

Systemic Racism as Negligence

Taifha Natalee Alexander*

TABLE OF CONTENTS

INTRODUCTION	616
I. CRITICAL RACE THEORY, NEGLIGENCE, AND THE STRUCTURAL NATURE OF RACIAL HARM	623
A. <i>CRT Exposes the Failure of Intent-Based Frameworks to Redress Systemic Racism</i>	623
B. <i>CRT's Critique of Intent as the Defining Element of Racial Harm</i>	625
C. <i>Negligence Doctrine Offers an Alternative to the Restrictive Intent-Based Framework.</i>	627
II. ESTABLISHING LIABILITY FOR SYSTEMIC RACISM IN TORT LAW	631
A. <i>Institutional Duty and Foreseeability in Systemic Contexts</i>	632
B. <i>Breach of Duty: Institutional Neglect, Not Individual Malfeasance</i>	642
C. <i>Causation: Policy as the Mechanism for Harm</i>	644
D. <i>Proving Harm: Damages and Institutional Remedies</i>	648
1. <i>Statistical Evidence Can Quantify Damages</i>	648
2. <i>Economic Damages and Equitable Relief Resulting from Systemic Racism as Negligence Claims.</i>	650
3. <i>Institutional Remedies: Beyond Monetary Compensation</i>	652
III. CASE STUDY: APPLYING THE SYSTEMIC RACISM AS NEGLIGENCE FRAMEWORK TO AN ANTI-CRT MEASURE IN EDUCATION	654
A. <i>Forsyth County Schools Owes a Duty.</i>	656

* Assistant Professor of Law, St. John's University School of Law. J.D., Georgetown University Law Center; LL.M., Specialization in Critical Race Studies, UCLA School of Law; B.S., St. John's University. I am thankful to the following individuals for sharing their brilliance to improve this Article: James Marcus Alexander, LaToya Baldwin Clark, Yvette Borjas, Anna Spain Bradley, Martha Chamallas, Blake Emerson, Rachel Godsil, Jonathan Feingold, Danielle Garcia, Rick Hasen, Nicole McConlogue, Mark McKenna, Hiroshi Motomura, Alanna Kane, Jasleen Kohli, K-Sue Park, Eloise Pasachoff, Sunita Patel, Brenda Suttonwills, Nadine Williams, Lindsay Wiley, and Noah Zatz. I am also grateful to the editors of the *Harvard Civil Rights-Civil Liberties Law Review*, Katie Mayopoulos, Rotem Litinski, Shahnur Said, and Max Sterling, for their superb edits. I am forever indebted to the Lutie A. Lytle Black Women Law Faculty Workshop for providing the space to generate this idea. To my mentors, Devon Carbado, Janel George, Laura Gómez, Cheryl Harris, Eloise Pasachoff, and Noah Zatz, thank you for your unwavering support and generous guidance in shaping the scholar I have become. This Article is dedicated to my late mother, Merdith 'Sally' Rowe, who navigated countless systems of oppression to demonstrate, through persistence and love, that justice is both a calling and a promise.

1.	<i>Foreseeability: Forsyth County Schools Should Have Anticipated Racial Harm</i>	657
2.	<i>Forsyth County Schools Had Actual and Constructive Knowledge</i>	660
3.	<i>Special Relationship: Forsyth County Schools Owes Students a Heightened Duty of Care</i>	661
B.	<i>Breach: Forsyth County Schools Failed Its Students of Color</i>	663
1.	<i>Forsyth County Schools Retained Control Over the Harmful Policy Environment</i>	663
2.	<i>Forsyth County Schools Omitted Safeguards that a Reasonable District Would Provide for Vulnerable Students</i>	664
3.	<i>Forsyth County Schools Ignored Practical Opportunities to Reduce Foreseeable Harm</i>	665
C.	<i>Causation: Forsyth County Schools' Anti-CRT Measure as a Structural Harm Mechanism</i>	665
1.	<i>Forsyth County Schools' Anti-CRT Measure Caused Racially Disparate Educational Outcomes</i>	666
2.	<i>Forsyth County Schools' Anti-CRT Measure Functioned as a Structural Exposure Mechanism</i>	666
3.	<i>Statistical and Structural Evidence Supports the Causal Link</i>	667
D.	<i>Damages: Quantifying the Cost of Racial Exclusion</i>	669
1.	<i>Forsyth County Schools' Students of Color Have a Legally Cognizable Injury for Non-Economic Harms Under the Systemic Racism as Negligence Framework</i>	669
2.	<i>Forsyth County Schools' Students of Color Can Measure Their Injuries with Reasonable Certainty Depending on Empirical Methodologies</i>	670
3.	<i>Remedies Available to Forsyth County Schools' Students of Color Include Removal of the Anti-CRT Measure, Student Support Funds, an Advisory Council, and Accountability Measures</i>	671
	CONCLUSION	672

INTRODUCTION

If negligence doctrine can hold polluters liable for foreseeable toxic harm, should it not also hold schools liable for the racial toxins their policies foreseeably cause? Negligence serves as a critical doctrinal vehicle for redressing harm resulting from failures to exercise care. Embedded in common law traditions, negligence doctrine has evolved significantly through application to new contexts where systemic, rather than individualized, failures produce harm. Some courts have applied negligence doctrine to an

expanding range of institutional responsibilities, from medical malpractice to corporate liability.¹ Yet, despite the doctrine's flexibility, courts have not applied the framework to address one of the most pervasive, enduring, and structurally embedded forms of harm in American society: systemic racism.²

As used throughout this Article, systemic racism does not refer to every instance of racial disparity, but to contemporary racial inequities that result from rules, statutes, regulations, and policies that reinforce the centuries-long, imbalanced accumulation of racial power. Such rules allocate opportunity and risk along established racial lines and thereby reproduce and perpetuate racial hierarchy even when individual actors do not harbor discriminatory intent. This Article contends that systemic racism is the foreseeable consequence of institutional design choices that ignore the historical context of how racial power operates across systems and through policy. As such, this Article argues that systemic racism is a legally cognizable harm under existing negligence doctrine and that American societal institutions, specifically public school districts, should be held liable when institutional policies foreseeably entrench racial disparities. Foreseeability is established through institutional knowledge of racially disparate impacts, public and administrative data documenting these disparities, or through special relationships.

The failure to apply negligence doctrine to systemic racism reflects a broader reluctance to recognize structural racial harm beyond antidiscrimination frameworks.³ This reluctance does not reflect a conceptual or

¹ Courts have progressively expanded the application of negligence doctrine to encompass various institutional responsibilities. *See, e.g.*, *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156 (Ct. App. 1982) (holding that hospitals may be liable for corporate negligence in failing to oversee the competency of physicians practicing within their facilities); *Jones v. Chicago HMO Ltd.*, 191 Ill. 2d 278 (2000) (holding that a Health Maintenance Organization may be liable for institutional negligence if it fails to exercise ordinary care in coordinating its members' health-care services); *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253 (Ill. 1965) (holding that hospitals may be held liable for corporate negligence when failing to implement policies ensuring adequate medical care and patient safety).

² Systemic racism is defined as the network of policies, institutional practices, and entrenched norms that, regardless of individual intent, are applied without regard for the historical imbalance of racial power that persistently allocates benefits and burdens along racial lines and thereby reinforces the pre-existing falsehood of a racial hierarchy in American societal institutions including, but not limited to, education, policing, housing and employment. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 19-21 (Rev. ed. 2020); EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY* 6-8 (5th ed. 2018); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 7-10 (3d ed. 2017); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 53-58 (2017); *see also* K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 YALE L.J. 1494-95 (2024) (explaining how the county title-registry system was created to validate settlers' claims over Indigenous lands and enslaved people, which still structures today's property market in racially stratified ways).

³ *Cf.* Rakhi Ruparelia, *"I Didn't Mean It That Way!": Racial Discrimination as Negligence*, 44 S.C.L.R. (2d) 81, 83-85 (2009) (arguing that individual racial discrimination should be recognized under negligence law to circumvent the limitations of intent-based frameworks). This Article expands Ruparelia's argument by shifting the focus from individual racial discrimination as negligence to systemic racism as institutional negligence—a distinction with significant doctrinal and practical implications as discussed throughout.

doctrinal incapacity of tort law to confront systemic racism. Instead, this reluctance stems from a jurisprudential legacy that confines race-based claims to antidiscrimination frameworks, which have become increasingly restrictive and operate as both evidentiary and epistemic barriers to relief. Under intent-based antidiscrimination legal frameworks,⁴ plaintiffs must prove intent to establish a *prima facie* case of racial discrimination. Critical Race Theory (CRT) scholarship has extensively analyzed the limitations of antidiscrimination frameworks,⁵ demonstrating that the evidentiary burden⁶ of proving an actor's mental state is often insurmountable and constrains efforts to redress systemic racism. Negligence, by contrast, does not require proof of intent and offers an alternative, existing doctrinal pathway for adjudicating racial harms arising from institutional policies or omissions that foreseeably cause risks resulting in systemic racial harm.

Although disparate impact doctrine provides a non-intent-based mechanism for redressing systemic harm, its doctrinal scope has been narrowed significantly through judicial interpretation, burden-shifting constraints, and limited remedial reach.⁷ Antidiscrimination frameworks remain necessary for addressing explicit, invidious discrimination. However, a central limitation of existing antidiscrimination frameworks is the frequent inability to address systemic racism, manifested through policies, practices, and omissions that sustain racial inequities across groups over time.⁸ As a result, the broader architecture of antidiscrimination law continues to reflect a conceptual and evidentiary model that insufficiently addresses institutional neglect. This Article seeks to fill that doctrinal gap by advancing a framework for systemic racism as negligence claims, which aligns with tort law's longstanding recognition of institutional duty and systemic risk. Negligence doctrine offers an alternative, underutilized pathway for holding institutions accountable for foreseeable racial harms rooted in policy omission or implementation, without the prohibitive burden of proof that antidiscrimination law requires.

⁴ *E.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 239 (1977); *Alexander v. Sandoval*, 532 U.S. 275, 275 (2001).

⁵ *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

⁶ *See, e.g.*, *Washington*, 426 U.S. at 229; *Vill. of Arlington Heights*, 429 U.S. at 252; *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁷ *See* Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1358-69 (2017) (detailing issues with confined judicial focus on discriminatory intent, significant disparities caused by requirements that plaintiffs prove a particular practice, and remedies focused on individual injuries, not broader systemic harms).

⁸ *See supra* note 5.

This Article develops the legal foundation for recognizing systemic racism as a legally cognizable harm under negligence doctrine. Each element of negligence—duty, breach, causation, and damages—can be satisfied when institutions enact, maintain, or disregard policies that foreseeably entrench racial disparities resulting in systemic racism. This Article does not propose the creation of new rights or an expansion of tort doctrine. Through existing negligence doctrine, courts have imposed corporate liability beyond direct interactions⁹ and concluded that institutions have a duty to prevent harm when their policies or omissions foreseeably create systemic risks.¹⁰ Building on this precedent, this Article offers a doctrinal intervention that provides a pathway for courts to interpret and apply established negligence doctrine to address racially entrenched institutional harms through systemic racism as negligence claims.

While systemic racism as negligence claims avoid the intent-based evidentiary barriers of antidiscrimination law, courts applying the framework must still confront the evidentiary hurdles that have long obscured diffuse racial harms. Generally, a direct causal link between a defendant's actions and a plaintiff's injury is required to satisfy the causation element,¹¹ which is a standard that inadequately captures how institutions perpetuate racial harm through diffuse and cumulative effects. However, toxic tort and products liability jurisprudence provides an illustrative model for overcoming evidentiary challenges by allowing plaintiffs to use probabilistic and statistical evidence to establish causation in systemic racism as negligence claims. Such allowances in tort law reflect a broader doctrinal willingness, particularly in some jurisdictions, to adapt negligence principles in response to complex harms. As a result, this doctrinal flexibility makes possible a framework for recognizing systemic racism as negligence claims as legally cognizable.

This evolution in evidentiary tort law has been driven by social and policy imperatives to better protect the public from large-scale systemic harm.¹² In toxic tort and products liability litigation, for example, plaintiffs

⁹ See, e.g., *Thompson v. Nason Hosp.*, 591 A.2d 703, 707-09 (Pa. 1991); *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156, 161 (1982); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164-65 (Wis. 1981); *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 258 (Ill. 1965).

¹⁰ See *Thompson*, 591 A.2d at 707-08; *Elam*, 183 Cal. Rptr. at 158; *Johnson*, 301 N.W.2d at 164-65; Meiring de Villiers, *Foreseeability Decoded*, 16 MINN. J.L. SCI. & TECH. 343, 344 (2014); OMRI BEN-SHAHAR, CAUSATION AND FORESEEABILITY, IN RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 644 (JENNIFER ARLEN ED., 2013); W. Johnathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1878 (2011).

¹¹ See, e.g., KEITH N. HYLTON, CAUSATION IN TORT LAW: A RECONSIDERATION, IN PHILOSOPHICAL FOUNDATIONS OF TORT LAW 174 (David G. Owen ed., 1995); Note, *Rethinking Actual Causation in Tort Law*, 130 HARV. L. REV. 2163 (2017).

¹² In *Elam*, the Court advanced a policy reason for finding the hospital responsible for its doctors' actions in stating that "...imposing the duty of care upon a hospital should have the 'prophylactic' effect of supplying the hospital with greater incentive to assure the competence of its medical staff and the quality of medical care rendered within its walls." See 183 Cal. Rptr. at 164.

frequently rely on epidemiological data and statistical evidence to establish causation and demonstrate that systemic exposure to harmful conditions may not always produce injuries that are traceable to a single event or actor.¹³ This Article contends that courts should apply the same evidentiary approach to systemic racism as negligence claims. Doing so aligns negligence doctrine with how courts already address other forms of systemic exposure. To be clear, some courts have recognized that requiring individualized proof of harm would be an insurmountable barrier in cases involving systemic exposure.¹⁴ Therefore, this Article contends that the same evidentiary approach could apply in cases of systemic racism where statistical disparities in education, policing, healthcare, employment, and other societal institutions provide strong empirical evidence of institutional negligence. This Article therefore proposes an evidentiary shift that clarifies how existing negligence principles of tort law can address the imminent challenge of racialized institutional harm.

This argument, while doctrinally compelling, is not without challenges. Courts may resist recognizing systemic racism as negligence due to concerns about attenuated causation, the challenge of managing structural oversight, or expansive liability. This Article responds to these concerns by demonstrating that negligence doctrine has been interpreted to encompass institutional and systemic liability in areas such as healthcare and environmental harm, and that this provides a doctrinal foundation for applying these principles to systemic racism as negligence claims. Judicial manageability concerns, often cited as reasons to limit liability, are addressed by core negligence constraints including foreseeability, causation, duty, and damage limitations. As a result, institutional responsibility remains confined to contexts where systemic racism is foreseeable, empirically demonstrable, and results in harm, which addresses concerns over runaway liability.

Despite procedural and doctrinal challenges, systemic racism as negligence claims may prevail under existing tort law in certain jurisdictions. This Article sets aside, for present purposes, procedural limitations such as sovereign immunity and state tort claims acts, which may be claim-dispositive in certain jurisdictions, to focus instead on the doctrinal framework of systemic racism as negligence claims. While these significant barriers warrant separate treatment, the present analysis and contribution of this Article focus on establishing a doctrinal negligence framework that can operate where procedural posture permits. Another challenge is the variation in institutional duties across jurisdictions. The systemic racism as negligence framework builds on instructive precedents in cases such as *Thompson v. Nason Hospital*, *Johnson v. Misericordia Community Hospital*, and *Elam*

¹³ See, e.g., *Sindell v. Abbott Lab's*, 607 P.2d 924 (Cal. 1980); *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984); Bert Black & David E. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 *FORDHAM L. REV.* 732 (1984).

¹⁴ E.g., *Sindell*, 607 P.2d at 933-39; *In re "Agent Orange,"* 597 F. Supp. at 748.

v. College Park Hospital, which reflect tort law's common law tradition of evolving to recognize new institutional risks. Jurisdictional variation does not undermine viability; rather, it highlights the importance of grounding such claims in existing tort principles that courts have recognized in similar contexts. Relatedly, while negligence claims seeking recovery for nonphysical injuries, such as emotional distress or dignitary harm, may face higher thresholds in some jurisdictions, the doctrinal tools exist to support such claims where foreseeability and institutional duty are clearly established. This Article does not claim that all courts must embrace the systemic racism as negligence framework proposed here; rather, it argues that many courts do have the doctrinal basis to do so. Systemic racism represents a doctrinally underrecognized category of foreseeable institutional harm. This Article offers an ambitious, yet viable, pathway grounded in tort law for contributing to the eradication of systemic, institutionalized racial harm.

Existing scholarship on race and tort law provides critical insights that support the systemic racism as negligence framework. Scholars have provided invaluable critiques of tort law's role in perpetuating racial injustice, particularly in critiquing damage assessments that use actuarial methods that reinforce racial economic disparities to disadvantage Black plaintiffs.¹⁵ Others have examined the limitations of antidiscrimination frameworks in addressing systemic racial harms by highlighting how courts' emphasis on intent-based liability has often insulated institutions from accountability,¹⁶ which is a limitation at the center of this Article. While scholars' contributions have been foundational in advancing race and tort law, much of existing race and tort law scholarship has focused on how tort law disadvantages members of historically subordinated racial groups¹⁷ rather than how tort law might affirmatively remedy systemic racism. This Article advances the discourse on race and tort law by positioning negligence as an additional doctrinal vehicle for remedying systemic racism.

While race and tort law scholars have provided foundational critiques of how tort law perpetuates racial injustice, CRT scholars offer the necessary

¹⁵ See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 74 (N.Y.U. Press ed. 2010); Martha Chamallas, *Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Maytal Gilboa, *The Color of Pain: Racial Bias in Pain and Suffering Damages*, 56 GA. L. REV. 651 (2022); see, e.g., Jennifer Wriggins, *Tort, Race, and the Value of Injury, 1900 – 1949*, 49 HOW. L.J. 99 (2005); Ronen Avraham, *Is Race and Sex-Based Targeting Efficient? A Closer Look at Tort Law's Discriminatory Damage Awards 1* (Oct. 15, 2015) (unpublished seminar paper) (on file with the Stanford Law School Law and Economics Seminar Program), https://law.stanford.edu/wp-content/uploads/2015/09/Ronen-Avraham_Is-Race-and-Sex-Based-Targeting-Efficient-A-Closer-Look-at-Tort-Law%E2%80%99s-Discriminatory-Damage-Awards.pdf [<https://perma.cc/FY99-G5B5>]; Noa Ben-Asher, *Trauma-Centered Social Justice*, 95 TUL. L. REV. 95 (2020).

¹⁶ See *supra* note 5; see also Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825 (2017); Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

¹⁷ See *supra* note 15; Camille A. Nelson, *Considering Tortious Racism*, 9 DEPAUL J. HEALTH CARE L. 905 (2005).

analytical framing for understanding why systemic racism persists as legally unredressed harm. Putting both legal frameworks in conversation with one another demonstrates how negligence doctrine can be interpreted to directly address systemic racism. CRT is an essential lens for understanding how law constructs, legitimizes, and maintains racial subordination.¹⁸ This Article establishes a doctrinal connection between CRT and tort law that has not yet been realized. CRT exposes the limitations of intent-based antidiscrimination frameworks and recognizes systemic racism as an institutional practice rather than the aggregation of an individual's discrete, intentional acts. By interrogating the ways antidiscrimination jurisprudence has historically individualized racial harm,¹⁹ CRT's insights on *institutional* nonaccountability for systemic racial harm provides the analytical framework to demonstrate why negligence doctrine, through a focus on institutional duty, is uniquely positioned to redress systemic racial harms.

