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COMPENSATION AS A TORT NORM

Mark A. Geistfeld

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Introduction

Honeste vivere (to live honorably), alterum non laedere (not to injure others), and suum cuique tribuere (to render to every man his due), were the three general precepts to which Justinian reduced the whole doctrine of the law…. And what of alterum non laedere? “Thou shalt do no hurt to thy neighbor.” Our law of torts, with all its irregularities, has for its main purpose nothing else than the development of this precept.1

In this passage from one of the first treatises on tort law, Sir Frederick Pollock invoked a compensatory rationale to explain the development of tort law. As Percy Winfield subsequently explained, Pollock “consistently adopted the … view” that tort liability is “based on the principle that … all injuries done to another person are torts.

1 Frederick Pollock and James Avery Webb, A Treatise on the Law of Torts (St. Louis: F.H. Thomas Law Book Co., 3d ed. 1894), vol. 1 at 12-13. The term “injury” was employed by early legal scholars such as Blackstone to refer to “a completed wrong that has been committed by one person against another.” John C.P. Goldberg, “Two Conceptions of Tort Damages: Fair v. Full Compensation,” 55 DePaul L. Rev. 435 (2006), 437. By equating injury with harm, however, Pollock referred to the other meaning of “injury” increasingly used by legal scholars and courts throughout the nineteenth century and commonly used today, namely, “a loss or setback that a person has suffered.” Id.
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unless there is some justification recognized by law.” This principle, according to Winfield, enables the common law to recognize new torts. If, to use Winfield’s phrasing, “the law of tort is based upon a general principle that all harm to another person is presumptively unlawful,” then one who causes injury to another commits a tort and is subject to liability for compensatory damages, unless there is some justification for the denial of liability. When derived from a compensatory norm, a cause of action for compensatory damages can be viable even if the nominate tort had not previously been recognized by courts. The evolutionary growth of tort law can be animated by a norm of injury compensation.

By the middle of the twentieth century, scholars had reached a consensus that “tort law ought primarily to be a means for compensating injured people” rather than “an instrument for admonishing currently undesirable civil conduct.” Since then, scholars have coupled the function of compensation with that of deterrence, yielding “the baseline proposition …. repeated at the outset of countless law review articles published in the last fifty years” that “the function of tort law is to compensate and deter.”

Despite this history, scholars now roundly reject 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.” Tort law relies on a default rule of negligence liability that primarily values the duty to exercise reasonable care and accordingly limits the availability of

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3 Id. at 36.
6 Emily Sherwin, “Compensation and Revenge,” 40 San Diego L. Rev. 1387 (2003), 1388.
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compensatory damages, fundamental attributes that appear to be wholly inconsistent with a compensatory norm.

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. Having concluded that tort law can be plausibly described by a compensatory tort right and its correlative compensatory duty, I will now try to show that 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).”

The argument proceeds in three parts. Part I argues that a compensatory duty can be justified by the principle of liberal egalitarianism, illustrating the claim with 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 is either largely or fully satisfied by the exercise of reasonable care, eliminating any obligation to pay compensatory damages in a wide range of cases. This compensatory norm justifiably limits liability in the manner suggested by Pollock’s general conception of tort law. It also unifies the functions of compensation and deterrence, yielding a coherent conception of the compensation-deterrence reasoning that is now so prevalent within the practice of tort law. Part III completes the argument by showing how such a compensatory tort right implements the principle of corrective justice in a conceptually interesting and determinate manner.

