

## COMPENSATION AS A TORT NORM

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The proposition that tort law implements a compensatory norm would seem to be clearly established by history. According to the conventional understanding, the emergence of legal rules requiring the payment of “compositions” or compensatory monetary damages was pivotal in the early development of law and the state.<sup>1</sup> As a substitute for revenge, the early state gave individuals a legal right to receive monetary compensation from those who had injured them, regardless of guilt or fault.<sup>2</sup> The early common law continued to rely on compensation as a substitute for revenge.<sup>3</sup> Consistently with these historical developments, the first American treatise on tort law described the “nature” of tort liability in compensatory terms: “The liability to make reparation for an injury is said to rest upon *an original moral duty*, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another.”<sup>4</sup> On this view, one’s exercise of the right to liberty entails a duty of compensation, even if the behavior was reasonable or not otherwise blameworthy.

Despite this history, scholars have roundly rejected the proposition that tort law implements a compensatory norm, relying on a reason that would seem to foreclose further inquiry about the matter: “Measures of compensatory liability sometimes exceed, sometimes fall short of, and sometimes bear no relation to what is required to make the claimant whole.”<sup>5</sup> Tort law relies on a default rule of

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<sup>1</sup> James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 *Chi. Kent L. Rev.* 41, 42 (1995) (identifying four stages in the conventional historical depiction of how law and the state developed, with the final stage consisting of the early state’s institution of “a system of ‘compositions’, substituting money damages for talionic vengeance”).

<sup>2</sup> *Id.* at 65.

<sup>3</sup> David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 *B.U. L. Rev.* 59, 59–60 (1996) (“In most instances, the same wrong could be prosecuted either as a crime or as a tort... According to the lawyers, victims who preferred vengeance over compensation prosecuted their wrongdoers for crime. Victims who preferred compensation over vengeance sued their wrongdoers for tort.”).

<sup>4</sup> 1 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 84 (Boston, Little, Brown & Co. 2d ed. 1861) (footnotes omitted).

<sup>5</sup> Emily Sherwin, *Compensation and Revenge*, 40 *San Diego L. Rev.* 1387, 1388 (2003) (arguing that the poor fit between compensation and the damages remedy suggests that compensatory damages seek to counterbalance rather than repair a wrong, giving it a “close affinity to revenge”).

negligence liability that primarily values the duty to exercise reasonable care and accordingly limits the availability of compensatory damages, two fundamental attributes of tort law that appear to be wholly inconsistent with a compensatory norm.

Numerous scholars have also concluded that no-fault tort compensation is normatively indefensible. Such liability, on one view, is anachronistic, nothing more than “a survival from the early days when all acts were held to be done at the peril of the doer.”<sup>6</sup> Strict liability, as another put it, embodies “[t]he concept universal among all primitive men, that an injury should be paid for by him who causes it, irrespective of the moral or social quality of his conduct....”<sup>7</sup> A compensatory duty is “primitive” insofar as the payment of compensatory damages is merely an expedient means for buying off another’s demand for revenge and retaliation. Historical practices do not necessarily provide a persuasive rationale for no-fault injury compensation, although scholars have invoked other normative concerns to reject a duty of compensation, concluding that one cannot commit a “wrong” or violation of another’s tort right without being blameworthy or at fault.<sup>8</sup> The compensation afforded by a no-fault rule of strict liability, on this view, cannot be derived from a normatively defensible tort right.

In contrast to the prevailing skepticism about the matter, in my view tort law implements a norm of compensation. As I have argued at length elsewhere, a compensatory tort right that is justified by the value of individual autonomy or equal freedom can persuasively explain the important tort doctrines governing physical harm, including those that limit liability.<sup>9</sup> Having concluded that tort law can be plausibly described by a compensatory tort right and its correlative compensatory duty, I now address the separate question of whether compensation is a defensible norm of justice for answering “questions about who is to get how much of what *and why* (i.e., on what grounds).”<sup>10</sup> Part I below argues that a compensatory duty can be justified by the principle of liberal egalitarianism, supporting the claim with an analysis of how a compensatory tort obligation can be derived from the conception of equality articulated by Ronald Dworkin. Part II then specifies the substantive content of a compensatory tort right and explains why the correlative compensatory duty can be fully satisfied by the exercise of

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<sup>6</sup> Jeremiah Smith, *Tort and Absolute Liability*, 30 Harv. L. Rev. 409, 413 (1917).

<sup>7</sup> Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. Pa. L. Rev. 111, 118 (1924).

<sup>8</sup> See John C.P. Goldberg & Benjamin Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917, 928-29, 951-52 (2010) (discussing the different scholars who have adopted a wrongs-based conception of tort liability and claiming that the conception excludes rules of strict liability).

<sup>9</sup> See generally MARK A. GEISTFELD, *TORT LAW: THE ESSENTIALS* (2008) (hereinafter *TORT LAW*).

<sup>10</sup> John C. Gardner, *What Is Tort Law For? Part I. The Place of Corrective Justice*, 30 Law & Phil. 1, 8 (2011) (defining norms of justice in these terms).

reasonable care. As this analysis shows, tort rules can distribute risk in a manner that satisfies the demands of a compensatory rightholder, even if those rules do not entitle the rightholder to compensatory damages in the event of injury. Part III completes the argument by showing how such a compensatory tort right implements the principle of corrective justice in a conceptually interesting manner that avoids the problem of vagueness that has otherwise plagued tort theories of corrective justice. This abstract norm of compensation is both normatively defensible and adequately descriptive of tort doctrine, making it plausible to interpret tort law in compensatory terms.

## I. Injury Compensation and Liberal Egalitarianism

Liberal egalitarianism justifies distributive schemes that strive to give everyone the same, just starting point so that each can pursue his or her own conception of the good life. Different pursuits typically generate different levels of individual wealth or welfare, and so only certain types of inequalities should be eliminated by redistribution. According to Thomas Nagel, “The essence of this moral conception is equality of *treatment* rather than impartial concern for well-being. It applies to inequalities generated by the social system, rather than to inequalities in general.”<sup>11</sup> To use Ronald Dworkin’s terminology, allowing for inequalities based on choice means that a distributive principle should be “endowment-insensitive” and “ambition-sensitive.”<sup>12</sup> One’s position in life should reflect ambitions and choices rather than the arbitrary circumstances of endowment beyond one’s control.

To identify the types of wealth redistributions that can be justified by liberal egalitarianism, Dworkin conceives of a hypothetical auction for determining the initial distribution of resources that would satisfy the principle of equality, an outcome he calls “equality of resources.” To conduct such an auction, the political system must have previously specified various legal entitlements, including those constitutive of tort law. These entitlements are grounded on the principle that individuals should incur the costs foreseeably caused by their autonomous choices, justifying a compensatory tort duty.

### A. *Equality of Resources*

As Dworkin stipulates, equality of resources is a general theory of distributional equality that treats individuals “as equals when it distributes or transfers so that no further transfer would leave their shares of the total resources

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<sup>11</sup> THOMAS NAGEL, EQUALITY AND PARTIALITY 106 (1991).