Further, CRT's liberatory principles, in alignment with tort law's broader purpose of corrective justice, provide an alternative legal framework for remedying systemic racism. Systemic harms require systemic remedies, which tort law is structured to provide. A negligence framework that incorporates CRT and tort law principles guards against systemic racism and provides a potential pathway for its dismantlement. Applying established negligence principles to a systemic racism as negligence claim ought to be the subsequent doctrinal intervention of tort law, which furthers negligence's fundamental purpose: preventing foreseeable harm and ensuring institutional accountability in service of corrective justice. By integrating CRT's analysis of structural racial subordination with tort law's existing capacity to address systemic harm, this Article advances a doctrinal framework that connects tort law, CRT, and civil rights commitments to redress systemic racism through existing doctrine.

This Article proceeds in three parts. Part I applies a CRT lens to demonstrate that negligence doctrine's recognition of institutional liability offers a doctrinally grounded basis for holding institutions liable for systemic racism. Part II demonstrates that each element of negligence can be satisfied in systemic racism as negligence claims. Part III operationalizes the systemic racism as negligence framework and reinforces the necessity of legal recognition of systemic racism as negligence claims by using Georgia's Forsyth County Schools (FCS) as a case study to analyze how an anti-CRT measure satisfies each element of a systemic racism as negligence claim.

¹⁸ See *supra* note 5; Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593 (2011); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003).

¹⁹ See *supra* note 16.

I. CRITICAL RACE THEORY, NEGLIGENCE, AND THE STRUCTURAL NATURE OF RACIAL HARM

Negligence doctrine has been interpreted to address institutional failures that result in widespread harm. However, courts largely fail to recognize systemic racism as a legally cognizable injury under negligence. This omission is the consequence of a legal system structured to remedy individualized racial harms rather than redress systemic ones. CRT challenges the notion that racism arises solely from individual bias and demonstrates instead that racism is entrenched in legal, political, and economic systems that uphold and reify racial hierarchies.²⁰ Similarly, negligence doctrine acknowledges that harm can be systemic and, as a result, imposes liability on an institution.²¹

This Part situates systemic racism within tort law's recognition of institutional liability and, through CRT, exposes the limits of intent-based anti-discrimination frameworks by: (A) critiquing the failure of such frameworks to redress systemic racism, which has allowed institutions to evade responsibility for foreseeable racial harms; (B) establishing that negligence doctrine provides an alternative framework to recognize institutional liability for systemic harm; and (C) reframing systemic racism as a legally actionable injury under negligence doctrine. In short, this Part establishes that systemic racism is not only a social injustice but also a legally cognizable harm within established negligence doctrine.

A. CRT Exposes the Failure of Intent-Based Frameworks to Redress Systemic Racism

Antidiscrimination frameworks struggle to account for systemic racism largely because these frameworks conceptualize racial harm as the result of discrete, intentional acts rather than as a function of institutional structures that sustain racial subordination.²² This individual model of liability assumes that discrimination occurs only when a specific perpetrator deliberately acts

²⁰ See *supra* note 5; Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

²¹ *Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991); *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156 (Ct. App. 1982); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156 (Wis. 1981); *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253 (Ill. 1965).

²² See, e.g., *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (establishing the intent framework for Equal Protection Claims); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977) (holding that discriminatory intent, rather than disparate impact alone, is required to establish an Equal Protection Clause violation); *McCleskey v. Kemp*, 481 U.S. 279, 280 (1987) (finding statistical evidence of racial disparities in death penalty cases insufficient without proof of discriminatory intent); see also *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that a law that disproportionately disadvantaged women did not violate the Equal Protection Clause absent evidence of intentional discrimination).

on racial animus and, as a result, fails to recognize how the law constructs, reifies, and legitimizes the falsehood of a racial hierarchy.²³ The Supreme Court has historically demanded direct proof of discriminatory intent to recognize racial harm,²⁴ a requirement that narrows the scope of legally cognizable racial injuries on a systemic level. As a result, even when systemic racism is a foreseeable and inevitable consequence of institutional policies, these policies remain beyond the reach of antidiscrimination law.

Scholars have extensively documented how intent-based legal frameworks have created difficulties for plaintiffs challenging systemic racism in courts.²⁵ Under prevailing jurisprudence, plaintiffs must demonstrate racial discrimination by identifying a specific actor whose discriminatory intent can be proven through direct evidence. This evidentiary threshold is nearly insurmountable in cases of systemic racial harm.²⁶ In *Washington v. Davis*, the Supreme Court found that facially neutral policies that result in disparate racial effects alone do not violate the Constitution unless plaintiffs can demonstrate intentional racial animus.²⁷ This ruling effectively foreclosed challenges to structural racism under the Equal Protection Clause and reinforced a legal framework that shields institutions from liability even when institutional policies entrench racial inequality to result in systemic racism. Relatedly, in *McCleskey v. Kemp*, the Supreme Court rejected statistical evidence showing that Black defendants were disproportionately sentenced to death because discriminatory impact alone was insufficient to establish an Equal Protection violation.²⁸ These decisions are representative of a broader commitment to an intent-based model of racial harm that renders systemic racism invisible by refusing to recognize structural manifestations of racism as legally actionable.

Even further, the highest Court in the country has consistently dismissed statistical disparities as legally sufficient under this framework, even when these disparities are demonstrably linked to institutional policies.²⁹

²³ See Lawrence, *supra* note 5, at 322-24 (arguing that the legal system's focus on intent ignores unconscious and structural racism); Freeman, *supra* note 5, at 1054-57 (critiquing how the perpetrator perspective in antidiscrimination law obscures institutional mechanisms of racial hierarchy); López, *supra* note 16, at 1784 (explaining how courts' insistence on proving discriminatory intent shields systemic racism from legal challenge); Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957-58 (1993) (examining how Equal Protection doctrine's intent requirement reinforces White normativity and renders systemic racial subordination legally invisible).

²⁴ *Washington*, 426 U.S. at 245; *Vill. of Arlington Heights*, 429 U.S. at 266-68; *McCleskey*, 481 U.S. at 292.

²⁵ See Crenshaw, *supra* note 5, at 1361-62.

²⁶ See *supra* note 22; see also López, *supra* note 16, at 1783 (recognizing that the requirement to prove malice for racial discrimination is so insurmountable that only a dismal percentage of federal employment discrimination plaintiffs prevail).

²⁷ *Washington*, 426 U.S. at 242.

²⁸ *McCleskey*, 481 U.S. at 292.

²⁹ See, e.g., *Washington*, 426 U.S. at 242; *Vill. of Arlington Heights*, 429 U.S. at 266-68; *McCleskey*, 481 U.S. at 292.

In one example of an institution attempting to implement race-conscious policies to redress historical racial disparities, the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, invalidated voluntary school integration plans despite extensive evidence of racial segregation, reflecting the Court's discomfort with addressing structural racial inequality through the traditional antidiscrimination framework.³⁰ Within antidiscrimination law, this discomfort may insulate institutions from liability by marginalizing systemic accounts of racial inequality, even where institutional policies are demonstrably linked to persistent racial disparities.

B. CRT's Critique of Intent as the Defining Element of Racial Harm

CRT directly challenges the assumption that racism operates solely through conscious, individualized intent.³¹ Scholars demonstrate that racism is structural, embedded within legal,³² economic,³³ and political³⁴ institutions that function to preserve racial hierarchies even in the absence of overtly discriminatory motives. This insight is particularly relevant to negligence doctrine because, unlike intentional torts, negligence does not require proof of subjective intent.³⁵ Given courts' interpretation of negligence liability to include institutional responsibility in areas such as environmental harm, public health, and corporate misconduct, a systemic racism as negligence claim is not a radical departure from tort law jurisprudence. Rather, it is an existing reality based on current legal interpretations, which requires no doctrinal expansion to root out systemic racism.

This doctrinal recognition aligns with CRT's foundational tenet: Systemic racism is not merely a product of individual bias but is sustained through legal structures that obscure institutional responsibility. Kimberlé Crenshaw demonstrates how legal frameworks obscure racial inequality by treating discrimination as a single-axis phenomenon that focuses on discrete acts of bias rather than on the overlapping structures that sustain systemic racism.³⁶ Relatedly, Charles Lawrence's scholarship critiques the

³⁰ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726-27 (2007) (plurality) ("The mere existence of unequal racial impact is not sufficient proof that a racial classification has been the product of purposeful discrimination."); *id.* at 743 (Kennedy, J., concurring) ("[R]ejecting state-mandated racial labels as inconsistent with individual dignity."); Flagg, *supra* note 23.

³¹ See Lawrence, *supra* note 5, at 322.

³² See Harris, *supra* note 20, at 1724-25 (demonstrating that Whiteness has been legally constructed as a form of property).

³³ See Carbado & Gulati, *supra* note 18, at 1789 (examining the persistence of institutional discrimination in a specific economic institution, the workplace).

³⁴ See Matsuda, *supra* note 20, at 327-30 (detailing that political institutions maintain racial subordination).

³⁵ See, e.g., RESTATEMENT (THIRD) OF TORTS § 3 (A.L.I. 2010); DAN B. DOBBS, THE LAW OF TORTS § 124 (2d ed. 2023).

³⁶ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*,

judiciary's reliance on intent to demonstrate racial bias and racially disparate outcomes in the absence of explicit discriminatory motive.³⁷ Systemic racism is embedded in institutional policies, practices, and norms that continue to produce racial subordination even in the absence of identifiable racist actors, a reality that intent-based antidiscrimination frameworks fail to recognize because racial harm is almost exclusively focused on individual animus.³⁸ Crenshaw's and Lawrence's critiques expose this fundamental flaw of intent-based legal frameworks. By requiring plaintiffs to prove that a specific decisionmaker acted with racial animus, courts overlook the broader, profoundly entrenched, yet legally cognizable patterns of exclusion and disadvantage that define systemic racism as a structural phenomenon.

Despite the overwhelming scholarly consensus on the inadequacy of intent-based frameworks to redress race-based discrimination claims on an individual level and a systemic level, courts continue to adhere to this doctrinal constraint.³⁹ Under current antidiscrimination law's intent-based framework, plaintiffs seeking to challenge racialized bans on antiracist teaching, training, and scholarship;⁴⁰ Black maternal and infant mortality rates;⁴¹ mass incarceration within the prison industrial complex;⁴² and other examples of systemic racism in societal institutions must demonstrate that institutional actors deliberately sought to discriminate, even when the foreseeable effects of these policies are well-documented and statistically verifiable. Antidiscrimination jurisprudence has, unfortunately, allowed institutions to operate in ways that disproportionately harm historically subordinated groups. Institutions are thus insulated from responsibility, creating widespread and far-reaching racial harms. This is the harm that negligence law aspires to protect against and correct.

1989 U. CHI. LEGAL F. 139 (1989); see generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-45 (1991) (detailing the ways legal frameworks obscure systemic racism by focusing on discrete acts of bias rather than on the structural conditions that sustain racial inequality).

³⁷ See Lawrence, *supra* note 5, at 322-23.

³⁸ See *supra* note 2.

³⁹ See Lawrence, *supra* note 5; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Devon Carbado & Cheryl Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

⁴⁰ See *Washington*, 426 U.S. 229; *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015).

⁴¹ See generally KHIARA BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (2011); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (Vintage Books 1999).

⁴² See Alexander, *supra* note 2.

C. Negligence Doctrine Offers an Alternative to the Restrictive Intent-Based Framework

Unlike antidiscrimination law, negligence does not require proof of intent to harm.⁴³ Instead, liability arises when an entity fails to exercise reasonable care in preventing foreseeable harm.⁴⁴ Courts have increasingly recognized institutional negligence to hold corporations, governmental agencies, and industries responsible for systemic failures that create widespread harm.

Systemic racism as negligence claims can exist under the current negligence doctrine framework because liability is imposed without proof of discriminatory intent. Courts applying corporate negligence in the healthcare setting illustrate this point. In *Elam*, *Johnson*, and *Thompson*, various state courts have held that a hospital owes a direct, nondelegable duty to patients to select and monitor competent physicians.⁴⁵ More specifically, these decisions find that a systemic failure in policy and procedure constitutes the hospital's negligence, which is independent of any individual doctor's fault.⁴⁶ These decisions recognize hospitals as gatekeepers with superior knowledge, control, and responsibility, which is precisely the role institutions such as school districts, police departments, and healthcare systems operate from when perpetuating racial harm. A court's recognition of a systemic racism as negligence claim would extend this existing doctrinal interpretation, not invent a new one. When foreseeable harm flows from policies, an institution is uniquely positioned to oversee them, and liability attaches for failure to exercise reasonable care.

Given this trajectory, recognizing systemic racism as a legally cognizable negligence claim is not only doctrinally consistent but also a necessary and timely doctrinal intervention to ensure accountability for institutional actors that perpetuate racial harm. Corrective justice theory has reemerged over the last decade as the primary rival to economic and instrumental accounts of tort law. Scholars from Martha Chamallas⁴⁷ to Gregory Keating⁴⁸ have reaffirmed tort law's core function of rectifying imbalances

⁴³ Negligence is defined as the failure to exercise the standard of care that a reasonable person would have exercised in a similar situation, which does not require a showing of intent. See *Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁴⁴ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (A.L.I. 2010).

⁴⁵ See *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156, 160-61 (Ct. App. 1982); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164-65 (Wis. 1981); *Thompson v. Nason Hosp.*, 591 A.2d at 708 (Pa. 1991).

⁴⁶ See *Elam*, 183 Cal. Rptr. at 160-61; *Johnson*, 301 N.W.2d at 164-65; *Thompson*, 591 A.2d at 708.

⁴⁷ See Martha Chamallas, *Social Justice Tort Theory*, 14 J. TORT L. 309 (2021).

⁴⁸ See Gregory C. Keating, *Corrective Justice: Sovereign or Subordinate?*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 37 (Andrew S. Gold, John C. P. Goldberg, Daniel B. Kelly, Emily Sherwin, & Henry E. Smith eds., 2020).

that defendants wrongfully impose on plaintiffs. This renewal matters for systemic racism as negligence claims because corrective justice is unambiguously relational: It asks whether A has imposed a foreseeable risk or loss on B, not whether A has acted with racial animus. This corrective justice framework is compatible with systemic racism as negligence claims because these claims involve concrete institutional breaches of duty that foreseeably externalize racial burdens onto identifiable communities. In connection with CRT's structural insights, corrective justice theory reveals systemic racism as the paradigmatic unreciprocated loss that negligence doctrine is intended to remedy. CRT scholars, including Richard Delgado, have long argued that systemic racism operates through entrenched institutional practices rather than discrete, intentional acts.⁴⁹ More specifically, due to doctrinal gaps and the positioning of race-based claims into antidiscrimination frameworks, the result is that institutions are shielded from liability when their institutional policies produce foreseeable racial harm. This is precisely the doctrinal gap that the systemic racism as negligence framework is designed to fill.

Negligence doctrine seeks to prevent and remedy harms that could have been avoided through the exercise of reasonable care.⁵⁰ The same analytical framework that courts have applied to institutional negligence in other contexts readily applies to systemic racism. As discussed previously, courts have recognized that institutions have affirmative obligations to mitigate risks that could foreseeably harm those they serve.⁵¹ Given that racial disparities in health outcomes, education access, and policing practices are extensively documented and predictable,⁵² institutions should be understood to owe a duty of care in preventing systemic racial harm. In systemic racism as negligence claims, a breach can occur when an institution fails to implement policies that would mitigate racial disparities despite clear evidence that those disparities exist. For example, under this framework, both hospitals that fail to address documented racial disparities in maternal and infant mortality rates, and law enforcement agencies that neglect training and oversight to prevent racial profiling, can be found to have engaged in policy-driven omissions that breach the duty of reasonable care.

⁴⁹ See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (3d ed. 2017); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Richard Delgado, *Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247 (2011).

⁵⁰ See RESTATEMENT (SECOND) OF TORTS § 281 (A.L.I. 1965).

⁵¹ See *Elam*, 183 Cal. Rptr. at 160-61; *Johnson*, 301 N.W.2d at 164-65; *Thompson*, 591 A.2d at 708.

⁵² See, e.g., David R. Williams, Jourdyn A. Lawrence & Brigitte A. Davis, *Racism and Health: Evidence and Needed Research*, 40 ANN. REV. PUB. HEALTH 105 (2019); Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 347 (2009); Osagie K. Obasogie & Peyton Provenzano, *Race, Racism, and Police Use of in 21st Century Criminology: An Empirical Examination*, 69 UCLA L. REV. 1206 (2023).

Whether systemic racism as negligence claims can satisfy traditional direct causation does not undermine the viability of such claims. Toxic tort doctrine demonstrates that negligence liability can extend beyond direct, one-to-one causal relationships to arise from systemic conditions that create foreseeable harm.⁵³ Courts have allowed plaintiffs in toxic tort litigation to prove factual causation through epidemiological evidence and, where tracing the harm to a single actor is impossible, to invoke alternative-liability or market-share theories.⁵⁴ Similarly, racial disparities evidenced in historical racial hierarchy schemes in education, healthcare, and policing can be linked to specific contemporary institutional policies and failures, such as school funding formulas, hospital triage algorithms, and policing patrol directives, that foreseeably result in racialized harm.⁵⁵ The harms caused by systemic racism, which can include economic deprivation, psychological trauma, increased mortality risks, and diminished access to resources, are measurable⁵⁶ and compensable within existing negligence frameworks. Systemic racism often arises where a special relationship exists, for example, between patients and hospitals or students and school districts, or where foreseeable bodily harm accompanies emotional distress. Courts in some jurisdictions

⁵³ E.g., *Sindell v. Abbott Lab's*, 607 P.2d 924, 936-38 (Cal. 1980); *In re "Agent Orange,"* 597 F. Supp. 740, 748 (E.D.N.Y. 1984).

⁵⁴ *Sindell*, 607 P.2d at 936-38 (adopting a market-share liability theory under which a plaintiff unable to identify the specific manufacturer responsible for their injury could recover damages from multiple defendants based on defendants' share of the relevant product market, where all defendants produced a fungible product and acted tortiously).

⁵⁵ See, e.g., Janel A. George, *Deny, Defund, and Divert: The Law and American Miseducation*, 112 GEO. L.J. 509, 517-20 (2024) (detailing the legacy of current anti-CRT laws as descendants of [enslavement] and Black codes); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); David Williams, Jourdyn A. Lawrence & Brigitte A. Davis, *supra* note 52; Osagie K. Obasogie & Peyton Provenzano, *supra* note 52.

⁵⁶ See Zinzi D. Bailey, Nancy Krieger, Madina Agénor, Jasmine Graves, Natalia Linos, & Mary T. Bassett, *Structural Racism and Health Inequities in the USA: Evidence and Interventions*, 389 LANCET 1453 (2017); Nick Bach, Richard Fry & Andrew Richter, *Wealth Gaps Across Racial and Ethnic Groups*, Pew Rsch. Ctr. (Dec. 4, 2023), <https://www.pewresearch.org/2023/12/04/wealth-gaps-across-racial-and-ethnic-groups/> [<https://perma.cc/MNN9-E42Y>] (last visited July 16, 2025); Bd. of Governors of the Fed. Rsr. Sys., *Greater Wealth, Greater Uncertainty: Changes in Racial Inequality in the Survey of Consumer Finances* (Oct. 18, 2023), <https://www.federalreserve.gov/econres/notes/feds-notes/greater-wealth-greater-uncertainty-changes-in-racial-inequality-in-the-survey-of-consumer-finances-20231018.htm> [<https://perma.cc/8FZJ-PHFR>] (last visited July 16, 2025); Am. Psych. Ass'n, *Stress in America: Impact of Discrimination* (Mar. 2016), <https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf> [<https://perma.cc/2HET-2NS3>] (last visited July 16, 2025); KFF, *Key Data on Health and Health Care by Race and Ethnicity* (Dec. 2025), <https://www.kff.org/racial-equity-and-health-policy/key-data-on-health-and-health-care-by-race-and-ethnicity/?entry=executive-summary-introduction> [<https://perma.cc/H33E-YC2F>] (last visited Mar. 30, 2026); *Fatal Force*, The Washington Post, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/ZV9N-TVGS>] (last visited July 16, 2025); U.S. Dep't of Agriculture, Econ. Rsch. Serv., *Food Access Research Atlas* (Jan. 8, 2025), <https://www.ers.usda.gov/data-products/food-access-research-atlas/> [<https://perma.cc/QH7L-49BH>] (last visited July 16, 2025).

routinely compensate plaintiffs for economic loss, pain and suffering, and emotional distress.⁵⁷

The evolution of negligence doctrine reinforces this Article's position. Historically, courts have interpreted negligence liability to address institutional failures in numerous analogous contexts.⁵⁸ These expansions did not require the creation of new theories of liability but rather the logical application of existing legal principles to newly understood harms. For example, in public nuisance litigation, courts have recognized systemic harm as legally cognizable in cases involving opioid distribution, gun-related violence, and lead contamination.⁵⁹ These cases illustrate that tort law can recognize institutional policies and omissions as sources of legally compensable harm, provided that the injury is foreseeable and preventable. The same principle applies to systemic racism as negligence claims. Systemic racism meets this threshold because well-documented racial disparities flowing from entrenched policies are foreseeably injurious and preventable.

