference.\textsuperscript{36} True, it was the property of the
dock owner that was injured, but the ship had a privilege to be at the dock (in
order to avoid the greater harm to the ship), so under emergency conditions does
the property belong to the ship or to the dock owner? And property does not
exist with pre-defined content. It is from the recognition of the right to exclude
others (whether for instrumental or moral purposes) that the law creates property
rather than the other way around.\textsuperscript{37} Further, it is well enough to believe that
justice or fairness require the shipowner to compensate the dock owner, but
believing is not understanding. Without an understanding of the concept of
fairness or justice that is being invoked, it is impossible to project the meaning of
\textit{Vincent}. Put more broadly, we cannot decide the issue by appealing to some
notion of property, fairness or unjust enrichment without specifying what those
terms mean –that is, without identifying the normative basis for our appeal to the
notion that we invoke.

This point can be illustrated and reinforced by examining the articles in
this symposium that offer a justificatory understanding of \textit{Vincent}. They seem to
elide Professor Sugarman’s justificatory challenge.

\textsuperscript{35} Sugarman. \textit{Tort Theory Failure}, supra note 3 at 24 - 25. Apparently, Broeder recognized the
defect in his own theory, \textit{id.} at 25, while Morris had previously disputed the loss spreading
argument as applied to Vincent, \textit{id} at 23.

\textsuperscript{36} See supra, text accompanying notes 3 - 13.

\textsuperscript{37} For a cogent development of this point for students in the context of \textit{Vincent}, see \textit{Abraham,
Professor Keating’s justification for the *Vincent* outcome rests on the fact that the storm threatened disproportionate damage to the ship, recognizing that prospective damage can be allocated to the shipowner and the dock owner on the basis of preexisting notions of property – that is, on the basis of who owned what. He continues: “But it is unfair – or unreasonable – for Lake Erie to save its own at Vincent’s expense. That would mismatch burdens and benefits.”

This concept of fairness “boils down to proportionality of burden and benefit, an idea at least as old as Aristotle.”

This appeal to fairness and the proportionality principle, it seems to me, is conclusory, not revelatory. It tells us little about the content of this concept of fairness, except to tell us that proportionality counts. But this tells us little about the proportionality principle, especially about how to identify the burdens and benefits that matter or how to make sure that the burdens and benefits are proportional. Keating’s later attempt to justify the benefits principle in light of the seemingly contrary result in the negligence regime (if the defendant acts reasonably, the defendant gets the benefits and the victim gets the burdens) also lacks justificatory appeal. His argument is that sometimes strict liability applies (in which case the result is “justified” by the benefits principle) and sometimes the negligence regime applies (in which case the result contradicts, seemingly, the benefits principle). But this does not tell us why the benefits theory sometimes applies and why it sometimes does not apply, which is to admit that we have no justificatory understanding of the benefits principle.

None of this, of course, is to say that Keating is wrong. It is simply to say that his conclusions are not falsifiable because we do not know the basis on which they are made. They are conclusions without content and it is the content that matters for the purpose of analysis. We need not disprove, or disapprove of, the conclusions to point out that they lack justificatory content. The justificatory

39 *Id.* at 32. Keating later says: “An ideal of fairness provides the moral basis for this judgment of wrongfulness. One aspect of this ideal is captured by the idea of unjust enrichment: Because the preexisting baseline of legal entitlement had pinned the lion’s share of risk of loss from the storm on Lake Erie, it is unjust for Lake Erie to gain by transferring that risk to and impoverishing Vincent.” *Id.* at 53.
40 *Id.* at 54 – 55.
41 After articulating his fairness/proportionality approach, Keating immediately interprets it in terms of legal doctrine, illustrating another analytical approach that lacks justificatory force. Keating shows how the fairness/proportionality approach can be used to understand traditional doctrines of unjust enrichment, strict liability (in the form of both *Rylands v. Fletcher* and nuisance doctrine), and the just compensation clause. *Id.* at 32 – 52. On its face, these applications appear to bolster the justificatory appeal of his theory. By showing that the theory is endorsed by doctrine –especially by multiple doctrines – he seems to be reinforcing our faith in the theory.
enterprise demands that we get behind the conclusion to understand the basis on which it is made. I do that below.\footnote{See infra, text following note 60.}

Professor Grodley relies on unjust enrichment as the doctrinal lens through which \textit{Vincent} can be understood,\footnote{Grodley, \textit{Damages}, supra note 19.} and Professor Grodley makes a significant contribution to legal theory by showing how unjust enrichment fits within a scheme that accommodates both tort and contract, and by tracing the origin of that scheme to the late scholastics.\footnote{\textit{Id.} at 15.} But his attempt to show the justification for the doctrine of unjust enrichment assumes the answer to the question he is asking. His justification assumes the plaintiff’s exclusive right to the property. Given this assumption, it is unjust that “[r]esources, from which one party had the exclusive right to benefit, had been used to confer on someone else the very benefit to which the first party had the exclusive right.”\footnote{\textit{Id} at 22} He does not, however, identify the source of this exclusive right, which is the very issue that the court must decide in \textit{Vincent}. The entire exercise in \textit{Vincent} is to determine whether the dock owner’s rights include the right to compensation for this damage, for that is the only way by which we can tell the extent to which the dock owner’s rights are exclusive. If we award compensation, the rights are, to that extent, exclusive; if we do not, the rights are, to that extent, capable of being invaded. Professor Grodley gets his conclusion only if property rights are thought to be self-defining or self-evident, but the privilege of the ship to stay at the dock shows the rights are not self-defining.

Professor Klar adopts the same approach, but he processes the reasoning through the doctrine of trespass rather than the doctrine of unjust enrichment.\footnote{Klar, \textit{Necessity in Canada}, supra note 21.} His justification depends on the following principle: “When defendant directly and deliberately interferes with a plaintiff’s right to the security of persons or to the exclusive possession of land or chattels, then the defendant has committed a trespass.”\footnote{\textit{Id.} at 20.} Like Professor Grodley’s appeal to the exclusive right from property, Professor Klar’s appeal to the right to exclusive possession assumes the very issue to be decided, and therefore fails as a justification. He also makes the same

\begin{itemize}
\item \textit{But none of this doctrinal discussion explains the content of the fairness/proportionality principle. The discussion simply asserts that the results in other cases are consistent with the fairness/proportionality principle, not that the content of the fairness/justificatory principle leads to the results in those cases. This too is a kind of empty justification. Consistency with the fairness/proportionality principle does not help us understand what the principle is or how to apply it.}
\item \textit{See infra, text following note 60.}
\item \textit{Grodley, \textit{Damages}, supra note 19.}
\item \textit{Id.} at 15.
\item \textit{Id} at 22
\item \textit{Klar, \textit{Necessity in Canada}, supra note 21.}
\item \textit{Id.} at 20.
\end{itemize}
argument in terms of personal autonomy, which, from a justificatory standpoint, would require a specification of the meaning of personal autonomy.