<sup>12</sup> Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 311 (1981).

more equal.”<sup>13</sup> So defined, the theory is “very abstract” because there are “different theories about what would count as equality of resources.”<sup>14</sup> Dworkin expends a considerable amount of his own resources to develop a “suitable conception,” but the basic idea is that once everyone has the same, just starting point, each can pursue his or her conception of the good life.<sup>15</sup> Wealth differences attributable to one’s ambition and autonomous choices are just, whereas differences stemming from one’s (unchosen) endowments, including disease and disability, are unjust. Consequently, “equality of resources requires that people pay the true cost of the lives they lead.”<sup>16</sup>

To determine what counts as a “cost” for distributive purposes, Dworkin constructs a hypothetical auction in which participants have equal resources, defined as things external to the individual bidder. Like any other competitive auction, Dworkin’s hypothetical auction yields prices that reflect opportunity costs or “fix the value of any transferable resource one person has as the value others forego by his having it.”<sup>17</sup> The resulting distribution would satisfy an “envy test,” because each participant would prefer his or her own bundle over one purchased by anyone else (otherwise the individual would have purchased such an alternative bundle). The distribution is equal in this fundamental respect, making opportunity costs (the auction prices) the normatively appropriate measure for evaluating distributional equality.

The opportunity cost or price obtained from any auction depends on how the underlying entitlements for the resource have been specified. Dworkin’s hypothetical auction accordingly requires a “background or baseline liberty/constraint system” that defines the particular liberties or entitlements associated with the resources to be auctioned.<sup>18</sup> This baseline must be justified by the same principle that justifies equality of resources, namely, “in the more abstract egalitarian principle, which requires a community to treat each of its members with equal concern.”<sup>19</sup> The abstract egalitarian principle measures equal shares in terms of opportunity costs, and so the baseline itself must be constructed by reference to “what we might call the *true* opportunity costs of a set of resources.”<sup>20</sup>

Dworkin then develops this concept by reference to a principle of abstraction: “This principle recognizes that the true opportunity cost of any transferable resource is the price others would pay for it in an auction whose

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<sup>13</sup> RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 12 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 65-119.

<sup>16</sup> *Id.* at 76.

<sup>17</sup> *Id.* at 149.

<sup>18</sup> *Id.* at 143.

<sup>19</sup> *Id.* at 147.

<sup>20</sup> *Id.* at 149.

resources were offered in as abstract a form as possible, that is, in the form that permits the greatest flexibility in fine-tuning bids to plans and preferences.”<sup>21</sup>

When described at this level of generality, the scheme itself is highly abstract. Nevertheless, it has specific implications for the substantive content of tort law.

### *B. Opportunity Costs and Tort Compensation*

According to Dworkin, the baseline of entitlements required by the hypothetical auction includes those specified by the tort system:

[A]ny competent baseline liberty/constraint system would include a principle of security: this would mandate constraints on liberty necessary to provide people with enough physical security and enough control over their own property to allow them to make and carry out plans and projects. I assume, in short, that an adequate baseline system would have legal constraints forbidding physical assault, theft, deliberate damage to property, and trespass, of the sort that are common to the criminal and civil laws of all developed legal systems.<sup>22</sup>

Dworkin expressly assumes the existence of laws that prohibit intentional wrongdoing, but a principle of security also addresses the more pervasive problem of accidental harms, making these rules part of the liberty/constraint baseline against which resources are equally distributed. Tort rules governing accidental harms, therefore, must be formulated by reference to the general consideration applicable to all aspects of the baseline—they must capture the “true opportunity costs of a set of resources.”<sup>23</sup>

In *Sovereign Virtue*, Dworkin describes tort law as a system for constraining liberty that “would correct for externality.”<sup>24</sup> To ensure that individuals internalize the “true” opportunity costs of their risky behavior, tort law could adopt a rule of strict liability. One who engages in risky behavior would incur a compensatory duty to pay damages for the injuries of those who were foreseeably harmed by the conduct, thereby correcting for externality as required by Dworkin’s formulation of liberal egalitarianism.

This reasoning finds further expression in Dworkin’s earlier discussion of torts in *Law’s Empire*, in which the appeal of strict liability is made evident by his conception of just distribution:

The theory of private responsibility we are testing explains why relative cost figures in these moral decisions. According to that theory we must act as if the concrete rights we cannot both exercise had not yet been distributed between us, and we must distribute these ourselves as best we can, in the way equality of

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<sup>21</sup> *Id.* at 151.

<sup>22</sup> *Id.* at 148-149.

<sup>23</sup> *Id.* at 149.

<sup>24</sup> *Id.* at 157.

resources commends. If we had time and occasion and good will enough to work out some compromise ... then equality might be protected in that way. *If compromise is not possible in the circumstances, however, we must each act so as to minimize the inequality of the distribution we achieve, and that means so that the loser pays less.* This principle of comparative harm cries out for elaboration, however. How shall we measure the relative costs of seizing or forgoing some opportunity? Our root assumption, that we are carrying forward a scheme of equality of resources rather than of utilitarian equality or some other welfarist conception, rules out some measures. We must not measure comparative cost in terms of happiness or satisfaction or some other dimension of welfare. So we must calculate who would lose less in these circumstances by comparing financial costs, not because money is more important than anything else but because it is the most abstract and therefore the best standard to use in deciding which of us will lose more in resources by each of the decisions we might make.<sup>25</sup>

This principle of comparative harm is satisfied by a rule of strict liability. A dutyholder subject to strict liability would choose to create a foreseeable risk of harm whenever the total net benefit of the activity exceeds the compensatory obligation for injuries suffered by the rightholder. Under these conditions, the dutyholder receives a net benefit from the risky interaction, and an award of fully compensatory damages in the event of an accident ensures that the interaction does not make the “loser” or injured rightholder worse off. As compared to the outcome in which the rightholder receives no compensation, strict liability minimizes the inequality of distribution between the interacting parties by minimizing the loss suffered by the rightholder as “loser” in that interaction. Alternatively, if the dutyholder rationally decides not to create the risk, then the total net benefit that she would have derived from the risky activity must be less than the compensatory obligation. Now the dutyholder is the “loser,” but her opportunity cost (the lost net benefit of the risky activity) is necessarily less than the opportunity cost that would otherwise be created by the conduct in question (measured by the total compensatory obligation owed to the rightholder). Once again, the rule of strict liability minimizes the loss or opportunity cost that must necessarily be incurred by one of the parties, thus satisfying the principle of comparative harm as formulated by Dworkin.

The appeal of no-fault tort compensation is not limited to Dworkin’s formulation of liberal egalitarianism. According to Will Kymlicka, liberal egalitarianism can be generally characterized in terms of an abstract principle of the type developed by Dworkin: “Treating people with equal concern requires that people pay for the costs of their own choices.”<sup>26</sup> This abstract principle provides a

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<sup>25</sup> RONALD DWORKIN, *LAW’S EMPIRE* 303 (1986) (emphasis added).

<sup>26</sup> WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 75 (1990).

morally coherent role for a compensatory tort obligation for reasons that are fully illustrated by Dworkin's conception of equality of resources.

