The Coherence of Compensation-Deterrence Theory in Tort Law

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INTRODUCTION

The most influential torts scholars in the Twentieth Century form a diverse group whose thoughts may be placed under the banner of compensation-deterrence theory. Holmes was the theory’s grandfather. It was developed in earnest by mid-century proponents such as Leon Green and William Prosser. Some of its most prominent later-century adherents have included Kenneth Abraham, Michael Green, James Henderson, William Powers, Robert Rabin, Gary Schwartz, Aaron Twerski, and John Wade. These scholars have largely defined the universe of torts for thousands of lawyers and judges through their books, treatises, and articles. This same group has taken the lead role in drafting the American Law Institute’s influential “Restatements” of tort law, as well as the 1991 “Reporters’ Study” of the American tort system. Moreover, a great deal—perhaps the majority—of twentieth-century torts scholarship has consisted of “normal science” undertaken within the paradigm of compensation-deterrence theory.1

Based on these sweeping generalizations by John Goldberg, one could easily wonder why the coherence of “compensation-deterrence theory” is worth addressing for a symposium honoring one of the purported adherents of this approach. The issue requires extensive analysis for reasons raised by Goldberg’s excellent history of tort scholarship in the twentieth century, the first article to identify “compensation-deterrence theory” as a leading interpretation of tort law.2 Despite Goldberg’s observations about the widespread acceptance of “compensation-deterrence theory,” it at this point deserves scare

* Sheila Lubetsky Birnbaum Professor of Civil Litigation, New York University School of Law. Special thanks to Bob Rabin and other participants at the 17th Annual Clifford Symposium on Tort Law and Social Policy for their helpful comments. As I hope is made clear by this Article, my understanding of tort law owes a great deal to the scholarship of Professor Rabin.


2. Cf. G. Edward White, Tort Law in America: An Intellectual History 146–47, 178 (1980) (describing the central debate as whether tort law is best understood as furthering the objective of compensation or deterrence and concluding that the issue was resolved by the 1970s in favor of a “consensus” conception of tort law as a “compensation system”).
quotes because Goldberg provides little reason for concluding that this approach is a coherent theory of tort law.

Having recognized that his depiction of compensation-deterrence theory is novel and therefore surprising in light of his claim that the approach has been deeply influential, Goldberg attributes his counter-intuitive finding to the antitheoretical nature of its inquiry:

To readers familiar with the academic literature of tort theory, the attribution of such great success to compensation-deterrence theory may seem odd, given that it is hardly ever mentioned there. This is in part because its adherents often have disagreed among themselves on substantive issues. It is also because these scholars tend to express skepticism about the utility of “theorizing” or “philosophizing”: modes of analysis they regard as antithetical to the sort of functional, instrumental, pragmatic, or purposive analysis in which scholars may usefully engage. Contained within these professions of theory-skepticism is an implicit disclaimer: We are in the business of sober, grounded analysis; we do not engage in idle theorizing. The adoption of this posture seems to have been fantastically effective. Indeed, compensation-deterrence theory enjoys a unique status as the only mode of theorizing about tort that has been largely spared the need to explain and justify itself.3

Goldberg ultimately concludes that “compensation-deterrence theory is no more or less a theory of tort than the other theories,”4 but his analysis belies that claim. Once required to explain and justify itself, compensation-deterrence theory fails on Goldberg’s account. On his view, this so-called theory typically involves “efforts at soft policymaking [that] have in turn engendered the impression that there is no content to tort law or scholarship, but merely an undisciplined, ad hoc balancing of policy factors.”5 If this description is accurate, then compensation-deterrence theory is merely an invitation for judges to engage in the unprincipled exercise of political power, leading Goldberg to conclude that “compensation-deterrence theory raises a basic issue as to the legitimacy of the common law of torts.”6 So conceptualized, compensation-deterrence theory does not meet the minimal requirements of a viable theory of tort law, at least as that concept is commonly employed within legal scholarship today.

Because there is no consensus about the appropriate rationale for tort liability, one must engage in an interpretive exercise in order to identify the most plausible rationale for tort liability. The interpretive exercise has been conceptualized in different ways by different schol-

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3. Goldberg, supra note 1, at 521–22 (footnotes omitted).
4. Id. at 522.
5. Id. at 536.
6. Id.
ars, but there is widespread agreement about the minimal requirements of a plausible interpretive theory. “It is a commonplace among most jurists that theoretical accounts of any area of the law, including tort, must fit some of the law’s principal structural and doctrinal features. It is also often assumed that such accounts must, where possible, make those features both intelligible and normatively respectable.”

The compensation-deterrence theory described by Goldberg probably fails the test of “fit” and undoubtedly flunks the test of normative respectability. He concludes that any effort to interpret the default rule of negligence liability in terms of compensation and deterrence “is reductionist, highly manipulable, and therefore of doubtful explanatory value,” leading Goldberg to conclude that the theory “arguably . . . fails to capture the contours and texture of tort doctrine.” Matters are even worse with respect to the test of normative respectability. According to Goldberg, compensation-deterrence theory relies on an “abstract idea of ‘policy’ [that] can just as readily support decisions to limit or not limit particular forms of negligence liability.” An inherently manipulable approach to tort law that can justify liability in only an ad hoc manner is worthy of little or no normative respect, effectively disqualifying the approach as a viable interpretation of tort law.

The disdain for compensation-deterrence reasoning is shared by other tort scholars. For example, Ernest Weinrib claims that the approach is fundamentally incoherent for quite evident reasons. The need for compensation depends only on the occurrence of injury, regardless of its source: “nothing about compensation as such justifies its limitation to those who are the victims of deterrable harms . . . .” Similarly, the need for deterrence exists whenever someone has engaged in undesirable behavior: “nothing about deterrence as such justifies its limitation to acts that produce compensable injury.” Any injury is an appropriate candidate for compensation, whereas any form of undesirable risky behavior is an appropriate candidate for deterrence. The functions of compensation and deterrence are not mu-

7. William Lucy, Method and Fit: Two Problems for Contemporary Philosophies of Tort Law, 52 McGill L.J. 605, 648 (2007). For example, according to the highly influential theory of Ronald Dworkin, the interpretation of law has two distinct dimensions—“fit” and “justification”—each of which provides an independent basis for evaluating the plausibility of different interpretations. See Ronald Dworkin, Law’s Empire 65–68 (1986).
8. Goldberg, supra note 1, at 534.
9. Id.
11. Id.
tually dependent and can be decoupled. Lacking internal coherence, either function can be arbitrarily invoked to reach whatever result the judge chooses in a particular case, making compensation-deterrence theory the sort of ad hoc, unprincipled approach described by Goldberg.

To be sure, Goldberg recognizes that “compensation-deterrence theorists tend to be highly skilled lawyers whose competence resides in parsing case law and rendering lawyerly judgments,”12 but without an underlying principle, compensation-deterrence theory cannot be rendered normatively respectable by the nature of common law reasoning. Like other forms of the common law, the legal inquiry in tort law relies on analogical reasoning, “arguing from one case to the next on the basis of perceived likenesses and differences and the location of the instant case in the landscape of common experience painted by the judge or lawyer in command of the full resources of the common law.”13 Because “[a]nalogical reasoning is reasoning by or from example, . . . from like to like,” it “presupposes some degree of (threshold) relevant similarity.”14 Without any underlying principle, there is no way to identify the requisite degree of similarity required by the analogical reasoning that judges employ to decide tort cases.

To illustrate, consider a case in which the plaintiff solely relies on prior cases that apparently furthered the function of compensation and not deterrence. Suppose the defendant responds by relying on prior cases that apparently denied the plaintiff compensation because liability would not further the function of deterrence. To decide whether the case law supports the plaintiff’s recovery, the judge must determine which line of cases is sufficiently similar to the present dispute and which line of cases can be distinguished. What are the relevant distinctions? Answering that question requires a resort to principle.

“The major challenge facing analogical reasoners is to decide when differences are relevant. To make this decision, they must investigate cases with care in order to develop governing principles. The judgment that a distinction is not genuinely principled requires a substantive argument of some kind.”15 Consequently, “no clear line of distinction can be drawn between argument from legal principle and

12. Goldberg, supra note 1, at 536.
14. Id. at 604.
argument from analogy. Analogies only make sense if there are reasons of principle underlying them.”

Rather than obviate the need for courts to rely on principle, the nature of common law reasoning critically depends on principle or the substantive reasons that explain why liability rules function in a particular manner. Thus, if the functions of compensation and deterrence are not coherently unified by an underlying principle of tort liability, then the nature of common law reasoning will not prevent compensation-deterrence theory from being arbitrary and unprincipled in application.