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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 “[t]he essence of this moral conception is equality of treatment rather than impartial concern for well-being.”\(^\text{10}\) To use Ronald Dworkin’s terminology, the distributive principle should be “endowment-insensitive” and “ambition-sensitive.”\(^\text{11}\) 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 constructs 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, thereby 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 more equal.”\(^\text{12}\) So defined, the theory is


“very abstract” because there are “different theories about what would count as equality of resources.”\textsuperscript{13} 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.\textsuperscript{14} 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.”\textsuperscript{15}

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.”\textsuperscript{16} 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 entitlement for the resource has 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.\textsuperscript{17} 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

\textsuperscript{13} Id.
\textsuperscript{14} Id. at 65-119.
\textsuperscript{15} Id. at 76.
\textsuperscript{16} Id. at 149.
\textsuperscript{17} Id. at 143.
members with equal concern.”18 The abstract egalitarian principle measures equal shares in terms of opportunity costs, so the baseline itself must be constructed by reference to “what we might call the true opportunity costs of a set of resources.”19

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 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.”20

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

The baseline of entitlements required by the hypothetical auction includes those specified by the tort system. As Dworkin explains, “any 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.”21 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.”22

In Sovereign Virtue, Dworkin describes tort law as a system for constraining liberty that “would correct for externality.”23 To ensure that individuals internalize the “true” opportunity cost of their risky behavior, tort law could adopt a rule of strict liability. One who

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18 Id. at 147.
19 Id. at 149.
20 Id. at 151.
21 Id. at 148-149.
22 Id. at 149.
23 Id. at 157.
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engaged in risky behavior would be obligated to pay compensatory damages to those who were foreseeably harmed by this autonomous choice, 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 resources commends. . . . *If compromise is not possible in the circumstances, . . . 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 can be satisfied by a rule of strict liability. A dutyholder subject to strict liability would choose to create a foreseeable risk of harm whenever the net private benefit from engaging in the activity exceeds the compensatory obligation that would be owed in the event of an accident causing injury to the rightholder. Under these conditions, the dutyholder benefits 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 net private benefit that she would have derived from the risky activity must be less than the compensatory obligation. Now

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the dutyholder is the “loser,” but her opportunity cost (the lost 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 be incurred by at least 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.” This abstract principle provides a 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. Compensation, however, is not wholly defined by the compensatory damages remedy. Within the context of a nonconsensual interaction or forced exchange, a compensatory payment is comprised of the resources required to satisfy a compensatory obligation. One’s compensatory obligation, in turn, is defined by the correlative compensatory entitlement held by the other party. The attributes of a compensatory tort right accordingly determine the compensatory properties of tort law, and so until that right has been fully specified, it is an open question whether tort law can implement a compensatory norm without granting an entitlement to compensatory damages in all cases.

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II. A Compensatory Tort Right and the Correlative Compensatory Duty

Any evaluation of a compensatory tort norm 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 justify the default rule of negligence liability. In a wide range of cases, the negligence rule distributes risk in a manner that fully satisfies the demands of a compensatory rightholder, yielding outcomes in which the dutyholder makes the full compensatory payment by exercising reasonable care rather than by paying compensatory damages in the event of accidental harm. In the remaining cases, the compensatory right justifies a rule of strict liability that must be supplemented by negligence liability to ensure that risk is distributed in an adequately compensatory manner. The compensatory properties of risk distribution can justify the default rule of negligence liability.

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.’”26 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. Rights-based tort rules, therefore, can

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26 Restatement (Second) of Torts, § 1 (1965), cmt. b.
be characterized in terms of an underlying priority that gives one set of interests legal protection over another set of conflicting or invading interests of the dutyholder.

A prioritized set of interests is valued more highly by tort law than the subordinate set of conflicting interests. How the interests are normatively valued for this purpose depends on the underlying principle of equality. Pursuant to liberal egalitarianism, tort law can give different values to the individual interests in physical security and liberty based on their relative importance for the equal exercise of the general liberal egalitarian right to autonomy or self-determination.

Because individuals must first be adequately secure in order to fully exercise autonomy, tort law can prioritize the individual interest in physical security.27 The exercise of liberty is also essential for living a meaningful life, so the requirement of equal treatment prevents the rightholder’s security interest from having an absolute priority that fully negates the value of the dutyholder’s conflicting liberty interest. Under liberal egalitarianism, a priority of the security interest must account for the value of liberty, explaining why “[m]ost of the rights of property, as well as of person . . . are not absolute but relative.”28

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.29 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;

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27 See Richard Wright, Justice and Reasonable Care in Negligence Law, 47 Am. J. of Jurisprudence 143 (2002), 170–94 (explaining why leading justice theorists reject the utilitarian approach of weighing all interests equally and instead maintain that rights-based tort rules prioritize the individual interest in physical security over the conflicting liberty and economic interests of others). See also text accompanying note 21.