To be sure, tort law does not ordinarily entitle accident victims to compensatory damages. Any evaluation of a compensatory tort norm, however, must begin with a more complete statement of a compensatory tort right and its implications for tort liability. Under at least one formulation, a compensatory tort right can explain why tort law has adopted a default rule of negligence liability that does not ordinarily entitle accident victims to compensatory damage awards.

## II. A Compensatory Tort Right and the Correlative Compensatory Duty

Tort liability requires a defendant dutyholder to pay compensatory damages for having violated the plaintiff's tort right, making it easy to understand why compensation must somehow factor into any plausible rationale for tort liability. The concept of compensation, though, is not necessarily limited to the compensatory damages remedy. The default rule of negligence liability can distribute risk in a manner that satisfies the demands of a compensatory rightholder, yielding outcomes in which the dutyholder pays for the full cost of her autonomous choices without having to pay compensatory damages in the event of accidental harm.

### A. *The Substantive Content of a Compensatory Tort Right*

According to the *Restatement (Second) of Torts*, an individual interest that "is protected against any form of invasion . . . becomes the subject matter of a 'right.'"<sup>27</sup> The specification of such a right necessarily prioritizes the protected interest of the rightholder over the conflicting interest of the dutyholder, making it possible for the tort rule to burden the subordinate interest of the dutyholder in order to protect the prioritized interest of the rightholder. A rule that protects the individual interest in physical security, for example, gives the security interest of the rightholder some sort of legal priority over the conflicting or invading liberty interest of the dutyholder. To do so, the tort rule must first distinguish these interests in a manner that justifies a priority for the security interest. The nature of the priority then defines the substantive content of the tort right and correlative duty, making it possible to characterize rights-based tort rules in terms of an underlying priority that gives one set of interests legal protection over another set of conflicting or invading interests.

For reasons developed by leading justice theorists, tort law can prioritize the individual interest in physical security on the ground that an individual must

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<sup>27</sup> RESTATEMENT (SECOND) OF TORTS § 1 cmt. b (1965).

first be adequately secure in order to fully exercise autonomy.<sup>28</sup> The exercise of liberty is also obviously essential for this purpose, and so a prioritization of the rightholder's security interest cannot ignore or negate the dutyholder's conflicting liberty interest. When justified by a principle of equality that values individual autonomy or self-determination, a legal priority of the security interest must be relative to that overarching, general principle. This general principle holds that each person has an equal right to autonomy (or freedom or self-determination) and then gives different values to the individual interests in physical security and liberty, depending on their relative importance for the exercise of the general right. In this respect, a tort right of security is relative to the right of liberty, explaining why courts have long recognized that "[m]ost of the rights of property, as well as of person . . . are not absolute but relative."<sup>29</sup>

Based on a relative priority of the security interest, tort rules can be formulated "to give compensation, indemnity or restitution for harms"—the first purpose of liability according to the *Restatement (Second) of Torts*.<sup>30</sup> If a dutyholder's exercise of liberty foreseeably causes physical harm to a rightholder, a compensatory obligation burdens the dutyholder's subordinate liberty interest to compensate harms it caused to the prioritized security interest of the rightholder; legal fault or an unreasonable liberty interest is not required to justify the compensatory obligation. This duty permits individuals to engage in risky behavior by relying on compensation to protect the rightholder's security interest, the type of outcome required by a right to liberty that is relative to a right of security.

A compensatory duty does not limit liability to behavior that violates norms of conventional morality and is abstract in that sense. Both the dutyholder and rightholder are often blameless, and in such cases of accidental harm, "it is a *fait accompli* that *some* innocent party will be burdened.... Therefore, it cannot be a moral requirement that no party lose out as a consequence of his own blameless conduct. All that remains open for decision is how the loss is to be apportioned."<sup>31</sup> An abstract compensatory norm allocates that burden to the risky actor based on the relative priority of the rightholder's protected interest in physical security.

To be justifiable, a compensatory norm must address any normative problems created by the rightholder's lack of consent and the poor manner in

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<sup>28</sup> See Richard Wright, *Justice and Reasonable Care in Negligence Law*, 47 Am. J. of Jurisprudence 143, 170-94 (2002) (explaining why leading justice theorists maintain that rights-based tort rules prioritize the individual interest in physical security over the conflicting liberty and economic interests of others).

<sup>29</sup> *Losee v. Buchanan*, 6 N.Y. 476, 485 (1873).

<sup>30</sup> RESTATEMENT (SECOND) OF TORTS § 901(a) (1979).

<sup>31</sup> Loren E. Lomasky, *Compensation and the Bounds of Rights*, 33 Nomos 13, 34 (John W. Chapman ed. 1991) (discussing cases of necessity).



which compensatory damages might otherwise protect the rightholder's autonomy. Most obviously, a tort duty limited to the payment of monetary compensation for a nonconsensual harm can be deeply corrosive of the rightholder's autonomy (consider rape). To ensure that a dutyholder does not behave in a manner that disvalues the rightholder's autonomy, a compensatory tort norm can prohibit behavior of this type, justifying extracompensatory damages that punish the dutyholder for having engaged in such reprehensible behavior. A compensatory tort norm can justify tort awards of punitive damages.<sup>32</sup>

In most cases, however, risky behavior does not entail any disrespect for the autonomy of others; the risk is an unwanted byproduct of the activity. To establish liability in these cases, a compensatory norm does not require culpability or personal fault. The dutyholder's exercise of liberty instead establishes the requisite form of responsibility for the foreseeable outcomes of the autonomous choice.<sup>33</sup> The occurrence of foreseeable injury, not any moral shortcoming in the behavior itself, can then trigger the obligation to pay compensatory damages.

This form of outcome responsibility is clearly reflected in the common law maxim *sic utere tuo ut alienum non laedas*, which for present purposes loosely translates into the principle to use your own so as not to injure another.<sup>34</sup> The maxim locates the compensatory duty in the injury-causing conduct rather than the unreasonableness of the injurer's behavior, and so it has frequently been invoked by courts and commentators to justify rules of strict liability.<sup>35</sup>

Such a compensatory norm can readily justify rules of strict liability, but it can also explain why the tort system relies on a default rule of negligence liability

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<sup>32</sup> See generally Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. Cal. L. Rev. 263 (2008) (discussing the role of punitive damages within a compensatory tort system and showing that this role persuasively explains the relevant tort rules).

<sup>33</sup> For more extended discussion of this conception of individual responsibility, see TONY HONORÉ, *RESPONSIBILITY AND FAULT* 14–40 (1999); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72, 92–93 (Gerald Postema ed. 2001).

<sup>34</sup> The maxim means “[u]se your own property in such a manner as not to injure that of another.” BLACK’S LAW DICTIONARY 1238 (5th ed. 1979). As applied to risky behavior not involving the use of property, the maxim yields a common law principle that “under the common law a man acts at his peril.” OLIVER WENDELL HOLMES, *THE COMMON LAW* 82 (1881) (stating that “some of the greatest common law authorities” held this view). See also *Commonwealth ex rel. Attorney Gen. v. Russell*, 33 A. 709, 711 (Pa. 1896) (“‘Sic utere tuo non alienum laedas’ expresses a moral obligation that grows out of the mere fact of membership of civil society. In many instances it has been applied as a measure of civil obligation, enforceable at law among those whose interests are conflicting.”).

