HIDDEN IN PLAIN SIGHT: THE NORMATIVE SOURCE OF MODERN TORT LAW

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According to conventional wisdom, the normative source of modern tort law is mysterious. The reasons trace back to the state of nature. In a world without centralized government, individuals protected themselves by exacting talionic revenge—"an eye for an eye"—on their injurers. These customary norms of behavior were the source of the early common law, but tort scholars have assumed that they were merely a barbaric punitive practice without any relevance to the modern tort system. This field of the common law had to be normatively recreated, making it "modern." The resultant body of tort law depends, as Oliver Wendell Holmes famously concluded, on "more or less definitely understood matters of policy." The policies in question, however, have never been clearly identified. Courts and scholars continue to disagree about the norms that generate the behavioral obligations of modern tort law.

The normative source of modern tort law has been hidden in plain sight because of this widely held but mistaken understanding of legal history. Contrary to conventional wisdom, the state of nature was governed by a reciprocity norm of equitable balance that has survived the evolving demands of the modern tort system. In cases of accidental harm, the reciprocity norm often took the form of a compensatory obligation requiring "the value of an eye for an eye." This norm was initially adopted and then further developed by the early common law. Courts subsequently invoked the reciprocity norm in the late nineteenth and early twentieth centuries to justify rules of negligence and strict liability. Once one looks, the importance of reciprocity is obvious.

Reciprocity, in the basic sense of "treating others like they treat you," is a metanorm that individuals use to identify and enforce more particularized behavioral obligations in a wide variety of social interactions. Reciprocity attains equitable balance in tort cases through a series of behavioral and compensatory obligations corresponding to the modern rules of negligence and strict liability. Given the ongoing, pervasive influence of reciprocity, it readily provides the type of normative judgment that jurors must exercise when determining the behavioral requirements of reasonable care in a negligence case. Reciprocity supplies a normative practice that is distinct to tort law, defining a behavioral paradigm that normatively demarcates torts as a substantive field of the common law.

But even though tort law is distinctively defined by the paradigm of compensatory reciprocity, this normative practice does not fully justify tort law. Reciprocity is a behavioral norm. Why should the legal system enforce the norm? Must it always do

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so? These questions must be resolved with a substantive rationale for tort law, not with a behavioral norm that is enforced by the law.

By enforcing the behavioral obligations of reciprocity, the tort system engages in a normative practice that can be justified by the liberal egalitarian principle that each person has an equal right to autonomy or self-determination, making each responsible for the costs of his or her autonomous choices. Liberal egalitarianism is the only principle of substantive equality that can justify the tort rules that give different treatment to different types of nonreciprocal behaviors. Far from being a barbaric relic of the past, the reciprocity norm is enforced by tort law in a manner that clearly reveals the substantive rationale for this field of the common law.

Introduction

The practice of tort law involves the legal enforcement of behavioral norms. How must one behave when exposing others to a risk of injury? If one injures another, under what conditions is he or she obligated to pay compensation for the injury? These questions are addressed by established tort doctrines, but the liability rules largely draw upon underlying behavioral norms without otherwise specifying their source and substantive content.

The normative source of modern tort law is mysterious for reasons that can be traced back to the customs that first defined the common law. "For westerners from the Dark Ages onward, custom was the fundamental legitimate source of rights. Custom formed the 'basic norm,' the fundamental source of legitimacy upon which 'legal reality,' the subjective understanding of the world as including rights, was founded."[1] Custom retained its theoretical primacy as the source of law into the sixteenth century,[2] yet tort scholars widely assume that modern tort law did not develop from these behavioral norms.

For tort purposes, the normative origins of the common law were famously tossed into the dustbin of history by Oliver Wendell Holmes, the intellectual architect of modern tort law. After the writ system was abolished in the mid-nineteenth century, Holmes provided the first persuasive account of torts as a distinct substantive field of the common law, and his approach has largely shaped the modern understanding of tort law.[3] In formulating his theory, Holmes relied on a model of evolutionary legal development that had been widely embraced by legal historians of the era. Within that model, the normative source of the early common law resides in the customs that governed conduct in the state of nature—wholly barbaric practices of talionic revenge captured by the biblical passage commonly paraphrased as "an eye for an eye, a tooth for a tooth."[4] Talionic revenge played an important deterrent and retributive role in a state of nature not governed by centralized authority, but within this model of evolutionary legal development, the norm's relevance to the legal system is limited to issues concerning the amount of punishment to be meted

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[1] James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. Chi. L. Rev. 1321, 1330 (1991) (footnote omitted).