For his part, Professor Geistfeld relies on his sophisticated theory of responsibility, which assigns responsibility to those who make choices and are responsible for outcomes. The problem with this theory is its usefulness as a theory of responsibility that supports the outcome in *Vincent*. The shipowner chose to stay at the dock and the bad outcome (to the dock owner) would not have occurred but for that choice. But this was a choice that the shipowner was privileged to make, so it is hard to see how it can be the source of responsibility. Moreover, it is not clear that the decision can even be considered to be a “choice” in a sense that is relevant to responsibility. The privilege to stay at the dock reflected that, given the storm and potential damage in the harbor or lake, the shipowner really had no choice, or at least not a choice that society would want to endorse. Outcome responsibility in *Vincent* is clearly in the hands of an act of nature –the force that robbed both the dock owner and the shipowner of good choices. Choice must have to do with responsibility (as I acknowledge below), but it cannot be the choice to stay at the dock that is the source of responsibility to pay for the damage to the dock.

If we want to take seriously Professor Sugarman’s challenge to explain the outcome in *Vincent*, we must understand *Vincent’s* outcome in terms of a justification that does not resort to either doctrinal conclusions or empty concepts. We must develop an understanding of the case through a methodology that seeks to explain how the law allocates unavoidable losses that result from human decision-making. I suggest that we view *Vincent* as resting on the fault principle.

II. My Central Claim

A. Introduction: Refocusing the Question

My argument that *Vincent* is a fault-based decision is straightforward. To be sure, the defendant’s decision to stay at the dock was reasonable, and therefore unobjectionable. The decision correctly minimized the damage from the storm. From a traditional negligence perspective, defendant minimized deadweight losses to society by choosing the least costly way of preventing harm. For this reason, the defendant shipowner was not negligent in its conduct. From this perspective, the *Vincent* outcome cannot be said to be fault-based.

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48 *Id.* at 21.
But the decision to inflict harm on the dock was not the only decision the defendant made. The defendant also decided not to pay for the damage to the dock when the dock owner requested compensation. This decision is equally important for it was linked to the decision to stay at the dock in a unique way. The decision to refuse to pay reparations was a statement that when deciding to stay at the dock the shipowner need not stand behind the decision by internalizing the consequences of that decision. If that attitude is unreasonable, then the decision not to pay reparations can be taken as evidence that the decision to stay at the dock was made in a faulty way, even though the act of staying at the dock was not faulty. In that way, the imposition of liability when reparations were not paid can be said to be fault-based.

Others have focused on the decision not to pay reparations as the source of the obligation that the court imposed in this case, and as the wrong that formed the basis of liability. However, commentators who have this understanding have thought about the refusal to pay reparations in terms of fairness or unjust

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50 To the extent that commentators have conflated the decision to stay at the dock with the decision not to pay reparations, we can easily speculate on the cause of that conflation. The decision not to pay reparations looks like nonfeasance, not misfeasance. As long as the dichotomy between misfeasance and nonfeasance was thought to mark the division in negligence between duty and no-duty, it was easy to treat decisions not to do something (that is, the decision not to pay reparations) as if it was a non-decision and therefore beyond the scope of analysis. That is why the misfeasance/nonfeasance distinction is dangerous. See e.g., Harold F. McNiece and John V. Thornton, Affirmative Duties in Tort, 58 Yale L. J. 1272 (1949) (“there exists an area of shadow-land where misfeasance and non-feasance coalesce”); Saul LeVemore, Foundations of Tort Law 225 (1994) (referring to the distinction as “useful but vulnerable” and referring to the “fine (or absurd) line between omissions and commissions.” Cardozo said of the distinction: “incomplete the formula is, and so at times misleading.” H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898 (N.Y. 1928). In fact, the appropriate distinction is not misfeasance/nonfeasance but the relationship between an actor and the risk. Ernest J. Weinrib, The Case for a Duty to Rescue, 90 Yale L. J. 247, 253-258 (1980) (hereinafter, Weinrib, Easy Rescue). See also, Jean Elting Rowe and Theodore Silver, The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries, 33 Duq. L. Rev. 807, 850-851 (1995) (hereinafter, Rowe and Silver, Action and Inaction) (suggesting distinction between cases in which the plaintiff would have suffered harm even if defendant did not exist, and cases in which the victim would not have been harmed if the defendant did not exist; this is similar to a test for creating the risk). That distinction is now the organizing principle on which the discussion of duty in the draft Restatement Third is constructed. Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) (Proposed Final Draft No.1, 2005) (hereinafter draft Restatement Third). Section 7 states the general rule: “An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”. This rule, which is applicable to an actor who creates a risk of harm, is then paired with the general rule of section 37: “Subject to [subsequent sections], an actor who has not created the risk of physical harm to another has no duty of care to the other].

51 See, e.g., Keating, Property Right and Tortious Wrong, supra note 19 at 2. The focus on the failure to pay reparations was also the basis of Robert Keeton’s proposed theory of conditional fault. Keeton, Conditional Fault in the Law of Torts 72 Harv. L. Rev. 401 (1959).
enrichment – concepts that seem not to relate to the reasonableness of the decision or to the fault of the actor making the decision. They have not looked at the relationship between the decision not to pay reparations and the decision to stay at the dock, and they have failed to see the shipowner’s decision-making as unreasonable in light of how we expect reasonable people to make decisions that affect other people. The non-fault characterizations, I believe, are a mistake, and have led us away from understanding the fault-based nature of the Vincent decision.

I hope to show how our understanding of Vincent changes if we shift our focus. Instead of finding the duty to pay reparations in some undefined concept like fairness or unjust enrichment, why not inquire into whether a reasonable person would make the decision to stay at the dock without also paying the reparations that the plaintiff requested? What would happen if we thought of the case in terms of what we expect of reasonable people when they interact with others and make decisions that affect the welfare of others? If we shift our focus in this way, we would see the way in which the decision to stay at the dock without paying reparations was fault-based and unreasonable. And that, in turn, might give us a deeper appreciation of both the fault standard that underlies the negligence principle and of the nature of the reasonable person.

B. The Damage as the Cost of Precautions

In order to approach this issue, we need to recognize the one aspect of Vincent that thus far has been overlooked by commentators – the relationship between the damage to the dock and the harm avoided by staying at the dock. In particular, we need to view the damage to the dock as the precaution that a reasonable person would take in order to avoid the greater expected harm from leaving the dock. The measure of the burden of preventing the harm from the storm was the damage inflicted on the dock, and the damage to the dock was the burden that society wants people to assume in order to be called reasonable. In terms of Judge Hand’s formula, the cost of prevention—lashing the boat to the dock—was the precaution that a reasonable person would be expected to take in order to avoid the larger expected loss of not taking the precaution.