In light of this obvious problem, the puzzle is to explain how compensation-deterrence theory could have exerted so much influence over the development of tort law during the twentieth century. To initially address this question, Part II provides a more complete description of compensation-deterrence theory. The scare quotes initially placed around compensation-deterrence theory are unnecessary for reasons given in Part III, which shows how the functions of compensation and deterrence can provide a coherent, normatively appealing theory of tort law. Part IV then relates this version of compensation-deterrence theory to broader developments within tort law over the course of the twentieth century. Part V concludes by explaining why this conception of tort law is still coherent even though it can justify the elimination of the tort system in favor of alternative institutional arrangements.

The analysis does not show that this particular formulation of compensation-deterrence theory is the one adopted by any of the scholars Goldberg lists as following this approach. The analysis instead attempts to make the basic point that such a widely held view about the nature of tort law is likely to be far more cogent than critics have recognized. Good reasons might counsel in favor of alternative rationales for tort liability, but compensation-deterrence theory cannot be rejected on the ground that it necessarily lacks the descriptive capabilities and normative respectability required for courts to engage in principled lawmaking.

17. See infra notes 22–44 and accompanying text.
18. See infra notes 45–89 and accompanying text.
19. See infra notes 90–117 and accompanying text.
20. See infra notes 118–28 and accompanying text.
21. For a listing of these proponents, see supra note 1 and accompanying text.
II. The Structure of Compensation-Deterrence Theory

The logic of compensation-deterrence theory has been skillfully developed by John Goldberg, who also provides the only express account of that theory in the literature. Goldbergs account, however, must be read in conjunction with the towering intellectual history of tort law provided by G. Edward White. Ultimately, the compensation-deterrence theory in Goldberg’s account corresponds to the “consensus thought” that White ascribes to tort scholarship for the period from 1945 to 1970. When read together, these two accounts clearly reveal the structural components of, and puzzles posed by, compensation-deterrence theory.

A. Compensation-Deterrence Theory

As Goldberg correctly observed, compensation-deterrence theory does not disavow the historical antecedents of modern tort liability, but instead is based on the manner in which the nature of tort liability had fundamentally changed by the twentieth century.

Compensation-deterrence theory accepts as its premise that tort suits probably once . . . . [were] characterized by the adjudication of private disputes by judges and juries who, through the formalities of the legal system, employed ordinary moral principles to determine whether a given defendant had violated the plaintiff’s rights and therefore became obligated, as a matter of justice, to provide re-dress in compensation for the violation.

In the late Nineteenth and early Twentieth Centuries, however, the character of the typical tort suit changed fundamentally. . . . In substance it was a new creature entirely. The substance of tort law changed because courts could no longer invoke conventional morality to resolve tort disputes.

With modernity came increasing doubt as to the possibility of consensus on moral norms or tenets. Moreover, . . . the conduct about which modern plaintiffs tended to complain no longer consisted of everyday bad acts, such as D intentionally striking P or stealing from P. Rather, it consisted of the failure of commercial enterprises to account adequately for the safety of employees, customers, and bystanders. There were no immediately applicable customary

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22. See supra note 3 and accompanying text.
23. See White, supra note 2.
24. Compare Goldberg, supra note 1, at 536–37 (suggesting that the logic of compensation-deterrence theory entails “the brave new world of antiformalist common law adjudication imagined by Prosser, in which judges forthrightly engage in ‘social engineering’”), with White, supra note 2, at 139–79 (using the scholarship of William Prosser to illustrate the consensus in tort scholarship during the period from 1945 to 1970).
norms for this sort of conduct. It was therefore no accident that the legal standard increasing employed by modern judges to gauge behavior—the standard of reasonable care—was an objective one designed to express what society demands of an actor, rather than to measure the actor’s moral culpability. As the economy and society modernized, objective negligence came to dominate tort, and tort increasingly took the form of rulings based on judges’ conceptions of the social desirability or undesirability of particular forms of conduct.26

Because judges could no longer base tort liability solely on wrongs defined by violations of conventional morality, courts had to adopt an abstract norm of liability embodied in the objective standard of reasonable care. What is that norm?

Because they have the power to order defendants to pay damages, courts can, in principle, deter the defendant and other similarly situated actors from engaging in conduct they deem undesirable; at least insofar as the threat of damages awards affects actors’ decisions and the court can rely on future courts to permit or impose sanctions on such actors. Likewise, courts can compensate at least some injured persons. Thus, the judges and juries who have been empowered by tort to legislate by the disposition of actions under the common law are in a position to accomplish two, and only two, things: deterrence and compensation. And so we arrive at the baseline proposition of compensation-deterrence theory, repeated at the outset of countless law review articles published in the last fifty years: The function of tort law is to compensate and deter.27

So far this account is uncontroversial and brilliant in laying bare a dynamic that had not been adequately appreciated. However, the nature of the judicial conception of desirable forms of conduct—the policy decision implicated by a tort claim—is not well explained by Goldberg. One must instead turn to White’s intellectual history for that explanation, which begins with the influence of Legal Realism on tort law:

Instead of “good rules” rather than “bad rules,” the mature Realists wanted the mythical nature of all rules revealed. Law for them was a set of governmental judgments about the claims of “interests”: the law that was “made” in a given case was a function of the “interests” at stake therein. The legal rules affecting water companies were different from those affecting railroads or coal miners. It was fruitless to generalize beyond the immediacy of the case and the clash of interests that it posed.28

26. Id. at 523–24 (footnotes omitted).
27. Id. at 525 (footnote omitted).
28. WHITE, supra note 2, at 82.
As interpreted by William Prosser, for example, “[t]ort law consisted of exercises in ‘social engineering’: it was ‘concerned primarily with the adjustment of the conflicting interests of individuals to achieve a desirable social result.’”29 This approach was widely followed. “In conceiving of tort law as a process in social engineering in which competing interests were weighed Prosser was in the mainstream of mid-twentieth-century legal thought.”30

As the twentieth century progressed, tort scholars continued to conceptualize tort law in the Realist terms of interest balancing, but most ultimately rejected the Realist premise that tort scholarship could be advanced by unmasking the mythical nature of all tort rules. “That retreat implicitly signified the renaissance in American jurisprudence of ‘consensus’ thought: a search for core values or basic principles around which lawmakers might cohere.”31

The ensuing search for consensus thought or a general principle helps to explain why, on Goldberg’s account, compensation-deterrence theorists were drawn to “the pure ‘fault principle,’ a rule of prima facie negligence liability unadorned by arbitrary limitations.”32

There is an airtight fit between compensation-deterrence theory and the pure fault principle: Precisely because the purpose of tort law is to deter socially undesirable conduct and to compensate any actual losses of welfare flowing from such conduct, and precisely because conduct is socially undesirable when unreasonable, it follows that, prima facie, whenever an actor’s unreasonable conduct causes any harm, the actor should pay for that harm. This way, the injured person is compensated by means of a payment that, because it comes from the pocket of the antisocial actor, will deter such acts in the future.33

The pure fault principle has obvious appeal to compensation-deterrence theorists, but the search for consensus during the mid-twentieth century did not end with negligence liability. According to Goldberg, William Prosser was one of the leading twentieth-century compensation-deterrence tort scholars.34 Like other mainstream tort scholars of this era, Prosser analyzed tort law as a matter of interest balancing. When compensation-deterrence theory is formulated in this manner, it can readily justify rules of strict liability.

As White explains:

29. Id. at 157 (quoting William L. Prosser, Handbook of the Law of Torts 15 (1941)).
30. Id. at 158.
31. Id. at 140.
32. Goldberg, supra note 1, at 527 (footnote omitted).
33. Id.
34. See supra note 1 and accompanying text.
Relational negligence, while retaining the concept of fault, had made the determination of where fault lay in a given case a process of interest-balancing. Strict liability theory proposed to conduct the interest-balancing altogether unburdened by notions of fault. In 1917 Jeremiah Smith had found those isolated instances of “strict” liability in tort law exceptional in their repudiation of the general fault standard. By 1941 Prosser was prepared to “question whether ‘fault,’ with its popular connotation of personal guilt and moral blame, and its more or less arbitrary legal meaning, which [would] vary with the requirements of social conduct imposed by the law, [was] of any real assistance in dealing with . . . questions of [risk allocation], except perhaps as a descriptive term.” Once the legal concept of fault was divorced from current standards of moral wrongdoing, Prosser argued, “there [was] a sense in which liability with or without ‘fault’ must beg its own conclusion.”