<sup>35</sup> See, e.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1254–56 (5th Cir. 1985) (noting that the *sic utere* maxim is the basis for the rule of strict liability governing ultrahazardous activities under Louisiana law).

to govern cases of accidental physical harm. The reason involves the manner in which the compensatory properties of a tort rule depend on how it distributes risk.

### *B. Compensation as Risk Distribution*

In a compensatory tort system, the appropriate formulation of liability rules critically depends on context. Different types of risky interactions create different types of compensatory problems. Solving the different types of compensatory problems shows why tort rules can distribute risk in a manner that satisfies the demands of a compensatory rightholder without including an entitlement to compensatory damages in all cases.

A compensatory tort right prioritizes the rightholder's interest in physical security over conflicting liberty interests of the dutyholder. This *interpersonal* conflict of interests does not exist in two important classes of nonconsensual harms. For cases in which the rightholder and dutyholder are engaged in reciprocally risky interactions or are otherwise in a contractual relationship, the tort rule governs an *intrapersonal* conflict of the rightholder's security and liberty interests. In these cases, the rightholder's compensatory demands are fully satisfied by a negligence rule requiring the dutyholder to exercise the cost-minimizing amount of reasonable care.

Consider tort rules governing reciprocal risks. For example, as two automobiles go past one another on the road, each driver simultaneously imposes a risk of physical harm on the other. For perfectly reciprocal risks, the interacting individuals are identical in all relevant respects, including the degree of risk that each imposes on the other, the severity of injury threatened by the risk, and the liberty interests advanced by the risky behavior. Of course, very few risky interactions will actually satisfy these conditions, but tort law evaluates risky behavior under an objective standard that in this instance asks whether the activity is common in the community.<sup>36</sup> Automobile driving is such an activity, and so as an objective matter, tort rules governing automobile accidents apply to reciprocally situated parties, even for cases in which the victim was walking or riding a bicycle.

Reciprocity eliminates any relevant differences between the interacting parties. For example, each automobile driver has the identical right against the

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<sup>36</sup> Compare GEISTFELD, TORT LAW, *supra* note \_\_, at 93–95 (explaining why the autonomous choices made by a rightholder, such as the decision not to drive automobiles, would violate the principle of equal treatment if these choices were to determine unilaterally whether the dutyholder is subject to negligence or strict liability, yielding a rule that evaluates reciprocity in the objective terms of whether the activity is common in the community); with RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS § 20 cmt. j (2010) (“Whenever an activity is engaged in by a large fraction of the community, the absence of strict liability can be explained by considerations of reciprocity.”).

other, and each owes an identical duty to the other. In these circumstances, neither party prioritizes the security interest over the liberty interest. Each interacting individual instead prefers a cost-minimizing duty of reasonable care that requires a safety precaution only if the benefit of risk reduction (fully accruing to the individual as reciprocal rightholder) exceeds the burden or cost of the precaution (also fully borne by the individual as reciprocal dutyholder).<sup>37</sup> Each rightholder, therefore, does not prioritize her security interest over the other's *reasonable* liberty interest as defined above. A tort rule that rejected each individual's preference for a cost-minimizing negligence rule by instead prioritizing the security interest under a rule of strict liability would be unreasonable or contrary to the autonomy interests of both parties to the risky interaction. For this class of cases, the reasonable demands of the compensatory rightholder—those conforming to the underlying value of equal autonomy—are fully satisfied by a negligence rule that requires the dutyholder to exercise the cost-minimizing amount of care.

In these cases, the dutyholder fully satisfies the compensatory obligation by exercising the amount of reasonable care required by the compensatory tort right. Doing so does not necessarily eliminate risk, creating the possibility that the interaction might accidentally injure the rightholder. In that event, however, the compensatory tort right does not entitle the victim to an award of compensatory damages—the dutyholder's exercise of reasonable care has already fully satisfied the rightholder's compensatory demands. A compensatory tort obligation does not entail the payment of compensatory damages in all cases of accidental harm.

The same outcome occurs for cases in which the rightholder and dutyholder seller are in a contractual relationship, as in product cases involving consumers and manufacturers.<sup>38</sup> By selling a product, the manufacturer creates a risk of physical injury to which the consumer is exposed. A tort rule that makes the manufacturer liable for these injuries will affect product costs, price, aggregate demand, and net profits. To identify the distributive effects of liability, one must first specify the appropriate baseline for analysis. This baseline cannot

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<sup>37</sup> For more rigorous demonstration, see Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 Cal. L. Rev. 773, 851-52 (1995).

<sup>38</sup> Unlike the manufacturer-consumer relationship discussed in text, in other types of contractual relationships, the rightholder sells something to the dutyholder. The most important example is the employment relationship (the sale of labor), in which the employee must be compensated for facing work-related risks either by an increase of wages or payment of compensation for work-related injuries. Employees currently receive both forms of compensation, albeit outside of the tort system (workplace injuries are governed by workers' compensation schemes that provide guaranteed compensation for work-related injuries). Workplace injuries accordingly provide further support for the conclusion that the law regulates accidental harms in a compensatory manner.

be derived by economic analysis, because cost-benefit analysis depends on prices, which in turn depend on the initial allocation of legal entitlements or property rights.<sup>39</sup> The initial allocation instead requires normative justification, and so the normatively justified tort rule defines the appropriate baseline for evaluating the distributive impact of tort liability. At this baseline, the consumer pays for the full cost of tort liability, as the equilibrium product price must cover all of the seller's costs, including its liability costs. Consumer interests are the only ones that factor into the distributive analysis required by the normatively justified tort rule, explaining why products liability law recognizes that "it is not a factor . . . that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry."<sup>40</sup> For risks not threatening injury to bystanders, product cases only implicate an intrapersonal conflict of consumer interests, those involving physical security, liberty (regarding product use) and money (product price and other financial costs of product use).<sup>41</sup>

In comparing her own security and liberty interests, the consumer gives no special priority to either one. The consumer prefers to pay for product safety only if the benefit of risk reduction (borne by the consumer) exceeds the cost of the safety investment (also borne by the consumer via the associated price increase or decrease of product functionality). Consumers reasonably expect product safety decisions to be governed by a cost-benefit calculus, because that decisional rule maximizes consumer welfare. A product that does not satisfy reasonable consumer expectations is defective and subjects the seller to liability under the widely adopted rule of strict products liability.<sup>42</sup> This rule does not entitle consumers to compensatory damages in all cases. Due to the relatively high cost of tort compensation as compared to other forms of insurance, consumers do not reasonably expect to receive tort compensation for injuries caused by nondefective products.<sup>43</sup> The reasonable compensatory demands of consumer rightholders are fully satisfied by cost-minimizing tort rules that limit liability to the physical harms caused by defective products.<sup>44</sup>

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<sup>39</sup> See Lewis A. Kornhauser, *Wealth Maximization*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 679 (Peter Newman ed. 1998).

<sup>40</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. f (1998).

<sup>41</sup> For risks threatening injury to bystanders, the analysis involves the interpersonal mediation of security and liberty interest characteristic of more general forms of tort liability. See MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 309-20 (2d ed. 2011).