Again, recognizing systemic racism as a legally cognizable negligence claim is not a radical departure from existing jurisprudence but rather a necessary doctrinal progression. As negligence imposes liability for corporate and public health harms, negligence doctrine should also address systemic racism, which is an equally structural, foreseeable, and preventable harm. As negligence doctrine has been interpreted to encompass institutional liability in public health, corporate governance, and other areas of legal redress,⁶⁰ negligence doctrine can also recognize systemic racism as a compensable injury. Failure to recognize systemic racism as negligence claims would not only perpetuate systemic racism, but also undermine the broader principles of negligence, which aim to prevent foreseeable harm and ensure institutional accountability.⁶¹ As recent corrective justice scholarship emphasizes, negligence doctrine functions to rebalance relational wrongs.⁶² Recognizing systemic racism as negligence claims applies that logic to a historically neglected category of loss. Courts already possess the private law doctrinal tools necessary to adjudicate claims of systemic racial harm.⁶³ Of course,

⁵⁷ See, e.g., *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036 (5th Cir. 1984) (ruling on negligence and strict liability claims for manufacture and failure to warn of asbestos insulation and awarding damages, including for pain and suffering).

⁵⁸ See *Sindell*, 607 P.2d at 936-38; *In re "Agent Orange,"* 597 F. Supp. at 748; *Thompson v. Nason Hosp.*, 591 A.2d 703, 708 (Pa. 1991); *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156, 160-61 (Ct. App. 1982); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164-65 (Wis. 1981).

⁵⁹ See *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

⁶⁰ See *Elam*, 183 Cal. Rptr. at 161; *Johnson*, 301 N.W.2d at 156; *Thompson*, 591 A.2d at 703.

⁶¹ See, e.g., *Elam*, 183 Cal. Rptr. at 160-61.

⁶² See generally Chamallas, *supra* note 47; see also Keating, *supra* note 48, at 38 (discussing corrective justice theory).

⁶³ See, e.g., *Elam*, 183 Cal. Rptr. at 161 (holding hospitals liable for systemic failures in overseeing medical staff); *Hunter*, 499 P.3d at 726-27 (finding corporate liability for systemic harm in the opioid crisis).

recognition is not uniform. However, pressing social realities and the need for coherent doctrine call for interpreting negligence liability to include systemic racism. The systemic racism as negligence framework applies current legal interpretations of negligence specifically, and tort law more broadly, to one of the most pervasive and preventable harms of our time.

II. ESTABLISHING LIABILITY FOR SYSTEMIC RACISM IN TORT LAW

Despite increasing recognition of institutional liability in negligence, systemic racism remains largely unaddressed within the doctrine. To establish a *prima facie* case of negligence, plaintiffs must show duty, breach, causation, and damages.⁶⁴ More specifically, a plaintiff must establish that a defendant owed a duty of care, breached that duty, and consequently caused harm to an individual owed that duty, for which damages are available.⁶⁵ Many courts regularly impose liability on corporations, hospitals, and government entities for failing to prevent foreseeable harm,⁶⁶ recognizing that liability is not limited to individual misconduct but applies to systemic failures that foreseeably endanger vulnerable populations. However, despite extensive scholarship that systemic racism results from identifiable institutional failures,⁶⁷ systemic racism is not treated as legally cognizable under negligence doctrine.

This Part argues that duty of care doctrine should recognize systemic racism as claims in order to ensure that institutions are held accountable for policies and omissions that perpetuate racial disparities by individually analyzing: (A) institutional duty, (B) breach, (C) causation, and (D) damages.⁶⁸ To be precise, systemic racism results from ignoring the contemporary manifestations of institutional failures that stem from historical racial disparities across multiple sectors, including healthcare, education, and policing.⁶⁹ These historically based racial disparities are foreseeable consequences of policy-driven action or omission regardless of individual racial animus.⁷⁰ This Part proceeds from a doctrinal premise that existing negligence principles provide a well-established basis for assessing institutional liability for systemic racial harm. Unlike constitutional or statutory antidiscrimination frameworks, which hinge on proof of intent or narrowly circumscribed remedies, tort law is structured to allocate institutional risk, enforce duties of reasonable care, and remedy foreseeable harms arising from policy and omission. This Part applies these settled principles by

⁶⁴ See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

⁶⁵ See *id.* at 99-101.

⁶⁶ See, e.g., *Elam*, 183 Cal. Rptr. at 161; see generally *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

⁶⁷ See *supra* note 5.

⁶⁸ See RESTATEMENT (SECOND) OF TORTS § 281 (A.L.I. 1965); *Elam*, 183 Cal. Rptr. at 159.

⁶⁹ See *supra* note 55.

⁷⁰ See *supra* note 56.

demonstrating how each element can be satisfied in a systemic racism as negligence claim.

A. *Institutional Duty and Foreseeability in Systemic Contexts*

The first element of a negligence claim is duty. Duty outlines the legal obligation to exercise reasonable care to avoid causing harm to others, particularly when such harm is foreseeable and the defendant has a relationship to the plaintiff that gives rise to a heightened duty.⁷¹ Courts historically construed duty narrowly, requiring direct relationships between plaintiffs and defendants.⁷² Over time, however, courts have drawn on existing negligence principles to recognize institutional responsibility when an institution's omission or policies create foreseeable risks in broader contexts, such as in corporate duty, public health, and environmental liability. This doctrinal interpretation provides a foundation that courts may use to evaluate systemic harms under a duty of care.⁷³ Jurisdictions vary in how they define the institutional duty, with some states more readily recognizing obligations to mitigate systemic or policy-driven risks, particularly in sectors like healthcare or education.⁷⁴ Jurisdictions that recognize obligations to mitigate systemic or policy-driven risks reflect a growing, though not yet universal, receptivity among certain courts to find institutions liable for systemic harm, which lends support for the systemic racism as negligence framework.

This section establishes that foreseeability is a threshold factor for demonstrating institution-based duties. Courts in several jurisdictions have imposed institutional negligence liability when risks are well-documented, preventable, and arise from systemic practices rather than isolated misconduct.⁷⁵ This reasoning offers a doctrinal pathway for courts to consider

⁷¹ See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928) (finding that duty is owed only to those in the zone of foreseeable harm); *Tarasoff*, 551 P.2d at 342-43 (establishing that the element of duty is met based on the special relationship exception); RESTATEMENT (SECOND) OF TORTS § 282 (A.L.I. 1965); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (A.L.I. 2010).

⁷² See *Palsgraf*, 162 N.E. at 100-01.

⁷³ See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (holding that products that pose a foreseeable risk of serious harm create a duty to guard against that risk through proper design, testing, warnings, or manufacturing process); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342-43 (Cal. 1976) (outlining a therapist's standard for a duty of care based in a special relationship exception).

⁷⁴ In *Palsgraf*, the New York court demonstrates the narrow foreseeability and proximity approach. See 162 N.E. at 100. However, in Illinois and California, the decisions in *Darling*, *Tarasoff*, and *Rowland* each broaden the element of duty to recognize institutional obligations in hospitals, mental healthcare, and premises management. See *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 258 (Ill. 1965); *Tarasoff*, 551 P.2d at 342-43; *Rowland v. Christian*, 69 Cal. 2d 108, 118 (1968).

⁷⁵ See *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156, 160-61 (Ct. App. 1982); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981); *Thompson v. Nason Hosp.*, 591 A.2d 703, 708-09 (Pa. 1991); *Darling*, 211 N.E.2d at 258; *MacPherson*, 111 N.E. at 1053; *Tarasoff*, 551 P.2d at 342-43; *Rowland*, 69 Cal. 2d at 133.

systemic racism as a form of foreseeable harm resulting from institutional policy and inaction. When plaintiffs occupy relationships with hospitals as patients or with school districts as students, the institution's control over plaintiffs' wellbeing and the plaintiffs' reliance create an affirmative duty for the institution to protect plaintiffs against foreseeable harms. Under this framework, systemic racism constitutes a legally cognizable risk when such risk is a predictable outcome of institutional policies. Therefore, systemic racism as negligence claims can be established on duty principles: a special relationship coupled with foreseeable harm.

Foreseeability is a threshold factor in determining when institutions owe a duty of care.⁷⁶ Courts have repeatedly held institutions liable for failing to prevent systemic risks that arise not from singular acts but from longstanding institutional practices that generate foreseeable harm.⁷⁷ In corporate negligence cases, courts have found that hospitals and corporate boards cannot ignore preventable dangers that arise from their policies.⁷⁸ In healthcare litigation, courts may support findings of liability when institutional actors knowingly maintain policies that contribute to systemic harms.⁷⁹ Additionally, in cases involving toxic and environmental harms, foreseeability has been key in recognizing duties where corporate conduct creates foreseeable risks of harmful exposure.⁸⁰

These cases arise from distinct doctrinal areas but share a common feature: Courts may impose a duty when institutions are aware of and fail to mitigate foreseeable systemic harms. Systemic racism follows a similar legal logic because the phenomenon produces persistent, predictable racial disparities in policing, healthcare, education, and other societal institutions that are based on historical and widespread racist policies. When a special

⁷⁶ See *Palsgraf*, 162 N.E. at 100 (“The risk reasonably to be perceived defines the duty to be obeyed . . .”); *Rowland*, 69 Cal. 2d at 111-12 (quoting Section 1714 of the Civil Code, “[E]veryone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care . . .”); *MacPherson*, 111 N.E. at 1053 (“If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made . . . the manufacturer . . . is under a duty to make it carefully.”); *Tarasoff*, 551 P.2d at 340 (“When a therapist . . . should determine that his patient presents a serious danger of violence to another, [the therapist] incurs an obligation to use reasonable care to protect the intended victim . . .”).

⁷⁷ See *MacPherson*, 111 N.E. at 1053; *Darling*, 211 N.E.2d at 258; *Johnson*, 301 N.W.2d at 156; *Elam*, 183 Cal. Rptr. at 161; *Thompson*, 591 A.2d at 708-09; *Rowland*, 69 Cal. 2d at 113.

⁷⁸ See *Elam*, 183 Cal. Rptr. at 161; *Johnson*, 301 N.W.2d at 156; *Thompson*, 591 A.2d at 707-08; *Darling*, 211 N.E.2d at 258.

⁷⁹ See, e.g., *Corey v. Wilkes-Barre Hosp. Co., LLC*, 307 A.3d 701, 718 (Pa. Super. Ct. 2023) (explaining the level of “systemic negligence” required in findings of liability where hospitals know, or should have known, of harmful practices, yet failed to adopt or enforce policies to prevent ongoing harm); see also *Tex. Health Res. v. Coming Attractions Bridal & Formal, Inc.*, 552 S.W.3d 335, 340-41 (Tex. App. 2018) (treating allegations that a hospital failed to implement policies and training in response to known infectious disease risks as departures from safety standards related to professional duties, though the claim was ultimately dismissed on procedural grounds).

⁸⁰ See, e.g., *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1148-49 (N.J. 2006); *Rougeau v. Ahlstrom Rhinelanders, LLC*, 785 F. Supp. 3d 438, 448-49 (W.D. Wis. 2025).

relationship exists, historically entrenched racial disparities can serve as indicators of foreseeable harm, primarily when those disparities predictably result from institutional policies that ignore the historical and pervasive effects of systemic racism. Where policies systemically burden one racial group in a manner consistent with known or historical patterns, those disparities are foreseeable consequences of institutional design. In such cases, racial disparities help establish that the institution should have anticipated the harm. The empirical evidence of racial disparities in these sectors is as well documented as the risks posed by environmental pollutants or pharmaceutical overprescription. The foreseeability of systemic racism aligns with the rationale courts have applied in similar contexts.

As foreseeability governs the scope of legal duty in corporate contexts and public health,⁸¹ institutions that sustain policies that foreseeably produce racial harm could reasonably be understood to have a duty under negligence principles. To this point, institutions have long been held liable for failure to act when their inaction foreseeably creates harm.⁸² In *Tarasoff v. Regents of the University of California*, the California Supreme Court held that mental health professionals have a duty to protect identifiable third parties from foreseeable harm posed by their patients.⁸³ The court emphasized that the combination of foreseeability and a special relationship created the duty owed.⁸⁴ This reasoning is directly applicable to systemic racism as negligence claims. Just as the therapists in *Tarasoff* were obligated to act on foreseeable threats, institutions cannot disregard racial harms that are predictable, preventable, and, under the current socio-political climate, pernicious. Negligence liability does not require an overt act of wrongdoing. It is sufficient to show an institution ignored known dangers and failed to mitigate foreseeable harm.⁸⁵ Although *Tarasoff* arose from the conduct of therapists employed by a public university, the court recognized that a special relationship can give rise to a duty—imputable to institutional actors—to prevent foreseeable harm to identifiable individuals.⁸⁶ Applying the logic of this case, public institutions, like private actors, may be held liable when acting in roles that carry legally recognized duties of care.

Systemic racism as negligence claims operate within this legal framework because, like a hospital's failure to evaluate physicians or a

⁸¹ See *MacPherson*, 111 N.E. at 1053; *Darling*, 211 N.E.2d at 258; see also RESTATEMENT (SECOND) OF TORTS § 289 (A.L.I. 1965) (noting that foreseeability is a central factor in determining duty).

⁸² See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976).

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.* at 346 (stating that the possibility of issuing an unwarranted warning is justified when weighed against the potential to save lives through timely intervention).

⁸⁶ See *id.* at 434-36; see also *id.* at 437 n.7 (recognizing institutional liability where hospitals, with knowledge of a patient's dangerousness, fail to take reasonable measures to prevent harm to others).

corporation's failure to prevent fraud, the product of sustained institutional neglect foreseeably entrenches racial disparities. The foreseeable, measurable, and preventable characteristics of systemic racism are undeniable.⁸⁷ Systemic racism does not emerge by chance. Instead, systemic racism results from historically entrenched policies executed by institutions that continue to disproportionately harm historically subordinated groups over time.⁸⁸

The foreseeability of these harms is documented across multiple societal sectors.⁸⁹ In healthcare, Black maternal mortality rates are three times higher than those of White women, despite decades of data demonstrating racial bias in pain management, medical treatment, and access to quality care.⁹⁰ Institutions, including hospitals, medical schools, and healthcare regulators are aware of these racial health disparities, which exacerbate preventable systemic racism.⁹¹ Relatedly, predictive policing algorithms and surveillance policies that disproportionality target Asian, Black, Latine, Indigenous, and Muslim communities reinforce long-challenged patterns of racial profiling.⁹² Research suggests that at least some law enforcement

⁸⁷ See, e.g., Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005) (analyzing how legal frameworks reinforce systemic racial disparities); Rothstein, *supra* note 2, at 125-28 (documenting the role of government policies in entrenching racial segregation and economic disparities); David R. Williams, *Race, Health, and Health Care*, 48 ST. LOUIS U. L.J. 13 (2003) (examining racial disparities in healthcare as a product of systemic institutional bias); Alexander, *supra* note 2, at 178-85 (arguing that racial disparities in policing and incarceration are foreseeable consequences of legal and policy decisions); AFRICAN AMERICAN POLICY FORUM, *The Unequal Opportunity Race* (YouTube, Feb. 26, 2010), https://www.youtube.com/watch?v=EMS_ff0pFzQ [<https://perma.cc/CG75-UDZH>] (illustrating systemic racial barriers through a visual metaphor of an unequal track race).

⁸⁸ See *supra* note 2.

⁸⁹ See *supra* note 55.

⁹⁰ Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1232 (2020) (stating that Black women are three times more likely to die in childbirth as White women); see also Nina Martin & Renee Montagne, *Black Mothers Keep Dying After Giving Birth. Shalon Irving's Story Explains Why*, NAT'L PUB. RADIO (Dec. 7, 2017), <https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why> [<https://perma.cc/9RMQ-E5LZ>] (reporting on racial disparities in maternal healthcare); Jamila Taylor, Cristina Novoa & Katie Hamm, *Eliminating Racial Disparities in Maternal and Infant Mortality: A Comprehensive Policy Blueprint*, CENTER FOR AM. PROGRESS (May 2, 2019), <https://www.americanprogress.org/article/eliminating-racial-disparities-maternal-infant-mortality/> [<https://perma.cc/9G4X-2W8R>] (documenting racial disparities in maternal health outcomes).

⁹¹ See *supra* note 56 (detailing the interconnectedness between health disparities and wealth gaps that results in systemic racism that cements among people of color).

⁹² See Eisha Jain, *Policing the Polity: The Supreme Court, Chinese Exclusion, and the Origins of Immigration Police*, 131 YALE L.J. 1794 (2022); see also Laura E. Gómez, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM* (The New Press 2020) (identifying how "neutral" legal regimes have historically racialized Latinos and entrenched hierarchy); ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* 55-70 (N.Y.U. Press ed., 2017) (analyzing how predictive policing disproportionately targets communities of color); Devon W. Carbado, *Predatory Policing*, 85 U. MO. KAN. CITY L. REV. 548 (2017) (discussing how the model of predictive policing and surveillance practices contributes to racial profiling and systemic discrimination); Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289 (2015); Arjun Singh Sethi, *The FBI Needs to Stop Spying on Muslim-Americans*, POLITICO (Mar. 29, 2016), <https://www.politico.com/>

agencies that deploy these systems continue to rely on flawed methodologies.⁹³ In the education context, school boards could anticipate that recent bans on CRT⁹⁴ and race-conscious teaching in K-12 schools would deepen racial disparities by stripping curricula of content focused on racism, historical inequity, and discrimination.⁹⁵ This foreseeable curricular gap disproportionately harms Asian, Black, Indigenous, and Latine students by reinforcing racial isolation and implicates the duty to avert foreseeable educational injury.⁹⁶ Additionally, research indicates that students who lack access to culturally responsive materials experience lower academic performance, increased alienation, and disproportionately harsh disciplinary measures, all of which have been linked to the school-to-prison pipeline.⁹⁷

magazine/story/2016/03/muslim-american-surveillance-fbi-spying-213773/ [https://perma.cc/6MT4-5GUH] (criticizing federal surveillance programs that profile Muslim communities under the guise of intervention).

⁹³ The New York Police Department has continued to engage in unconstitutional stop-and-frisk practices, which grew out of enslavement and Black codes, despite the results of stop-and-frisk policies disproportionately impacting people from historically subordinated groups. See Maia Coleman, *Illegal NYPD Stop-and-Frisk Tactics Went Unchecked, Monitor Says*, N.Y. TIMES (Feb. 3, 2025), <https://www.nytimes.com/2025/02/03/nyregion/nypd-stop-and-frisk-monitor.html> [https://perma.cc/T394-KSGU].

⁹⁴ Also referred to as anti-CRT measures throughout the Article.