[2] *See id.* at 1340–47 (discussing continental Europe); *id.* at 1352–61 (discussing seventeenth-century England).

[3] For extended discussions of the foundational role played by Holmes in the modern conceptualization of tort law, see Thomas C. Grey, *Accidental Torts*, 54 Vand. L. Rev. 1225, 1256–57 (2001); G. Edward White, *The Emergence and Doctrinal Development of Tort Law, 1870–1930*, 11 U. St. Thomas L.J. 463, 473–75 (2014).

[4] *See Exodus* 21:24. For a more complete description of this model, see *infra* Section I.A.

out by the criminal justice system.[5] Without any pre-existing normative practices of relevance for tort law, the field had to be normatively recreated, making it "modern." Holmes accordingly concluded that "[e]very important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy."[6]

The policies in question, however, have never been clearly identified. The resultant ambiguity at the core of modern tort law leaves ample room for disagreement, turning the field into a fertile source of ongoing controversy. Is it good public policy to expand tort liability in order to promote safety and provide accident victims with compensation? Or is it good public policy to instead limit tort liability whenever doing so would efficiently reduce accident costs and thereby increase national wealth? More fundamentally, what is the policy in question? One of allocative efficiency, or an alternative rights-based conception rooted in principles of fairness or justice? If so, what is the appropriate conception of justice? Corrective or distributive? These issues have been extensively debated by tort scholars, who disagree about the policies or principles of tort law while sharing the Holmesian premise that the normative origins of the common law are irrelevant to the modern tort system.[7]

The inconclusive debate over the normative source of modern tort law is based on an erroneous interpretation of the historical record. In contrast to the understanding that prevailed when Holmes first formulated his theory of tort law, legal historians now have a different grasp of the primitive social practices of talionic revenge. The need to avenge one's honor by exacting reciprocal revenge on a wrongdoer certainly mattered in the state of nature, but the moral code of the talion also recognized a reciprocity norm of compensation—the "value of an eye for an eye."[8] For cases in which the injury was accidental or did not otherwise merit retribution via revenge, such a compensatory exchange would adequately restore equitable balance

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[5] *Cf.* Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 25 (1994) (concluding that "there is no incompatibility between the stern dictates of [talionic revenge] and the more humane doctrine that punishment should be adjusted to reflect the degree of the offender's responsibility for his crime").

[6] O.W. HOLMES, JR., THE COMMON LAW 35 (Boston, Little, Brown & Co. 1881).

[7] *See generally* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (explaining why tort scholars have widely assumed that the character of tort suits had fundamentally changed by the twentieth century and describing the varied theories that leading scholars have developed to explain or justify modern tort law). For further discussion, see *infra* Section I.C.

[8] *See infra* Section II.A (discussing the historical evidence involving compensatory practices in the state of nature).

between the parties as normatively required by reciprocity. The talionic compensatory norm, though, is not recognized by the model of evolutionary legal development that was first relied on by Holmes and then implicitly accepted by the ensuing generations of tort scholars.

The absence of the talionic compensatory norm in the evolutionary narrative explains why tort scholars, from Holmes onwards, have struggled to identify the rationale for modern tort law. Without an identifiable starting point, on what normative basis has tort law developed? If, as one skeptic put it, tort law merely originated "in the quirks of early common law procedure" that comprised the writ system, then there simply is "no reason to think that tort law is a composite whole rather than a rationally inexplicable heap," unless, of course, there has been "an invisible hand" that has "guided . . . tort law toward the realization of certain social goods."[9]

The interpretation of tort law has been reduced to arguments over a contentious invisible hand because of the widely shared assumption that the normative origins of the common law are not relevant to modern tort law. If scholars instead recognized that the reciprocity of compensation defensibly defined the normative obligations of the early common law, then their understanding of tort law might be quite different. Tracking the evolution of reciprocity reshapes the normative understanding of modern tort law, or so I will argue in this Article.