29 Restatement (Second) of Torts § 901(a).
neither legal fault nor an unreasonable liberty interest is 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 security that is relative to a right of liberty.

To be justifiable, a compensatory norm must address any normative problems created by the rightholder’s lack of consent and the poor manner in 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 avoids behavior 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.30 A compensatory tort norm can define the types of behavior for which a compensatory obligation adequately protects the rightholder’s autonomy.

In most cases, however, risky behavior entails no 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. For cases of accidental harm in which the interacting parties are blameless, “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.”31 By prioritizing the rightholder’s interest in physical security, the compensatory norm places the loss on the risky actor. The dutyholder’s exercise of liberty establishes the requisite form of responsibility for the foreseeable outcomes of the

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30 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).

autonomous choice. 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 embodied in the common law maxim sic utere tuo ut alienum non lædas, which for present purposes loosely translates into the principle to use your own so as not to injure another. 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.

Such a compensatory norm can be used not only to justify rules of strict liability, but also to explain why the tort system relies on a default rule of negligence liability 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.


33 The maxim means “[u]se your own property in such a manner as not to injure that of another.” Black’s Law Dictionary (St. Paul, MN: West Publishing Co, 5th ed. 1979), 1238. As applied to risky behavior not involving the use of property, the maxim yields a principle that “under the common law a man acts at his peril.” Oliver Wendell Holmes, The Common Law (Boston, MA: Little, Brown & Co., 1881), 82 (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 lædas’ 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.”).

34 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).
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. The different compensatory problems have different solutions, most of which do not include an entitlement to compensatory damages in all cases. Tort rules can instead distribute risk in a manner that fully satisfies the demands of a compensatory rightholder.

A compensatory tort right prioritizes the rightholder’s interest in physical security over conflicting liberty interests of the dutyholder for reasons of autonomy. If that priority applies to an interaction between the two parties, it justifies the rightholder’s entitlement to compensatory damages in the event of injury. Such an interpersonal conflict of interests, however, 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 direct or indirect contractual relationship, the tort rule governs an intrapersonal conflict of the rightholder’s security and liberty interests. In these cases, the rightholder does not prioritize the security interest and instead has compensatory demands that are fully satisfied by a negligence rule requiring the dutyholder to exercise the cost-minimizing amount of reasonable care.

First, 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. Very few risky interactions will actually satisfy these conditions. But due to the requirement of equal treatment, tort law evaluates risky behavior under an objective standard that, in this instance, asks whether the activity is common in
the community.35 Automobile driving is such an activity, 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 other, each owes an identical duty to the other, and each expects to derive a benefit, on balance, by participating in the activity of driving.

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).36 By minimizing accident costs, the negligence rule maximizes the net benefit that each driver expects to gain by participating in the activity.

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

35 Compare Geistfeld, Tort Law (note 7) 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 would be subject to negligence or strict liability, thereby justifying 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 (2010), cmt. j (“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.”).

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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 direct or indirect contractual relationship, as in product cases involving consumers and manufacturers. The consumer rightholder purchases the product on the expectation that doing so, on balance, will be advantageous. By selling the 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. The distributive impact of tort liability, however, must be defined in relation to the normatively justified tort rule.

37 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 receipt of compensation for work-related injuries. The employer minimizes this total compensatory obligation by adopting cost-effective safety measures and compensating employees for the residual risks. 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, with the different compensatory legal rule in these cases (one of strict liability) stemming from the different form of contractual relationship (the rightholder as seller rather than buyer).

38 To identify the distributive effects of liability, one must first specify the appropriate baseline for analysis. This baseline cannot be derived by economic
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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.”

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).

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. 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. 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.