When interest balancing is “unburdened by notions of fault,” compensation-deterrence theory can justify rules of strict liability. Prosser, for example, famously championed the rule of strict products liability. Once tort liability no longer depends on the defendant’s violation of conventional morality, forms of no-fault liability can become acceptable.

Because it recognizes that tort liability does not depend on personal fault or culpable wrongdoing by the defendant, compensation-deterrence theory ultimately merges into the consensus thought that White ascribes to tort scholarship during the period from 1945 to 1970. The consensus involved the resolution of the debate following World War II about “whether tort law best functioned primarily as an instrument for admonishing currently undesirable civil conduct or whether tort law ought primarily to be a means for compensating injured people.” Having rejected the admonishment function, compensation-deterrence theory simply utilizes tort liability as a means for compensating injured people, thereby explaining White’s finding that the consensus in tort scholarship that occurred during the mid-twentieth century largely involved the emergence of such a compensatory rationale for tort liability.

An idea of Torts as a public law subject, concerned primarily with the adjustment of risks among members of the public so as to achieve fairer and more efficient means of compensating injured persons, was replacing an idea of Torts as a private law subject, con-

35. W hite, supra note 2, at 109 (alterations in original) (footnote omitted) (quoting Prosser, supra note 29, at 431).
36. See generally William L. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960) (arguing that product sellers should be strictly liable for physical harms caused by defective products).
37. Id. at 146–47.
cerned primarily with deterring and punishing blameworthy civil conduct.38

When tort compensation is not limited to the redress of blameworthy civil conduct, the liability rule will necessarily serve two functions—it identifies the conditions under which injury compensation is desirable and accordingly creates financial incentives for dutyholders to avoid injuring others by acting safely. These two functions can then be merged into a unitary conception of tort liability—what Goldberg calls compensation-deterrence theory.

B. The Puzzle of Compensation-Deterrence Theory

The conclusion that compensation-deterrence theory can justify rules of strict liability would seem to bolster the most devastating critique that Goldberg levels against that approach: its inability to explain why the functions of compensation and deterrence justify a default rule of negligence liability instead of strict liability.

On the prescriptive level, those compensation-deterrence theorists who have embraced fault as a general standard of liability have offered remarkably little by way of justification. Indeed, for all the attention they have devoted to negligence, they have said very little about why they regard it as striking the right mix of deterrence and compensation.39

This challenge is considerable. As compared to negligence liability, strict liability provides compensatory damages in more cases. As for the objective of deterrence, strict liability gives actors an incentive to exercise the same amount of care required by the Hand formulation of negligence liability.40 However, the difficulty of proving negligence liability can substantially reduce its deterrence capabilities, a problem that courts have relied upon to justify rules of strict liability, including the critically important rule of strict liability governing the commercial distribution of defective products.41 Both compensation and deter-

38. WHITE, supra note 2, at 178.
39. Goldberg, supra note 1, at 535.
40. See generally Steven Shavell, Strict Liability Versus Negligence, 9 J. LEGAL STUD. 1 (1980) (showing that negligence and strict liability each provide incentives to exercise the amount of care required by cost–benefit analysis or the Hand formula with respect to those risks that are fully governed by each liability rule).
41. E.g., Barker v. Lull Eng’g Co., 573 P.2d 443, 455 (Cal. 1978) (“[T]his court’s product liability decisions . . . have repeatedly emphasized that one of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action.”). By justifying strict products liability in this manner, courts were relying on established doctrine. See Frederick Pollock, The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law 393 (1st ed. 1887) (“[T]he ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of danger, coupled with the
rence would seem to favor a greater role for strict liability than currently recognized by the tort system, making it hard to see how compensation-deterrence theory can plausibly explain why negligence liability dominates the torts landscape.

The problem stems from the compensatory component of compensation-deterrence theory. A pure deterrence-based theory can rely on a general rule of negligence liability that is supplemented by rules of strict liability for the exceptional cases in which negligence is hard to prove. The objective of injury compensation, by contrast, would seem to straightforwardly justify a default rule of strict liability, which provides compensatory damage awards for a much wider range of accidental harms than negligence liability. By making the compensation of injury an important function of tort liability, how can compensation-deterrence theory plausibly explain the default rule of negligence liability?

Any effort to square compensation-deterrence theory with tort doctrine must also explain why tort scholars in the twentieth century increasingly viewed tort law as a form of public law. According to Goldberg, compensation-deterrence theory maintains that, in evolving from its premodern incarnation, tort law “had transformed itself from private to ‘public’ law, whereby it functioned to achieve collective, not corrective, justice.”42 Similarly, the “consensus thought” that White ascribes to tort scholarship during the period from 1945 to 1970 partly involved “replacing an idea of Torts as a private law subject” with “[a]n idea of Torts as a public law subject.”43 By conceptualizing torts in the collective terms of public law, were mainstream tort scholars also adopting the radical position that courts ought to reject the traditional bilateral framework of tort law—one that bases liability on the defendant’s breach of a duty in violation of the plaintiff’s tort right? If so, then what explains Goldberg’s conclusion that compensation-deterrence theorists “have largely defined the universe of torts for thousands of lawyers and judges,” in no small part due to their “lead role in drafting the American Law Institute’s influential ‘Restatement’s’ of tort law”?44 Is it possible to square the idea that tort liability can function as a form of public law with a mainstream, conventional conception of tort liability that operates within the traditional bilateral framework of tort law?

difficulty of proving negligence as the specific cause, in the particular event of the danger having ripened into actual harm.

42. Goldberg, supra note 1, at 524.
43. White, supra note 2, at 178.
44. Goldberg, supra note 1, at 521 (footnotes omitted).
The foregoing formulation of compensation-deterrence theory, therefore, leaves unanswered fundamental questions. Negligence or strict liability? Private law or public law? As these questions reveal, compensation-deterrence theory requires further development to be deemed a viable interpretive theory of tort law.

III. A PRINCIPLED FOUNDATION FOR COMPENSATION-DETERRENCE THEORY

Compensation-deterrence theory recognizes that tort law was originally a form of private law that redressed a violation of the plaintiff’s right by the defendant-dutyholder, but it also recognizes that as social conditions changed, the substantive content of the tort right could no longer be defined by conventional morality or customary norms of behavior.\(^{45}\) Compensation-deterrence theory, therefore, is based on the premise that modern tort law must rely on an abstract norm to determine the substantive content of the liability rules. Identifying the content of that norm is critical for the formulation of compensation-deterrence theory, as is true for any other interpretive theory of tort law not based on conventional morality or customary social practices.

For historical reasons, the abstract tort norm is quite plausibly one of compensation—the concern that first distinguished tort law from criminal law in the medieval writ system:

> Lawyers and judges in English royal courts between 1200 and 1500 drew a distinction between crime and tort. . . .

> The distinction between crime and tort was not a difference between two kinds of wrongful acts. In most instances, the same wrong could be prosecuted either as a crime or as a tort. Nor was the distinction a difference between the kinds of persons who could initiate the actions. Victims could initiate actions of both kinds. 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.\(^{46}\)

In this era, one’s entitlement to compensation was determined by conventional morality or customary norms of behavior—the original source of the common law. Due to the changed social circumstances largely wrought by the industrial revolution, conventional morality and customary norms no longer provided adequate guidance for the

\(^{45}\) See supra notes 25–26 and accompanying text.

liability inquiry. In responding to these changed circumstances, courts did not have to forego the historical concern for compensation. Instead, the altered circumstances quite plausibly forced courts to determine the substantive content of liability rules by relying on an abstract tort norm of compensation—one that justifies tort compensation by abstracting away from conventional morality and customary norms of behavior.

Such a compensatory norm is clearly reflected in the scholarship of Oliver Wendell Holmes, the intellectual architect of modern tort law. According to Holmes, “[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms.” A purpose of indemnifying one for harms is nothing other than a compensatory rationale for tort liability that is not defined by violations of conventional morality.

To be sure, tort law does not provide compensation for all harms suffered by accident victims, but the question remains whether tort law can be plausibly understood in terms of an abstract compensatory norm. 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 such formulation, a compensatory tort right can explain why tort law has adopted a default rule of negligence liability, yielding a conception of tort law that can be adequately described by compensation-deterrence theory.

A. Interest Analysis in a Rights-Based Tort System

Insofar as compensation-deterrence theory can be ascribed to mainstream tort scholarship of the twentieth century, it must conform to the mode of analysis commonly employed by scholars of that era. “[T]he mainstream of mid-twentieth-century legal thought” conceived “of tort law as a process in social engineering in which competing interests were weighed.”