52 See, e.g., Ernest J. Weinrib, THE IDEA OF PRIVATE LAW 198 (1995) (“restitution is required because the privilege of using the dock was not the free gift of the dock owner, but was mandated by law. Having benefited the boat owner must remove the detrimental effects of that use”). See also text accompanying notes 38 to 49.
53 I am indebted to David Ricco, a student in my Torts class in 2000 for the point made in this paragraph. He has generously told me that he was led to this conclusion by the Socratic dialogue about Vincent in class. However, it is not clear that the notion had crystallized for me before he completed the point.
54 Carroll Towing Co. v. United States, 159 F. 2d 169 (2d Cir. 1947).
Once we view the damage to the dock as the burden that a reasonable person would undertake to prevent the greater harm from the storm, we can see the way in which Vincent explored the concept of reasonableness.

To be sure, in the usual negligence case, an actor is expected to invest her own resources (effort, time, or money) in reasonable precautions in order to prevent harm to others. Here the actor is allowed to impose the cost of reasonable precautions on another (by choosing to stay at the dock) in order to avoid harm to herself. But this difference, it turns out, is not crucial to how we analyze the situation to determine where the loss from the storm should fall. We use normal tools from the normal negligence case to analyze this somewhat different, but analogous case.

In the standard negligence case, the defendant has a relatively inexpensive means of preventing expected harm, and negligence law imposes a penalty on the defendant for not incurring that cost and preventing the harm. Vincent raised the same issue, but with a twist. In Vincent, the only way of preventing the loss was to impose a cost on someone else (at least initially), and the issue is whether that cost (the cost of taking reasonable precautions) should lie where it falls or whether it should be internalized into the activity of shipping. Should a third party be required to pay for the cost of reasonable precautions (by absorbing the loss to the dock), or should the cost of reasonable precautions be transferred to the person who has the responsibility to prevent the harm and who would incur the harm if the reasonable precautions were not taken?

We can thus interpret Vincent’s outcome in terms of general negligence doctrine. Under general negligence law, one is required to pay for the cost of precautions up to the amount of the expected harm. The cost of precautions – the damage to the dock – is the cost that the defendant must pay because otherwise the defendant would not have paid for the reasonable precautions that negligence law requires people to take. In other words, the fault principle in negligence says that an actor who faces a risk of loss (his own or others) should invest in reasonable care to avoid that loss. That is all that Vincent required.

Similarly, following Epstein, we can recognize that if a single entity owned both the dock and the ship, the entity would have done the reasonable thing by absorbing the damage to the dock as the price of avoiding the greater expected harm from leaving the dock. That is a reasonable decision – and would be the one the entity undoubtedly would make – because when the decision was made the expected damage to the dock was less than the expected damage to the ship. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 157 (1973). And a single-entity owner of the dock and the ship would not think of asking another to absorb the costs of reasonable precautions.

One other ramification of this characterization of Vincent suggests itself. It is clear that what the Vincent court is doing is to internalize the cost of precautions – an entirely appropriate task of negligence law. Moreover, because we internalize the costs of precautions without trying to deter the activity, Vincent helps us untangle the connection between cost internalization and deterrence, suggesting that cost internalization rather than deterrence is what negligence law is accomplishing.
Thus far, I have attempted only to establish the relationship between the damage to the dock and the harm that was avoided by letting the damage occur, and I have done this only to establish a framework for understanding Vincent as a negligence case. This framework is consistent with our understanding that the issue in Vincent is not whether the precaution should be taken—the doctrine of necessity gives the shipowner the privilege to stay and damage the dock. The framework simply shows that the underlying issue in Vincent is whether the cost of precautions should be paid by the dock owner or the shipowner. We still must face the issue of why the shipowner rather than the dock owner should pay the cost of reasonable precautions to avoid the greater harm from leaving the dock. And we must face the issue of what we can say about the reasonable person by analyzing the propriety of the shipowner’s refusal to pay reparations for reasonable precautions.

C. Who Pays for Precautions?

Based on this reframing, we know that the underlying issue in Vincent is whether the shipowner or the dock owner should pay the cost of taking reasonable precautions to avoid the harm. That is, Vincent is asking which party should invest in reasonable precautions to prevent unreasonable harm, the dock owner or the shipowner. In one sense, once we have posed the question, the question seems to answer itself. It seems natural to assume that the shipowner should bear that cost because that is only “fair.”

Yet I think there is value in pressing our inquiry further to see if we can understand the justificatory content of this notion of fairness and its relationship to the reasonable person. In this type of privilege case, the defendant must choose between injury to himself and injury to others. The question is whether the defendant who must choose between his own and someone else’s welfare must pay for the consequences of the choice, even if the choice minimizes the total loss of welfare. Three lines of argument and inquiry suggest themselves. In the subsequent discussion, I go through each line of inquiry individually to see what insights that line of inquiry gives us. Then, I combine the lines of inquiry to suggest that each is but one facet of understanding the concept of the reasonable person.

To be sure, in the normal negligence case we deter unreasonable conduct when we internalize the losses from activities in which the actor has failed to take reasonable care. But we also internalize the cost of precautions even when we do not want to deter the conduct, which is what Vincent accomplished. In other words, under the reading that I am giving, the general task of tort law is to determine when we should internalize external costs, which we sometimes do to deter conduct that is unreasonable and sometimes to internalize the cost of taking reasonable precautions.
First, we might focus on the actor as decision-maker. Negligence law says that an actor should invest in reasonable precautions to prevent greater harm. Here the relevant “actor” is clearly the ship, because the ship captain made the decision to stay at the dock. Accordingly, negligence law would require the shipowner and not the dock owner to pay for the reasonable precautions. To not invest in reasonable precautions would be faulty in the same way that it is faulty, and unreasonable, for any person who makes a decision that affects others not to invest in reasonable care. We can think of this as integrating the decision about who should pay for the precautions into the decision about whether the precautions should be taken.

As a second approach, we might rely on the benefit principle to say that because the harm avoided was harm to the ship, we should require those who avoided the harm to incur the costs of that “benefit.” Here we are relying on one of the traditional approaches to Vincent—the benefit approach—but we are narrowing the scope of the benefit principle that we are applying. Instead of saying that one who benefits from an activity (staying at the dock) should bear the cost of that activity—an impossibly broad principle—we are saying that one who benefits from taking reasonable precautions should pay for those precautions. Because the ship was the beneficiary of the reasonable precaution that it took, the ship should, if this principle holds, pay for the precautions.

A third approach—which I will call the responsibility approach—is to directly ask the question of how we know who (which actor) should bear the cost.

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57 To be sure, under a different set of facts, the dock owner might have been the decision-maker, perhaps by trying to protect the dock from the damage or by trying to induce the ship to move away from the dock. The analysis I provide here accounts for that by factoring into the analysis the relevant decision-making capacity of the two decision-makers. Under the doctrine of necessity, however, the dock owner’s decisions were circumscribed by the law—the dock owner was not privileged to remove the ship from the dock. Ploof v. Putnam, 71 A. 188 (1908). All the dock owner could have reasonably done here was to try to take steps to reduce the damage to the dock, but under the hypothesis we are using to analyze the case, no such steps were possible. If they were, the dock owner would have been required to take them and would have acted unreasonably for not taking them.