⁹⁵ See Theresa Montaño & Tricia Gallagher-Geurtsen, *Yes, Critical Race Theory Should be Taught In Your School: Undoing Racism in K-12 Schooling and Classrooms Through CRT*, 69 UCLA L. REV. DISC. 84 (2022) (observing that bans on CRT disproportionately harm students of color by restricting curriculum focused on racial injustices and how those injustices contribute to historical and contemporary realities of racial inequality); PEN AMERICA, *America's Censored Classrooms 2024* (Oct. 8, 2024), <https://pen.org/report/americas-censored-classrooms-2024/> [https://perma.cc/FM5Z-2CGM] (documenting the proliferation of educational gag orders and the chilling effect on teaching about race and gender in K-12 schools); AFR. AM. POL'Y F., *CRT Summer School 2024: No U-Turn on Racial Justice*, <https://www.aapf.org/crt2024> [https://perma.cc/R8WN-5YAY] (last visited Feb. 28, 2026) (convening individuals in virtual teach-ins across several days to analyze how disinformation about CRT has been deployed to undermine racial justice and how CRT frameworks provide essential insights into understanding the current backlash agenda); Mica Pollock, John Rogers, Alexander Kwako, Andrew Matschiner, Reed Kendall, Cicely Bingener, Erika Reece, Benjamin Kennedy & Jaleel Howard, *The Conflict Campaign: Exploring Local Experiences of the Campaign to Ban "Critical Race Theory" in Public K-12 Education in the U.S., 2020-2021*, UCLA INST. FOR DEMOCRACY, EDUC., & ACCESS (Jan. 2022), <https://idea.gseis.ucla.edu/publications/the-conflict-campaign> [https://perma.cc/NR27-CZKV], (last visited Feb. 28, 2026) (examining how local initiatives to ban CRT have disrupted educational environments and limited discussions on systemic racism).

⁹⁶ See LAURA C. CHÁVEZ-MORENO, *HOW SCHOOLS MAKE RACE: TEACHING LATINX RACIALIZATION IN AMERICA* 151 (Harvard Educ. Press 2024); Montaño & Gallagher-Guersen, *supra* note 95; Rebecca Novick, *Weaponizing Public Education: Local Governance and the Fight Against Critical Race Theory in Public Schools*, 16 ALB. GOV'T L. REV. 1, 8-9 (2022-23); see also Gloria Ladson-Billings, *From the Achievement Gap to the Education Debt: Understanding Achievement in U.S. Schools*, 35 EDUC. RESEARCHER 3 (Oct. 2006) (introducing the concept of "education debt" to demonstrate how decades of curriculum omissions leave Black, Latine, Indigenous, and Asian students systemically underserved and racially isolated).

⁹⁷ See Monique W. Morris, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* 85-102 (The New Press 2016) (examining how exclusionary discipline policies disproportionately affect Black female students and increase their risk of exposure to the carceral state); Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 840-41 (2014) (documenting the disproportionate impact of zero tolerance policies on minority

By enacting and enforcing these anti-CRT measures, educational institutions and policymakers sustain foreseeable racial harm through institutional neglect.

In each of these contexts, the racial disparities extending from historically entrenched race-based policies are not incidental. Instead, these disparities are predictable outcomes of entrenched institutional policies that institutions continue to maintain despite abundant internal and external evidence of their harmful impact. This dynamic mirrors the types of institutional risks that courts have recognized as sufficiently foreseeable to impose a duty of care in other negligence contexts. For example, when a hospital grants surgical privileges to or staffs doctors without appropriate competency reviews or ongoing oversight, the predictable result is patient injury, and a duty attaches to the hospital.⁹⁸ As such, when schools, law enforcement agencies, or housing authorities maintain policies that, according to data, deepen inequities, those institutions should bear the same legal responsibility to prevent foreseeable harm. In light of these contexts, and to mitigate widespread racial harm, courts may justifiably recognize systemic racism as a foreseeable risk that gives rise to an institutional duty of care under a systemic racism as negligence framework.

Further, once institutions are aware of systemic racial harms, whether through internal reports, public data, testimony, or repeated complaints, there is no avoiding liability by claiming a gradual impact of those harms or organizational inaction. Courts have consistently found that entities that fail to address known risks cannot escape liability merely because the harm occurred over time or through institutional inertia.⁹⁹ For example, in *Johnson*, the Wisconsin Supreme Court held a hospital liable for failing to investigate a surgeon's malpractice history, which is a failure rooted in the institution's administrative omissions.¹⁰⁰ As such, the legal standard for foreseeability does not require certainty.¹⁰¹ Instead, the legal standard for

students); Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317 (2002) (analyzing disparities in school discipline and their contribution to the school-to-prison pipeline).

⁹⁸ See *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 257 (Ill. 1965) (adopting corporate negligence doctrine to find that hospitals have a duty to ensure the patient is not injured through negligent acts of its physicians); *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156, 161 (Ct. App. 1982) (showing that a hospital owes an institutional duty to safeguard patients against foreseeable harms arising from institution-wide practices).

⁹⁹ See *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164-65 (Wisc. 1981) (stating that a hospital's duty is not based on a one-time credentialing event but is ongoing and that willful blindness to known risk is treated as constructive knowledge); *Darling*, 211 N.E.2d 253 at 259 (outlining a hospital's duty to supervise patient care meant the hospital could not avoid liability by showing that an injury occurred over time if the risk was known).

¹⁰⁰ See *Johnson*, 301 N.W.2d at 164-65.

¹⁰¹ The legal standard for foreseeability has been interpreted to demonstrate that duty turns on risks that are reasonably perceivable, not certain. Once a reasonable institution could or should have anticipated harm, the institution must take steps to prevent the foreseen harm.

foreseeability requires that a reasonable institution should have anticipated and taken steps to prevent harm.¹⁰² Under this standard, the persistence of systemic racism establishes an institution's duty of care. Courts may hesitate to label systemic racism as a foreseeable risk; however, well-known hazards in analogous contexts—such as hospitals' failures to investigate physicians' competence or certain institutions' failure to act on threats to identifiable individuals—are recognized as foreseeable.¹⁰³ Duty is not limited to new or unexpected risks. One function of negligence liability is to address persistent dangers that are within an institution's scope.

While foreseeability is a central factor in determining institutional duty, courts also recognize that special relationships impose affirmative legal obligations on institutions.¹⁰⁴ A special relationship arises where one party exerts significant control over another's well-being, which creates a heightened duty of reasonable care that extends to harms that a reasonable institution would anticipate.¹⁰⁵ Courts have recognized this heightened duty in healthcare, education, and, to a lesser extent, public safety contexts.¹⁰⁶ For example, in negligence cases in the school setting, some jurisdictions recognize that schools owe a duty of care to students because of the compulsory nature of education and the reliance students place on school officials for their safety.¹⁰⁷ In *Munn v. Hotchkiss School*, for example, the Connecticut Supreme Court held that a school had a duty to protect students from foreseeable risks during a school-sponsored trip because institutions responsible for minors must take reasonable precautions to prevent harm.¹⁰⁸ Similarly, in the healthcare context, government actors, hospitals, and medical professionals owe a heightened duty of care to patients and foreseeable victims of the patient's violence, arising from the special relationship and the professional standard of care that governs.¹⁰⁹ In *Tarasoff*, the court recognized

See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976); *Johnson*, 301 N.W.2d at 156 at 164.

¹⁰² See *Palsgraf*, 162 N.E. at 100; *Rowland v. Christian*, 69 Cal. 2d 108, 112 (1968); *MacPherson*, 111 N.E. at 1053; *Tarasoff*, 551 P.2d at 340; *Johnson*, 99 301 N.W.2d at 164.

¹⁰³ See *Johnson*, 301 N.W.2d at 164-65; *Tarasoff*, 551 P.2d at 342-43.

¹⁰⁴ See *id.* at 340; *Darling*, 211 N.E.2d at 258; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 (2012).

¹⁰⁵ See *Tarasoff*, 551 P.2d at 340 (finding the therapist-patient relationship gives rise to a heightened duty of care once the patient poses a foreseeable danger); *Darling*, 211 N.E.2d at 258 (finding that the hospital-patient relationship creates an independent duty to ensure patients are not injured through the negligent acts of staff physicians).

¹⁰⁶ See *Tarasoff*, 551 P.2d at 340; *Darling*, 211 N.E.2d at 258; *Central Anesthesia Ass'n v. Worthy*, 254 Ga. 728 (1985); *Munn v. Hotchkiss Sch.*, 165 A.3d 1167 (Conn. 2017); see also *Schuster v. City of New York*, 5 N.Y.2d 75 (N.Y. 1958) (finding that a special duty existed between the New York Police Department and an informant from whom the department solicited confidential information to apprehend bank robber Willie Sutton).

¹⁰⁷ See *Munn*, 165 A.3d at 1186.

¹⁰⁸ See *id.*

¹⁰⁹ See, e.g., *Tarasoff*, 551 P.2d at 341-43.

that when a special relationship exists, such as that between a therapist and a patient, and the therapist knows or should know the patient poses a serious threat of violence, the therapist and, by extension, the institution, may have a duty to take reasonable steps to protect a foreseeable, identifiable victim.¹¹⁰ Further, within the special relationship framework, this duty arises from the professional relationship and the foreseeability of harm.¹¹¹

In the law enforcement setting, although courts typically hold that the government owes no individual duty of protection absent a special relationship, liability may attach where the law enforcement agency induces cooperation or reliance, as in *Schuster v. City of New York*.¹¹² In *Schuster*, the New York Court of Appeals held that the city could be liable for failing to protect an individual who had responded to official appeals for public assistance in capturing a fugitive.¹¹³ The court reasoned that, by soliciting Schuster's cooperation, the city created a special relationship that gave rise to a duty of protection, since liability is appropriate when the government induces a person's involvement and then fails to protect that individual from foreseeable harm resulting from that involvement.¹¹⁴ This doctrine stands in contrast to the D.C. Court of Appeals' reasoning in *Warren v. District of Columbia*, a landmark case frequently cited for the principle that, absent a special relationship, law enforcement agencies do not owe individual members of the public a specific duty of protection.¹¹⁵

While *Warren* was dismissed, an integral portion of the opinion recognizes that "the duty to provide public services is owed to the public at large, and absent a special relationship between the police and an individual, no specific legal duty exists."¹¹⁶ This framework aligns with Restatement (Second) of Torts § 314A(4).¹¹⁷ Under the Restatement § 314A(4), when an institution is required by law to take a person into custody, and thereby deprive that individual of regular opportunities for protection, a duty is triggered for the institution to take reasonable action to protect the person from unreasonable risk of physical harm.¹¹⁸ To date, no appellate decision has provided sufficient facts to support a finding of the special relationship in the law enforcement context. However, given the degree of control that officers wield over detainees, under the Restatement's § 314A(4) framework

¹¹⁰ See *id.*

¹¹¹ See *id.* at 348; *Munn*, 165 A.3d at 1176.

¹¹² See *Schuster v. City of New York*, 5 N.Y.2d 75, 80-81 (1958).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *Warren v. District of Columbia*, 444 A.2d 1, 5-6 (D.C. 1981) (en banc).

¹¹⁶ *Id.*

¹¹⁷ See RESTATEMENT (SECOND) OF TORTS § 314A(4) (A.L.I. 1965) (stating that being required by law to take custody of a person and, as a result, depriving the individual of their regular opportunities for self-protection, triggers a duty to take reasonable actions to safeguard that person from foreseeable physical harm).

¹¹⁸ See *id.*

and analogous institutional duty precedents in healthcare or education, a court could find that detention or protective undertakings by law enforcement create a nondelegable duty of reasonable care to prevent foreseeable harm. Recognizing such a duty in the policing context would reflect a well-established tort principle: When the state restricts liberty, the state assumes responsibility for basic safety.

This framework supports the recognition of institutional duties in systemic racism as negligence claims particularly where a special relationship arises from institutional control over vulnerable populations. Institutions that exercise exclusive control over critical public functions in society, such as education, policing, and healthcare, should be expected to account for the foreseeable racial harms their policies, omissions, and practices produce. Just as schools owe a duty to protect students from foreseeable physical harm, and hospitals owe a duty of care to patients in their custody, institutions may bear a comparable responsibility when their systemic practices predictably endanger racialized communities. The duty to prevent systemic racism, therefore, arises not only from foreseeability but also from the nature of the special relationship that stems from institutional control over vulnerable populations. The recognition of such duty is grounded in tort law doctrine, as well as public policy, and is a reasonable and principled application of existing negligence law.

In fact, courts applying traditional negligence doctrine have implicitly laid the foundation for holding institutions liable for foreseeable racial harms resulting from systemic decisions. *Munn*, *Tarasoff*, *Schuster*, and even *Warren*, all demonstrate that when an institution has a special relationship with students, patients, informants, or other individuals within its care or control, the institution assumes an affirmative duty to act reasonably to prevent foreseeable harm, including harm arising from its policies or systemic omissions. The doctrinal logic of these cases reinforces the principle that institutional duties extend beyond individual misconduct to encompass systemic risk. The recognition of racialized harm that stems from historical racist policies as a foreseeable consequence of institutional conduct fits within the established legal framework of negligence, particularly where institutions owe duties arising from control, reliance, or custodial relationships.

Building on this relational-duty framework, a parallel line of tort precedent, including *Johnson*, *Elam*, *Thompson*, and *In re National Prescription Opiate Litigation* (“*Opiate Litigation*”), demonstrates that institutional liability may stem from institutional policies themselves or the failure to adopt adequate policies where foreseeable harm results. For example, in *Johnson v. Misericordia Community Hospital*, the Wisconsin Supreme Court affirmed that a hospital may be liable under corporate negligence for policy-level omissions.¹¹⁹ The hospital’s omission—failing to obtain and review a known disciplinary report about a surgeon—constituted a policy-level failure that

¹¹⁹ See *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981).

foreseeably endangered patients.¹²⁰ This reflects an acknowledgement that negligence may arise from the design or failure of organizational systems, not only from the misconduct of individual actors. A landmark decision on this point is *Elam v. College Park Hospital*,¹²¹ where the California Court of Appeal held a hospital liable for corporate negligence after a surgeon severely injured a patient because the surgeon was granted privileges despite a known record of malpractice.¹²² *Elam* is significant because the case reinforces the prophylactic purpose of tort law: Imposing a duty of care on institutions entrusted with essential functions, like credentialing medical professionals, creates incentives to act reasonably and, as a result, assists in the prevention of foreseeable and systemic harms.¹²³ Similarly, in *Thompson v. Nason Hospital*, the Pennsylvania Supreme Court recognized that hospitals owe an independent, nondelegable duty of care to patients under the doctrine of corporate negligence.¹²⁴ This duty includes maintaining adequate institutional policies, supervision, and oversight, particularly where the hospital has constructive knowledge of risks associated with systems, procedures, or personnel.¹²⁵ In *Thompson*, the court reversed summary judgment and clarified that a jury could find that the hospital breached its institutional duty, independent of any individual employee's actions, by failing to coordinate and monitor the patient's care.¹²⁶ In *Opiate Litigation*, a federal district court denied summary judgment on negligence and public nuisance claims based on allegations that manufacturers engaged in systemic deceptive marketing campaigns and failed to monitor opioid distribution, which contributed to a widespread public health crisis.¹²⁷

Across these various contexts, from hospital credentialing and custodial care to pharmaceutical distribution, courts have applied established negligence doctrine to recognize that when an institution's special relationship, gatekeeping role, or custodial control creates foreseeable risks to those under its care, a duty of reasonable care may attach. These decisions illustrate that institutional liability may also arise from policy-level failures, not just individual misconduct, when such failures endanger identifiable populations. Systemic racism produces similarly well-documented and predictable

¹²⁰ *See id.*

¹²¹ *See Elam v. Coll. Park Hosp.*, Cal. Rptr. 156, 161 (Ct. App. 1982).

¹²² *See id.* at 160-61.

¹²³ *See id.* at 164.

¹²⁴ *See Thompson v. Nason Hosp.*, 591 A.2d 703, 708 (Pa. 1991).

¹²⁵ *See id.*

¹²⁶ *See id.* at 709.

¹²⁷ *See In re Nat'l Prescription Opiate Litig.*, No. 1:17 MD 2804, 2019 LX 51544 at *8-11 (N.D. Ohio Sept. 3, 2019) (denying summary judgment based on plaintiffs' allegations that manufacturers' misleading marketing and failure to monitor opioid distribution contributed to widespread public harm); *see also In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020) (discussing the certification of a proposed negotiation class in the same multidistrict litigation without addressing the merits of the underlying claims).

disparities, stemming from centuries-long, institutionalized policies based on the falsehood of a racial hierarchy, of which institutions are increasingly aware. As such, recognizing a duty under a systemic negligence theory would reflect a consistent application of tort law's foreseeability principle and its evolving recognition of institutional responsibility.

B. Breach of Duty: Institutional Neglect, Not Individual Malfeasance

Once a duty is established, courts assess whether the defendant exercised reasonable care in preventing foreseeable injury. Breach occurs when an institution fails to take reasonable precautions against established, known, or reasonably anticipated risks.¹²⁸ Courts have recognized institutional breaches in cases where hospitals, corporations, and governmental agencies failed to act on well-documented dangers, even when no single individual acted intentionally or negligently, because the structure or policy gave rise to the risk.¹²⁹ This Article builds on that principle to argue that institutional responsibility in other domains provides a doctrinally consistent pathway for courts to recognize systemic racism as a breach of institutional duty under negligence law.

Together, *Johnson* and *Darling* suggest that a breach of duty may result from an institution's failure to implement, revise, or enforce reasonable policies where such omissions foreseeably place the plaintiffs at risk. In *Johnson*, the Wisconsin Supreme Court affirmed a jury verdict finding a hospital liable for breach of its duty of care by failing to screen a surgeon with a known disciplinary history adequately and, as a result, exposing patients to foreseeable harm.¹³⁰ The court held that institutional negligence may arise when a hospital neglects its independent oversight responsibilities, even absent intentional or negligent conduct by an individual employee.¹³¹ Similarly, in *Darling v. Charleston Community Memorial Hospital*, the Illinois Supreme Court upheld a hospital's liability for failing to oversee the medical staff, which reinforced the principle that failure to adopt or enforce adequate safeguards can constitute a legally actionable breach.¹³²

Courts have also recognized that institutional policies may constitute a breach of duty when the policies foreseeably result in risk to the public.

¹²⁸ See, e.g., *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 258 (Ill. 1965) (finding that breach occurs as soon as a hospital fails to exercise the care dictated in its protocols); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 171-72 (Wis. 1981) (outlining that a breach could occur if the hospital failed to exercise the reasonable care of a like or similarly situated average hospital); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 345-46 (Cal. 1976) (implying that once a therapist knows or should know of a patient's serious risk of violence, failing to take reasonable steps to protect the foreseeable victim constitutes a breach of duty).

¹²⁹ See, e.g., *Darling*, 211 N.E.2d at 258; *Johnson*, 301 N.W.2d at 171-72; *Tarasoff*, 551 P.2d at 345-46.

¹³⁰ See *Johnson*, 301 N.W.2d at 171-72.

¹³¹ See *id.*

¹³² See *Darling*, 211 N.E.2d at 258.

In *Opiate Litigation*, that breach was based on the persistence of harmful institutional practices, including the overpromotion of opioids and the failure to monitor suspect pharmaceutical orders, despite mounting statistical evidence of the drugs' addictive and deadly effects.¹³³ The court based its finding of breach on the pharmaceutical companies' failure to revise or restrain these policies, thereby supporting a doctrinal understanding of breach rooted in institutional omission. This framework applies directly to systemic racism claims. Just as pharmaceutical companies in *Opiate Litigation* maintained distribution systems despite clear warning signs, many institutions today uphold educational, policing, and healthcare policies that have been shown to cause racially disparate harm, are based on historically racist policies, or fail to implement safeguards to prevent racially disparate outcomes.