<sup>42</sup> See generally *id.* (using the concept of reasonable consumer expectations to explain the important substantive tort doctrines involving liability for defective products).

<sup>43</sup> See *id.* at 61-67 (explaining why consumers do not reasonably prefer an entitlement to tort damages for injuries caused by nondefective products due to the relatively high costs they must incur to receive tort compensation as compared to the other forms of insurance).

<sup>44</sup> See *id.* at 256-66 (explaining why consumers do not reasonably expect to receive compensatory damages in most cases of pure economic loss and stand-alone emotional harms, even when caused by defective products).

As in cases of perfect reciprocity, the dutyholder in product cases fully satisfies the compensatory obligation by making the cost-minimizing investments in product safety required by the compensatory tort right. Doing so does not necessarily eliminate risk, but the dutyholder has fully satisfied the compensatory tort right and is not obligated to pay compensatory damages for injuries caused by the residual (or reasonable) risks inherent in most nondefective products. The demands of the compensatory rightholder, once again, are fully satisfied by a rule that does not require the dutyholder to pay compensatory damages in all cases.

### *C. Risk Distribution as Nonideal Compensation*

In most cases, the negligence rule can attain the ideal compensatory outcome by distributing risk in the manner that best protects the interests of a compensatory rightholder, structuring the risky interaction so that the rightholder is not made worse off, *ex ante*, than she would otherwise be in a world without the risk. The only remaining cases are those in which the parties are not in a contractual relationship and the dutyholder creates an objectively defined nonreciprocal risk of physical harm. Under these conditions, the negligence rule can still distribute risk in the manner reasonably required by the compensatory tort right, but the compensation is not ideal.

These cases involve activities that are not common in the community and create risks above the ordinary level of background risk. A paradigmatic example involves the use of dynamite for construction purposes, although objectively defined nonreciprocal risks are also created in myriad other ways, including instances in which the dutyholder's lack of intelligence or skill creates dangers above the background level (defined by ordinary intelligence and skill). For this class of cases, the tort rule must mediate an interpersonal conflict between the dutyholder's interest in liberty and the rightholder's interest in physical security. A compensatory tort rule prioritizes the security interest and entitles the plaintiff to compensatory damages for these injuries—the same outcomes attained by the rule of strict liability for abnormally dangerous activities and the pockets of strict liability within the objectively defined negligence standard of reasonable care.<sup>45</sup> The compensation afforded by these forms of strict liability, however, is not ideal.

To see why, consider how strict liability responds to the problem of an irreparable injury such as premature death. Aside from the obligation to pay compensatory damages, a strictly liable dutyholder incurs no behavioral obligations. In deciding how to behave, a self-interested dutyholder rationally takes any safety precaution with a burden (denoted *B*) costing less than the expected liability costs that she would otherwise face by creating the risk (the

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<sup>45</sup> See GEISTFELD, TORT LAW, *supra* note \_\_, at 92-97.

amount of compensatory damages  $D$  discounted by the probability of accident  $P$ ). For a fatal risk, the dutyholder is not obligated to pay compensatory damages for the decedent's loss of life's pleasures ( $D = 0$ ).<sup>46</sup> The self-interested dutyholder will ignore these risks in deciding how safely to behave, reducing and potentially eliminating her incentives for taking costly precautions that would reduce the risk of a fatal accident ( $B > P \cdot D = 0$ ).

To solve the safety problem inherent in a rule of strict liability, the rightholder reasonably prefers to supplement that duty with a behavioral obligation of reasonable care that depends on the harm actually threatened to the rightholder (premature death) as opposed to the amount of compensatory damages available in such cases (zero for a decedent's loss of life's pleasures). Such a safety obligation must be derived from the compensatory duty, which can be defined by the total burden that a dutyholder would incur under ideal conditions in which the rightholder is fully compensated.<sup>47</sup> The dutyholder does not bear this entire compensatory burden under a rule of strict liability, as there is no way to compensate a dead rightholder for the loss of life's pleasures. To eliminate this shortfall, the tort rule can relocate the compensatory obligation to the exercise of reasonable care. These safety expenditures, when added to the cost-minimizing precautions that the dutyholder would otherwise take under ideal compensatory conditions, further reduce risk or the likelihood that the rightholder will suffer injury. Such a negligence rule requires the dutyholder to satisfy the compensatory obligation, in part, by incurring these expenses through the exercise of reasonable care. The supplemental rule of strict liability then fulfills the compensatory obligation with respect to the remaining or residual risks not eliminated by the exercise of reasonable care. These abnormal or nonreciprocal risks are subject to strict liability, but the default rule of negligence liability also continues to distribute risk in the manner reasonably required by the compensatory tort right.<sup>48</sup>

The risk distribution in these cases is not ideal for the rightholder, unlike the distribution that occurs in cases of reciprocal risks and products liability. Risk distribution can be fully compensatory only when the burdens of the compensatory duty are borne by the rightholder (as reciprocally situated dutyholder or consumer). For nonreciprocal risky interactions that occur outside

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<sup>46</sup> See, e.g., Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. Rev. 1, 6-7, 20-22 (2005) (finding that the decedent's loss of life's pleasures is not a compensable harm in the vast majority of states).

<sup>47</sup> For more rigorous discussion of the argument in this paragraph, see Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. Rev. 114 (2001).

<sup>48</sup> This reasoning explains why a strictly liable dutyholder who reprehensibly rejects the duty to exercise reasonable care is subject to punitive damages. Cf. *Owens-Ill., Inc. v. Zenobia*, 601 A.2d 633, 653 (Md. 1992) (adopting the majority rule requiring proof of "actual malice" to justify an award of punitive damages in cases of strict products liability).

of contractual relationships, the rightholder does not bear the full burden of the compensatory duty or otherwise directly benefit from the dutyholder's risky behavior. These interactions will disadvantage the rightholder unless she is fully compensated for any resultant injuries, an outcome that is not feasible for fatal accidents and other irreparable injuries. The dutyholder's compensatory shortfall can be eliminated by redirecting these expenditures to the exercise of reasonable care, but the rightholder will still ordinarily face some risk of injury that cannot be fully compensated by the damages remedy. Tort law cannot structure these risky interactions to ensure that the rightholder is not made worse off, *ex ante*, than she would otherwise be.

This compensatory problem, however, does not justify a ban of the risky behavior. The compensatory right is based on a relative priority of the security interest, not an absolute priority that negates or gives no value to conflicting liberty interests.<sup>49</sup> By exercising reasonable care and paying compensatory damages for the harms foreseeably caused by the residual nonreciprocal risks, the dutyholder fully satisfies the compensatory obligation. This exercise of liberty has normative value that is not negated by the manner in which social conditions or transaction costs make it infeasible to attain the ideal compensatory outcome. The *reasonable* compensatory demands of the rightholder—those that give equal concern to the autonomy of the dutyholder—do not justify a ban of the dutyholder's exercise of liberty. These interactions can leave the rightholder worse off than she would otherwise be, but tort law still distributes risk in the manner that fully satisfies the reasonable demands of the compensatory rightholder.