58 This reading is therefore consistent with, and fills out, Professor Geistfeld’s theory of outcome responsibility as the basis for analyzing Vincent. See supra note 49. Under my reading, however, the act for which the defendant is responsible is the act of not paying reparations, not the act of staying at the dock.

59 The benefit principle provided the original justification for the Vincent outcome. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926). It continues to provide a frequent justification for the outcome. Broeder, supra note 33 at 229 and Geistfeld, supra note 49 at 22. The problems with a general benefits principle—that the actor who benefits from an activity should bear the cost—were pointed out by Keeton. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 414–418 (1959). That benefit principle is overly broad because a reasonably careful driver is allowed to benefit from driving even if she injures another.
of taking reasonable precautions, and to determine the relevant merits of assigning the cost to each of the two parties in this case – the dock owner or the shipowner. This approach takes the fundamental question that Vincent poses – the question of whether the loss should be allocated to the dock owner or to the shipowner – and frames it in terms of the cost of precautions rather than the loss. We are not asking who should bear the loss in the case; we are asking who should pay for the cost of taking reasonable precautions. Framing the issue in this way allows us to see the ramifications of the choice that must be made for our understanding of the fault principle.

Let me now investigate the normative implications of each of these three approaches.

1. Focusing on Decision-making: The Efficiency Analysis.

We can understand the Vincent decision as reflecting a desire to place responsibility on decision-makers so that they might make decisions that are socially beneficial with a minimum of intrusion from the judicial system.\(^{60}\)

Under this efficiency-based approach, the reason we internalize the cost is that the shipowner has superior access to the information that is necessary to make a socially useful decision with minimum of intrusion by the courts.\(^{61}\) We internalize the cost in order to give the party with access to the best information the incentive to act on the basis of that information.\(^{62}\) To see this, recall that we could potentially get the socially appropriate decision by one of two legal regimes.

Under present law, we give the shipowner the privilege of staying at the dock as long as the shipowner is willing to pay for damages to the dock. The shipowner then stays at the dock whenever the expected damage from doing so is less than the expected damage to the ship. Alternatively, we could set up the legal

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\(^{60}\) The analysis in this section was suggested by the instrumental approach to Vincent taken by Professor Morris. Morris, TORTS 42 – 46 (1953). He focused on the decision of the dock owner not to force the boat away, reasoning that compensation would keep the dock owner from interfering with the ship owner’s decision to stay at the dock. This seems to ignore the incentives on the dock owner to do the reasonable thing (allow the ship to stay at the dock) and the lawful thing (because the ship was privileged to stay at the dock). See Sugarman, supra note 3 at 21 – 22. Nonetheless, I have found that focusing on how various legal rules influence the decisions made by the actors to be helpful in my own analysis.

\(^{61}\) The rationale presented here assumes that high transactions costs would make it difficult for the dock owner and the shipowner to minimize the loss and allocate the costs of minimizing the loss. It therefore seeks to understand how the law should allocate decision-making authority over this unavoidable interference and which legal regime will best induce the private decision-making to reach a socially appropriate result.

\(^{62}\) This line of thought is suggested in Abraham, THE FORMS AND FUNCTIONS OF TORT LAW 402 (2d Ed. 2002).
system so that the dock owner has the absolute right to cast off the trespassing ship, provided only that the dock owner is obliged to compensate the shipowner when the expected damages to the ship are greater than the damage to the dock. If the dock owner had the requisite information, the dock owner would not cast the ship off if the expected damage to the dock were less than the expected damage to the ship. In other words, if the expected damage to the dock were $500 and the expected damage to ship were $501 the dock owner would not cast off the ship, for it would then have a loss of $1. But it would cast off the ship if the expected loss to ship were less than $500, for then it would save money by avoiding damage to the dock. Under either legal regime, if there is perfect information we get the socially appropriate result and minimize the sum of the costs to the dock and the ship.

Of course, both the dock owner and the shipowner make decisions under uncertainty and without access to complete information. Each suffers from bounded rationality. But the dock owner and the shipowner face bounded rationality to different degrees; they do not have equal access to the information that is needed to make a socially appropriate decision. The shipowner has experience with both docks and ships, while the dock owner has experience only with docks and with ships at docks, but not with ships in the open water. Because we are asking the parties to make the decision based on predicted losses, we want to put the decision in the hands of the party with the best access to information and the best incentive to interpret the probabilities accurately. The dock owner and the shipowner stand in different positions in this regard.

If the dock owner made the initial decision of whether to sacrifice the ship or the dock, two types of potential errors could influence the decision. First, the dock owner has a poor basis for predicting the expected loss to the ship in the storm on open waters. The dock owner simply does not have the experience or background needed to make that decision. Second, for the dock owner the damage to the dock is immediate and emotional, making it likely that the dock owner would amplify the expected damage to the dock when making the decision of whether to choose damage to the dock or damage to the ship. Although this error would be corrected by a court if the expected loss to the dock were found to be less than the loss estimated by the dock owner (and if it were less than the expected loss to the ship), such judicial intervention is a waste of resources when the decision can be put in the hands of a decision-maker whose decisions are less prone to error. Both the problem of estimating the potential risk of harm and the problem of overestimating the potential damage to the dock (the cost of protection) make the dock owner an unattractive decision-maker in this instance.

By contrast, the shipowner has both better access to information and better incentives to act on the information in a socially relevant way. First, the shipowner has experience with both ships and docks. It has not only sent ships
through storms before, it has considered how to minimize damage that ships impose on docks (because minimizing that cost reduces the cost of unloading the cargo). This puts the shipowner in a better position than the dock owner to predict the expected losses to both the dock and the ship. As for incentives, the shipowner can be expected to overestimate the expected damage to the ship, just as the dock owner can be predicted to overestimate the damage to the dock. But for the shipowner, the damage to the dock is immediate and observable (whereas for the dock owner the damage to the ship is in the future and unobservable).

In short, we give the shipowner the right to make the decision of how to minimize the costs to the ship and to the dock because the shipowner is in a better position than the dock owner to have access to the information that is needed to make a socially appropriate decision.\(^\text{63}\)

Of course, the shipowner suffers one disability as a decision-maker. The shipowner has a conflict of interest in how it views the expected loss to the dock and the ship. Because the shipowner suffers the loss to its ship, but not the loss to the dock, the shipowner is likely to systematically overemphasize the expected damage to the ship in comparison to the expected damage to the dock. Internalizing the dock damage to the shipowner offsets that bias. The shipowner bears the cost either way and thus is not biased in interpreting the information that it has. It decisions are therefore more dependable and less subject to reversal or challenge. Internalization gives the shipowner the appropriate incentives to make the decision with a minimum of oversight and intervention by the legal system.