Taken together, *Johnson*, *Darling*, and *Opiate Litigation* illustrate three guiding principles that support institutional liability when foreseeable harms persist due to policy-level neglect. First, institutions may be held responsible for foreseeable harm when they fail to implement, revise, or reinforce policies designed to mitigate known risks.¹³⁴ Second, breach can occur when an institution, despite actual or constructive knowledge of foreseeable harm, declines to adopt reasonable preventative measures.¹³⁵ Third, courts have permitted institutional liability even absent a culpable individual actor, affirming that systemic omissions or flawed policies, rather than discrete misconduct, can be legally actionable.¹³⁶ These principles provide a doctrinal foundation for applying negligence law to systemic racism. Racial disparities in healthcare, education, and policing have been well documented and are statistically foreseeable. When institutions adopt, maintain, or fail to correct policies that perpetuate these harms, such omissions may constitute a breach of duty under a systemic racism as negligence claim. In this context, breach analysis centers on whether an institution had actual or constructive knowledge of the racial harm, maintained control over the relevant policies, failed to provide adequate safeguards, and declined to implement reasonable interventions.

This doctrinal framework aligns with seminal CRT scholarship emphasizing institutional accountability for systemic racial harm. Like CRT, negligence doctrine does not require linking liability to a single bad actor. Courts have recognized that institutional liability may arise not only from individual intent but from systemic omissions where an institution's policies foreseeably endanger the public.¹³⁷ CRT scholars, including Kimberlé Crenshaw, Richard Delgado, and Charles Lawrence have long argued that racism is not simply the result of isolated acts of bias, but a structural reality

¹³³ See *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020).

¹³⁴ See *Johnson*, 301 N.W.2d at 171.

¹³⁵ See *Darling*, 211 N.E.2d at 258.

¹³⁶ See *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667.

¹³⁷ See *id.*

embedded in legal and social institutions.¹³⁸ This insight mirrors negligence doctrine's recognition that institutions can be held liable for failing to take reasonable precautions against foreseeable, systemic harm.¹³⁹ Courts have affirmed or allowed claims to proceed against hospitals that failed to prevent medical incompetence and corporations that failed to monitor dangerous distribution systems by recognizing institutional omissions, such as failing to implement or revise policies to address known risks, as a basis for breach.¹⁴⁰ These developments support the argument that institutions have committed a breach of duty when they fail to intervene against documented racial harms. The systemic racism as negligence framework offers a pathway by which courts can recognize such breaches as actionable under existing negligence doctrine and extend accountability to institutions whose policies foreseeably create racial harm.

C. Causation: Policy as the Mechanism for Harm

Some may argue that causation is the most difficult element to prove in a systemic racism as negligence claim because traditional negligence doctrine requires linking a specific harm to an identifiable action or omission. This may be challenging to demonstrate given the widespread and diffuse nature of systemic racism. A systemic racism as negligence claim does not require redefining causation. Instead, it applies established causation principles to the pervasive and statistically demonstrable harms of systemic racism. Courts recognize that widespread harm can be traced to institutional policy failures.¹⁴¹ To establish causation at an institutional level, a plaintiff must demonstrate that the harm was a foreseeable consequence of the institution's negligence.¹⁴² In toxic tort, public health, and mass tort litigation, courts have accepted probabilistic and epidemiological models, such as statistical correlations and aggregate harm, to support causation, particularly where individualized proof is impractical.¹⁴³ These frameworks acknowledge

¹³⁸ See *supra* note 5.

¹³⁹ See, e.g., *Johnson*, 301 N.W.2d at 171; *Darling*, 211 N.E.2d at 258; *Elam v. Coll. Park Hosp.*, 183 Cal.Rptr. 156, 161 (1982); *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667.

¹⁴⁰ See, e.g., *Johnson*, 301 N.W.2d at 171; *Darling*, 211 N.E.2d at 258; *Elam*, 183 Cal. Rptr. at 161; *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667.

¹⁴¹ See, e.g., *Sindell v. Abbott Lab'ys*, 607 P.2d 924, 936-38 (Cal. 1980) (accepting a probabilistic approach to causation under market-share liability that when the industry-wide standard is the cause of the plaintiff's injury then each industry member contributes to the plaintiff's harm); *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 594 (Ct. App. 2017) (affirming liability where lead-paint manufacturers' conduct was a substantial factor in causing widespread residential lead contamination); *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667 (recognizing that manufacturers' overpromotion and failure to monitor created the opioid epidemic).

¹⁴² E.g., *Johnson*, 301 N.W.2d at 171; *Elam*, 183 Cal. Rptr. at 161; *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667.

¹⁴³ See *ConAgra*, 227 Cal. Rptr. 3d at 543-45; *Sindell*, 607 P.2d at 935-37; *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667.

that when systemic failures expose populations to foreseeable risks, causation can be inferred from patterns of harm, not only from individualized misconduct.¹⁴⁴ In systemic racism as negligence claims, where plaintiffs may suffer tangible harms such as elevated anxiety, chronic illness, or environmental exposure, courts may find that a similar use of probabilistic evidence provides a legally sufficient basis to show causation.

Toxic tort litigation provides precedent for recognizing causation in the absence of direct, individualized proof of harm.¹⁴⁵ Plaintiffs exposed to hazardous substances are rarely able to pinpoint a single defendant responsible for their injuries. Instead, some courts have held that causation may be inferred from statistical evidence demonstrating that exposure to a harmful condition caused the plaintiff's injury.¹⁴⁶ *In re Paoli R.R. Yard PCB Litigation* and *State of New Hampshire v. Exxon Mobile Corp.* illustrate this point. In *In re Paoli*, even though the plaintiff was unable to identify which exposure caused the injury, the Third Circuit approved the evidentiary use of epidemiological studies showing a significantly increased risk of injury and concluded those studies were sufficient to permit a jury to infer that the toxic exposure more likely than not caused the plaintiff's disease.¹⁴⁷ Similarly, in *Exxon*, the New Hampshire Supreme Court upheld the use of a statewide sampling model for toxic contamination to establish both the existence and scope of the State's injury when no single spill could be traced to a discrete defendant.¹⁴⁸ Together, these cases suggest that when hazardous releases stem from institutional negligence, courts may accept statistical and epidemiological evidence rather than direct, individualized proof. Demographic and public health data may provide an evidentiary pathway to establish causation where racialized harm stems from institutional policies in systemic racism as negligence claims, just as some jurisdictions have permitted the use of risk-based models in toxic tort claims.

The same risk-based evidentiary logic is applied throughout tort law in mass harm tort and products liability contexts. The following cases are not cited as precedents for negligence. Instead, these authorities demonstrate that across otherwise distinct tort frameworks, courts accept statistical evidence to recognize the causal connection in diffuse, institutionally-generated harms. This is a doctrinal interpretation that is readily transferable to systemic racism as negligence claims. In *Opiate Litigation*, plaintiffs demonstrated that industry-wide failure to regulate opioid distribution foreseeably led to mass addiction and public health harms.¹⁴⁹ Some courts in

¹⁴⁴ See *ConAgra*, 227 Cal. Rptr. 3d at 543-45; *Sindell*, 607 P.2d at 935-37; *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667.

¹⁴⁵ See *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 at 839-40 (3d Cir. 1990); *State v. Exxon Mobil Corp.*, 126 A.3d 266, 291-96 (N.H. 2015).

¹⁴⁶ See *In re Paoli*, 916 F.2d at 839-40; *Exxon*, 126 A.3d at 302.

¹⁴⁷ See *In re Paoli*, 916 F.2d at 839-40.

¹⁴⁸ See *Exxon*, 126 A.3d at 296-98.

¹⁴⁹ See *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 667.

the *Opiate Litigation* Multidistrict Litigation allowed claims to proceed or reached findings of liability based on corporate practices that foreseeably contributed to the opioid epidemic.¹⁵⁰ Further, the Northern District of Ohio rejected arguments that the causal chain was too attenuated and ruled that statistical evidence linking corporate policies to widespread harm was sufficient to establish causation.¹⁵¹

In the products liability context, the Fifth Circuit in *Borel v. Fibreboard Paper Products Corporation* found asbestos manufacturers liable under negligence and strict liability. Their liability was based on testimony and studies about dust's health effects showing that workplace exposure caused long-term health consequences.¹⁵² The ruling emphasized that plaintiffs need not trace their injuries to a single actor but can instead show that the defendant's conduct foreseeably contributed to the harmful conditions.¹⁵³ Relatedly, in *Sindell v. Abbott Laboratories*, the plaintiff, a woman who developed clear cell adenocarcinoma after in utero exposure to the same fungible diethylstilbestrol (DES) distributed by nineteen manufacturers, could not identify which defendant produced the carcinogenic dose.¹⁵⁴ The California Supreme Court held that causation could be inferred from each manufacturer's market share and allocated liability proportionally to the share of the DES market during the relevant period.¹⁵⁵ These rulings confirm that where institutional conduct foreseeably creates public harm, courts may infer causation through systemic data. This framework offers analytic legitimacy for applying risk-based evidence to systemic racism as negligence claims.

In fact, racial disparities in policing, healthcare, education, and other societal institutions are statistically predictable outcomes of institutional policies that ignore the historical entrenchment of racist policies to perpetuate systemic racism.¹⁵⁶ In the healthcare context, decades of research, including studies by the U.S. Department of Health and Human Services (HHS) and health scholars, demonstrate that disparities in mortality, access to medical treatment, and exposure to environmental hazards are foreseeable consequences of longstanding institutional failures.¹⁵⁷ The HHS Action Plan

¹⁵⁰ See Nate Raymond & Brendan Pierson, *Pharmacies Prevail in Appeal of \$650-Million Opioid Award in Ohio*, REUTERS (Dec. 10, 2024), <https://www.reuters.com/legal/ohio-top-court-says-pharmacies-could-not-be-sued-over-opioid-epidemic-2024-12-10/> [https://perma.cc/JYC3-XVLP].

¹⁵¹ See *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 808-09 (N.D. Ohio 2022).

¹⁵² See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081, 1083-86 (5th Cir. 1973).

¹⁵³ See *id.*

¹⁵⁴ See *Sindell v. Abbott Lab'ys*, 607 P.2d 924, 930-31 (Cal. 1980).

¹⁵⁵ See *id.*

¹⁵⁶ See *supra* note 55.

¹⁵⁷ See U.S. Dep't of Health & Hum. Servs., *HHS Action Plan to Reduce Racial and Ethnic Health Disparities: Implementation Progress Report 2011-2014* 12 (2015), <https://aspe.hhs.gov/sites/default/files/private/pdf/206166/DisparitiesActionPlan.pdf> [https://perma.cc/W9HD-5JDM]; Williams, *supra* note 87; *supra* note 56.

to Reduce Racial and Ethnic Health Disparities explicitly documents how these outcomes are shaped by policy choices that disproportionately affect people from historically subordinated groups.¹⁵⁸ Such health-related harms, ranging from higher rates of asthma to premature death,¹⁵⁹ underscore the doctrinal viability of systemic racism as negligence claims by reinforcing a causal link between institutional policies and racially disparate outcomes.

Causation in toxic tort and products liability supports recognizing systemic racism as negligence claims where institutional policies in healthcare, policing, and education create racially disparate harms for vulnerable populations, even absent individualized proof.¹⁶⁰ This context invokes the same evidentiary parity rule in tort law: When a defendant's policy materially increases the risk of the very harm suffered, statistical proof of that heightened risk satisfies causation even when pinpoint tracing is impossible. As courts have recognized statistical, historical, and epidemiological evidence as sufficient to establish causation in toxic exposure and products liability litigation,¹⁶¹ a similar analytical approach can be applied to systemic racism claims under negligence doctrine without requiring a doctrinal overhaul. Negligence doctrine has been interpreted to embrace this approach to causation because the doctrine promotes the same deterrence and cost-internalization goals where actors that choose policies concentrating risk on a vulnerable group should bear the cost of the predictable injuries those policies produce. Like exposure to environmental toxins, systemic racism operates as an insidious, pervasive force that does not stem from a singular, identifiable act but is embedded within institutional structures and policy decisions over time. Again, in both contexts, direct individualized proof of harm is often unattainable. However, in toxic tort, mass harm, public nuisance, and products liability, that unattainability of proof does not foreclose satisfying the causation element. Instead, tort law has been interpreted to recognize that institutions may be held liable when their policies and omissions foreseeably cause harm and that causation can be established through

¹⁵⁸ *See id.*

¹⁵⁹ *See supra* note 56.

¹⁶⁰ *See* U.S. Dep't of Just., *Investigation of the Ferguson Police Dep't* 62-65 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/JB5M-MGH2>].

¹⁶¹ Common law negligence frameworks are governed by tort-based causation principles that routinely permit statistical, epidemiological, and probabilistic proof where conduct foreseeably generates systemic risk. Some courts have accepted probabilistic evidence in tort contexts, including toxic tort and products liability litigation, because negligence doctrine is organized around risk production and causation rather than motive. This approach differs structurally from constitutional Equal Protection doctrine, under which liability turns on proof of discriminatory intent, rendering statistical disparities insufficient absent evidence of purposeful racial animus. *See generally* *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990); *State v. Exxon Mobil Corp.*, 126 A.3d 266 (N.H. 2015); *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (recognizing the reliance on probabilistic evidence to establish causal links between defendants' conduct to systemic, widespread harm without requiring individualized proof).

statistical, epidemiological, and historical evidence. This principle underscores that systemic harm, when empirically documented and historically entrenched, can satisfy the causation element of negligence under existing tort law. By recognizing systemic racism as negligence claims in this established causation framework, courts can apply existing tort doctrine to empirically supported racial harm without requiring a doctrinal overhaul.

D. *Proving Harm: Damages and Institutional Remedies*

Damages, the final element of a negligence claim, are typically awarded to compensate the plaintiff for harm sustained, though in some cases, nominal or punitive damages may be available.¹⁶² Unlike constitutional law, tort law provides an established common law framework for calculating damages in cases involving both individual and institutional harms, including economic loss, emotional injury, and diminished quality of life. Courts routinely compensate plaintiffs for such injuries,¹⁶³ and systemic racism inflicts many of the same harms in measurable and documented ways. As discussed previously, some courts may rely on actuarial models, empirical data, and expert testimony in complex litigation cases.¹⁶⁴ These established methodologies may also serve as evidentiary foundations for quantifying aggregate harm in complex negligence cases.¹⁶⁵ Courts in certain jurisdictions have accepted these evidentiary techniques in toxic tort, public nuisance, and products liability litigation.¹⁶⁶ Damages can and should be awarded for systemic racism as negligence claims because: (A) courts accept statistical evidence to quantify complex harms; (B) both economic and noneconomic harms stemming from systemic racism are legally cognizable; and (C) courts possess the capacity to impose institutional remedies alongside monetary awards.

1. *Statistical Evidence Can Quantify Damages*

Some courts have affirmed that statistical and empirical evidence may serve as proof of damages, particularly in cases involving diffuse, institutional harm.¹⁶⁷ This approach has been most clearly developed in products

¹⁶² See *In re Paoli*, 916 F.2d at 850-52; *Exxon*, 126 A.3d at 306-08; *Sindell v. Abbott Lab's*, 607 P.2d 924, 937 (Cal. 1980); *Borel*, 493 F.2d at 1081; *ConAgra*, 227 Cal. Rptr. 3d at 568-70.

¹⁶³ See RESTATEMENT (SECOND) OF TORTS § 905-06 (A.L.I. 1979).

¹⁶⁴ See, e.g., *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d at 826-31; *Exxon*, 126 A.3d at 295-96; see also *In re Paoli*, 916 F.2d at 854 (finding that the district court improperly excluded expert testimony based on a meta-analysis of epidemiological data).

¹⁶⁵ See Noel C. Birle, *Toxic Torts - Evidence - Third Circuit Recognizes Medical Monitoring Tort and Makes Significant Rulings Concerning Expert Testimony in Toxic Tort Cases*, 37 VILL. L. REV. 1174 (1992).

¹⁶⁶ See, e.g., *Sindell*, 607 P.2d at 937; *Borel*, 493 F.2d at 1083; *In re Paoli*, 916 F.2d at 854.

¹⁶⁷ See, e.g., *Exxon*, 126 A.3d at 306-08; *ConAgra*, 227 Cal. Rptr. 3d at 568-70.

liability and toxic tort litigation where traditional individualized proof is often impractical due to the scale and nature of injuries.¹⁶⁸ Although products liability, toxic tort, and public nuisance claims invoke doctrines such as strict liability, abnormally dangerous activities, and nuisance that differ from pure negligence, negligence theories remain available and are frequently pleaded as well. Courts confronting community-wide injuries are faced with the same evidentiary puzzle as those in negligence cases: how to translate population-level risk and cost into a legally acceptable damages figure when person-by-person proof is impossible.

As such, some courts have permitted reliance on epidemiological studies and statistical modeling to assess damages in complex tort claims involving systemic or population-based harms.¹⁶⁹ In *Exxon*, the New Hampshire Supreme Court upheld the use of a statistical statewide sampling and an expert cost-analysis model to estimate the full scope of groundwater remediation expenses as compensable institutional damages under public nuisance law.¹⁷⁰ Similarly, in *Opiate Litigation*, the trial court relied on prescribing records, statistical evidence, and epidemiological expert testimony to support public nuisance claims seeking abatement of widespread public health harms, without requiring individualized proof.¹⁷¹ It is worth noting the Sixth Circuit's subsequent interlocutory appeal addressed only class certification issues and due process issues, not damages methodology.¹⁷² These cases recognize that when institutional misconduct causes widespread harm, statistical methodologies are both evidentially and doctrinally permissible. Most importantly, these approaches suggest that when harm is systemic, courts may permit population-level evidence to establish damages.

The same doctrinal logic that underlies the use of statistical and epidemiological data in cases like *Exxon* and *Opiate Litigation* supports systemic racism as negligence claims, especially where racial disparities and economic opportunity are empirically documented and historically entrenched. Systemic racism, like mass toxic exposure, produces measurable harms over time, affecting historically subordinated groups.

For instance, in an environmental racism claim, under the systemic racism as negligence framework, plaintiffs might, by analogy to *Exxon*, rely on health data to show disproportionate asthma, cancer, or mortality rates. In healthcare-related claims, such as maternal mortality or life expectancy,

¹⁶⁸ See *Sindell*, 607 P.2d at 937; *Borel*, 493 F.2d at 1094.

¹⁶⁹ See *id.* at 1094-95 (relying on medical testimony and epidemiological studies of insulation workers to establish that asbestos exposure causes serious, cumulative health harms); *Exxon*, 126 A.3d at 296-97 (permitting the State to rely on aggregate and circumstantial evidence where requiring individualized proof of contamination would impose an "impossible burden"); *ConAgra*, 227 Cal. Rptr. 3d at 530 (finding that the trial court appropriately relied on expert testimony and population-level data to establish harm suffered).

¹⁷⁰ See *Exxon*, 126 A.3d at 301-02.

¹⁷¹ See *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 796-97 (N.D. Ohio 2022).

¹⁷² See *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020).

population-level evidence of disparities can satisfy the damages element in the same way the *Opiate Litigation* courts accepted statistical public health data. In each of these scenarios, the harms are tangible and data-derived, not speculative or symbolic. These cases are not offered as precedent for negligence in every jurisdiction but instead reveal a consistent doctrinal approach. Courts currently possess the analytical tools to quantify group-level harm when individualized proof is unattainable. Accepting statistical models and group-level data instead of individualized damages can apply to systemic racism as negligence claims without expanding existing tort law. These parallels do not create a novel theory of liability but instead offer a pathway to a form of institutional harm rooted in tort law—systemic racism—that courts *can* address.

The systemic racism as negligence framework offers courts an opportunity to use settled doctrinal interpretation to address entrenched, systemic racialized harm. Courts have historically interpreted the evidentiary rules of tort law to allow population-level data and expert analysis in cases where institutional harm cannot be traced to a single actor but is nonetheless widespread and legally redressable. The systemic racism as negligence framework builds on this evidentiary foundation to address enduring, racial harms through settled doctrine.