#### *D. Breaches of the Compensatory Duty*

Breach of the primary duty to exercise reasonable care creates a second-order duty to pay compensatory damages for the physical harms proximately caused by the breach. Though inherently related, these two duties are not substantively equivalent. Due to the inherent limitations of the compensatory damages remedy, the second-order duty to pay compensatory damages does not fully substitute for the first-order duty to exercise reasonable care.

The most severe physical harm governed by tort law is wrongful death, and yet monetary damages cannot compensate a dead rightholder for the premature loss of life. Compensatory damages also do not make the plaintiff-rightholder "whole" in cases of bodily harm, nor does this remedy strive to do so.<sup>50</sup> Premature death and bodily injury are paradigmatic examples of an

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<sup>49</sup> See *supra* Part II.A.

<sup>50</sup> See RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979) (stating that a damage award for the loss of life's pleasures is not supposed to "restore the injured person to his previous position" but

irreparable injury, although this common-law category also encompasses damage to real or tangible property.<sup>51</sup> The entire category of physical harms—bodily injury or damage to real or tangible property—is comprised of irreparable injuries that ordinarily cannot be fully compensated by the damages remedy.

For this reason, breaches of the primary compensatory obligation to exercise reasonable care will usually not be remedied in a fully compensatory manner. The exercise of reasonable care is the only way for a dutyholder to fully satisfy the reasonable compensatory demands of the rightholder, explaining why the negligence rule imposes a primary behavioral obligation on the dutyholder that cannot be fully satisfied by the payment of compensatory damages for breach.<sup>52</sup>

To protect the integrity of the first-order duty, tort law prohibits the dutyholder from consciously rejecting or recklessly ignoring the primary duty to exercise reasonable care. A dutyholder who engages in this prohibited conduct and breaches the primary duty is subject to punitive damages, regardless of whether the dutyholder is willing and able to pay compensatory damages.<sup>53</sup> The inadequacy of the compensatory damages remedy justifies the extracompensatory remedy of punitive damages to vindicate the compensatory tort right.

But even in these cases, the primary duty is breached only if the unreasonable conduct proximately caused the rightholder to suffer compensable harm. The failure to exercise reasonable care, no matter how reprehensible, creates no further compensatory obligation in the absence of injury. There is simply nothing left to compensate. In cases of injury, by contrast, the breach of a primary compensatory duty to exercise reasonable care creates a compensatory shortfall that triggers the second-order duty to pay compensatory damages. Tort liability is based on the occurrence of injury for obvious compensatory reasons in accord with “ordinary moral evaluation” that careless behavior causing injury is “deemed worse” than careless behavior that does not ripen into harm.<sup>54</sup>

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should instead only “give to the injured person some pecuniary return for what he has suffered or is likely to suffer”).

<sup>51</sup> Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 Yale L. J. 142, 164 (2011) (discussing the rule of irreparable injury and explaining why it ordinarily encompasses damages to real or tangible property).

<sup>52</sup> See Mark A. Geistfeld, *Tort Law and the Inherent Limitations of Monetary Exchange: Property Rules, Liability Rules, and the Negligence Rule*, 4 J. Tort Law, No. 1, Art. 4 (2011), at <http://www.bepress.com/jtl/vol4/iss1/art4>.

<sup>53</sup> Geistfeld, *The Principle of Misalignment*, *supra* note \_\_, at 165-69 (identifying the types of behavior prohibited by the negligence rule and providing citations to cases holding that a defendant who engaged in such behavior cannot avoid liability for punitive damages even if fully willing and able to pay compensatory damages).

<sup>54</sup> Goldberg & Zipursky, *supra* note \_\_, at 942 (arguing in favor of interpretations of tort law that can incorporate this “framework of moral thought that people deploy regularly in their daily lives”).



By focusing on the consequences of breach in cases of irreparable injury, it becomes apparent why a compensatory negligence rule is primarily concerned about the prevention of injury through the exercise of reasonable care. According to a leading nineteenth century treatise, in cases of irreparable injury “judges have been brought to see and to acknowledge . . . that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it.”<sup>55</sup> In seeking to prevent irreparable injuries, the common law has also long recognized the principle that the tort obligation cannot impose undue hardship on the dutyholder.<sup>56</sup> When derived from a compensatory duty, a primary obligation to reduce the risk of irreparable harm through the exercise of reasonable care does not impose undue hardship on the dutyholder. Compliance with this duty distributes risk in the manner reasonably demanded by the holder of the compensatory tort right, making it possible for tort law to compensate rightholders for physical harms that cannot be fully repaired by the damages remedy.

### III. Compensation and Corrective Justice

As a form of corrective justice, tort liability repairs the inequality created when a dutyholder violates the correlative tort right of another. Not only does the compensatory tort right satisfy the requirements of corrective justice, such a tort right is arguably required in order to make corrective justice a conceptually interesting and adequately determinate interpretation of tort law.

#### A. Compensation as a Form of Corrective Justice

The importance of corrective justice within tort law has been extensively analyzed by Jules Coleman, who explains the conception in these terms:

Corrective justice claims that when someone has wronged another to whom he owes a duty of care, he thereby incurs a duty of repair. This means that corrective justice is an account of the second-order duty of repair. *Someone* does not incur a second-order duty of repair unless he has failed to discharge some first-order duty. However, the relevant first-order duties are not themselves duties of corrective justice. Thus, while corrective justice presupposes some account of

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<sup>55</sup> JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA 389 (1883); *see also* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687, 699 (1990) (“Judges act on these premises, whether or not they consciously acknowledge all that Pomeroy imputed to them.”).

<sup>56</sup> *Cf.* Laycock, *supra*, at 732-39 (discussing the rule that monetary damages provide the remedy for harms that would otherwise be irreparable when equitable relief would interfere with countervailing rights or impose undue hardship on the dutyholder).

what the relevant first-order duties are, it does not pretend to provide an account of them.<sup>57</sup>

By exclusively addressing the second-order duty of repair, this formulation of corrective justice lacks explanatory power. When the duty of repair is triggered only by the plaintiff's exercise of a power that subjects the defendant to liability, the judgment itself creates the compensatory obligation.<sup>58</sup> Any judgment requiring compensatory damages in a suit between private litigants can function as a form of corrective justice, explaining why Coleman concludes that corrective justice cannot otherwise account for the substantive nature of the first-order duty. Due to this lacuna, Barbara Fried has concluded that "cost/benefit analysis is currently the only game in town for determining appropriate standards of conduct for socially useful acts that pose some risk of harm to others (a category that describes almost all noncriminal conduct)."<sup>59</sup> The apparent inability of corrective justice to specify the requirements of reasonable care—to determine adequately the behavior required of the dutyholder—has also led Jody Kraus to conclude that "economic theories appear to have the edge on deontic theories because their explanations of judicial decisions systematically yield more determinate results, at least in principle."<sup>60</sup> Whatever the merits of corrective justice might otherwise be, an overly indeterminate formulation might be of little or no use in tort law.