Improving the presumptive legitimacy of the shipowner’s decision is important. The decision is likely to be made under difficult circumstances with incomplete information and with little time to examine or augment the information. The information will be subject to emotional biases. The cost of evaluating the decision \textit{ex post} is likely to be high, not only consuming valuable judicial resources but also leading the court to make errors—either by reversing a decision that was correctly made or by upholding a decision that did not minimize the losses. Minimizing those costs is a valuable social function of the law.

\(^{63}\) The shipowner will not have superior information in every case, of course. We can imagine a case where the dock owner, but not the shipowner, knows that a dangerous chemical or expensive painting is on the dock, and therefore knows of unexpectedly high risks if the ship stays at the dock. Because the law is looking for a general rule, the best it can do is to assign decision-making authority to the party that in the majority of cases will have superior ability to make a socially appropriate decision. Moreover, tort law can adjust to cases that deviate from the expected norm. Once the decision-making rules are laid out and the decision-making authority is allocated, the parties must adjust to that allocation. In the example given, private information of the dock owner that is relevant to the shipowner’s decision would impose a burden—a duty to warn—on the dock owner. The failure to reveal information that the shipowner needed to make a socially appropriate decision would relieve the shipowner of the obligation to pay for the resulting damage. \textit{Palsgraf v. Long Island Ry. Co.} 248 N.Y. 339 (1928).
This reading of Vincent emphasizes the value of internalizing the cost of an activity in order to give the actor with access to the best information an incentive to act on the basis of that information to achieve a socially correct result. It suggests that the result in Vincent is actually a case of cost internalization to allow private decision-making to conform to socially useful results with a minimum of intrusion by courts. This reading tells us why the law is set up to allow the shipowner and not the dock owner to make the decision of which risk of loss to accept, and why the shipowner had to bear the costs of its decision. However, we understand this internalization in the context of negligence cases only if we understand the benefits theory underlying the normal negligence case.

2. The Benefit Analysis

If we approach Vincent by focusing on the party that benefited from the decisions that were made, the approach looks, at first glance, to be paradoxical. After all, it cannot be the case that those who benefit from taking reasonable precautions must pay for them. Under negligence principles, innocent victims are entitled to expect that actors will themselves invest in reasonable precaution in order to benefit the victims. Negligence law is grounded on the notion that an actor will incur costs (the costs of precautions) for the benefit of another. And it cannot be that all who benefit from an activity must pay the costs of that activity. After all, actors who act reasonably benefit from their activity without having to compensate those who incur the cost of their activity (that is, those who are harmed by non-negligent infliction of harm).

The benefit argument as traditionally understood is far too broad. But this is not the only way of looking at the notion of “benefit” in negligence law. We can also understand that actors benefit by taking reasonable precautions. In the ordinary negligence case, we impose the cost of precautions on the actor who is attached to the risk because that actor benefits from taking the precautions. The “benefit” is avoiding legal liability for acting unreasonably. Negligence law sets up a choice that all actors face. They can either invest in reasonable care or they can risk the payment of damages. Investing in reasonable care has the benefit of avoiding the greater loss of expected harm from the activity.

In this sense, the benefit theory fits Vincent well and reinforces the way in which Vincent acts like a normal negligence case. The law allocated the cost of

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64 The actor who is attached to the risk is the actor who has created the risk or the actor who has a special responsibility to protect the victim because of the actor’s relationship to the victim. Although the draft Restatement Third does not use the concept of an actor being “attached to the risk,” it does use both the concept of actors who create the risk (in section 7) and actors who have responsibility for the risk because of a special relationship (sections 37 to 44). See RESTATEMENT (THIRD) OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL HARM, PROPOSED FINAL DRAFT NO.1 (APRIL 6, 2005).
protection to the shipowner in *Vincent* because, just as is true in any negligence case, the owner of the ship benefited from the precautions by not having to pay the expected harm of not taking the precautions. In the normal negligence case the defendant has a choice between paying the expected harm in terms of damages or paying to avoid those damages. In *Vincent*, the defendant had to choose between paying the expected harm in terms of damage to its ship or paying for the precautions necessary to avoid those damages. The benefit theory applicable to *Vincent* from negligence cases simply says that to reap the benefit of avoiding damages, reasonable people should invest in reasonable precautions.

With this understanding, the benefit theory becomes a way of matching costs and benefits for an actor so that the actor has before it the information needed to make a decision.65 This can be understood as an important part of forcing a decision-maker to make a socially responsible (and therefore efficient) choice, making sure that the decision-maker matches costs and benefits that are relevant to its decision. In particular, as outlined in the previous section, because the shipowner in *Vincent* is required to invest in the cost of saving its ship, the shipowner will make the socially appropriate choice between staying at the dock and leaving the dock. This decision takes into account both an attempt to minimize the harm and the interests of the dock owner in not suffering losses.

3. The Responsibility Approach

So far, I have identified two interrelated reasons for imposing the cost of repairing the dock on the shipowner. These reasons confirm our intuition that normally negligence law imposes the costs of investing in precautions on the actor who is making the decision about risk—the actor who is attached to the risk—and who will therefore benefit from investing in reasonable precautions.

This may not be quite a complete answer, however. We could conceive, at least analytically, of a negligence regime that would say that *someone* should invest in reasonable care to avoid a greater loss, but that would identify a third party to pay for the cost of precautions—some actor who is not the actor who is responsible for the risk (and who therefore benefits from avoiding harm from the risk). From society’s point of view, as long as someone invests in reasonable care (in the context of *Vincent*, as long as someone absorbs the damage to the dock) the greater harm is avoided and the reasonable result is guaranteed. From the standpoint of the social cost-benefit analysis that is embedded in the negligence

65 The reader can see the way in which the arguments here fill out the content of the fairness/proportionality principle that Professor Keating advances. *See supra*, text accompanying notes 38 to 42. We make the obligation to invest in reasonable precautions a prerequisite for avoiding liability (the fairness of the negligence rule) in order to match the costs and benefits of the chosen activity (the proportionality principle).
principle, as long as the cost of reasonable precautions gets paid, it is not clear why we care that the cost is borne by one person rather than another.  

So why do we require the actor who benefits from the precautions (that is, the actor who would otherwise have to pay damages to injured parties) to also bear the cost of taking precautions?

One way of approaching an answer to this question is to point out the ramifications of any non-legislative approach that would separate the obligation to pay for the cost of precautions from the obligations of the person who is responsible for the risk that caused the harm. Take the person who digs a hole in the sidewalk and knows that if the hole is not properly marked and guarded someone might come along and fall into the hole. The digger of the hole is responsible for the risk created by virtue of having dug the hole and is therefore responsible for making sure that reasonable precautions are taken to avoid unreasonable risk.  Suppose then that the hole-digger went to his neighbor’s house and borrowed some sawhorses and tape, and that he put up the sawhorses and tape to protect against risks to others. Can we imagine a negligence regime in which the hole-digger could impose the cost of reasonable precautions on another in this way? Can we conceive, in other words, of a negligence regime in which a person who creates the risk can send the bill for protecting against the risk to another? 