The argument proceeds in three parts. Part I first describes the model of evolutionary legal development that Holmes used to formulate his influential theory of tort law. It then explains why that model characterizes the primitive customs of talionic revenge in a wholly retributive manner that led Holmes, and the ensuing generations of tort scholars, to conclude that the talionic norms played no positive role in the development of tort law. This conclusion has forced tort scholars to identify some other normative source, and the difficulty of doing so has created the fundamental ambiguity of modern tort law.

Based on a more accurate portrayal of talionic customs in the state of nature, Part II first revises the model of evolutionary legal development that was relied on by Holmes. The historical record shows that in addition to revenge, the talionic moral code enforced a reciprocity norm of compensation that was facilitated by the early state and not rejected as per the conventional account. Because this reciprocity norm was adopted by the early common law, Part II then traces the norm's subsequent evolution within tort law. Courts repeat-

[9] Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 241 (2011).

edly invoked the reciprocity norm to justify the default rule of negligence liability and the supplemental rule of strict liability for abnormally dangerous activities. As shown by extensive empirical study, such a reciprocity norm also continues to inform individual judgments of socially acceptable behavior in a wide variety of settings, providing the type of normative judgment that jurors must exercise when determining the behavioral requirements of reasonable care in a negligence case.[10]

Part III concludes by defending the normative significance of reciprocity for the modern tort system. The reciprocity of compensation defines a behavioral paradigm that makes tort law a distinct normative field of the common law. This normative attribute explains why the apparent influence of reciprocity on tort law has not been entirely missed by tort scholars, but as Part III explains, scholars have roundly rejected any effort to conceptualize tort law in these terms. Part III then shows that these critiques fail to recognize that reciprocity is a behavioral norm and not a substantive rationale for tort law. When reciprocity is conceptualized in behavioral terms, the norm generates the behavioral obligations and rights that are enforced by modern tort law in cases of accidental harm. As Part III finally demonstrates, tort law enforces the reciprocity norm for reasons that supply the substantive rationale for this field of the common law.

The normative importance of reciprocity has been hidden in plain sight because of a widely held but mistaken understanding of legal history. Once one looks, the importance of reciprocity is obvious.

I
Legal History and the Mischaracterization of Primitive Law

Although the common law originated in medieval times, the modern tort system did not fully emerge until the writ system was abolished in the latter half of the nineteenth century.[11] The initial conceptualization of torts as a substantive field of the common law was largely accomplished by the scholarship of Oliver Wendell Holmes. "His account of the subject happened to fit with the flow of events and

[10] *See, e.g.*, Marianna Bicskei et al., *Negative Reciprocity and Its Relation to Anger-like Emotions in Identity-Homogenous and -Heterogenous Groups*, 54 J. Econ. Psychol. 17, 18 (2016) (discussing the wide range of social settings in which "experimental research has confirmed that a considerable proportion of subjects reveal social preferences and exhibit a behavioral pattern based upon reciprocity"). For more extensive discussion, see *infra* Section II.B.2.

[11] *See* Grey, *supra* note 3, at 1231 (explaining why the Field Code and subsequent abolishment of the writ system led to the emergence of tort law as a substantive field).

so took hold, and now it strikes us almost as common sense rather than theory."[12]

When Holmes first conceptualized tort law, "evolutionary accounts of societies and their institutions were popular," and so "it became usual to relate the history of delictual [or tort] obligation to stages of social development."[13] Holmes adhered to this approach: "I believe that it will be instructive to go back to the early forms of liability, and to start from them."[14]

As explained more fully below, Holmes interpreted these primitive forms of tort liability by relying on an account of evolutionary legal development that had been constructed by legal historians of the time. This account of legal development, now called the self-help model, depicts the state of nature as being governed by barbaric self-help practices of reciprocal revenge—an eye for an eye. Uncivilized customs of this sort understandably have no defensible role in a modern tort system, explaining why the normative origins of the common law do not factor into the Holmesian conception of modern tort law.