As in cases of objective reciprocity, the dutyholder in product cases fully satisfies the compensatory obligation by making the cost-minimizing investments in safety required by the compensatory tort right. Doing so does not necessarily eliminate risk, but the dutyholder (having fully satisfied the compensatory tort right) 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 negligence rule that does not require the dutyholder to pay compensatory damages in all cases.

C. Risk Distribution as Nonideal Compensation

In a wide range of cases, the negligence rule can attain the ideal compensatory outcome by distributing risk to maximize the net benefit that a rightholder expects to derive from the risky interaction, so the rightholder is not made worse off, *ex ante*, than she would otherwise be in a world without the risk (and the associated benefit to be gained from the risky activity). The only remaining cases involve rightholders who are not in a contractual relationship with a dutyholder who creates an objectively defined nonreciprocal risk of physical harm. In these cases, the negligence rule can still distribute risk in the manner reasonably required by the compensatory tort right, but the compensation is not ideal, even when supplemented by a rule of strict liability.

These cases involve activities that are not common in the community and create risks above the ordinary level of background

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42 See id. at 61-67.
43 See id. at 256-66 (explaining why consumers do not reasonably expect to receive compensatory damages for pure economic loss and stand-alone emotional harms caused by defective products).
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 resolves these conflicts by prioritizing the rightholder’s security interest, justifying a right to compensatory damages for these injuries—the same outcome that is 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.44

The compensation afforded by these forms of strict liability, however, does not fully satisfy the compensatory obligation. In the event of a fatal accident, the dutyholder is not obligated to pay for the decedent’s loss of life’s pleasures because the damages award cannot compensate a dead person, a problem that substantially reduces and potentially eliminates the compensatory damage award for wrongful death.45 The most severe type of physical harm cannot be fully redressed by a rule of strict liability.

To solve the compensatory problem inherent in a rule of strict liability, the rightholder reasonably prefers to supplement this rule with a behavioral obligation of reasonable care that directly protects against the threat of premature death. Such a safety obligation must

44 See Geistfeld, Tort Law (note 7) at 92-97.
45 See Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 811 (Ct. App. 2003) (ruling on a punitive damages award in a wrongful death case involving an award of zero compensatory damages); Edward A. Adams, Venue Crucial to Tort Awards: Study: City Verdicts Depend on Counties, N.Y.L.J., Apr. 4, 1994, at 1, 5 (reporting results of empirical study finding, among other things, that the average tort award in New York City between 1984 and 1993 was three times higher for brain damage rather than wrongful death, which was only twice as much as the average damage award for a herniated disc).
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 always fully compensated. Because the dutyholder does not bear this entire compensatory burden under a rule of strict liability, tort law can eliminate the compensatory shortfall by shifting that component of the compensatory obligation from the compensatory damages remedy into the duty to exercise reasonable care.46

Such a negligence rule requires the dutyholder to satisfy the compensatory obligation, in part, by incurring these expenses through 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. The supplemental rule of strict liability then fulfills the compensatory obligation with respect to the remaining, residual risks that are not eliminated by the exercise of reasonable care. These abnormally dangerous or nonreciprocal risks are subject to strict liability, but the default rule of negligence liability continues to distribute risk in the manner reasonably required by the compensatory tort right.47

Nonetheless, the risk distribution in these cases is not ideal for the rightholder, unlike the distribution that occurs in cases involving reciprocal risks or contractual relationships. As we have found, risk distribution can be fully compensatory for rightholders who (1) incur the burdens of the compensatory duty (as reciprocally situated dutyholder or consumer) and (2) participate in the risky activity (such as by driving or using a product) engaged in by the dutyholder (another driver or a product manufacturer). For nonreciprocal risky


47 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, 325 Md. 420, 601 A.2d 633, 653 (1992) (adopting majority rule requiring proof of “actual malice” to justify punitive damages under strict products liability).
interactions that occur outside of contractual relationships, neither condition applies. The rightholder does not bear the full burden of the compensatory duty or otherwise derive a sufficient benefit from the risky activity engaged in by the dutyholder, so it is not possible for tort law to distribute risk in a manner that would fully compensate the rightholder.