Although the negative answer to this question seems clear enough, it is instructive to consider why the answer is clear. It is this: if we could conceive of a negligence regime in which the one who creates a risk or benefits from removing the risk could impose on others the cost of protecting against the risk, then we would be saying that the other has a duty to protect victims. This would be a kind of great incursion on the principle that one person does not have to look out for the welfare of another unless that person is attached to the risk of harm in some significant way.

66 Indeed, the government can assign the cost of taking reasonable precautions to taxpayers by subsidizing investment in reasonable precautions. This occurs, for example, when the government pays for crossing signals to be installed at railroad intersections or when the government pays to have roads go either under or over the railroads. Clearly, the identification of who should absorb the cost of taking reasonable precautions is separable from the issue of what precautions are reasonable in a particular case.

67 Several commentators have pointed out that the effect of the opposite outcome in Vincent would be to force the dock owner to be altruistic, although they have not connected that to the negligence aspects of the case. See e.g., Keating, Property Rights and Tortious Wrongs, supra note 19 at 56.

In other words, if the actor who digs the hole could look to another to protect from the risks that that activity engenders, the actor could conscript the resources of another. If this were allowed, it would, in effect, impose a duty on the part of others to aid the actor in protecting against risks that the actor created. This would give rise to a duty to protect others that goes far beyond anything that the law, or most commentators, have yet envisioned. Following the example I have already given, it would allow one neighbor to require another neighbor to come to his aid without any showing of a basis for establishing a duty to aid another.

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69 Even those who argue persuasively for a duty of easy rescue, like Ernst Weinrib, would not envision that the duty would extend when the potential rescuer is not as well placed as another to undertake the rescue. Because the shipowner is in a position to rescue himself with the payment of the costs of staying at the dock, there is no warrant to impose a duty of easy rescue on the dock owner. Any duty of easy rescue must assume that the victim cannot look out for herself, and that no other rescuer is in a better position to undertake the rescue.

70 Of course, Professor Sugarman advocates precisely the position that I would avoid. He wants to make it impossible for the dock owner to seek damages from the shipowner in order to reinforce the notion that reasonable people engage in easy rescues. Sugarman, supra note 3 at 103 – 118. Here I part company with Professor Sugarman. His position is supported by a preference not an argument, and it suffers from a mistake in logic. Giving the dock owner the right to seek compensation does not reduce the altruism of dock owners who would like to contribute to the well-being of others, for it does not prohibit them from failing to enforce their rights. The issue in Vincent is not whether the dock owner must sue but whether the dock owner may sue. An altruistic dock owner can simply say: “Do not bother to pay me.” Indeed, perhaps we have seen so few cases testing the Vincent outcome precisely because actors in the position of the dock owner accept that moral argument that they should absorb the loss and not seek compensation from the person rescued using their resources. The outcome in Vincent leaves the altruistic option open. Indeed, it may well be that the outcome that Sugarman advocates – an increase in altruism – is better served by the Vincent outcome than it would be with the opposite outcome. After all, an actor who could enforce a right but voluntarily gives it up is arguably more altruistic than an actor who seems to act altruistically but in fact has no other options. Moreover, the Vincent outcome is arguably truer to the altruistic ideal because it allows the decision of whether to be altruistic to be influenced by the circumstances of the case that are not relevant to the question of whether the dock owner has a right to seek compensation. The actor in the position of the dock owner is likely to take into account the relative wealth of himself and the other, her perception of whether the other could have reasonably avoided the harm (even if she cannot prove the negligence) and other distributive factors that matter for altruistic decisions. The Vincent outcome therefore not only allows a person in the position of the dock owner to be altruistic, it allows that person to define the terms and conditions of the altruism and thus to further the creation of altruistic norms.
Of course, *Vincent* is different from the defendant who digs a hole and relies on another person’s resources to create a barrier against the hole. The ship in *Vincent* did not create the risk to his ship and is not connected to that risk in any way, except that the defendant bears the loss if the risk is not reasonably addressed. But the prior discussion about matching benefits and costs in the person who can make a decision about those benefits and costs shows the way in which *Vincent* is like the general negligence case in an analytically relevant way. Because the shipowner in *Vincent* benefits from the investment in reasonable care and must make the decision about whether to risk staying at the dock or leaving the dock, the shipowner is attached to the risk in a way that is relevant to negligence law. There is no more warrant in asking the dock owner to contribute to the reduction of that risk than there would be if an actor were to dig a hole in a sidewalk and ask the neighbors to chip in to protect against the harms that might occur from that hole.\(^{71}\)

In other words, the justification for internalizing the damage to the dock in the act of shipping is precisely the same as the justification for requiring that an actor who creates a risk also invest in reasonable precautions to reduce that risk to reasonable levels. By requiring the actor who is attached to the risk to pay for reasonable precautions we put decision making in the hands of the person who benefits from the decision and make it impossible for the decision-maker to conscript the resources of another to help reduce the risk.\(^{72}\)

\(^{71}\) The astute reader will recognize that my explanation of the *Vincent* outcome is not complete, for I have relied upon a principle – the notion that in the absence of a special relationship one has no duty to rescue a potential victim -- without independently justifying the principle. That is true, but I hope that the principle is so well explained in the literature that reliance on it for justificatory analysis is itself justified.

\(^{72}\) George Fletcher may have had a similar rationale in mind when he proposed a corrective justice interpretation of *Vincent* that centered on the dominance of the ship owner over the dock owner, a dominance given by law.

“The [dock owner] may not exercise defensive force to protect his property. He may not do anything except wait until the dock is damaged. He has no option but to receive compensation after the deed. In all of these cases, the guiding principle of justice is that, if the injurer dominates another by the imposition of a risk that is beneficial to society as a whole, the injurer must make whole those who suffer resulting injuries.” Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1676 (1993). The law took the relevant decision out of the hands of the dock owner because the doctrine of necessity required the dock owner to allow the ship to stay at the dock (by requiring the dock owner to pay penalties unless the dock owner could prove that leaving the dock was less harmful than staying at the dock). As I have shown, by putting decision-making authority in the hands of the party that would otherwise be responsible for the expected harm, the law is recognizing the dominance of the relevant decision-maker and is effectively endorsing the notion that that decision-maker should not be allowed to conscript the resources of others to fulfill its own obligations.
D. The Reasonable Person

I have gone through this analysis of how we determine who must pay the cost of reasonable precautions so that we can view Vincent as a case that invokes fault principles. Doing so augments our understanding of the normative basis of negligence law. What might this understanding of the Vincent case tell us about the reasonable person? In what way was the shipowner’s decision not to pay reparations part of an unreasonable act?