The influence of the self-help model has not waned. Today, theories of tort law that are otherwise quite different nevertheless implicitly adopt the premises of the self-help model and its associated characterization of primitive behavioral norms. Based on the widely shared assumption that the normative origins of the common law have no contemporary relevance, scholars have engaged in a long-running debate over the substantive rationale for tort liability, creating the fundamental ambiguity of modern tort law. To fully understand the current state of tort scholarship, we must begin with the self-help model of legal development that is supposed to explain how the common law and other matters of legal obligation evolved from primitive society.

A. The Self-Help Model of Evolutionary Legal Development

"[O]ur dominant model of the origins of law and the state" is "what legal historians often call the 'self-help' model."[15] Historians first developed the model in reaction to the social-contract model formulated by philosophers of the Enlightenment, which "proposed that the early state formed when human beings joined together to clamp

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[12] *Id.* at 1284.

[13] Geoffrey MacCormack, *Revenge and Compensation in Early Law*, 21 AM. J. COMP. L. 69, 69 (1973).

[14] HOLMES, *supra* note 6, at 2.

[15] James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI.-KENT L. REV. 41, 41 (1995).

down, in a civilized way, on the disorderly and chaotic violence of the state of nature."[16] In the social-contract model, the state of nature is an analytic device that provides abstract reasons why individuals might rationally confer power on state actors in order to curb violence, but the model characterizes the state of nature in a manner that does not accord with historical evidence. Extensive study of the historical record has instead revealed "that the violence of the state of nature had a kind of spontaneous order, founded in the systematic organization of vengeance."[17] Based on these practices, legal historians "argued that the early state arose in the effort to *supervise* and *institutionalize* the violence of the state of nature rather than to eliminate it" as assumed by the social-contract model.[18] The self-help remedies of systemized vengeance accordingly provided the basis for the early state within this model of evolutionary legal development, which "has collected some imposing authority over the last couple of centuries" and has dominated the field since the late nineteenth century.[19]

The self-help model can be described by four basic stages of evolutionary legal development[20]:

Stage 1: The State of Nature. Prior to the emergence of centralized government, society was organized by kinship groups (family, clan, tribe, or village). When the member of one group injured someone from another, the aggrieved collective would exact revenge on the other kinship group, which in turn would often punish the individual member responsible for the harm.[21] "In the course of time, custom began to impose limits upon the extent to which vengeance might be exacted,"[22] yielding ritualized practices of revenge. Rather than being lawless, the state of nature was governed by norms constituting "the law of the talion, the law of retaliation, of tit for tat, whose classic formulation is the biblical eye for an eye, tooth for a tooth."[23]

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16 *Id.*

17 *Id.* at 42.

18 *Id.*

19 *See id.* (observing that the self-help model "was articulated and embraced with variations, by some of the greatest names in the history of legal scholarship, including Rudolf von Jhering and Max Weber" and "has been applied to explain the rise of legal systems all over the early civilized world").

20 *Id.*; *cf.* MacCormack, *supra* note 13, at 73–74 (proposing a similar historical trajectory with respect to the development of the Roman Twelve Tables).

21 *See* Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 355–56 (2003). This account differs from the "conventional narrative of socio-legal evolution" as involving "a transition from collective responsibility in 'primitive' societies to individual responsibility in 'modern' ones" *Id.* at 351. This difference, though important, does not factor into the ensuing analysis.

22 MacCormack, *supra* note 13, at 74.

23 WILLIAM IAN MILLER, EYE FOR AN EYE 20 (2006) (observing that the talionic model of justice held sway in numerous ancient societies).

Stage 2: Emergence of the Early State. Instead of eliminating the existing system of vengeance governed by the law of the talion (or *lex talionis*), the early state first sought to supervise the practice without otherwise attempting to prevent violence. "Thus, the early state assumes a kind of licensing power over acts of talionic vengeance, requiring that injured parties seek formal state sanction before avenging themselves."[24] Within the Hegelian model, this development represents the evolution from a purely subjective legal consciousness—defined in part by the wronged individual or kinship group acting as prosecutor, judge, and enforcer—to a more objective legal consciousness that acknowledged the authority of a neutral third party (the state) to mediate one's claim for revenge.[25]

Stage 3: From Licensing to Enforcement. Over time, the early state began to exact revenge on behalf of injured parties, seeking to enforce talionic revenge rather than merely to license it. From this and the ensuing stage of development, Max Weber "derived his 'monopoly of violence' model for the nature and function of the modern state."[26]