47. See Mark A. Geistfeld, Legal Ambiguity, Liability Insurance, and Tort Reform, 60 DePaul L. Rev. 539, 545–47 (2011) (explaining why the rise of mass markets required tort law to reject customary safety practices in favor of an abstract tort norm).
49. For more extended development of a compensatory tort right, including extensive discussion of why such a right can explain the important doctrines and practices of tort law, see Mark A. Geistfeld, Tort Law: The Essentials 81–377 (2008). The discussion in the ensuing two subsections is largely drawn from id. at 81–107.
50. White, supra note 2, at 158.
To evaluate tort liability in terms of interest balancing, one need not reject the traditional framework of tort law that bases liability on the defendant’s breach of a duty in violation of the plaintiff’s tort right. A tort inquiry that seeks to mediate or balance conflicting individual interests can be completely consistent with a rights-based conception of tort law that fully embraces the bilateral structure of tort liability.51

To be protected by a right, an individual must have some interest that is legally protected from being harmed by others seeking to further their own interests or those of society.52 This formulation of the tort right occurs at the outset of the multivolume Restatement (Second) of Torts:

If society recognizes a desire as so far legitimate as to make one who interferes with its realization civilly liable, the interest is given legal protection, generally against all the world, so that everyone is under a duty not to invade the interest by interfering with the realization of the desire by certain forms of conduct. Thus the interest in bodily security is protected against not only intentional invasion but against negligent invasion or invasion by the mischances inseparable from an abnormally dangerous activity.53

An individual interest that “is protected against any form of invasion . . . becomes the subject matter of a ‘right’.”54 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 in-


52. An individual right, more precisely, places limits or constraints on the reasons that can justify governmental actions such as the enforcement of tort rules. See Ronald Dworkin, Rights as Trumps, in Theories of Rights 153, 153 (Jeremy Waldron ed., 1984) (explaining why individual rights are “trumps over some background justification for political decisions that states a goal for the community as a whole”); see also Jeremy Waldron, Pildes on Dworkin’s Theory of Rights, 29 J. Legal Stud. 301 (2000) (explaining why Dworkin’s formulation of rights as “trumps” rules out justifications for infringing the right that are inconsistent with the substantive rationale for the right).

53. Restatement (Second) of Torts § 1 cmt. d (1965). The Restatement defines “interest” as “the object of any human desire” and explains the relevance of these interests for tort law. Id. § 1.

54. Id. § 1 cmt. b.
terest 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.

Consider a tort rule governing risky interactions between an automobile driver and a pedestrian. The transportation enables the driver to pursue various liberty interests, including economic interests. As an unwanted by-product of that activity, the driver exposes pedestrians to a risk of bodily injury. A pedestrian is also acting in furtherance of her liberty interests, including economic interests. In the event of a crash that physically harms the pedestrian, by definition, her interest in physical security has been injured, causing the pedestrian to suffer emotional harm (pain and suffering) and economic harm (medical expenses). If the driver were obligated to pay compensatory damages for any of these harms, the monetary payment would be detrimental to her economic interests. Any precautionary obligations that tort law imposes on the driver, such as a duty to drive slowly, are detrimental to the associated liberty interests. Similarly, any precautionary obligations that tort law imposes on the pedestrian, such as a prohibition against jaywalking, restrict those liberty interests. The way in which tort law regulates the risky interaction will burden or threaten at least one party’s interests: either the pedestrian’s interests in liberty and physical security; the driver’s liberty interests, including the economic interest; or the interests of both parties. How these conflicting interests should be mediated is the basic question that must be addressed by tort law, and different resolutions of the problem are provided by different specifications of the tort right.

An absolute right to physical security, for example, would prohibit the driver from threatening the pedestrian’s security in any way. The pedestrian’s interest in physical security would have absolute priority over the driver’s conflicting liberty interest, justifying the negation of the conflicting—and absolutely subordinate—liberty interest by a tort rule that prohibits driving whenever the activity would threaten bodily injury to a pedestrian, even if the risk were minuscule.

For reasons suggested by this rule, tort law does not give the rightholder’s security interest an absolute priority over the conflicting liberty interests of another. As Holmes showed, the early common law did not give the individual “an absolute right to his person, and so
forth, [to be] free from detriment at the hands of his neighbors.” 55 An absolute right would require the wholesale elimination of nonconsensual risks, effectively preventing individuals from exercising their liberty whenever the conduct might pose any risk, however slight, of causing physical harm to another. An absolute right to physical security would largely block social interactions, an outcome that is contrary to the reason for prioritizing the security interest in the first instance.

Tort law protects the individual’s interest in physical security for the basic reason that an individual must be adequately secure in order to live a meaningful life. As a matter of equality, this concern for individual autonomy must apply to both the rightholder and correlative dutyholder, which in turn explains why tort law has not adopted an absolute right to physical security.

To be autonomous moral agents, individuals must have liberty, a requirement vividly expressed by the New Hampshire state motto, “Live free or die.” Without liberty, physical security may not be worth having. Liberty, however, depends on security. Unless our bodies and personal possessions are adequately secure, the threat of physical harm severely compromises our ability to make plans and live a life of our choosing. The aftermath of September 11, 2001 provides a sobering illustration. Autonomy requires both security and liberty.

For this reason, tort law cannot give an absolute priority to one of these interests. The priority must instead be relative. The priority is justified by a principle of equality that values individual autonomy or self-determination, making the priority relative to that overarching, general principle. This general principle holds that each person has an equal right to freedom (or autonomy 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 can be 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.” 56

This formulation of the tort right (and its correlative duty) explains why the domain of tort law is limited to nonconsensual interactions. The prima facie case for tort liability requires the absence of consent, which distinguishes tortious behavior from socially acceptable behav-

55. See Holmes, supra note 48, at 84–95 (1945) (explaining why this common description of the tort right is mistaken).
“For example, consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift.”

Fully consensual social interactions are not regulated by tort law due to “the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure.”

To promote individual autonomy or self-determination, tort law needs to protect a rightholder’s interest in physical security only when she does not give her fully informed, voluntary consent to the interaction.

Due to the pivotal importance of consent, the value of individual autonomy or self-determination quite plausibly provides the metric by which a tort rule balances or mediates conflicting interests of rightholders and dutyholders, like drivers and pedestrians. Each of the conflicting interests can be compared in terms of its importance for the exercise of autonomy in the community, and the resultant relative valuation of the interests makes it possible for tort law to determine the extent to which the interests of the rightholder should be protected or prioritized over the conflicting interests of the dutyholder.

As Prosser explained, “This process of ‘balancing the interests’ is by no means peculiar to the law of torts, but it has been carried to its greatest lengths and has received its most general conscious recognition in this field.”

By conceptualizing tort law in terms of the interest analysis favored by compensation-deterrence theorists, one can fully embrace a rights-based conception of tort liability that operates within the traditional bilateral framework of tort law.

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57. Modern tort law originated with the writ of trespass, and allegations of wrongdoing under that writ “were thought to be inappropriate where the defendant had acted with the consent of the plaintiff.” D. J. IRBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 42 (1999). Modern tort law continues to limit liability to nonconsensual interactions. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 112 (5th ed. 1984) (explaining why consent “goes to negative the existence of any tort in the first instance”); see also DAN B. DORBS, THE LAW OF TORTS 218 (2000) (“In many cases, consent is not a true affirmative defense [to an intentional tort] but instead marks a deficiency in the plaintiff’s prima facie case.”); DORBS, supra, at 540–41 (explaining why the prima facie case for negligence liability depends on the absence of consent).


59. Francis H. Bohlen, Voluntary Assumption of Risk (pt. 1), 20 HARV. L. REV. 14, 14 (1907) (discussing the common law maxim “volenti non fit injuria,” or to one who consents no wrong is done).

60. PROSSER, supra note 29, at 17.
B. An Abstract Norm of Compensation

The discussion so far has developed an abstract formulation of tort law, one that shows how any rights-based tort rule can be characterized by the manner in which it mediates conflicting individual interests in relation to an underlying value of individual autonomy or self-determination. Doing so is necessary in order to determine whether such an abstract norm can explain why tort law does not limit liability for compensatory damages to cases in which the defendant violated conventional morality or departed from customary social practices, the type of norm posited by compensation-deterrence theory.61

Although the compensatory norm is abstract in this sense, it nevertheless is firmly grounded in social conditions. In a rights-based tort system that strives to give everyone an equal opportunity to exercise autonomy or self-determination, tort disputes often involve cultural and moral matters. To use the familiar terms of the Declaration of Independence, such a rights-based tort system gives everyone an equal right to “the Pursuit of Happiness” (autonomy or self-determination), which in turn supplies the value for determining how one individual’s “right to life” must be mediated against another’s “right to liberty.” Both are necessary for the purpose of self-determination, but each does not have to be equally important in this respect. The appropriate relation of these two rights will always be contestable in light of the changing facts of social life, the importance of particular types of risky conduct for purposes of self-determination within different communities, and the consequences of injury for leading a life of one’s own choosing.