To answer this question we must understand the relationship between the decision to stay at the dock and the decision not to pay reparations. As we have seen, the first relevant decision was the decision of the ship captain to stay at the dock, knowing of the risks to the dock but balancing those risks against the risks to the ship. The second relevant decision – the decision not to pay reparations – was related to that decision because it determined the kind of information that the decision-maker would take into account when deciding whether to stay at the dock. The decision not to pay reparations was effectively a statement by the owner of the ship that the decision to stay at the dock need not be informed by the interests of the dock owner, but only by the interests of the shipowner. Here is why.

If the shipowner were not required to pay for the damages to the dock, then the ship captain could ignore the welfare of the dock owner in balancing the various interests that were relevant to the decision of whether to stay at the dock. And, if the ship captain were allowed to ignore the welfare of the dock owner, the ship captain could, as we have already seen, systematically underestimate the damage to the dock, relying solely upon his own interest in making that decision. This would have two ramifications. First, from an instrumental viewpoint, the ability to ignore the welfare of the dock owner would mean that in some cases the captain’s decision would impose more damage on the dock than is warranted by the expected harm to the ship. While that mistake could be corrected by legal intervention (the decision to stay at the dock would then be unreasonable), it saves judicial resources to force the decision-maker to take all relevant costs into account. Just as important, from a philosophical viewpoint, if the shipowner were not required to pay for the damage to the dock, the court would be affirming that the captain need not take into account the welfare of another when deciding whether to stay at the dock.

By internalizing the cost of the damaged dock to the person making the decision, the court overcame both of those problems. First, by making the shipowner responsible for the costs to the dock, the court made sure that the ship captain made a rational choice among the available options, given the information
available to him. As explained above, once the ship captain knows that the
shipowner must pay for damage to the dock, the ship captain would not
misunderstand or misinterpret the information the captain had about damage
to the dock and the potential damage to the ship. This does more than just save on
judicial resources; it also maximizes personal autonomy of the decision-maker,
giving the decision-maker full authority, but also full responsibility, for the
consequences of that decision. Second, the court affirmed the obligation of the
ship captain to look out for the welfare of others, in this case the dock owner. In
other words, because the ship captain must pay the damages to the dock, the
decision of the ship captain to stay at the dock required the ship captain to
consider the welfare of the dock owner as well as the welfare of the ship and its
crew.\textsuperscript{73}

The outcome in \textit{Vincent} essentially says that in making the decision about
whether to stay at the dock, a reasonable person will take into account the
interests of the dock owner, and the court is imposing the costs of that decision on
the decision-maker in order to reinforce the way that reasonable people make
decisions. Any other result allows the decision-maker to conscript the resources
of the dock owner and thus to ignore the dock owner’s interests. Only by
internalizing the costs of the damage to the dock can the law insure that the
decision-maker takes into account all of the welfare effects of the decision-
maker’s deliberations about whether to stay at the dock.

Accordingly, the decision to stay at the dock was reasonable, but only if in
making that decision the shipowner was contemplating that is would later make
the dock owner whole, and that intention must then be manifested in the decision
to pay reparations. By contrast, a decision \textit{not} to pay reparations was
tantamount to a claim that the defendant need not think about the welfare of the
dock owner when making decisions –despite knowledge of the potential damage
to that welfare.\textsuperscript{74} The claim that one can ignore the interests of another is, by

\textsuperscript{73} The decision in \textit{Vincent} thus preserves, to the maximum extent possible, the autonomy of both
the dock owner and the shipowner. The dock owner retains the option of not enforcing the rights
awarded to him in \textit{Vincent}, and the dock owner’s autonomy is further protected by the requirement
that the shipowner take into account the damage to the dock when deciding whether to stay at the
dock. The shipowner has the autonomy to make the decision about whether to stay at the dock,
although at the cost of having to honor the autonomy of the dock owner. The opposite result
would have allowed the shipowner to ignore the interests of the dock owner and would have
disabled the dock owner from acting altruistically by not enforcing its right to seek payment for
the damages.

\textsuperscript{74} The fault in \textit{Vincent} was therefore in making the decision to stay at the dock without also
implicitly agreeing to assume the cost of the reparations. It is this aspect of the shipowner’s
decision, rather than the refusal to pay reparations itself, that makes the decision faulty. The
decision to stay at the dock could only be made reasonably with the implicit agreement to pay for
the damage. The later decision to refuse reparations breached that understanding. In this respect,
\textit{Vincent} is symmetrical with general negligence cases. In general negligence cases, the defendant
itself, unreasonable, for no reasonable person acts with disregard of the welfare of others. In the normal negligence case, it is unreasonable to ignore the expected harm to another that could have been avoided by reasonable means, for that is tantamount to ignoring the welfare of another. In this case, it is unreasonable to ignore the costs of precautions, for that would be tantamount to ignoring the welfare of another. Either way, the defendant acts unreasonably when it fails to invest in reasonable precautions because that is tantamount to exalting the decision-maker’s interests over the interests of others.

Interestingly, this analysis is congenial with the two dominant theories that animate our understanding of tort doctrine: law and economics theories and corrective justice theories. In terms of law and economics, we internalize that cost of preventing the harm in order to make sure that the person who is making the decision has before it all the information about the welfare effects of the decision that is relevant to the decision. This is internalization, not deterrence, for we are not trying to deter the conduct (staying at the dock). We are trying to deter the effort to ignore the welfare of another when making decisions.75

In the language of corrective justice, the shipowner is required to pay the value of the harm to the dock because that is the only way by which the decision to stay at the dock will force the shipowner to consider the welfare of the dock owner. Only that outcome forces the defendant to recognize the obligation of each person to honor the existing distribution of welfare between that person and others. Any other decision allows the defendant to ignore the welfare of another and thus to upset the balance between actor and those affected by his acts.

It should be noted that this understanding of Vincent is consistent with general negligence law and does not undermine it. This understanding applies only where the defendant makes a choice and the choice is between the defendant’s welfare and another’s welfare. It is only in those circumstances that the law needs to make sure that the defendant is willing to pay for the plaintiff’s damage so that the law knows that the defendant will overcome the inherent conflict of interest that occurs when a person must choose between his welfare and that of another. Accordingly, if a defendant is driving down the street non-negligently, and must choose between hitting a boy running in front of her or hitting a parked vehicle, no conflict of interest infects the defendant’s decision-making a decision about the level of care to take, implicitly agreeing to pay reparations to the victim as a guarantee that the defendant will evaluate the defendant’s interest (to minimize the burdens of precaution) against the interests of the victim (to avoid the risk of expected harm).

75 Alternatively, we could say that the internalization is consistent with the need to deter the defendant from ignoring the interests of the dock owner. As I have explained in the text, only by internalizing the damage to the dock can we make sure that the defendant takes into account that cost (a proxy for the relevant interest of the dock owner). This interpretation marries the internalization perspective with the deterrence perspective, but explains that we are not trying to deter the ship from staying at the dock.
making and the defendant need not pay reparations unless the defendant makes an unreasonable choice. Similarly, where a defendant slips on unrecognizable black ice and falls into another pedestrian, the defendant need not pay reparations. The defendant has made no choice that implicates the welfare of another and the Vincent analysis applies only when a choice is made.