These problems exist only because the conventional account of corrective justice depicts the compensatory obligation as a second-order remedial duty that is generated by a judgment in the lawsuit. In a compensatory tort system, by contrast, the compensatory obligation is the first-order duty. The duty and correlative compensatory right are abstract and become concrete only in the context of a particular interaction between a dutyholder and rightholder. The concrete form of the compensatory duty ordinarily reduces to the duty to exercise reasonable care.<sup>61</sup> The associated requirements of reasonable care—the conduct required of the dutyholder—can be specified with the same amount of determinacy, in principle, as that attained by economic formulations of the duty.<sup>62</sup> Breach of this first-order compensatory duty gives the plaintiff a power and the defendant a correlative liability, which in turn can result in a judgment that triggers the second-order remedial duty to pay compensatory damages. The liability, though, is predicated on a (first-order) duty to compensate as required by

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<sup>57</sup> JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 32 (2001).

<sup>58</sup> Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *Geo. L.J.* 695 (2003).

<sup>59</sup> Barbara H. Fried, *The Limits of a Nonconsequentialist Approach to Torts*, *Legal Theory* (forthcoming).

<sup>60</sup> Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 *Va. L. Rev.* 287, 304 (2007).

<sup>61</sup> See *supra* Part II.B.

<sup>62</sup> See GEISTFELD, *TORT LAW*, *supra* note \_\_\_, at 191-204.

corrective justice, making a compensatory tort system a form of corrective justice that is substantively distinct from other bodies of law that generate a compensatory obligation only from a judgment in the lawsuit. A compensatory tort right makes the corrective-justice interpretation of tort law conceptually interesting while eliminating the problem of vagueness that has otherwise plagued rights-based accounts of negligence liability.<sup>63</sup>

The precise manner in which this formulation of tort liability satisfies the demands of corrective justice can be explained by John Gardner's formulation. According to Gardner, "[s]ome transactions need not be wrongful in order to call for correction. They are wrongful only if they go uncorrected."<sup>64</sup> The first-order duty to exercise reasonable care satisfies this requirement by satisfying the demands of the compensatory rightholder. Breach of a first-order duty is then wrongful, according to Gardner, if "[t]he reasons not to do whatever one did, the thing that now calls for correction, suffice to make that action wrongful even if it is corrected."<sup>65</sup> The breach of the first-order compensatory duty to exercise reasonable care, therefore, is wrongful if it proximately causes the rightholder to suffer physical harm—an irreparable injury that cannot be fully repaired by the compensatory damages remedy.<sup>66</sup> In these cases, the dutyholder's payment of compensatory damages "still leave[s] too great a rational remainder behind, too much in the way of unsatisfied or imperfectly satisfied reasons, for the wrongdoing to have been averted by the act of correction [via the payment of compensatory damages] alone."<sup>67</sup> Due to the inherent inadequacy of the compensatory damages remedy, breach of the first-order compensatory duty to exercise reasonable care is wrongful, thereby making the second-order duty to pay compensatory damages a form of corrective justice that redresses a prior wrong or (corrective) injustice (the failure to satisfy the primary compensatory obligation through the exercise of reasonable care).

A compensatory tort right also straightforwardly explains why corrective justice entails the remedial forms employed by tort law. According to Gardner's continuity thesis, "If all else is equal, the reasons that were capable of justifying a primary obligation are also capable of justifying a secondary one."<sup>68</sup> A primary obligation to exercise reasonable care, when grounded on a compensatory tort

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<sup>63</sup> Cf. Fried, *supra* note \_\_, at 20 & 29 (recognizing that contradictions or paradoxes inherent in deontological accounts of tort law do not exist for a compensatory account); Zipursky, *supra* note \_\_, at 710-12 (arguing that corrective justice provides a conceptually uninteresting description of tort law if "the recognition of a right of action in tort" is not "isomorphic with the recognition of a duty of repair").

<sup>64</sup> See Gardner, *supra* note \_\_, at 34.

<sup>65</sup> *Id.*

<sup>66</sup> See *supra* Part II.D.

<sup>67</sup> Gardner, *supra* note \_\_, at 34.

<sup>68</sup> *Id.* at 33.

right, provides the strongest possible justification for a secondary obligation to pay compensatory damages for breaches of the primary obligation—the payment of compensatory damages supplies the “next best conformity” with the compensatory duty. This justification fully applies to the payment of compensatory damages for irreparable injuries, such as pain and suffering, and even to the payment of punitive damages in the appropriate cases,<sup>69</sup> two forms of liability that Gardner believes cannot be justified as a matter of corrective justice.<sup>70</sup> A compensatory tort right and its correlative compensatory tort duty would seem to fully instantiate the principle of corrective justice.

### B. *Can a Compensatory Tort Right Be Just?*

Although a compensatory tort right justifies the default rule of negligence liability, it also justifies complementary rules of strict liability for activities that are not common in the community and create risks above the ordinary level of background risk.<sup>71</sup> However, “[s]trict liability is widely thought to be unjust because there is liability without fault.”<sup>72</sup> Unless it would be just to impose compensatory obligation not limited by fault, a compensatory tort system cannot implement the principle of corrective justice.

The injustice created by a rule of strict liability has been fully identified by Ernest Weinrib:

Whereas corrective justice treats the litigants as equals, strict liability [centers itself] on only one of the parties—the ... plaintiff.... The inequality in strict liability emerges from the principle that the defendant is to be liable for any penetration of the plaintiff’s space. *What is decisive for the parties’ relationship is the demarcation of the domain within which the law grants the plaintiff immunity from the effects of the actions of others; the activity of the defendant is then restricted to whatever falls outside this sphere.* Thus the interests of the plaintiff unilaterally determine the contours of what is supposed to be a bilateral relationship of equals.<sup>73</sup>

As the italicized language reveals, strict liability would be unjust if it prohibited a dutyholder defendant from physically harming the rightholder plaintiff. Under such a rule, a rightholder could restrict the activity of a dutyholder (via injunctive relief) to those activities that could not harm the rightholder. A pedestrian could prevent another from driving, for example, or else waive the right to physical immunity in exchange for money. The demand for

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<sup>69</sup> See *supra* notes

<sup>70</sup> Gardner, *supra* note \_\_\_, at 47-48.

<sup>71</sup> See *supra* Part II.C.

<sup>72</sup> Peter Jaffey, *Duties and Liabilities in Private Law*, 12 *Legal Theory* 137, 153 (2006).

<sup>73</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 177 (1995) (italics added and paragraph structure omitted).

payment would not be limited by the norm of compensation, and so the pedestrian could extract from the driver virtually all of the surplus or net benefit from driving. In effect, such a rule of strict liability would strive to eliminate all nonconsensual risks in society or otherwise prevent actors from reaping the benefits of engaging in a wide swath of socially valuable risky activities. For this type of rule, “the interests of the plaintiff unilaterally determine the contours of what is supposed to be a bilateral relationship of equals,” thus violating the requirement of equality.