In the early stages of economic development, for example, a society must expend most of its wealth to satisfy basic needs like hunger and shelter. One individual’s interest in physical security is hard to distinguish from another’s liberty or economic interests directed toward maintenance of the basic conditions required for a healthy existence. In these social circumstances, the value of autonomy does not justify a relative priority of the rightholder’s security interest over the (normatively indistinguishable) economic or liberty interest of the dutyholder.

Without any normative distinction between the conflicting interests of the two parties involved in the suit, tort law has no basis for shifting the loss from one party (the defendant) to another (the plaintiff). The loss must lie where it fell, on the injured plaintiff. The imposition of liability instead requires a normative distinction between the interests

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61. See discussion supra Part I.A.
of the two parties, such as a finding of negligence (an *unreasonable* liberty interest) that enables tort law to shift the loss to the defendant-dutyholder (thereby burdening his subordinate liberty interest) in order to compensate the plaintiff-rightherholder (thereby protecting his prioritized security interest). Interest analysis can readily explain why the early common law would base liability on violations of conventional morality or departures from customary forms of behavior, each of which involves the dutyholder’s unreasonable exercise of liberty that is normatively distinguishable from, and legally subordinate to, the legally protected security interest of the rightherholder. The logic of liability, however, is tied to social conditions and not conventional morality.

Indeed, in the early stages of economic development, a rights-based tort system would often limit duties in order to immunize risky behavior from negligence liability. For some forms of behavior, the duty to exercise reasonable care can entail a great enough restriction on the exercise of liberty so that, on balance, individual autonomy would be promoted within the community by permitting the risky conduct to occur despite the ensuing threat to physical security. As the twentieth century progressed, social wealth accumulated and individuals were increasingly able to expend their economic resources in a discretionary manner. The exercise of liberty was no longer tethered to the maintenance of conditions necessary to sustain life. Under these conditions, tort law can prioritize the individual interest in physical security over the conflicting liberty interest of another based on the judgment that our bodies and tangible possessions must

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62. See generally Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care*, 44 *Wake Forest L. Rev.* 899 (2009) (discussing how courts have limited negligence liability based on the concern that the duty to exercise reasonable care would unduly restrict the exercise of individual autonomy for the category of cases in question).

be adequately secure before we can meaningfully exercise our liberty in the pursuit of happiness.  

Based on this balancing of the interests, 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.  **65** 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.  This duty permits the dutyholder 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 physical security that is relative to a right of liberty.  Changed social circumstances accordingly explain why the interest balancing employed by a rights-based tort system would produce a mid-twentieth-century “consensus” conception of tort law as a “compensation system.”  **66**

This compensatory norm is abstract in the sense that it provides a basis for modern tort law to subject a defendant to liability for conduct that does not deserve to be admonished for having violated conventional morality.  A compensatory norm does not require culpability or personal fault; the dutyholder’s exercise of autonomy instead establishes the requisite form of responsibility.  The occurrence of foreseeable injury, not any moral shortcoming in the behavior itself, can then trigger the obligation to pay compensatory damages.

The normative power of this conception . . . resides in the idea that the exercise of a person’s positive agency, under circumstances in which a harmful outcome could have been foreseen and avoided, leads us to regard her as the author of the outcome.  Others can appropriately say of her, and she can say of herself, that she did it, and this is true even if other factors (some of which might be the acts of other persons) also causally contributed to the harm.  The agent acted and caused harm under circumstances in which she had a sufficient degree of control to avoid its occurrence, and for that reason she has a special responsibility for the outcome that other persons do not have.  That we view outcome-responsibility as reason-affecting in this way is part of our deepest self-understanding of

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**64.** Cf. Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 170–94 (2002) (showing that the 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).

**65.** RESTATEMENT (SECOND) OF TORTS § 901(a) (1979).

**66.** See White, *supra* note 2.
what it means to be a moral agent capable of both acting in the
world and acknowledging responsibility for what one has done.67

This form of responsibility is clearly reflected in the common law
maxim sic utere tuo ut alienum non lædas, which for present purposes
loosely translates into the principle of using your own so as not to
injure another.68 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 com-
mentators to justify rules of strict liability.69

This form of responsibility is also recognized by the Restatement
(Third) of Torts, which justifies strict liability in terms of a
position [that] resonates deeply in public attitudes; if the person in
the street is asked whether a party should be liable for injuries that
the party causes, the person’s answer is likely to be affirmative.
These perceptions and attitudes can be easily explained; when a
person voluntarily acts and in doing so secures the desired benefits
of that action, the person should in fairness bear responsibility for
the harms the action causes.70

The principle of outcome-responsibility—that a defendant can be
legally responsible for having foreseeably caused physical harm to an-
other regardless of personal fault or blameworthiness—has also been
recognized by other legal systems. For example, “this idea is an old,
fundamental element of European private law.”71

AND THE LAW OF TORTS, supra note 51, at 72, 92–93 (footnote omitted); see also TONY HONORE,
RESPONSIBILITY AND FAULT 14–40 (1999) (developing the concept of outcome-responsibility as
a justification for strict liability).

68. 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.” HOLMES, supra note 48, at 82 (stating that “some of the greatest
common law authorities” held this view).

69. 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); 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 obliga-
tion, enforceable at law among those whose interests are conflicting.”).

70. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 cmt. f
(2010); see also Francis H. Bohlen, Mixed Questions of Law and Fact, 72 U. PA. L. REV. 111, 118
(1923) (“The 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 . . . still dominates the
opinion of the sort of men who form the average jury.”).

71. Nils Jansen, Duties and Rights in Negligence: A Comparative and Historical Perspective on
(arguing that liability based on outcome-responsibility, as opposed to blameworthiness, “is con-
stitutive for the modern European law of extraterritorial liability”).
An abstract norm of compensation, therefore, can readily justify rules of strict liability, but can it also explain why the tort system relies on a default rule of negligence liability to govern cases of accidental harm? The same problem is faced by compensation-deterrence theory: Why do the functions of compensation and deterrence not justify a general rule of strict liability instead of negligence liability? Inter-

C. The Value of Deterrence Within a Compensatory Tort System

A compensatory tort norm is easily conflated with the compensatory damage remedy, making it seem self-evident that such a norm does not value deterrence or otherwise justify the limited availability of the compensatory damage remedy—two fundamental attributes of negligence liability. Consequently, the proposition that tort law serves the function of compensation has been summarily dismissed by scholars on the ground that the “tort system does not . . . purport to redress all material losses, physical or mental.” As one leading scholar put it, “[I]f by the term ‘function’ we mean a ‘goal’ of tort law, the notion that providing compensation is a function of tort law is debatable at best.” This critique assumes that tort law can accomplish the function of compensation only through an award of compensatory damages, but that assumption is not warranted when liability is justified by an abstract norm of compensation.

An abstract norm of compensation would exclusively rely on the compensatory damage remedy only if the harm suffered by the legally protected interest of the plaintiff could be fully compensated by that remedy. The injuries of primary concern to tort law—bodily injury and damage to real or tangible property—are not fully reparable in this respect. Most obviously, simply compensating someone with monetary damages for a nonconsensual physical harm can be problematic (consider rape). Before it can defensibly employ the compensatory damage remedy, a compensatory norm must first address any normative problems created by the rightholder’s lack of consent and the poor manner in which compensatory damages otherwise protect

72. See supra notes 39–45 and accompanying text (identifying the limited role of strict liability as one of the central puzzles posed by compensation-deterrence theory).
the tort right. A compensatory tort norm is not the same as the compensatory damage remedy.

For these reasons, a compensatory tort norm does not justify a rule of strict liability as the sole means for protecting the tort right. When a dutyholder is subject only to a rule of strict liability, she faces a single legal obligation to pay compensatory damages to a rightholder for the injuries governed by the duty. An exclusive duty to pay compensatory damages is obviously problematic for nonconsensual harms that cannot be adequately redressed with this remedy. Due to this inherent limitation of the compensatory damage remedy, an abstract norm of tort compensation justifies negligence as the default rule of liability.