2. *Economic Damages and Equitable Relief Resulting from Systemic Racism as Negligence Claims*

The harms of systemic racism encompass both economic and noneconomic injuries. Institutional failures, such as predatory policing, racialized healthcare neglect, and exclusionary education policies, cause measurable racial harm. These harms include mass incarceration, higher rates of preventable disease or death, school pushout, and diminished lifetime earnings.¹⁷³ While tort law does not allow race-based damage multipliers, systemic racism as negligence claims may appropriately seek compensatory relief that fully accounts for historic and structural disadvantages, similar to courts recognizing pain and suffering, lost opportunity, and restorative remedies in

¹⁷³ See Bailey, *supra* note 56; Ladson-Billings, *supra* note 96; see also MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2016); William Darity Jr., Darrick Hamilton, Mark Paul, Alan Aja, Anne Price, Antonio Moore & Caterina Chiopris, *What We Get Wrong About Closing the Racial Wealth Gap* (Samuel DuBois Cook Ctr. on Soc. Equity & Insight Ctr. for Cmty. Econ. Dev., 2018), <https://insightcced.org/wp-content/uploads/2018/07/Where-We-Went-Wrong-COMplete-REPORT-July-2018.pdf> [<https://perma.cc/ABK4-2K8W>]; Benjamin Harris and Sydney Schreiner Wertz, *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEP'T OF THE TREASURY (Sep. 15, 2022), <https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap> [<https://perma.cc/5BPA-G6DN>]; Nazgol Ghandnoosh and Luke Trinka, *One in Five: How Mass Incarceration Deepens Inequality and Harms Public Safety*, THE SENTENCING PROJECT (Jan. 16, 2024), <https://www.sentencingproject.org/reports/one-in-five-how-mass-incarceration-deepens-inequality-and-harms-public-safety/> [<https://perma.cc/5N8Q-VRH4>].

institutional harm cases. To avoid replicating past injustices in the context of calculating monetary damages for plaintiffs from historically subordinated groups, systemic racism as negligence claims could adopt a reparative approach to compensatory remedies that reflects the scope and historical depth of racial harm. This outlined approach resonates with CRT's commitment to move beyond formal equality and toward equitable, substantive remedies that are not only geared toward restoration but also acknowledge the persistent legacies of institutional neglect that enable prospective relief.

The recognition of damages beyond purely economic harm is well established in tort law. Courts routinely award noneconomic damages such as pain and suffering, emotional distress, and loss of quality of life, even though recovery for emotional and dignitary harms under negligence doctrine often varies across jurisdictions and under certain policy constraints.¹⁷⁴ Where plaintiffs seek recovery for purely psychic harm, these claims typically fall under the tort of negligent infliction of emotional distress (NIED), which imposes additional doctrinal requirements not present in traditional negligence actions.¹⁷⁵ The systemic racism as negligence framework does not rely on NIED, nor should it for two main reasons. To begin, the framework seeks noneconomic damages as a component of a conventional negligence claim where the harm alleged is the foreseeable result of institutional policies and omissions. Moreover, because such harms are already actionable under traditional negligence, plaintiffs should not need to meet the heightened burdens and additional constraints of NIED claims.

NIED claims and systemic racism as negligence claims would operate distinctly in at least five ways. First, NIED is a standalone cause of action requiring specific elements, such as "zone of danger" or bystander proximity rules.¹⁷⁶ Conversely, systemic racism as negligence claims employ the four elements of negligence—duty, breach, causation, and damages—based on institutional conduct. Second, NIED often allows recovery even in the absence of a tangible injury. However, systemic racism as negligence claims typically allege legally cognizable physical or economic harms such as increased health risk in the medical context, environmental toxin exposure in potential claims brought as environmental racism, and even loss of educational opportunity in the school context, all of which satisfy the

¹⁷⁴ Courts in most jurisdictions traditionally limited negligence recovery for pure emotional or dignitary harms to narrow circumstances, including bystanders within the physical "zone of danger" or those suffering a contemporaneous impact. *See, e.g., Zell v. Meek*, 665 So. 2d 1048, 1051 (Fla. 1995) (reaffirming the "impact rule" requiring discernible physical injury). However, several states now recognize freestanding NIED for direct victims of psychological injury. *See, e.g., Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 923 (1980) (giving rise to direct victim NIED based on misdiagnosed illness); *Sacco v. High Country Indep. Press*, 896 P.2d 411, 418 (Mont. 1995) (adopting independent NIED cause of action for foreseeable severe emotional harm).

¹⁷⁵ *See, e.g., Molien*, 27 Cal. 3d at 922; *Sacco*, 896 P.2d at 418.

¹⁷⁶ *See Zell*, 665 So. 2d at 1051; *Thing v. La Chusa*, 48 Cal. 3d 644, 651 (1989).

harm requirement under established tort doctrine.¹⁷⁷ Third, NIED evolved to address acute, individual emotional trauma. In contrast, systemic racism as negligence claims address widespread, community-level harms analogous to mass tort litigation.¹⁷⁸ In such cases, as discussed, courts have accepted statistical and epidemiological evidence to support damages. Fourth, the systemic racism as negligence framework seeks to recover for both economic and dignitary injuries recognized under the Restatement (Second) of Torts, such as mental suffering accompanying legally actionable harms without invoking NIED's policy-driven limitations on recovery.¹⁷⁹ Fifth, some courts have allowed systemwide harm and remediation costs to be calculated under tort frameworks that mirror general negligence principles,¹⁸⁰ as seen in public health and mass tort litigation. This demonstrates that institutional damages, including emotional or dignitary injuries, can be addressed through conventional negligence remedies without relying on NIED.

To be clear, permitting recovery for emotional harm in systemic racism as negligence claims aligns with broader tort principles that recognize institutional liability for systemic failures. Psychological injuries caused by systemic racism,¹⁸¹ such as post-traumatic stress disorder from racialized policing, community isolation, and trauma linked to discriminatory school discipline, or health-related stress as the result of medical neglect, are no less severe than the harms courts have recognized in cases like *Exxon* where persistent stress, anxiety, fear of long-term effects, and community grief flowed foreseeably from corporate negligence. Accordingly, courts need not depart from existing precedent to address harms in a systemic racism as negligence claim. Instead, courts need only extend existing institutional negligence damages frameworks to this category of longstanding structural injury—systemic racism—which is simply another category of harm meriting redress under traditional negligence analysis.

3. *Institutional Remedies: Beyond Monetary Compensation*

Systemic racism as negligence claims would not expose institutions to limitless liability because courts may award equitable remedies under appropriate circumstances. Negligence doctrine is equipped with traditional tort limits, which prevent runaway damages.¹⁸² When plaintiffs seek

¹⁷⁷ See RESTATEMENT (SECOND) OF TORTS § 924(1)(c) (A.L.I. 1979).

¹⁷⁸ See, e.g., *State v. Exxon Mobil Corp.*, 126 A.3d 266, 279; *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020) (describing allegations of pervasive community-level harms caused by opioid manufacturers, including addiction, overdose deaths, and significant public expenditures by local governments for public health and safety responses).

¹⁷⁹ See RESTATEMENT (SECOND) OF TORTS § 924 (A.L.I. 1979).

¹⁸⁰ See, e.g., *Exxon*, 126 A.3d at 279.

¹⁸¹ See *supra* note 56.

¹⁸² Negligence doctrine contains measures to ensure only those harms that were foreseeable at the duty and proximate-cause stages are actionable; remoteness principles bar recovery for

equitable relief, such as injunctive or structural reform, courts impose an additional layer of constraint through equitable doctrines.¹⁸³ Equitable relief is available only when (1) plaintiffs demonstrate that monetary damages are inadequate; and (2) systemic reform is necessary to prevent future harm.¹⁸⁴ These constraints also apply to remedies for systemic racism as negligence claims, which can include structural reform, injunctive abatement, monitoring, and remediation protocols.

When an institution's ongoing conduct continues to create harm, courts may grant injunctive or declaratory relief to address and prevent continuing injury.¹⁸⁵ Precedent from public nuisance and environmental harm offer insightful models of how courts have granted structural and equitable remedies in response to ongoing or persistent systemic harms.¹⁸⁶ In *Exxon*, the New Hampshire Supreme Court upheld a mandatory abatement fund requiring Exxon to finance a statewide toxin-sampling regime, groundwater monitoring, and remediation of contaminated public water wells.¹⁸⁷ This decision demonstrates a doctrinal recognition of using equitable remedies like abatement funds to address ongoing systemic harm when compensatory relief alone cannot curb prospective risk.

When analyzed through negligence doctrine, systemic racism as negligence claims present a comparable scenario: Institutional policies that foreseeably produce racially stratified harms may be analogized to public nuisance or environmental contamination cases. Where institutional policies, as progeny of historical racist policies, perpetuate racial harms, courts may award targeted injunctive relief, in addition to or in the absence of monetary compensation. Such relief may include revised training protocols, monitoring regimes, or data-transparency requirements, all without straining established tort and equitable doctrines. This remedial flexibility aligns with tort law's capacity to redress systemic harms through prospective relief when monetary damages alone are insufficient. As demonstrated in cases like *Exxon*, courts have ordered institutions to implement institutional reforms when institutional policies or omissions caused widespread public harm.¹⁸⁸ Similarly, systemic racism as negligence claims may present a factual and doctrinal basis for courts to consider remedies that are

highly attenuated injuries; and but-for and proximate causation requirements prevent liability for intervening or superseding events. See, e.g., *Palsgraf*, 162 N.E. at 100-01.

¹⁸³ See *Exxon*, 126 A.3d at 279 (upholding a mandatory statewide abatement order requiring systemic sampling, monitoring, and remediation protocols for toxic contamination under public nuisance). But see *Boomer v. Atl. Cement Co.*, 26 N.Y.2d 219, 223 (1970) (declining to issue injunction in nuisance case and instead awarding permanent damages after balancing public and economic interests).

¹⁸⁴ See *Exxon*, 126 A.3d at 279 (demonstrating that systemic remediation is necessary to address ongoing public nuisance when monetary relief is inadequate).

¹⁸⁵ See *ConAgra*, 227 Cal. Rptr. 3d at 570.

¹⁸⁶ See *Exxon*, 126 A.3d at 279.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

responsive to the scale and persistence of the institutional harm alleged. In alignment with CRT's emphasis on community-informed, context-sensitive remedies,¹⁸⁹ plaintiff-suggested reforms can be considered in determining injunctive relief. Provided that the court finds monetary damages inadequate and the injunctive relief is narrowly tailored to redress the injury, plaintiffs could suggest policy changes, institutional restructuring, or public acknowledgement of the harm. These interventions reflect the vision of CRT and the principle that tort law can address complex systemic injuries without departing from existing doctrine.¹⁹⁰

III. CASE STUDY: APPLYING THE SYSTEMIC RACISM AS NEGLIGENCE FRAMEWORK TO AN ANTI-CRT MEASURE IN EDUCATION

Building on negligence doctrine, Part II established that systemic racism is a compensable injury when an institution's policymaking foreseeably entrenches racial subordination. That doctrinal framework is particularly salient now given the current assault on truth in education across the country. The CRT Forward Tracking Project at UCLA School of Law identified nearly 900 anti-CRT measures introduced in forty-nine states across 249 government entities, all of which are aimed at restricting access to truthful information about race and systemic racism through an orchestrated, widespread campaign to reject CRT.¹⁹¹ The breadth of governmental action demonstrates that these anti-CRT measures are not isolated, local anomalies and instead reflect a coordinated national pattern that is reshaping educational governance. Although cast in ostensibly neutral terms, anti-CRT measures operate by excising books, silencing classroom dialogue, and threatening teacher discipline when race is discussed in ways that depart from vague and unclear directives,¹⁹² which foreseeably impacts students of color's access to educational opportunity and inclusion.

This extraordinarily oppressive, nationwide proliferation of measures to restrict speech and learning signals a broader resistance to acknowledging

¹⁸⁹ See Matsuda, *supra* note 20, at 324-25.

¹⁹⁰ See *Exxon*, 126 A.3d at 279; *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 550-51, 597-98 (Ct. App. 2017); *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 826 (N.D. Ohio 2022) (finding defendants may be liable for abatement of ongoing consequences of a public nuisance even after the underlying conduct has ceased); *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2022 LX 20631, (N.D. Ohio Aug. 22, 2022) (entering judgment requiring defendants to fund abatement award and comply with injunctive relief).

¹⁹¹ As noted on the CRT Forward Tracking Project website, 870 anti-CRT measures have been introduced across 249 government entities in the United States. See Taifha Natalee Alexander, LaToya Baldwin Clark, Isabel Flores-Ganley, Cheryl Harris, Jasleen Kohli, Lynn McLelland, Paton Moody, Nicole Powell, Kyle Reinhard, Milan Smith & Noah Zatz, CRT Forward Tracking Project (Mar. 30, 2026) (UCLA School of Law Critical Race Studies Program), www.crtforward.law.ucla.edu [<https://perma.cc/E7PX-84CE>]; Jonathan Feingold & Joshua Weishart, *Discriminatory Censorship Laws*, 99 TULANE L. REV. 585, 600-01 (2025).

¹⁹² *Id.*

systemic forms of racial inequality. Across the United States, a diverse array of communities, from major metropolitan centers to rural towns, have introduced measures restricting the ability to teach about CRT and systemic racism.¹⁹³ Thirty miles from Los Angeles, the Placentia-Yorba Linda Unified School District enacted an anti-CRT resolution that banned CRT as a framework for recognizing, analyzing, and combatting the systemic nature of racism, and instead advanced a colorblind ideology that functionally upholds racial discrimination within contemporary society.¹⁹⁴ On the East Coast, the enactment of a New Hampshire “divisive concepts” law in 2021 that prohibited public school teachers from teaching that New Hampshire or the United States is “fundamentally racist” led to self-censorship among new educators and confusion over permitted topics related to systemic racism and history.¹⁹⁵ Southlake Carroll Independent School District, which serves a wealthy suburb near Dallas, Texas, passed rules banning teachers from discussing systemic racism after parents objected to diversity programs.¹⁹⁶

These anti-CRT measures do more than suppress classroom dialogue. They actively entrench systemic racism by denying students access to the historical and social context that would provide them with the tools to address the most pressing racial and social justice issues of our time. They also chill truthful discussions and teaching about race, racism, and systemic racism, thereby engendering systemic exclusion, psychological distress, and diminished access to educational and professional opportunities for students of color. This dignitary injury not only inflicts individual psychological harm but also potentially sets into motion a series of racially disparate outcomes, such as elevated dropout rates, foreclosed postsecondary pathways, limited labor market prospects, as well as disproportionate interaction with the carceral state. Each of these outcomes constitutes a legally cognizable injury under negligence doctrine when foreseeably produced by institutional policy that produces racially disparate outcomes, further entrenching systemic racism.

This Part operationalizes the systemic racism as negligence framework by demonstrating how a court could adjudicate a claim arising from anti-CRT

¹⁹³ *Id.*

¹⁹⁴ See Placentia-Yorba Linda Unified Sch. Dist., Cal., Res. No. 21-12, Resolution Concerning District Teaching of Critical Race Theory as a Framework on Matters Relating to Race (Apr. 5, 2022), <https://4.files.edl.io/c30b/04/06/22/194827-8344512a-9061-418d-a3f9-14e0b380fdb4.pdf> [https://perma.cc/SV2P-XEL7].

¹⁹⁵ See N.H. H.B. 2, 2021 GEN. CT. (Reg. Sess. 2021); Ethan Dewitt, *As They Await State Guidance, Teachers Consider How ‘Divisive Concepts’ Law Will Affect Lesson Plans*, NEW HAMPSHIRE BULLETIN (July 12, 2021), <https://newhampshirebulletin.com/2021/07/12/as-they-await-state-guidance-teachers-consider-how-divisive-concepts-law-will-affect-lesson-plans/> [https://perma.cc/HZB7-K4NS].

¹⁹⁶ See Mike Hixenbaugh, *Southlake, Texas, Rejected Diversity Lessons in Schools. But a Federal Probe May Demand Them.*, NBC NEWS (Mar. 8, 2022), <https://www.nbcnews.com/news/us-news/southlake-texas-rejected-diversity-lessons-schools-federal-probe-may-demand-n1291109> [https://perma.cc/8BRC-SEBQ].

measures against a school district and other institutional actors involved in the development or implementation¹⁹⁷ of anti-CRT measures. The focus on these institutional actors, specifically school boards, underscores that the systemic racism as negligence framework is concerned with a nationwide pattern of racialized harm that is sufficiently entrenched across local, state, and federal levels to warrant doctrinal treatment. Because abstraction obscures harm, Part III grounds the systemic racism as negligence analysis in one representative case study to demonstrate how (A) duty, (B) breach, (C) causation, and (D) damages can be proven under common law tort principles. The case study features Forsyth County Schools (FCS),¹⁹⁸ whose “divisive concepts” policy exemplifies the structural features common to anti-CRT measures adopted across jurisdictions. Although negligence rules vary by jurisdiction, the analysis proceeds in alignment with the precedent outlined in Part II and deliberately sets aside sovereign immunity and public duty defenses, which are issues that lie beyond this Article’s scope. By applying the systemic racism as negligence framework to FCS’s “divisive concepts” policy,¹⁹⁹ this Part demonstrates how courts can recognize and redress systemic racism as a cognizable negligence claim.

A. *Forsyth County Schools Owes a Duty*

As established in Part II, a legal duty of care can arise when either (1) the harm is reasonably foreseeable or (2) a special relationship exists that gives rise to an affirmative duty to protect against foreseeable harm.²⁰⁰

¹⁹⁷ As detailed in a New Yorker investigation and subsequent tweets, the anti-CRT campaign was deliberately manufactured to mobilize public opposition in the wake of the 2021 racial reckoning. While this Author does not wish to grant undue attention to the anti-CRT campaign’s architects, any systemic racism as negligence claim targeting school boards should likewise scrutinize the extremist think-tank groups that, as institutions, supplied and circulated boilerplate model bans on curriculum that resulted in widespread racial harm to students of color. See Benjamin Wallace-Wells, *How A Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [https://perma.cc/8FYW-9KJP]; see also THE HERITAGE FOUNDATION, *Rejecting Racism in Postsecondary Institutions and Postsecondary Accreditation* (Jan. 22, 2024), <https://www.heritage.org/model-legislation/rejecting-racism-higher-education> [https://perma.cc/42FH-6TFP] (detailing the method and language to be used to introduce bans on evidence-based culturally responsive teaching into curriculum).

¹⁹⁸ Of the nearly 900 anti-CRT measures identified by UCLA’s CRT Forward Tracking Project, FCS offers a factually rich and doctrinally significant setting to examine how institutional policy decisions may foreseeably result in racial harm under the systemic racism as negligence framework.

¹⁹⁹ See Forsyth Cnty. Bd. of Educ., Board Policy Manual, Policy IKBB: Divisive Concepts Complaint Resolution Process (Draft June 21, 2022) (on file with author); see also FORSYTH COUNTY SCHOOLS, *Forsyth County Board of Education Special Called Meeting* (YouTube, June 21, 2022), https://www.youtube.com/watch?v=7QAJVKVjV44&ab_channel=ForsythCountySchools%28Georgia%29 [https://perma.cc/42V7-PATU] (recording of meeting where Policy IKBB is approved).

²⁰⁰ See *supra* Part II. A. Institutional Duty and Foreseeability in Systemic Contexts.

School districts such as FCS owe a duty to their students. This duty arises, in part, because students are required by law to attend school and must rely on the institution for access to educational opportunity and protection from harm, including harms that arise from institutional policy. The following analysis demonstrates that the first element of a systemic racism as negligence claim against FCS is met through both foreseeability and a special relationship.

1. *Foreseeability: Forsyth County Schools Should Have Anticipated Racial Harm*

The test for duty evaluates whether the type of harm suffered was the kind that a reasonable school district would have anticipated as a probable consequence of implementing the anti-CRT measure. At the time of adopting the anti-CRT measure in June 2022, FCS was aware that restricting race-conscious pedagogy could result in racialized educational exclusion and psychological disengagement among students of color.