Tort law does not formulate rules of strict liability in this way. Properly understood, strict liability is “liability rule” that does not impose any behavioral obligations on the dutyholder beyond the obligation to pay compensatory tort damages, making it a duty “not to injure” only in the limited sense that the duty can be breached only if there is an injury requiring compensation.<sup>74</sup>

Consider the rule of strict liability for the abnormally dangerous activity of blasting. The rule expressly recognizes that the activity is reasonable and does not prohibit the conduct or provide grounds for injunctive relief.<sup>75</sup> The rule instead requires the blaster as dutyholder to pay compensatory damages to a rightholder for injuries to the interests protected by the tort right, the type of remedial scheme characteristic of a liability rule. The compensatory duty is not unjust for giving the defendant “a duty to do something that is beyond him.”<sup>76</sup> The defendant must simply pay compensatory damages. The protected interests of the plaintiff also do not “unilaterally determine the contours of what is supposed to be a bilateral relationship of equals” as Weinrib claims. Strictly liable actors are free to blast and impose these nonconsensual, reasonable risks on others, subject only to the duty that they compensate the ensuing foreseeable harms.

An *absolute* right to physical security would create the injustice identified by Weinrib—the security of such a rightholder would have absolute dominion over the conflicting liberty interest of a dutyholder—but a compensatory tort right is defined by a *relative*, default priority of the rightholder’s interest in physical security over the dutyholder’s interest in liberty.<sup>77</sup> The priority is justified by the

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<sup>74</sup> The concept of a “liability rule” was first developed in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). Within this framework, a liability rule is contrasted with a “property rule” that requires the rightholder’s consent and accordingly relies on injunctive relief as a remedy. Thus, the rule of strict liability criticized by Weinrib is a property rule rather than a liability rule.

<sup>75</sup> See RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (stating that the rule of strict liability for abnormally dangerous activities “is not based upon any intent of the defendant to do harm to the plaintiff or to affect his interests, nor is it based upon any negligence, either in attempting to carry on the activity in the first instance, or in the manner in which it is carried on”).

<sup>76</sup> Jaffey, *supra* note \_\_, at 153 (identifying this concern as the reason why strict liability “is widely thought to be unjust”).

<sup>77</sup> See *supra* Part II.A.

relative importance of physical security for the exercise of individual autonomy within the liberal political community, thereby giving rightholders and dutyholders an equal opportunity for self-determination. There is nothing inherently unjust about a compensatory rule of strict liability

Indeed, if the compensatory duty is overly onerous for the liberty interest, then tort law limits the duty accordingly. For example, the rule of strict liability for abnormally dangerous activities does not apply to socially valuable activities.<sup>78</sup> If social value is categorically defined by reference to the autonomy interests of all parties who would be governed by the rule, tort law limits the compensatory duty of strict liability in the manner required by liberal egalitarianism. In these cases, strict liability would cause a loss of social value (or autonomy burden on the relevant category of liberty interests) that is outweighed by the gain in social value (promotion of autonomy by categorically protecting the security interests of rightholders), justifying the rule of negligence liability for this category of risky interactions. The same principle then applies to negligence liability and explains both the limitations of duty and the full immunities from tort liability.<sup>79</sup> The way in which tort liability can unduly curtail the exercise of liberty only justifies the varied limitations of liability rather than the wholesale rejection of strict liability.

### *C. The Relation Between Corrective and Distributive Justice*

As a form of corrective justice, a compensatory tort system resolves a tort dispute without any reliance on the principle of distributive justice. Such a compensatory tort system or its functional equivalent (regulation plus social insurance), however, is essential for implementation of a liberal egalitarian scheme of distributive justice. To see why, consider the following distribution of wealth that can be justified by a liberal egalitarian distributive principle such as equality of resources:

#### **JUSTIFIED PRE-ACCIDENT DISTRIBUTION OF WEALTH**

<u>Brad</u>	<u>Others</u>	<u>Peter</u>
\$2 million	\$200,000	\$110,000

Suppose that Peter injures Brad while driving, causing Brad \$50,000 of damages. Without a tort system or other means of legal redress, the accident would result in the following distribution of wealth:

<sup>78</sup> RESTATEMENT (SECOND) OF TORTS § 520(f) & cmt. k.

<sup>79</sup> See GEISTFELD, TORT LAW, *supra* note \_\_, at 91-97.

**ACTUAL POST-ACCIDENT DISTRIBUTION OF WEALTH**

<u>Brad</u>	<u>Others</u>	<u>Peter</u>
\$1.95 million	\$200,000	\$110,000

The \$50,000 reduction in Brad’s wealth occurs only because he had the misfortune of being injured in the crash. But what if that injury is Peter’s responsibility, because Peter’s exercise of autonomy violated Brad’s right to physical security? In that event, the compensatory tort system would deem Peter to be the “owner” of the injury costs, making him responsible for the loss suffered by Brad. Peter would owe a compensatory duty to Brad for the losses caused by the infringement of Brad’s right. This compensatory obligation is not retributive and can be satisfied by consensual arrangements like insurance contracts.<sup>80</sup> Assuming that Peter has no insurance, the compensatory duty he owes to Brad would produce the following distribution of wealth:

**COMPENSATORY POST-ACCIDENT DISTRIBUTION OF WEALTH**

<u>Brad</u>	<u>Others</u>	<u>Peter</u>
\$2 million	\$200,000	\$60,000

To implement this outcome, tort law must only consider the risky interaction between Peter and Brad; the wealth held by Others is irrelevant. Peter and Brad are the two parties to the tort suit. By enforcing the rights-based tort rule, the tort system would determine that Peter violated a compensatory duty owed to Brad, giving Brad the right to receive \$50,000 from Peter as compensation for the injury.

As per the requirements of corrective justice, the compensatory tort transfer is adjudicated without any reliance on the principle of distributive justice—the wealth held by Others is irrelevant to resolution of the tort claim—and yet tort liability plays an integral role in the distributive scheme. An accident creates at least two potential distributive outcomes that could be the subject of further redistributions under a liberal egalitarian scheme of distributive justice. Under the actual post-accident distribution of wealth, Peter does not bear the costs of his autonomous choice as required by the liberal egalitarian principle, unlike the compensatory post-accident distribution of wealth. By implementing corrective justice, a compensatory tort system establishes the normatively

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<sup>80</sup> “Corrective justice goes to the nature of the obligation; it does not prescribe the mechanism by which the obligation is discharged.... Nothing about corrective justice precludes the defendant from anticipating the possibility of liability by investing in liability insurance.” WEINRIB, PRIVATE LAW, *supra* note \_\_, at 135-36 n.25.

appropriate baseline of wealth and resources against which the complementary distributive scheme operates.

Thus, a compensatory tort system is a form of corrective justice that is distinct from a scheme of distributive justice such as equality of resources. The two forms of justice are instead complementary or morally coherent in that each one finds justification in the same principle of equality.

### **Conclusion**

Tort law entitles a rightholder to an award of compensatory damages under quite limited conditions, a fundamental feature of liability that would seem to foreclose a compensatory conception of tort law. A compensatory tort right, however, does not necessarily entail an entitlement to compensatory damages in all cases. The exercise of reasonable care by the dutyholder can fully exhaust the compensatory obligation. Such a compensatory duty finds justification in the principle of liberal egalitarianism that makes an individual responsible for the foreseeable consequences of her autonomous choices. Compensation a defensible norm of justice that can persuasively explain tort doctrine, despite the limited availability of the compensatory damages remedy.