Whereas strict liability exclusively relies on the compensatory damage remedy, negligence is a behavioral rule that primarily obligates dutyholders to exercise reasonable care, an obligation that cannot be fully satisfied by the dutyholder’s willingness to pay compensatory damages to the rightholder in exchange for a nonconsensual violation of the tort right. The duty of reasonable care includes the obligation to behave by reference to “the value which the law attaches to the conduct,” which need not equal the actor’s subjective valuation. For example, a driver who speeds for the thrill of scaring pedestrians does not promote an objectively recognized tort value. Without the pedestrians’ consent, the conduct completely disvalues their protected interests in physical security and is not legitimizied by the driver’s payment of compensatory damages for any injuries caused by this conduct.

75. To be sure, a strictly liable defendant can act in a manner that merits punitive damages. See Owens-Ill., Inc. v. Zenobia, 601 A.2d 633 (Md. 1992) (upholding punitive damage awards for products liability claims based solely on strict liability). However, the punitive award is not merited by the mere fact that the conduct subject to strict liability (such as the sale of a defective product) proximately caused the plaintiff’s injury. See id. at 653–56 (following the majority rule by requiring proof of “actual malice” to justify an award of punitive damages in a product case). The additional proof required to support a claim for punitive damages, such as actual malice or deliberate indifference, would necessarily establish ordinary negligence liability in addition to strict liability. Cf. Smith v. Wade, 461 U.S. 30, 47–48 (1983) (“Most cases under state common law, although varying in their precise terminology, have adopted more or less the same rule, recognizing that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence.”). The resultant rule is not a pure form of strict liability, and so in this respect strict liability entails no legal obligation beyond the duty to pay compensatory damages.


78. Restatement (Second) Torts § 283 cmt. e (1965).
Otherwise, dutyholders would be able to violate the tort rights of others, including the right to be protected from physical attack, merely by paying the “price” of compensatory damages, contrary to the autonomy rationale for the individual right.79 Lacking any objective value, the conduct can be prohibited by tort law (and punished by the penalty of punitive damages).80 The objectively defined negligence rule, therefore, enables tort law to formulate the duty to ensure that the absence of the rightholder’s consent is not contrary to the underlying value of individual autonomy or self-determination protected by the tort right.

Aside from the difficulties posed by the absence of consent, courts have recognized that the compensatory damage remedy does not adequately protect the tort right for another obvious reason. 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.81 As the California and Wisconsin Supreme Courts observed almost a century ago, “No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages.”82 The monetary award undoubtedly benefits the plaintiff, but courts have recognized that the efficacy of the compensatory damage remedy is inherently limited by the poor manner in which money can substitute for the plaintiff’s lost bodily integrity.

To address these obvious problems with the compensatory damage remedy, courts have adopted various rules. Since at least the seventeenth century, the common law has defined an injury as being “irrep-

79. See, e.g., Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 Yale L.J. 1335, 1338–39 (1986) (“It is surely odd to claim that an individual’s right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn’t the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?”).
80. See Geistfeld, supra note 76, at 165–69 (identifying the types of behavior prohibited by the negligence rule and explaining why a defendant who engaged in such behavior cannot avoid liability for punitive damages even if she is fully willing and able to pay compensatory damages for the injuries in question).
81. The difficulty involves the problem of compensating the badly injured plaintiff for the loss of life’s pleasures. 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 should instead only “give to the injured person some pecuniary return for what he has suffered or is likely to suffer”).
arable” if it “cannot be adequately measured or compensated by money.”83 Premature death and bodily injury are paradigmatic examples of irreparable injuries, although the judicial conception of irreparable injury extends to damage inflicted on a rightholder’s real or tangible property.84 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.”85

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.86 The issue of undue hardship is addressed by the abstract norm of compensation.

A dutyholder’s compensatory obligation can be defined by the burden that she would incur under ideal compensatory conditions in which there are no irreparable injuries.87 This compensatory obligation, in turn, can determine the amount of care required by the negligence rule. Instead of requiring the dutyholder to expend the compensatory resources on the damages remedy, the tort rule can relocate that compensatory obligation to the exercise of reasonable care. These safety expenditures reduce risk, or the likelihood that the rightholder will suffer irreparable injury. Dollar for dollar, the prevention of premature death and other irreparable injuries provides better protection for the rightholder’s interest in physical security than does an award of monetary damages. The resultant duty to exercise reasonable care accordingly seeks to prevent the irreparable injury of physical harm without imposing undue hardship on the dutyholder.

83. BLACK’S LAW DICTIONARY 856 (9th ed. 2009).
84. See Geistfeld, supra note 76, at 164 (discussing the rule of irreparable injury and explaining why it ordinarily encompasses damages to real or tangible property).
85. JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA 389 (1883). In discussing this quotation, Professor Douglas Laycock has observed:

Pomeroy’s statement . . . is not quite right . . . . But it captures an important insight . . . . Remedies that prevent harm altogether are better for plaintiffs, and plaintiffs should have such remedies if they want them and if there is no good reason to deny them. A general preference for damages is not a reason unless there is a reason for the preference. Judges act on these premises, whether or not they consciously acknowledge all that Pomeroy imputed to them.

86. Cf. Laycock, supra note 85, 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).
the same approach the common law takes with respect to other types of irreparable injuries.

For example, an automobile driver cannot ordinarily pay compensation to a pedestrian prior to their risky interaction, and, in the event that the pedestrian is killed in an accident, the driver cannot provide ex post compensation with the damage remedy. In order to give the pedestrian rightholder the compensation to which she is entitled, tort law requires the dutyholder to exercise reasonable care. The duty of reasonable care specifies required forms of precautionary behavior that would prevent the rightholder from suffering injury in the first instance. As explained above, this precautionary burden can be specified in a manner that equals the total burden that the dutyholder would otherwise incur under ideal conditions of full compensation. Thus, under the negligence rule, the dutyholder can satisfy the compensatory obligation by incurring these expenses through the exercise of reasonable care that directly protects the rightholder’s interest in physical security. The standard of reasonable care, therefore, can be derived from a compensatory obligation while also comporting with the common meaning of compensation as “something that counterbalances or makes up for an undesirable or unwelcome state of affairs.”

A compensatory formulation of the tort right accordingly resolves one of the central puzzles posed by compensation-deterrence theory, which is to explain why these two functions do not justify a default rule of strict liability. In a compensatory tort system, the functions of compensation and deterrence are each vitally important in a manner that justifies objective negligence liability as the default rule for accidental harms.

Because the compensatory tort right values the functions of compensation and deterrence, it also explains why tort law can be usefully analyzed with compensation-deterrence theory. The substantive content of a compensatory tort right is based on the type of interest balancing that is employed by compensation-deterrence theory. Consequently, the logic of a compensatory tort right can be readily expressed in terms of compensation-deterrence theory, explaining why mainstream tort scholarship in the twentieth century can be described either in terms of compensation-deterrence theory or a consensus position based on a compensatory conception of tort liability.

89. Compare Goldberg, supra note 1, at 521 ("[A] great deal—perhaps the majority—of twentieth-century torts scholarship has consisted of ‘normal science’ undertaken within the paradigm of compensation-deterrence theory."). with White, supra note 2, at 146–47, 178 (describing the
the apparent differences between these two conceptions of tort liability, each can be derived from an abstract tort norm of compensation.

IV. COMPENSATION-DETERRENCE THEORY IN CONTEXT

Many, if not most, of the tort scholars who might be placed in the compensation-deterrence camp will be puzzled by a formulation of compensation-deterrence theory based on a compensatory tort right. During the twentieth century—the purported heyday of this scholarly approach—the rationale for tort liability often involved considerations of public law, alternative compensation systems, and liability insurance, none of which seems to be relevant to a conception of private tort law grounded in an individual right. Once the tort right is placed in context, however, it becomes easy to see why a compensatory norm straightforwardly leads to discussions of public law and alternative compensation systems.

A. Private Law? Public Law?

As John Goldberg has shown, compensation-deterrence theory envisions tort law in a manner that “had transformed itself from private to ‘public’ law, whereby it functioned to achieve collective, not corrective, justice.”90 If compensation-deterrence theory conceptualizes tort law in terms of collective justice, how could it be compatible with a formulation of tort liability based on a compensatory tort right that implements corrective justice?

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 the traditional tort concern for corrective justice is now often no different from the concern for collective justice.