FCS's anti-CRT measure, specifically the vague, boilerplate language²⁰¹ and hasty enforcement provisions,²⁰² suggests that FCS should have foreseen a chilling effect on race-related instruction, expression, and access to content, resulting in the marginalization and exclusion of students of color. The anti-CRT measure defines "divisive concepts" broadly to include nine specifically outlined definitions and a tenth catchall definition²⁰³ to effectively grant school authorities unfettered discretion to deem almost any discussion of race as violative.

FCS's anti-CRT measure foreseeably deters educators from teaching or discussing race-related content, resulting in exclusion and dignitary harm to students of color. To demonstrate how the language is overbroad and vague to chill speech and learning on any topic of race, definition (G) defines a "divisive concept" as any concept that results in an individual, solely by

²⁰¹ See Forsyth Cnty. Bd. of Educ., *supra* note 199.

²⁰² See *id.* at 3 (requirements (5)(D)(i) outlining the five-day investigation, additional five-day reporting time to the complainant, and three-day decision deadlines that force teachers to self-censor rather than risk an administrative finding of violation of the anti-CRT measure).

²⁰³ See *id.* at 1 (definitions (1)(A) – (I) defining divisive concepts to mean "any of the following concepts, including views espousing such concepts: (A) One race is inherently superior to another race; (B) The United States of America is fundamentally racist; (C) An individual, by virtue of his or her race, is inherently or consciously racist or oppressive toward individuals of other races; (D) An individual should be discriminated against or receive adverse treatment solely or partly because of his or her race; (E) An individual's moral character is inherently determined by his or her race; (F) An individual, solely by virtue of his or her race, bears individual responsibility for actions committed in the past by other individuals of the same race; (G) An individual, solely by virtue of his or her race, should feel anguish, guilt, or any other form of psychological distress; (H) Performance-based advancement or the recognition and appreciation of character traits such as a hard work ethic are racist or have been advocated for by individuals of a particular race to oppress individuals of another race; or (I) Any other form of race scapegoating or race stereotyping.").

virtue of his or her race, feeling anguish, guilt, or any other form of psychological distress.²⁰⁴ Such breadth predictably deters educators from engaging in classroom instruction on race, history, and inequality. As written, definition (G) does not allow for a teacher or speaker to know with any level of certainty what speech is forbidden or permitted. Here, almost any honest and accurate conversation of history, ethics, or social responsibility could be framed as imposing guilt. Lessons on the forced removal of Indigenous people, Jim Crow segregation, anti-Asian violence during the passage of the Chinese Exclusion Act, or even contemporary ethical debates regarding Land Back, reparations, and privilege could all be captured under FCS's anti-CRT measure to limit permissible lessons from educators and students. Further, there is no objective standard for "solely by virtue" or "psychological distress." Must teachers parse whether Black students' emotional response stems "solely" from race rather than content or pedagogical framing? Would a single moment of discomfort or grappling with injustice satisfy the undefined standard of psychological distress? Or must psychological distress reach clinical severity over persistence and time? FCS's anti-CRT measure leaves one with more questions than answers. While the anti-CRT measure states that discussion of divisive concepts as part of a larger course is not prohibited,²⁰⁵ there is a simultaneous prohibition on sharing personal political beliefs in the classroom setting.²⁰⁶ This conflicting phrasing provides an additional broad and subjective basis for complaints because educators are pressured to self-censor discussions on systemic racism rather than risk their professional careers if found to be in violation.

More specifically, the anti-CRT measure does not offer clarity on how to distinguish between discussing systemic racism in an academically appropriate manner versus advocating for a "divisive concept." As a result, the anti-CRT measure predictably discourages discussions, curricula, teaching, and training on historical racial injustices and justice by limiting access to accurate and inclusive education. Research on the importance of inclusive classroom communities and the negative impacts of classroom censorship, which was available at the time of the measure's adoption, has documented that exclusion from culturally responsive materials negatively impacts the academic engagement and psychological health of students of color.²⁰⁷

²⁰⁴ See *id.* at 1 (Definitions (1)(G)).

²⁰⁵ See *id.* at 2 (Requirements (4)(E)).

²⁰⁶ See *id.*

²⁰⁷ See, e.g., Beverly Daniel Tatum, *Talking about Race, Learning about Racism: The Application of Racial Identity Development Theory in the Classroom*, 62 HARV. EDUC. REV. 1 (1992) (showing that when educators avoid honest conversations about race, students of color experience increased anxiety, alienation, and internalized stigma that impair both learning and mental health); Geneva Gay, *Preparing for Culturally Responsive Teaching*, 53 J. TEACHER EDUC. 106 (2002) (finding that teachers who are trained and resourced to include students' cultural backgrounds see marked gains in motivation, self-esteem, and academic performance and, inversely, that censoring or omitting such content depresses engagement and overall student well-being).

Additionally, the formal complaint process outlined in the anti-CRT measure enables complainants to file challenges against materials or teaching practices believed to violate the measure's prohibitions.²⁰⁸ These complaints must be reviewed within five school days, responded to within ten days, and include multiple layers of appeals involving the district superintendent and the state Board of Education,²⁰⁹ which adds additional layers of pressure on educators to avoid engagement with discussions that may trigger enforcement of the measure. The vague and overbroad definition of "divisive concepts," coupled with a multi-layered complaint process, ensures that any discussion of race can trigger FCS's anti-CRT measure for disciplinary review and, as a result, contributes to an environment where teachers and students are systemically excluded from teaching and learning.

The foreseeability of racial harm was clear before FCS enacted the anti-CRT measure. Board meeting minutes featured repeated warnings that censorship of pro-DEI policies and initiatives would harm students of color's educational opportunities.²¹⁰ These concerns, supported by available scholarship on exclusion and isolation, demonstrate that FCS had constructive notice that the anti-CRT measure posed a general and foreseeable risk to a vulnerable population of students whose identities were most implicated by discussions of race, history, and inequality.

As in *Johnson*, *Thompson*, and *Darling*, where courts held hospitals liable for failing to prevent foreseeable harm from policy or oversight failures, foreseeability in systemic racism as negligence claims stem from institutional awareness that policy decisions are likely to harm those most impacted. Given national discourse and local feedback, a reasonable school district, such as Corona-Norco Unified School District in California,²¹¹ would have anticipated that restricting race-conscious instruction could produce exclusionary effects, especially for students of color. Because FCS proceeded with the anti-CRT measure despite this awareness, the foreseeability requirement of the duty analysis is satisfied.

²⁰⁸ See Forsyth Cnty. Bd. of Educ., *supra* note 199, at 3.

²⁰⁹ See *id.*

²¹⁰ See Alex Whittler, *Forsyth County Residents Debate Diversity Curriculum in Schools*, FOX 5 ATLANTA (May 18, 2021), <https://www.fox5atlanta.com/news/forsyth-county-residents-debate-diversity-curriculum-in-schools> [<https://perma.cc/SQP4-A8QN>].

²¹¹ The CRT Forward Interactive Map shows that the Corona-Norco Unified School District's proposed anti-CRT Measure, 2021-22 Resolution No. 4: District Stance on Critical Race Theory failed after community members expressed the dangers of implementation to students. See TAIFHA NATALEE ALEXANDER, LA'TOYA BALDWIN CLARK, ISABEL FLORES-GANLEY, CHERYL HARRIS, JASLEEN KOHLI, LYNN McLELLAND, PATON MOODY, NICOLE POWELL, KYLE REINHARD, MILAN SMITH & NOAH ZATZ, CRT FORWARD TRACKING PROJECT 14 (UCLA School of Law Critical Race Studies Program Aug. 21, 2025).

2. *Forsyth County Schools Had Actual and Constructive Knowledge*

In the context of FCS, the institution had actual and constructive knowledge that the anti-CRT measure would generate racially disparate harm. Community discussions in Forsyth County before and during the adoption of the anti-CRT measure further demonstrate that school officials were on notice of the potential harm of restricting discussions on race, which underscores the institution's failure to respond to foreseeable harm. While opposition to CRT was discussed, many community members expressed apparent support for DEI initiatives and race-conscious curricula.

During FCS's board meetings about the importance of DEI, educators, students, and parents explicitly warned officials that restricting discussions on race would deprive students of an academically rigorous and historically accurate education. Educators expressed concerns that race-restrictive measures would not only lead to the erasure of critical discussions on racial justice but would also foster an exclusionary learning environment for students from historically subordinated groups.²¹² Further, Damian Galvan, an FCS student, addressed the school board to defend DEI efforts while also demonstrating how restraining those efforts systemically prevents teachers from teaching in FCS.²¹³ Damian also emphasized the significance of race-conscious curricula by highlighting the county's rapidly growing Asian American population.²¹⁴ He argued that the education system should accurately reflect this demographic diversity rather than exclude perspectives that contribute to a more inclusive and representative curriculum.²¹⁵ Ryan Liming, another FCS student, credited DEI policies as a contributing factor to a school climate that fostered his sense of inclusion and safety after coming out as transgender because, in part, DEI training broadened teachers' views on his identity.²¹⁶ Local resident Letresha Jackson argued that DEI programs should not be controversial because DEI policies ensure all students feel valued and included in their education.²¹⁷

In *Munn*, the Supreme Court of Connecticut held that the element of duty applied where school officials failed to protect a student against a foreseeable but statistically rare harm,²¹⁸ underscoring that the duty to safeguard

²¹² See Whittler, *supra* note 210; Damian Galvan, *Teach Our County's Racist Past So We Can Learn from It and Move Beyond It*, ATLANTA J.-CONST. (July 8, 2021), <https://www.ajc.com/education/get-schooled-blog/forsyth-student-teach-our-countys-racist-past-so-we-can-learn-from-it-and-move-beyond-it/D36D35L36JEXBHY2MXLVUVBCQU/> [<https://perma.cc/SQP4-A8QN>]; Ryan Liming, *Diversity, Equity, and Inclusion Plan: A Discussion*, DENMARK UNLEASHED (Nov. 15, 2021), <https://denmarkunleashed.com/936/student-life/diversity-equity-and-inclusion-plan-a-discussion/> [<https://perma.cc/8QLA-WQC8>].

²¹³ See Galvan, *supra* note 212.

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ See Liming, *supra* note 212.

²¹⁷ See Whittler, *supra* note 210.

²¹⁸ See *Munn v. Hotchkiss Sch.*, 165 A.3d 1167, 1185-86 (Conn. 2017).

students depends on foreseeability rooted in knowledge.²¹⁹ Additionally, similar to *Darling*, where a hospital's systemic failures in oversight and institutional policy led to patient injury,²²⁰ FCS enacted and enforced a district-wide anti-CRT measure despite explicit warnings that doing so would produce racialized educational exclusion. Unlike in *Johnson*, where institutional liability arose from failure to uncover a physician's history of misconduct,²²¹ FCS was not only presented with clear warnings of foreseeable harm but also actively reviewed and disregarded these warnings. This affirmative disregard of notice provided by the community provides even stronger support for a finding that FCS had actual knowledge of the foreseeable racial harms the anti-CRT measure would produce. Collectively, these warnings, voiced during official deliberations,²²² directly placed FCS on notice that race-restrictive measures would foreseeably result in educational exclusion, systemic alienation, and dignitary harm, especially among students of color.

3. *Special Relationship: Forsyth County Schools Owes Students a Heightened Duty of Care*

Duty can also be established when a special relationship imposes an affirmative duty to prevent foreseeable harm.²²³ Certain special relationships may trigger a duty of care. For example, the relationship between schools and students is based in the control exercised by schools over its students.²²⁴ While certain jurisdictions, such as California, have recognized a special relationship between schools and students that includes responsibility for student well-being, emotional safety, and access to a safe and supportive academic environment,²²⁵ Georgia has not yet declared such a special relationship for purposes of negligence. Instead, Georgia courts have focused largely on discretionary distinctions under official immunity and have recognized duties mainly in custodial or disciplinary contexts.²²⁶

However, the lack of express recognition of a special relationship in Georgia does not preclude liability under analogous duty principles, mainly

²¹⁹ See *id.* at 1172.

²²⁰ See *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 258 (Ill. 1965).

²²¹ See *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981).

²²² See Galvan, *supra* note 212.

²²³ Since foreseeability was established in the previous section, this section will analyze the special relationship between FCS and FCS's students with a particular focus on FCS's students of color.

²²⁴ See *supra* Part II.A. Institutional Duty and Foreseeability in Systemic Contexts.

²²⁵ In California, courts have held that schools owe a duty to protect students by virtue of the special relationship and have confirmed this duty extends to psychological and educational harms. See, e.g., *Rodriguez v. Inglewood Unified Sch. Dist.*, 230 Cal. Rptr. 823, 833 (Ct. App. 1986); *C.A. v. William S. Hart Union High Sch. Dist.*, 270 P.3d 699, 702 (Cal. 2012).

²²⁶ See, e.g., *Wilson v. Anderson*, 913 S.E.2d 813, 818 (Ga. Ct. App. 2025) (refusing official immunity for administrators who allegedly failed to investigate a student threat where the district policy created a ministerial duty to act without allowing discretion).

where ministerial obligations apply. A notable recent case in Georgia highlights how school duty can be enforced even without an initially recognized special relationship.²²⁷ In *Wilson v. Anderson*, the Georgia Court of Appeals held that administrators could be liable where they failed to investigate student threats in violation of a ministerial duty imposed by school policy.²²⁸ *Wilson* demonstrates that even in the absence of a formally recognized special relationship, school districts can owe actionable duties where the district's own policies impose clear, ministerial obligations, and where the district fails to act despite foreseeable harm.

Persuasive authority also supports recognition of a relationship-based duty where schools enforce policies impacting educational access and well-being, not just physical safety.²²⁹ The court in *Munn* found that a private school owed a duty to prevent foreseeable risk of illness arising from a school-sponsored trip based on the school's control and the students' vulnerability.²³⁰ This analysis offers a compelling analog. FCS is a public school district that compels student attendance and exercises exclusive control over daily instruction, disciplinary protocols, and access to academic resources. During instructional hours, students are placed under the custodial care of FCS officials who make educational decisions. The anti-CRT measure was passed at the district level, enforced by local educational agencies, and applied across all K-12 schools in Forsyth County. The vague directives in the anti-CRT measure shaped what books students could read, what historical narratives were accessible, and, although the measure was vague in scope, the disciplinary consequences for violations were abundantly clear. As a result, the directives impacted what students could, and could not, learn. FCS's anti-CRT measure, issued by an entity that controls virtually every legal aspect of an enrolled child's educational experience for at least thirteen consecutive years, produced foreseeable effects on students' access to educational content and classroom participation. Students do not opt in to FCS policies; instead, students are subjected to them by law. Teachers, under threat of employment discipline, adhere to FCS's anti-CRT measure. FCS's position resembles that of an institutional steward with exclusive control over a legally captive population and thus justifies heightened responsibility under traditional negligence principles.

The argument that FCS acted within discretionary authority does not obviate its duty of care under a special relationship obligation. While discretionary function immunity may limit liability, it does not negate the existence of a duty where a special relationship is found to exist. In the

²²⁷ See *id.*

²²⁸ See *id.*

²²⁹ See, e.g., *Rodriguez*, 230 Cal. Rptr. at 831; *C.A. v. William S. Hart Union High Sch. Dist.*, 270 P.3d 699, 702 (Cal. 2012); *Munn v. Hotchkiss Sch.*, 165 A.3d 1167, 1186 (Conn. 2017).

²³⁰ See *Munn*, 165 A.3d at 1181.

school context, that duty arises from the control that institutions exercise over students and the students' resulting dependence.²³¹ Even if Georgia has not expressly recognized a special relationship in the case of psychological or educational harms, Georgia's own precedent has recognized that school districts may still owe a duty to students when the district acts outside educational necessity or fails to respond to foreseeable institutional risks.²³² FCS is not a passive educational entity. FCS exercises exclusive control over students' attendance, instruction, and curricular access, and enforces policies for all students within the district. Given FCS's custodial authority and the foreseeable harm stemming from the anti-CRT measure, the special relationship between FCS and its students supports a finding that FCS owed a legal duty to protect its students, particularly its students of color, from racially stratified harms resulting from the anti-CRT measure.

B. Breach: Forsyth County Schools Failed Its Students of Color

Under a systemic racism as negligence claim, a court may find that when school districts enact policies that predictably result in educational exclusion, psychological harm, or systemic barriers to learning for students, that school district breaches its duty. This subsection demonstrates that FCS breached its duty.

A breach of duty occurs when a school district: (1) retains control over a harmful policy environment; (2) omits safeguards that a reasonable district would provide for vulnerable students; and (3) ignores practical opportunities to reduce foreseeable harm.²³³ As applied to FCS, the district was repeatedly warned of the negative impacts that measures like the anti-CRT rule would create, maintained control over the policy environment, and ignored practical alternatives that would have mitigated the anti-CRT measure's discriminatory effects. These actions and omissions constitute a breach of FCS's legal duty under the systemic racism as negligence framework.

1. Forsyth County Schools Retained Control Over the Harmful Policy Environment

The second prong of the breach analysis evaluates whether the district exercised control over the policy decisions that created the risk. In the case of FCS, the school board introduced, voted on, enacted, and enforced the anti-CRT measure. FCS exercised centralized control.²³⁴ The school board drafted the anti-CRT measure, including its overbroad definitions and

²³¹ *Id.*

²³² See *Wilson*, 913 S.E.2d at 817.

²³³ See *supra* Part II.B. Breach of Duty: Institutional Neglect, Not Individual Malfeasance.

²³⁴ See Eloise Pasachoff, *Equality, Centralization, Community, and Governance in Contemporary Education Law*, 42 FORDHAM URB. L.J. 763, 771-74 (2015) (recognizing how centralization may result in less equality within schools).

ambiguous enforcement triggers. FCS also designed the complaint procedures, established timelines for investigations and appeals, and delegated enforcement authority to local education agencies. The application of the anti-CRT measure was centralized: FCS oversaw the interpretations, determinations of violations, and personnel discipline to exert institutional control across the school district.

FCS exercised discretionary authority over the anti-CRT measure. As in *Darling*, where a hospital's internal governance failures supported a finding of breach, FCS's control over a harmful educational framework gives rise to liability. Similarly, in *Exxon* and *Opiate Litigation*, courts found that institutional actors that maintained oversight over harmful systems could be held liable for their affirmative policy decisions. FCS's central role in authoring and implementing its anti-CRT measure satisfies the first prong of the breach analysis under established doctrine.

2. *Forsyth County Schools Omitted Safeguards that a Reasonable District Would Provide for Vulnerable Students*

The next prong of the breach test examines whether an institution left vulnerable individuals without protective measures. FCS's students of color, already at disproportionate risk of educational exclusion, racial isolation, and psychological distress due to the historical entrenchment of systemic racism through racist policy, were especially vulnerable when FCS enacted the anti-CRT measure. FCS's anti-CRT measure restricted inclusive pedagogy, disincentivized teacher engagement with race-related content, and chilled discussions of systemic inequality, all without installing any institutional safeguards to preserve access to critical educational materials or protect students from dignitary harm.

FCS could have adopted procedural or substantive protections, such as review panels, educator guidance, or exceptions for pedagogically focused discussions on race during the drafting, implementation, or enforcement stages. Instead, the school board enacted a sweeping, vague prohibition on "divisive concepts" while omitting even minimal protections for impacted students. As in *Johnson*, where the hospital's institutional breach stemmed in part from the failure to investigate known risks associated with patients, a vulnerable population,²³⁵ FCS's omission of protective mechanisms supports a finding of breach. Similarly, in *Opiate Litigation*, institutional liability turned not only on the harmful effects of policy, but also on the failure to mitigate those effects through reasonable safeguards.²³⁶ FCS's decision to

²³⁵ See *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981).

²³⁶ In reviewing defendants' Rule 50 motion, the court relied on trial evidence supporting liability, including defendants' systemic failure to "maintain effective controls against diversion" and to investigate suspicious orders. See *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 795 (N.D. Ohio 2022).

proceed without protections for students foreseeably affected by the policy satisfies this prong of the breach analysis.