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.\textsuperscript{48} 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 simply because social conditions make it infeasible to attain the ideal compensatory outcome. The \textit{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

\textsuperscript{48} See Part II.A.
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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.\(^49\) Premature death and bodily
injury are paradigmatic examples of an irreparable injury, although
this common law category also encompasses damage to real or
tangible property.\(^50\) 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 irreparable injuries, 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. The superior
compensatory attributes of risk distribution accordingly explain why
negligence is a “behavioral” rule defined by a first-order safety
obligation that is substantively more important than the second-order
remedial duty to pay compensatory damages for breach.\(^51\)

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 defendant who engaged
in this prohibited conduct and breached the primary duty is subject to
punitive damages, regardless of whether the defendant was always
willing and able to pay compensatory damages.\(^52\) The

\(^{49}\) See Restatement (Second) of Torts, § 903 (1965), cmt. a (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 should instead only “give to the injured person some
pecuniary return for what he has suffered or is likely to suffer”).

\(^{50}\) Mark A. Geistfeld, “The Principle of Misalignment: Duty, Damages, and the
Nature of Tort Liability,” 121 Yale L. J. 142 (2011), 164 (discussing the rule of
irreparable injury and explaining why it ordinarily encompasses damages to real or
tangible property).

\(^{51}\) See Mark A. Geistfeld, “Tort Law and the Inherent Limitations of Monetary
Exchange: Property Rules, Liability Rules, and the Negligence Rule,” 4 J. Tort

\(^{52}\) Geistfeld, “The Principle of Misalignment” (note 50) at 165-69 (identifying the
types of behavior prohibited by the negligence rule and providing citations to cases
extracompensatory award of punitive damages is required to vindicate the compensatory tort right due to the inherent inadequacy of the compensatory damages remedy.

But even in these cases, a dutyholder breaches the primary duty only if the unreasonable conduct proximately causes 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.\(^\text{53}\)

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.”\(^\text{54}\) In seeking to prevent irreparable injuries, the common law has also long recognized the principle that the tort obligation cannot

\(^{53}\) John C.P. Goldberg and Benjamin Zipursky, “Torts as Wrongs,” 88 Tex. L. Rev. 917 (2010), 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”).

\(^{54}\) John Norton Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of America (San Francisco, CA: A.L. Bancroft & Co., 1883), 389; see also Douglas Laycock, “The Death of the Irreparable Injury Rule,” 103 Harv. L. Rev. 687 (1990), 699 (“Judges act on these premises, whether or not they consciously acknowledge all that Pomeroy imputed to them.”).
impose undue hardship on the dutyholder.55 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

To be a form of corrective justice, tort liability must repair the inequality created by a dutyholder’s violation of a correlative tort right. 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 concept 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

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55 Cf. Laycock, “The Death of the Irreparable Injury Rule” (note 54) 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).
justice presupposes some account of what the relevant first-order duties are, it does not pretend to provide an account of them.\textsuperscript{56}

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.\textsuperscript{57} Any judgment requiring the payment of compensatory damages for a rights violation in a suit between private litigants is a form of corrective justice. This formulation cannot identify anything distinctive about the practice of corrective justice within tort law, nor can it fully specify the first-order behavioral requirements of the tort 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).”\textsuperscript{58} The apparent inability of corrective justice to fully specify the first-order behavioral obligation also supports Jody Kraus’s conclusion 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.”\textsuperscript{59}

These problems exist whenever the domain of corrective justice is limited to the second-order remedial duty that is generated by a judgment in the lawsuit. When compensation is a first-order duty,

\textsuperscript{58} Barbara H. Fried, “The Limits of a Nonconsequentialist Approach to Torts,” 18 \textit{Legal Theory} 231 (2012), 231.
however, the corrective-justice interpretation of tort law is adequately
determinate and conceptually interesting.60

A first-order compensatory duty and correlative 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 obligation ordinarily reduces to the duty to exercise
reasonable care.61 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.62

In addition to being adequately determinate, a compensatory tort
duty makes the principle of corrective justice a conceptually
interesting rationale for tort law. The compensatory duty is primary
and not merely a secondary remedial obligation, giving corrective
justice distinctive importance within tort law.