As Oliver Wendell Holmes famously observed, “Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment.”91 Holmes then observed that “the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or prop-

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90. Goldberg, supra note 1, at 524.
91. Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 467 (1897).
erty by railroads, factories, and the like.”92 As the economy expanded throughout the twentieth century, individuals became increasingly situated in a mass market of some sort. The increased interdependence among individuals in modern society has also created other forms of interrelationships among individual tort rights. Today, the nature of a rights violation is often quite different from the isolated, ungeneralized wrongs that were redressed by the early common law. Tort liability now routinely involves the redress of an individual right that is interrelated with the rights of other individuals, creating categorical effects that explain why tort liability can be fruitfully analyzed in the collective terms of public law.

Consider the problem of automobile accidents. As an objective matter, tort rules governing automobile accidents apply to reciprocally situated parties, which means that each individual driver is simultaneously a rightholder and dutyholder in equal respects vis-à-vis all other individual drivers.93 When each person is simultaneously a rightholder and dutyholder in equal respects, any normative distinction between the individual as rightholder and the individual as dutyholder effectively collapses, yielding a unitary conception of the individual driver whose full set of interests must be adequately protected by tort law.94 The concern for corrective justice between the individual rightholder and correlative dutyholder, therefore, is no different than the concern for collective justice or the way in which tort liability must serve the collective good of all drivers.

The same conclusion applies to individual rightholders in mass markets for reasons most easily illustrated by products liability. Individual consumers have different preferences for product safety and other aspects of quality, making it ordinarily infeasible for product sellers in a mass market to completely satisfy the preferences of everyone. Product sellers in mass markets respond to aggregate consumer demand, and so products liability rules are formulated by reference to the safety expectations of the ordinary or average consumer, not the particular plaintiff.95 What is fair or just for the individual consumer is no different from what is collectively best for all consumers in the

92. Id.
93. See Geistfeld, supra note 49, at 93–95 (explaining why reciprocity in the individual case depends on an objective inquiry concerning the nature of the risky activity that does not depend on the actual traits of the plaintiff and defendant).
94. See id. at 197–98.
95. See, e.g., Campbell v. Gen. Motors Corp., 649 P.2d 224, 233 n.6 (Cal. 1982) (concluding that, under the consumer-expectations test, “the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case”).
Corrective justice, once again, overlaps with collective justice.

Any evaluation of tort law that misses the collective nature of these liability rules will ignore critical features of the tort landscape for reasons that can again be most easily illustrated by products liability. Because a manufacturer’s safety decision depends on the safety needs of the average or ordinary consumer, the individual tort right of each consumer in the market is necessarily interrelated. Any particular rights violation can have categorical effects for similarly situated rightholders. A single claim seeking recovery for injuries caused by a defectively designed product, for example, implicates all other identically designed products in the market. One claim can also influence the litigation decisions of similarly situated consumers, further influencing the manufacturer’s safety decisions with respect to the entire market. Litigation of the individual tort case does not involve an isolated instance of wrongdoing that was characteristic of the claims adjudicated by the early common law, but can now affect other rightholders (consumers) in the mass market, creating categorical effects that are not present in the traditional tort context. These effects are made obvious by a characterization of products liability as a form of collective liability or public law, whereas any evaluation of these claims that views them as mere instances of individual wrongs will miss this critical aspect of products liability cases.

“Early and mid-twentieth-century tort scholars . . . argued that in an interdependent society the costs of injuries were everyone’s responsibility. The public law dimensions of tort law grew from this perception of social interdependence.” In an increasingly interdependent society, the traditional tort concern for corrective justice becomes increasingly indistinguishable from a concern for collective justice. By focusing on the latter concern, one can analyze aspects of tort liability that might not otherwise be apparent. A concern for collective jus-

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The transition to the mature litigation stage comes only when the threat to prevail is such that defendants face a substantial probability of loss in the event of trial. The usual way to establish the credibility of this threat, not surprisingly, is through actual plaintiff victories in some early cases.

Id. at 15.

97. White, supra note 2, at 219.

98. Cf. Mark A. Geistfeld, Due Process and the Deterrence Rationale for Punitive Damages, in The Power of Punitive Damages—Is Europe Missing Out? (R.C. Meurkens & E. Nordin eds., 2012) (showing that punitive damages limited to the vindication of the plaintiff’s
tice, however, can be squared with a rights-based conception of tort liability.

Indeed, the ascription of a social purpose to the tort inquiry does not necessarily make tort law a form of public law for reasons identified by Robert Rabin:

A “tort system” exists only because at some point a sovereign developed the notion that for communal reasons it made sense to provide a mechanism for redress of individual grievances resulting from personal harm through “courts.” . . . A system of private law does not fall from the sky or emerge mystically from a collective will. Whether it is a response to utilitarian concerns or claims of natural right, it cannot but reflect an independent choice of external purpose.99

Compensation-deterrence theory can be socially purposive or involve an exercise in social engineering without rejecting the premise that tort law is based on individual tort rights and their correlative duties.

B. Liability Insurance and Alternative Compensation Systems

In describing the mid-twentieth-century “consensus” conception of tort liability as a “compensation system,”100 G. Edward White discusses the various ways in which tort scholarship of this era was influenced by considerations of liability insurance and alternative compensation systems. “Liability insurance had come to be conceived of as the principle mechanism for distributing losses in tort law.”101 Having concluded that “tort law had become primarily a compensation system designed to distribute the costs of injuries throughout society efficiently and fairly,”102 tort scholars understandably considered institutional alternatives. By the 1970s, White observed that “[t]he novel quality of recent [tort] casebooks [was] their tendency to speculate broadly on the functions of tort law as a whole, especially when evaluated against alternative compensation systems, such as no-fault insurance schemes.”103 These developments can all be explained by a compensatory conception of tort liability.

individual tort right as required by the constitutional requirement of due process fully further the social interest in general deterrence in mass markets).

100. See WHITE, supra note 2, at 146–47, 178.
101. Id. at 148.
102. Id. at 150.
103. Id. at 215.
Regardless of the categorical or social effects of liability, context also matters in tort law because it determines the nature of the relationship between the rightholder and dutyholder. Outside of accidental injuries in mass markets, the most pervasive form of tort liability for much of the twentieth century involved automobile accidents.\textsuperscript{104} For compensatory purposes, tortious conduct in a market relationship is fundamentally similar to tortious conduct on the highway. That similarity, in turn, explains why compensation-deterrence theory is so attentive to concerns about liability insurance and alternative compensation systems.

In cases involving automobile accidents or accidental harms in market settings, the rightholder (driver or consumer) effectively pays for the burdens of the duty (as a reciprocally situated driver or consumer paying higher prices).\textsuperscript{105} To adequately protect the rightholder’s full set of interests in these contexts, tort law must minimize the cost of injury compensation ultimately borne by the rightholder, a goal that will necessarily consider the available forms of insurance and alternative institutions for compensating injuries.

As established by the substantial market for insurance that exists today, individuals ordinarily are made better off by having insurance for monetary losses such as medical expenses, lost wages, and property damage.\textsuperscript{106} However, health insurance was not widely available in the United States until the 1950s.\textsuperscript{107} Not surprisingly, accidental injuries were often financially ruinous for individuals in this era.\textsuperscript{108} For these reasons, many tort scholars in the first half of the twentieth century maintained that tort compensation supplies a justifiable form of insurance for accident victims.\textsuperscript{109} When courts adopted strict pro-


\textsuperscript{105} See Giestfeld, supra note 49, at 197–99.

\textsuperscript{106} Under the common condition in which there is a decreasing individual marginal utility of wealth (the analytic characteristic of risk aversion), actuarially fair insurance reduces the total cost (measured in terms of reduced individual utility) of accidental monetary harms. See, e.g., Hal R. Varian, Microeconomic Analysis 180–81 (3d ed. 1992).

\textsuperscript{107} See Rash Fein, Medical Care, Medical Costs: The Search for a Health Insurance Policy 23–24 (1986); Paul Starr, The Social Transformation of American Medicine 327–28 (1982).

\textsuperscript{108} For a particularly influential study reaching this conclusion, see Comm. to Study Comp. for Auto. Accidents, Report to the Columbia University Council for Research in the Social Sciences (1932).

ucts liability in the middle of the century, they often justified the liability rule with this insurance rationale. The insurance rationale for tort liability critically relies on the defendant’s tort liability being covered by liability insurance, which in turn spreads the risk of accidental injuries throughout society. In a historical period of limited forms of insurance, one could defensibly conclude that rightholders such as consumers or automobile drivers would prefer to pay for tort compensation for their accidental injuries because that compensation functioned as a cost-effective means of insurance.