3. *Forsyth County Schools' Ignored Practical Opportunities to Reduce Foreseeable Harm*

The final prong of the breach test evaluates whether the institution declined to adopt reasonable, efficient precautions that could have mitigated foreseeable risk. Even if racial harm was not the policy's explicit intent, the failure to implement efficient safeguards in connection with a known risk constitutes a breach.

FCS had multiple precautionary options available that could have preserved race-conscious instruction while maintaining administrative oversight. For example, the district could have issued clarifying language to distinguish academic analysis from prohibited advocacy, established teacher training on compliant curriculum, created a moderation process for complaints, or implemented exemptions for students to opt in to race-conscious curricula. Each precaution would have preserved students' educational access while reducing the likelihood of overbroad censorship and educational exclusion. Community members explicitly proposed such interventions during school board meetings, and scholarship²³⁷ consistently affirms the harmful effects of policies like FCS's anti-CRT measure. FCS not only declined these interventions to mitigate risks to vulnerable students but also adopted a structure that maximized student vulnerability and curricular suppression. This refusal to take reasonable and efficient interventions to mitigate harm to vulnerable students, despite available solutions, satisfies the final prong of the breach test. Under corporate negligence precedent,²³⁸ an institution's failure to adopt safeguards against foreseeable harm constitutes breach, and FCS's omission therefore satisfies that requirement.

C. *Causation: Forsyth County Schools' Anti-CRT Measure as a Structural Harm Mechanism*

As established in Part II, the causation element in a systemic racism as negligence claim does not require novel legal theories but instead applies settled tort doctrine to institutional policies that foreseeably produce racial disparities. Again, courts have accepted historical, statistical, and structural evidence to prove that an institution's conduct may function as a substantial factor in causing harm, particularly when direct, individualized proof is impractical. This section applies that recognized framework to FCS's anti-CRT measure, demonstrating that, if FCS's students of color were to bring a systemic racism as negligence claim against FCS, they could establish

²³⁷ See *supra* note 207.

²³⁸ See, e.g., *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d at 258; *Johnson*, 301 N.W.2d at 171-72.

causation by showing that their educational exclusion, psychological disengagement, and racial marginalization were direct consequences of the FCS's choice to implement the anti-CRT measure.

1. *Forsyth County Schools' Anti-CRT Measure Caused Racially Disparate Educational Outcomes*

Under the substantial factor test, causation can be satisfied when an institutional policy or omission materially increases the risk of the type of harm suffered. That harm need not be certain or immediate, only probable enough that a reasonable institution would have taken preventive steps. FCS's anti-CRT measure, through vague restrictions on race-conscious pedagogy and a punitive complaint mechanism, deterred inclusive instruction and materially elevated the risk that students of color would experience psychological distress, academic disengagement, and racial alienation. Testimony from the community in support of race-conscious teaching warned the district that implementation of anti-CRT measures could impair the educational experiences of students of color.²³⁹ These warnings were supported by empirical research establishing that culturally responsive pedagogy improves outcomes for historically subordinated student groups.²⁴⁰

Like the institutional conduct at issue in *Exxon* and *Opiate Litigation*, FCS's policy choices materially increased the risk of systemic harm. In *Exxon*, the court upheld the use of market share liability to satisfy causation where Exxon was part of the relevant market for gasoline that contained contaminants, such that liability could be based on its participation in the market causing the harm.²⁴¹ In *Opiate Litigation*, the court held that pharmaceutical distributors' failure to act on suspicious opiate orders created a public health crisis.²⁴² Here, FCS was repeatedly warned by the community that the anti-CRT measure would cause harm to students of color. However, FCS implemented the anti-CRT measure anyway, which materially increased the risk of academic disengagement, psychological stress, and feelings of exclusion among students of color. As such, the causation element is satisfied under the substantial factor test.

2. *Forsyth County Schools' Anti-CRT Measure Functioned as a Structural Exposure Mechanism*

Courts assessing causation may examine whether an institutional policy functions as a structural exposure mechanism. In complex tort litigation, courts have accepted that causation may be established without pinpointing

²³⁹ See Galvan, *supra* note 212.

²⁴⁰ See Tatum, *supra* note 207.

²⁴¹ See *State v. Exxon Mobil Corp.*, 126 A.3d 266, 297-98 (N.H. 2015).

²⁴² See *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d at 795.

a single actor where the institution's policy infrastructure contributes to widespread harm. FCS's anti-CRT measure operates in precisely this manner by creating a policy environment that predictably and cumulatively deprives students of inclusive pedagogy, suppresses discussions of race, and imposes dignitary harm.

The vague prohibitions on "divisive concepts" and the low threshold for filing complaints against educators operated as a structural deterrent that chilled race-conscious pedagogy. This chilling effect served as the causal link between the policy and the injury experienced by students of color. By design, the anti-CRT measure incentivized educators to avoid any instruction that might be perceived as controversial or noncompliant. The broad and subjective language, prohibiting concepts that might cause "psychological distress" or be interpreted as promoting "divisive concepts," placed educators in a coercive position to either self-censor or risk employment discipline. Predictably, this narrowed the scope of permissible discourse on historical and contemporary racial issues and ultimately deprived students of color of an inclusive and historically accurate education. Educators may have avoided essential content, while students of color faced curricular omission and psychological harm, which makes the anti-CRT measure a direct causal mechanism of systemic racial exclusion. As in *Opiate Litigation*, where courts recognized that institutional policies regulating drug distribution enabled systemic exposure and harm,²⁴³ the design of FCS's anti-CRT measure materially increased the likelihood of educational exclusion for students of color. Moreover, *Sindell* can support the broader legal principle that where direct causation is impractical to prove, a court may recognize that institutional design, such as market-wide DES distribution or policy-wide speech restrictions, serves as a sufficient framework to support a finding of causation.²⁴⁴

3. Statistical and Structural Evidence Supports the Causal Link

In cases involving systemic exposure, causation may be established through aggregate and statistical evidence demonstrating that defendants' conduct substantially contributed to an ongoing public injury, without requiring individualized proof.²⁴⁵ Similarly, a systemic racism as negligence

²⁴³ See *id.*

²⁴⁴ See *Sindell v. Abbott Lab'ys*, 607 P.2d 924, 936-37 (Cal. 1980).

²⁴⁵ See, e.g., *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 550-51 (Ct. App. 2017) (warranting abatement by relying on evidence including public health data on elevated blood lead levels, the prevalence of pre-1951 housing with lead paint, and expert testimony on exposure pathways and abatement effectiveness, showing an ongoing risk of harm without individualized proof of causation); see also *Opiate Litig.*, 589 F. Supp. 3d at 795 (describing finding that defendants "substantially contributed" to opioid oversupply and holding defendants liable for "ongoing consequential effects" of the nuisance).

claim may rely on statistical disparities to show that a school district's actions were a substantial factor in producing racialized harm.

In 2023, a year after the adoption of the FCS's anti-CRT measure, the U.S. Department of Education's Office of Civil Rights (OCR) completed an investigation into FCS's book removal practices and found that the district's actions, most of which targeted race, gender, or identity, created a racially and sexually hostile environment for students.²⁴⁶ While the OCR investigation was focused on FCS's book removal process, the investigation revealed a broader institutional pattern of race-based educational censorship and exclusion, which is a dynamic that is materially replicated in FCS's "Divisive Concepts" Complaint Resolution Policy.

The OCR report documented that, following the book removals, students of color experienced increased fears, reduced access to culturally responsive materials, and heightened perception of exclusion, all effects that logically flow from the "Divisive Concepts" Complaint Resolution Policy.²⁴⁷ Additionally, the OCR report provides notable statistics to evaluate the causation element.²⁴⁸ As the report outlines, the racial demographics of Forsyth County are 49% White, 27% Asian, 15% Hispanic, and 5% Black.²⁴⁹ However, communications at board meetings suggest removed books featured characters of color.²⁵⁰ Students of color reported psychological harm and curricular marginalization resulting from the removals, including diminished classroom belonging and academic participation.²⁵¹ These racialized outcomes reflect the precise harms predicted among FCS's students, educators, and parents when vocalizing their support of DEI in the classroom.²⁵² In some instances, student disengagement extended beyond classroom withdrawal. Students reported avoiding school altogether due to the perception that their identities and histories were being systemically excluded.²⁵³ This withdrawal behavior is consistent with the systemic chilling effect documented by OCR and further demonstrates how FCS's policies contributed to racialized educational exclusion. While *Sindell* addressed causal uncertainty in the context of products liability, the court's acceptance of nonindividualized systemic evidence provides persuasive support for recognizing statistical data, such as the OCR's findings regarding FCS, as probative of causation in systemic tort claims.

²⁴⁶ See U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. REGION IV, OCR COMPLAINT NO. 04-22-1281, 6-7 (2023), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04221281-a.pdf> [https://perma.cc/9JQ8-MVQY].

²⁴⁷ See *id.* at 7.

²⁴⁸ See *id.* at 4.

²⁴⁹ *Id.*

²⁵⁰ See *id.* at 7.

²⁵¹ See *id.* at 5-6.

²⁵² See *supra* note 207.

²⁵³ See *supra* note 207.

Together, this evidentiary foundation supports the inference that the “Divisive Concepts” policy operated as a structural conduit through which exclusion and harm occurred. FCS’s anti-CRT measure materially increased the risk of academic disengagement, psychological harm, and exclusionary learning conditions. As a result, the causation element can be met through this statistical evidence.

D. Damages: Quantifying the Cost of Racial Exclusion

Having satisfied the duty, breach, and causation elements, the final element of a systemic racism as negligence claim is damages. The damages element consists of three interrelated components: (1) a legally cognizable injury that is economic, non-economic, or institutional; (2) the capacity to measure those injuries with reasonable certainty using statistical, actuarial, and expert methodologies; and (3) the availability of monetary compensation or equitable, prospective relief.²⁵⁴ As discussed in Part II, courts have endorsed these approaches in tort law. The same doctrinal framework can be applied to address systemic racism as negligence claims where institutional policies inflict widespread, empirically documented harms. Since this Part serves as a case study, the existing record lacks specific evidence of out-of-pocket economic loss or discrete institutional deprivations. As such, the damages analysis is limited to non-economic harms. Harm in the form of dignitary injury is abundantly documented. Critically, the dignitary harm to FCS’s students of color extends beyond discrete emotional injury. The dignity harm could potentially manifest into a legacy of gross racialized harms, like higher dropout rates, reduced access to post-secondary opportunities, and disproportionate involvement in carceral systems.²⁵⁵ In applying the three-part test for damages to FCS’s anti-CRT measure, a court can, and should, recognize both the tangible learning loss and dignitary injuries suffered by FCS’s students of color and tailor remedies that restore educational opportunities through both monetary awards and structural reforms.

1. Forsyth County Schools’ Students of Color Have a Legally Cognizable Injury for Non-Economic Harms Under the Systemic Racism as Negligence Framework

As discussed in the Duty Section in this Part,²⁵⁶ under the systemic racism as negligence framework, a school district’s duty extends beyond generic care to an affirmative obligation to protect students from harm, including psychological distress, exclusion, or diminished educational access resulting from race-suppressive institutional policies. The court in

²⁵⁴ See *supra* Part II.D. Proving Harm: Damages and Institutional Remedies.

²⁵⁵ See Ladson-Billings, *supra* note 96, at 6-7.

²⁵⁶ See *supra* Part III.A. Forsyth County Schools Owes a Duty.

Munn upheld a substantial non-economic damages award for a student who suffered long-term psychological, cognitive, and dignitary injuries due to a school's failure to safeguard against foreseeable harm.²⁵⁷ The court reaffirmed that when schools occupy a custodial relationship with students, the school bears a heightened obligation to prevent institutional injury. When FCS adopted the anti-CRT measure, the institution created an environment that predictably produced psychological and dignitary harms. By functionally classifying any race-related discussions as suspect, the anti-CRT measure produced shame, disengagement, and alienation among FCS's students of color. These injuries are the psychic harms systemic racism as negligence claims aim to redress.

While Georgia law generally does not permit recovery for purely psychic injury in negligence claims absent physical impact,²⁵⁸ courts in other jurisdictions have awarded damages for emotional injury where a special relationship exists.²⁵⁹ Setting aside any sovereign immunity defenses for the purposes of this doctrinal analysis, the presence of a special duty, which requires FCS to protect student learning environments, positions this systemic racism as negligence claim to support legally cognizable economic harm to FCS's students of color. The injuries FCS's students of color experienced, as outlined in the OCR investigation, such as withdrawing from class participation, reporting feelings of exclusion, and perceiving the school environment as racially hostile, are not novel to courts and reflect the kind of psychological and dignitary harms for which institutional negligence cases, like *Munn*, have upheld damages. Harms suffered by FCS's students of color reflect the type of institutional psychic injuries that current negligence doctrine has increasingly recognized. The systemic racism as negligence framework supports treating dignitary harms of shame and alienation as compensable psychic injuries and supplies the doctrinal basis, across jurisdictions, to recover non-economic damages for FCS's anti-CRT measure.

2. *Forsyth County Schools' Students of Color Can Measure Their Injuries with Reasonable Certainty Depending on Empirical Methodologies*

Tort law does not require mathematical precision in measuring damages. Rather, once harm is established, damages need only be shown with reasonable certainty. As explained in Restatement (Second) of Torts § 905 and § 906, courts permit recovery for nonpecuniary harm even where exact amounts cannot be determined if a credible basis for the specified damage

²⁵⁷ See *Munn v. Hotchkiss Sch.*, 165 A.3d 1167, 1186 (Conn. 2017).

²⁵⁸ See, e.g., *Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 584 (2000); *Ryckley v. Callaway*, 412 S.E.2d 826, 828 (Ga. 1992).

²⁵⁹ See, e.g., *Munn*, 165 A.3d at 1176.

sum exists. In institutional or systemic tort contexts, courts have accepted expert testimony and inferential methods, such as statistical modeling or aggregated evidence, to demonstrate harm that is not amenable to individualized proof.

In the context of systemic racism as institutional negligence, damages might similarly be approximated using empirical methodologies.²⁶⁰ Just as the court in *ConAgra* accepted the use of expert and statistical evidence to estimate remediation costs for community-wide harm,²⁶¹ a court analyzing a systemic racism as negligence claim may similarly recognize that dignitary and educational injuries demand redress. In this FCS case study, measurability would turn on validating psychic harm through psychometric and clinical testimony. To ground damages in reasonable certainty, an educational psychologist or clinical sociologist can provide testimony to measure the policy's stigmatizing effect on the senses of belonging and identities of students of color at FCS. That testimony, corroborated by structured interviews with teachers, administrators, and students, can supply the empirical basis for per-student dignitary awards.

3. *Remedies Available to Forsyth County Schools' Students of Color Include Removal of the Anti-CRT Measure, Student Support Funds, an Advisory Council, and Accountability Measures*

Even when a damages award focuses solely on noneconomic harms, systemic racism as negligence claims contemplate both retrospective compensation for dignitary injury and prospective structural reform. A unified remedy package ensures that courts not only redress past psychic injuries but also dismantle the systemic policy that gave rise to the injury. Consistent with Matsuda's principle of seeking input from those directly impacted to ensure that relief reflects the needs and insights of those whom the policy harmed, remedies must be designed in consultation with those who have been most harmed.

In alignment with community input, equitable relief must target the structural source of the harm. The court should permanently revoke FCS's anti-CRT measure and enjoin any future resulting discipline. Revising the policy language alone would perpetuate the chilling effect. The anti-CRT measure's vague definitions and complaint mechanism inevitably produce self-censorship and deprive students of color of full participation in their education. Any remedy that sharpens the definitions or provides an opportunity for students and teachers to file appeals or responses to complaints would function to sustain an environment where students are shamed and alienated, but also frustrated in having to defend themselves, their positions,

²⁶⁰ See *supra* Part II.D.1 Statistical Evidence Can Quantify Damages.

²⁶¹ See *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499, 569-70 (Ct. App. 2017).

and, more importantly, their identities. Only complete rescission can restore teachers' confidence to engage in candid discussions of race and racism and allow students to have access to this classroom instruction.

Second, a monetary award should be paid into a Student Support Fund managed by an independent trustee. Community-informed advisory panels would recommend how the fund underwrites culturally affirming initiatives, which could include counseling services, student support, affinity-group programming, peer mentoring initiatives, or other interventions to ensure that compensation directly addresses localized harms. This remedy structure parallels the public nuisance abatement framework affirmed in *ConAgra*, where the court approved an equitable fund-based remedy tailored to the long-term effects of lead exposure.²⁶²

Relatedly, the court could establish an Independent Advisory Council on Race and Pedagogy, funded at an amount sufficient to support administrative salaries and operations over a specified period of time. Following Matsuda's approach,²⁶³ Council membership and agenda setting could be determined through participatory forums with students, teachers, parents, and civil rights advocates. The Council would be empowered to review policies related to race, issue binding recommendations within thirty days, and publish quarterly reports on the progress of FCS's DEI initiatives and instructional climate surveys. At the end of the four-year period, FCS would be responsible for either sustaining the Council or adopting an alternative, community-approved oversight mechanism. Structural oversight and participatory governance measures like this one are consistent with the decision in *ConAgra*, which recognizes that effective remedies for public harms extend beyond damages to include institutional realignment and community-informed accountability structures.

Together, these measures satisfy the remedial prong of a systemic racism as negligence claim: The monetary award redresses dignitary injury while the removal of the anti-CRT measure and community-informed structural reforms deliver the prospective relief essential to restoring and safeguarding full educational opportunity.

CONCLUSION

Imagine a school board meeting, not unlike one in Forsyth County, where parents and students of color testify not only to their exclusion, but to their right to inclusion. Where racial harm is not dismissed as political controversy but recognized and remedied as a legal injury. Where board members pause, consult, and research before ever enacting vague, punitive policies—not out of fear of backlash, but because the law affirmatively demands accountability for foreseeable racial harm, lowering the chances

²⁶² See *id.* at 568-70.

²⁶³ See Matsuda, *supra* note 20, at 362-63.

of such harm occurring. Under a systemic racism as negligence framework, that future is doctrinally plausible.

Courts and scholars have interpreted negligence doctrine to recognize institutional liability in cases where systemic failures foreseeably cause harm. Systemic racism, like other legally cognizable institutional harms, is a form of institutional injury within the doctrinal grasp of tort law. The legal tools are available. What has been missing is the *recognition* that these tools can be used to serve racial justice. The systemic racism as negligence framework does not create new rights within tort doctrine; rather, it applies existing negligence principles to systemic racism as an institutional harm within tort law's doctrinal reach. If adopted, the systemic racism as negligence framework could transform how courts understand an institution's duty to racially marginalized communities. School districts, healthcare providers, and other institutions would no longer be shielded by the absence of overt intent but would be bestowed with the responsibility to ensure racial disparities are not further cemented. These institutions would be required to assess foreseeable racial harms in the same manner as other systemic risks—preventively, transparently, and equitably. This proposed shift would not serve as the single solution to systemic racism but would change the legal landscape to one of collective recognition and responsibility for racial harms caused by institutional actors.

The systemic racism as negligence framework presents some challenges, like sovereign immunity and jurisdictional variations, which must be seriously considered in future scholarship. However, tort law has evolved through the courts' willingness to recognize new claims reflecting the ever-changing nature of society. From asbestos exposure to hospital-acquired infections, the law generally, and tort law more specifically, has adapted when patterns of preventable harm become too visible to ignore. Systemic racism is now positioned at that very threshold.

The systemic racism as negligence framework offers a critical intervention: a pathway to make the law more legible to the people most often harmed by it. The framework calls on courts to deliver on the promise negligence doctrine has been interpreted to make—the promise to intervene when institutions foresee harm and fail to act. In doing so, the systemic racism as negligence framework allows tort law to reckon with structural injustices and finally bring us closer to fulfilling our potential as a truly multiracial democracy for everyone.