Consider the reasons why compensatory tort rules satisfy the
requirements of corrective justice. According to John Gardner,
“[s]ome transactions need not be wrongful in order to call for
correction. They are wrongful only if they go uncorrected.”63 A
transaction of this type is embodied in the first-order compensatory
duty to exercise reasonable care, which deems risky behavior to be
wrongful if the dutyholder failed to correct for risky behavior by not
satisfying the compensatory obligation through the exercise of
reasonable care. This type of wrongdoing is also entailed by the
supplemental rules of strict liability for objectively nonreciprocal
risks, which involve behavior that is reasonable (for satisfying the

60 Cf. Fried, “The Limits of a Nonconsequentialist Approach to Torts” (note 58) at
244, 250 (recognizing that contradictions or paradoxes inherent in deontological
accounts of tort law do not exist for a compensatory account); Zipursky, “Civil
Recourse, Not Corrective Justice” (note 57) 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”).
61 See Part II.B-C.
62 See Geistfeld, Tort Law (note 7) at 191-204,
(note 8) at 34.
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first-order compensatory duty of care) and not inherently wrongful (such as blasting for construction purposes). These forms of behavior only become wrongful if the dutyholder failed to satisfy the remaining component of the compensatory obligation by not correcting for the occurrence of injury through the payment of compensatory damages. By satisfying both the first-order compensatory duty to exercise reasonable care and any supplemental rules of strict liability, a dutyholder fully satisfies the rightholder’s compensatory entitlement and the corresponding demands of corrective justice.

So, too, a breach of the first-order compensatory duty to exercise reasonable care constitutes a corrective injustice. The breach of a first-order duty is wrongful as a matter of corrective justice, 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.”64 This requirement is satisfied by a breach of the first-order compensatory duty to exercise reasonable care that proximately caused the rightholder to suffer physical harm—an irreparable injury that cannot be fully repaired by the compensatory damages remedy.65 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.”66 The inherent inadequacy of the compensatory damages remedy fully explains why a breach of the first-order compensatory duty to exercise reasonable care is a wrong that can be redressed by corrective justice.

Having breached the first-order duty, a defendant incurs the second-order remedial obligation to pay compensatory damages for the wrongful injuries proximately caused by the breach. This form of corrective justice, however, is substantively different from other

64 Id.
65 See Part II.D.
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remedial forms of corrective justice. A defendant’s payment of tort damages does not simply redress a prior wrong; it redresses a prior corrective injustice (the failure to satisfy the primary compensatory obligation through the exercise of reasonable care).

Under Gardner’s continuity thesis, “[i]f all else is equal, the reasons that were capable of justifying a primary obligation are also capable of justifying a secondary one.”67 A primary or first-order compensatory duty to exercise reasonable care provides the strongest possible justification for a secondary remedial obligation to pay compensatory damages for breaches of the primary duty—the payment of compensatory damages supplies the “next best conformity” with the first-order compensatory duty.

This rationale then extends to the payment of compensatory damages under the supplemental rules of strict liability. Negligence and strict liability are constitutive elements of a single compensatory tort entitlement.68 For cases in which the exercise of reasonable care does not fully satisfy the compensatory obligation, the conduct is wrongful unless accompanied by the payment of compensatory damages under the rule of strict liability. This payment, however, does not fully substitute for the primary obligation to exercise reasonable care. Both obligations must be satisfied to prevent the conduct from being wrongful, providing the requisite connection between the duty of care and the compensatory damages award.

Punitive damages can also be justified by the compensatory norm, making this liability a form of corrective justice for reasons missed by others.69 By unifying the first-order behavioral duty with

67 Id. at 33.

68 If the compensatory entitlement cannot be adequately protected by a rule of strict liability, the resultant compensatory shortfall can be eliminated by redirecting that compensatory obligation into the standard of reasonable care, illustrating the inherent relation between the remedy of strict liability and the underlying obligation to exercise reasonable care. See Part II. C. For more rigorous argument showing that negligence and strict liability can be constitutive elements of a single entitlement, see Geistfeld, “Tort Law and the Inherent Limitations of Monetary Exchange: Property Rules, Liability Rules, and the Negligence Rule” (note 51).