III. Implications and Conclusion

I have argued that Vincent is really a fault-based case. The defendant was required to pay reparations to the dock owner because to refuse to pay reparations would be unreasonable in light of how a reasonable shipowner would think about the dock owner’s welfare when the shipowner decided to stay at the dock. To be sure, the defendant was not “negligent” in the popular sense of the word because the defendant was not acting inattentively or in any impaired way when deciding not to pay reparations. But negligence law does not distinguish between decisions that are deliberate and those that are simply inattentive; both can be unreasonable.

I have impliedly argued, and now affirm, that Vincent should not be understood as a case of strict liability or liability without fault. The act of staying at the dock was not faulty, but liability was not imposed for the act of staying at the dock. Liability was imposed for not paying reparations after staying at the dock, and that decision was faulty because it failed to take into account the welfare of the dock owner in a way that the law expects of a reasonable person. Based on the analysis that I have given, the reasonable person is one who makes a reasonable accommodations between her interest and the interests of others when making decisions that may affect the welfare of others. The defendant in Vincent failed to do that.76

The subtext of this analysis and conclusion, however, relate not to tort law but to the methodology by which we understand the law, and, in particular, to the kinds of arguments that we accept as explanations for the law’s outcomes. In this concluding section it may be worth summarizing the methodological lessons that can be drawn from my analysis.

The general methodological theme of this article is that thinking about the law in justificatory terms requires that we abandon the attempt to understand case outcomes through doctrinal categories or general concepts. Instead we must

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76 That Vincent does not invoke strict liability principles does not say anything in particular about the role of strict liability in tort law, except to remove one case that was thought to be on the strict liability side of the ledger. However, that Vincent can be moved from the strict liability side of the ledger to the negligence side of the ledger does cast a shadow over the notion that strict liability and negligence reside in different spheres and the related notion that the border between the two spheres is impermeable. The implications of that shadow are left to be worked out in other articles. See Peter M. Gerhart, The Death of Strict Liability (manuscript on file with the author).
understand the law in terms of the reasons that support one outcome over another. Doctrinal and conceptual thinking begs the very question to be answered—and thereby covers it up—by appealing to a standard that must itself be defined and justified. As Professor Sugarman has emphasized, and as I have repeated in this article, appeals to doctrines of property, contract, or strict liability lack justificatory content. Appeals to property doctrines fail to recognize that property is the total of rights awarded to the owner, not a basis for determining those rights. Appeals to contract fail to recognize that any legally imposed default rule must itself be justified on some welfare basis. And appeals to strict liability simply state a conclusion—the plaintiff could prevail without showing fault—without any basis for saying why the plaintiff could prevail without showing fault.

Similarly, appeals to concepts like fairness or justice are also non-justificatory unless the analyst can reveal the content of the definition of justice or fairness that is being applied. Without revealing their justificatory content, appeals to fairness or justice are either stating a preference or simply making a non-falsifiable argument. Either approach lacks justificatory content.

By contrast, in this article I have taken the justificatory enterprise seriously and have sought to understand and evaluate Vincent’s outcome by appealing to a range of thought that explains, with some degree of specificity, the instrumental and moral theories that support the decision. For example, I used theories of decision-making under uncertainty—an instrumental theory—to show how we allocate rights in order to influence the decision-maker to take into account relevant costs and benefits. And I used a moral theory—why an actor is not in general responsible for the welfare of others—to show why some costs should be internalized. Together I believe these theories construct a plausible basis—one that is appealing socially and morally—for understanding why courts impose liability for harm and thereby create rights to seek redress from harm. By revealing the social and moral wisdom that appears to support the outcome, we understand the case in non-conclusory terms and can apply its wisdom to other situations. The learning from Vincent is transportable in ways that otherwise would not be possible.

The difference between doctrinal/conceptual approaches and justificatory approaches is illustrated well in the context of our understanding of Vincent. Conventional approaches to Vincent have sought to use an existing concept or doctrine to understand the outcome—a kind of top-down approach that lacks revelatory content unless the content of the concept or doctrine is itself understood. I have tried to understand Vincent in terms of the problem that must be solved by the law by using a series of social and moral tools that can help us understand how legal institutions solve that problem.
It may be worth articulating some of the features of my analysis, for I would posit that several aspects of the approach here are central to justificatory analysis in a wide variety of contexts.

First, I started with a characterization of the problem that the law had to address, and I stated the problem not in terms of legal categories but in terms of the social problem that must be addressed—namely, the interrelationship between two parties caught in a storm. Rather than asking a legal question—for example, should the defendant be responsible without fault?—I identified the problem of social interaction that the law has to address—namely, when harm occurs because of bad luck, how should we think about who should bear loss?

Second, I focused on decision-making as the unit of analysis. I asked: “who made what decisions and what kinds of constraints does the law want to put on the decision-maker in light of the uncertainty with which the decision-maker must deal.” This allowed me to get around the question of whether staying at the dock was unreasonable and go directly to the question of whether the decision to refuse to pay reparations was unreasonable. Focusing on the decision-maker as the unit of analysis invokes a sensible view of the relationship between law and society, for it positions law as a social force for constraining and evaluating human decision-making. The law is trying to judge and influence human behavior, and it is the decision of actors that controls their behavior. It therefore makes sense to focus on the nature of the actor’s decision-making in light of relevant social interactions to determine whether the decision-making was socially appropriate.

Of course, the focus on a social interaction and the focus on the actor as decision-maker are interrelated, for the law is dealing with decision-making in a social context and therefore with how people make decisions in a social context. Under this view, law is a part of the behavioral sciences, built upon our understanding about, and influencing, how people behave when interacting with other human beings.

Third, the tools I used to address and evaluate decision-making in a social context were drawn from a mixture of instrumental and moral theory. Instrumental thinking allowed me to understand the nature and consequences of the decisions made by the various actors and to explain why the decision-maker who benefits from a decision should also bear the costs of that decision. Moral theory allowed me to recognize that there are limits on what burdens the law can impose on individual autonomy, and I used that theory to explain why the owner of the ship should not be allowed to conscript the resources of the dock owner to contribute to the socially appropriate outcome.

This suggests that good justificatory analysis is neither exclusively instrumental nor exclusively moral, the exclusive province of neither the economist nor of the philosopher. It is the province of both. The reasons for this
are themselves tied to the view that law addresses issues of social interaction by understanding both the instrumental and moral influences on human decision-making, recognizing that human decision-making is based on both internalized norms (the moral aspect of decision-making) and on consequences of decisions (the instrumental aspects of decision-making). To the extent that corrective justice scholars emphasize that humans rely on elemental beliefs about how one should act toward another, they have it right. To the extent that law and economics scholars rely on how people make decisions on the basis of those beliefs but in the face of uncertainty, they have it right. Together, we can get it right.