The insurance market has dramatically changed, however. Since the mid-twentieth century, health insurance has become widely available. By the 1960s, a sizable portion of the population had health insurance, such insurance was widely available, and government-funded social insurance programs had substantially expanded. Today the vast majority of accident victims receive some injury compensation from their own insurance policies and government programs.

An individual’s insurance choice is no longer limited to “tort insurance” as opposed to no insurance. It now involves a range of insurance options. All else (such as the risk of injury) being equal, the individual tort rights of consumers and automobile drivers are best protected by legal rules that redirect injury compensation from the tort system into alternative mechanisms that are less costly for these rightholders. As compared to the tort compensation financed by liability insurance, compensation supplied by other insurance mechanisms is much less costly. Under these conditions, the insurance rationale for tort liability is not tenable—the conclusion expressly reached by courts in the area of products liability and the motivation for no-fault insurance schemes governing automobile accidents. The reorientation away from liability insurance to

112. This market grew rapidly during World War II, when employers began offering health insurance as an employee benefit not subject to wage controls, making it an important form of employee remuneration in a tight labor market. See Fein, supra note 107, at 21–22. The insurance provided by employers also had tax advantages, further promoting its growth. See id. at 22.
113. See id. at 23, 52–67.
114. See Deborah R. Hensler et al., Compensation for Accidental Injuries in the United States 108 tbl.4.22 (1991) (summarizing a study that found about eighty-five percent of all accident victims received some compensation from their own insurance and public programs).
115. See Geistfeld, supra note 110, at 64–67.
116. Id. at 67 & nn.17–18.
117. See Engstrom, supra note 104, at 352–56.
alternative compensation mechanisms does not somehow devalue the underlying tort right, but instead is directly implied by it.

V. Conclusion

Courts and commentators regularly analyze tort law in terms of the functions of compensation and deterrence. For example, the Supreme Court of Hawai‘i has recently explained that

[a]pproaching torts from a policy perspective is germane to Hawai‘i jurisprudence; as this court has written, “tort law is primarily designed to vindicate social policy.” One social policy enacted through the tort system is compensating injured plaintiffs. . . . Second, tort law seeks to prevent injury where possible by providing incentive to deter negligent acts.118

In addition to underscoring the importance of compensation-deterrence reasoning, this passage also reveals its apparent shortcomings. Why is the function of compensation only furthered in cases of negligence? Why not compensate a larger number of injured plaintiffs under a rule of strict liability? Is the function of compensation instead somehow tied to the function of deterrence? If so, what determines the relation between these two functions? What is the social policy that courts rely on to answer these questions in a principled manner?

As these questions suggest, the functions of compensation and deterrence do not obviously cohere into a viable theory of tort law. This problem has been seized by critics who argue that, despite the widespread acceptance of compensation-deterrence reasoning, the approach is incoherent and unprincipled in application.

The functions of injury compensation and deterrence can be unified by an abstract tort norm of compensation, one that does not limit liability to violations of conventional morality or customary practices in the community. For historical and other reasons, compensation plausibly provides the norm by which tort law defines the obligation running between dutyholders and rightholders. When risky interactions threaten the irreparable injury of physical harm, the compensatory damage remedy does not adequately protect the rightholder’s interest in physical security. Consequently, the compensatory tort norm redirects the dutyholder’s compensatory obligation from the payment of compensatory damages to the exercise of reasonable care, yielding a default rule of negligence liability that is formulated to deter the irreparable injury of physical harm without imposing undue hardship on the dutyholder. A compensatory tort norm justifies the manner in

which negligence liability furthers the function of deterrence, unifying compensation and deterrence within a coherent rationale for tort liability.

Regardless of whether the approach is described abstractly as a compensatory norm or more concretely in terms of compensation-deterrence reasoning, it poses one last puzzle. By valuing alternative institutional mechanisms for compensating injuries and deterring unsafe behavior, the approach could justify the elimination of tort liability altogether. Why, then, would this type of reasoning be embraced by scholars whose decision to specialize in the study of tort law presumably reflects a deep belief in its fundamental importance? The point is forcefully made by John Goldberg, yet again, in his observation that “tort is a department of the law that has fewer serious champions than any comparable subdiscipline. . . . Tort law is unloved.”

The question might seem to be particularly puzzling when considered in relation to the honoree of this Symposium, Robert Rabin. Without question, Rabin is deeply interested in the institutional alternatives to tort law, but it is equally without question that Rabin deeply cares about tort law. Why else expend the considerable effort to produce so many editions of a casebook entitled *Tort Law and Alternatives*? Is such an extended commitment both to tort law and its alternatives somehow incoherent? I do not purport to give an answer on Bob’s behalf, but I do not see why there is any necessary tension between tort law and its institutional alternatives.

When one values both compensation and deterrence, tort law takes on significance that is not limited to existing legal arrangements. Any government concerned about protecting individuals from physical harm will use tort law in combination with other institutions. The first such institution was the criminal justice system. With the advent of the modern administrative state, government has employed an array of other regulatory institutions. Polluters are subject to a variety of statutory and regulatory requirements enforced by the Environmental Protection Agency; a different federal agency regulates workplace safety; another one regulates prescription drugs and medical devices; and other federal agencies regulate other matters of public health and

121. The ensuing discussion is largely derived from the conclusion of Geistfeld, supra note 49, at 375–77.
safety. The states also have regulatory agencies. The extent to which the government protects individuals from harmful behavior now largely depends on the combined effect of administrative regulation, criminal law, and tort law.

Similarly, the compensatory significance of tort law depends on the extent to which the government otherwise provides insurance for injured citizens. Insofar as a disabled or injured individual receives government-funded insurance for health care and lost wages, the compensatory role for tort law is reduced.

Thus, one can imagine a society in which tort law is largely unnecessary. All risks could be regulated administratively, and all compensable harms could be covered by insurance. These institutions would adequately protect the individual interest in physical security, eliminating this role for tort law.

The unrealism of this scenario does not detract from the significance of its implications. Unlike the United States, countries in the European Union have less tort liability supplemented by more extensive administrative regulation and government-provided insurance. The reduced role of tort liability in these liberal democracies hardly makes them less fair or less just than the United States, just like the increased role of tort liability in the United States hardly implies that Americans are litigation crazy. Tort law is but one institution of many that protects individuals from physical harm, making the functional importance of tort law contingent on the full range of complementary institutions.

The contingency of the tort system does not reduce the importance of tort law. Behavior that is wrongful as a matter of tort law can also be wrongful in other contexts, making tort doctrines useful for these related legal fields. The federal securities laws, for example, rely on tort concepts of fraud and causation. The protection of individual rights is also of primary concern for other important bodies of law, including civil rights and human rights more generally. Tort law is one

123. See id. at 1279–95.
125. Cf. Dana A. Kerr et al., A Cross-National Study of Government Social Insurance as an Alternative to Tort Liability Compensation, 76 J. Risk & Ins. 367, 382 (2009) (“Using data from 24 countries over a 12-year period . . . [to] find a strong negative relationship between the government social program spending and the size of liability costs as measured by insurance premiums. . . . [This supports] the hypothesis that generous social programs have influenced the development of litigation as a means to compensate injured parties.”).
of the oldest legal institutions for protecting individual rights, deeply influencing how we think about protecting rights in other contexts.127

Is the individual right to physical security best protected by a cost–benefit analysis of safety decisions? Does the right require greater protection? These issues, which have long occupied the tort system, are now critically important for determining how governments should approach the problem of global warming, illustrating how tort principles can guide momentous decisions outside of the tort system.128 Tort law originated in a world far different from our own, but the government still needs to adequately protect each individual from physical harm, giving tort principles significance that extends far beyond the tort system. One need not love the tort system in order to love tort law.

127. The major legal systems throughout history have recognized tort law, making widely adopted tort rules a source of international law governing human rights. The International Court of Justice, for example, is supposed to apply “the general principles of law recognized by civilized nations.” U.N. Charter art. 38, para. 1.c.

128. Those who want governments to take decisive actions to immediately reduce the threat of global warming often invoke the precautionary principle, which maintains that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (June 13, 1992), reprinted in 31 I.L.M. 874, 879 (1992). The appropriate interpretation of the precautionary principle has long been in dispute, with critics claiming that the principle cannot be justified or implemented in a defensible manner. See Mark Geistfeld, Implementing the Precautionary Principle, 31 ENVTL. L. REP. 11,326, 11,326 (2001). When interpreted as a solution to the type of the problem addressed by tort law, involving the fair protection of the individual right to physical security, the precautionary principle translates into a well-defined decision rule. See Geistfeld, supra, at 11,377–33.