69 Compare notes 30 and 52 (explaining how punitive damages protect the integrity of a compensatory right) with Ernest J. Weinrib, “Civil Recourse and Corrective
the full set of second-order remedial duties, the compensatory tort norm yields a unified body of tort rules that 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. This attribute of a compensatory right would seem to be problematic, however, for “[s]trict liability is widely thought to be unjust because there is liability without fault.” Unless it would be just to impose a 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:

> 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.

Although strict liability would be unjust if it were to grant the plaintiff rightholder an “immunity” from being accidentally harmed

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70 See Part II.C.
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by a defendant dutyholder, tort law does not formulate rules of strict liability in this way. For example, the rule of strict liability for the abnormally dangerous activity of blasting recognizes that the activity is reasonable and does not prohibit the conduct with an “immunity” from injury granted to the rightholder; it only requires the blaster as dutyholder to pay compensatory damages to an injured rightholder.73 The compensatory duty is not unjust for giving the defendant “a duty to do something that is beyond him,” which is the criticism most commonly leveled against rules of strict liability.74 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 claimed. Strictly liable actors are free to impose these nonconsensual, reasonable risks on others, subject only to the duty that they compensate the ensuing foreseeable harms. Properly understood, strict liability is “liability rule” that does not impose any behavioral obligations on the dutyholder beyond the requirement to pay compensatory tort damages.75

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

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73 E.g., Spano v. Perini Corp., 250 N.E.2d 31, 34 (N.Y. 1969) (explaining that the plaintiff’s claim of strict liability does not seek to “exclude the defendant from blasting” but instead “merely seek[s] compensation for the damage”). If these activities were presumptively unreasonable and prohibited, the mere choice to engage in them would subject the dutyholder to punitive damages. See note 52.  
74 Jaffey, “Duties and Liabilities in Private Law” (note 71) at 153 (identifying the impossibility of engaging in risky behavior without ever harming another as the reason why strict liability “is widely thought to be unjust”).  
75 A “liability rule” exclusively relies on the compensatory damages remedy to protect the rightholder’s interests, unlike a “property rule” that immunizes these interests from harm absent the rightholder’s consent and accordingly employs injunctive relief as a remedy. See Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,” 85 Harv. L. Rev. 1089 (1972). For reasons discussed in the text, the rule of strict liability criticized by Weinrib is a property rule rather than a liability rule.
the dutyholder’s interest in liberty.76 The relative priority recognizes that both security and liberty are required for the exercise of autonomy within the liberal egalitarian 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.77 When social value is categorically defined by reference to the autonomy interests of all parties who would be governed by the duty, then strict liability can be justifiably limited if it would cause a loss of social value (or limitation of autonomy for 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), yielding the rule of negligence liability for this category of risky interactions. The same principle then applies to negligence liability and explains both the partial limitations of duty and the full immunities from tort liability.78 The way in which tort liability can unduly curtail the exercise of liberty only justifies the varied limitations of the tort duty 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 (sufficiently comprehensive regulation plus social insurance), however, is essential for implementation of a liberal

76 See Part II.A.
77 Restatement (Second) of Torts, § 520(f) (1965) & cmt. k.
78 See Geistfeld, Tort Law (note 7), at 91-97; Mark A. Geistfeld, “Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care,” 44 Wake Forest L. Rev. 781 (2009).
egalitarian scheme of distributive justice. By implementing corrective justice, a compensatory tort system establishes the normatively appropriate baseline of wealth and resources against which the complementary distributive scheme operates.\textsuperscript{79} A compensatory tort system, therefore, 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 underlying abstract 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 satisfy 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 is a defensible norm of justice that can persuasively explain tort doctrine, despite the limited availability of the compensatory damages remedy.