Stage 4: From Revenge to Monetary Compensation. Having accumulated sufficient power by this point, the early state finally prohibited private violence, instituting a system of "compositions" that substituted "money damages for talionic vengeance."[27] At this stage, the "elements of revenge have disappeared and the principle is established throughout the law that for every injury compensation should be paid."[28]

As implied by its name, the self-help model gives a pivotal role to talionic practices: the development of law and the state is explained by the replacement of the self-help remedy of talionic revenge—an eye for an eye, a tooth for a tooth—with the emergence of a "central authority [that had] become strong enough to prohibit the exaction of revenge and replace it with the payment of compensation."[29] The first forms of law within the newly emergent state "simply codified existing custom" of talionic revenge (as per the second stage of develop-

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[24] Whitman, *supra* note 15, at 42.

[25] This development is clearly identified by Wilhelm Eduard Wilda, "who did the most to solidify and elaborate the Hegelian tradition." *Id.* at 62. According to Wilda, "[i]t is in vengeance that the legal consciousness first reveals itself," and "[v]engeance is the representation of law from the purely subjective point of view." *Id.* (quoting WILHELM EDUARD WILDA, GESCHICHTE DES DEUTSCHEN STRAFRECHTS 157 & n.1 (Halle, C.A. Schwetschke & Sohn 1842)). For a more general description of the Hegelian model of the evolution of legal consciousness, see *id.* at 59–60.

[26] *Id.* at 43.

[27] *Id.* at 42.

[28] MacCormack, *supra* note 13, at 74.

[29] *Id.* at 69.

ment).[30] Consequently, "[i]n its treatment of the sources, our scholarly tradition began as an attempt to interpret 'eye for an eye, tooth for a tooth'; and in many ways it has never gotten beyond that starting point."[31]

Based on its role in the self-help model, talionic revenge has rather straightforward implications for the value of reciprocity in a modern tort system. Reciprocity is treating others as they have treated you, and so talionic revenge is a form of negative reciprocity involving a negative or harmful equality of treatment (the eye for an eye). Within the self-help model, negative reciprocity has the following characteristics:

• Under the talion, negative reciprocity was nothing other than revenge or retaliation. As Jeremy Waldron has explained, "[i]n the popular imagination, [*lex talionis*] is regarded as a principle of retribution. Its stern insistence on matching the penalty to the crime seems to indicate an almost entirely backward-looking [ex post] approach to punishment. We gouge out the offender's eye because he gouged out the victim's eye."[32]

• The negative reciprocity of talionic revenge was barbaric. As William Miller has observed, "[w]e take the talion as a classic statement of irrational revenge, as an emblem of a society so blind to good sense as to prefer two one-eyed people to one. We are embarrassed by it and sneer at those who advocate it, thinking them barbaric and cruel."[33]

• Due to its barbaric nature, the negative reciprocity of talionic practices did not distinguish between revenge and compensation. As Rudolf von Jhering put it, "[t]hat punishment in all these cases serves simultaneously the function of damages is incontestable."[34]

• The barbaric conflation of punishment and compensation was eliminated by the more mature early state (of stage 4), which replaced the uncivilized remedy of private revenge with the civilized remedy of compositions or monetary damages, thereby transforming negative reciprocity from a barbaric practice (revenge) into a civilized one (compensation). In this respect, revenge and compensation are antithetical remedies, although the two are unified in the sense that one evolved as a substitute for the other. But because civilized compensa-

30 Whitman, *supra* note 15, at 53.

31 *Id.* at 54.

32 Waldron, *supra* note 5, at 26.

33 MILLER, *supra* note 23, at 20.

34 Whitman, *supra* note 15, at 65 (quoting RUDOLF VON JHERING, GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG 126–27 (9th ed. 1953)).

tion evolved as a substitute for the barbaric negative reciprocity of talionic revenge, the normative role of compensatory damages was largely limited to harmful interactions for which retribution (like its predecessor, revenge) was otherwise merited.

Based on the self-help model, negative reciprocity holds little or no appeal for modern tort law. In addition to being barbaric, the underlying talionic practices targeted aggressive conduct—one gouging out the eye of another—that presumably merited retribution and would constitute criminal wrongdoing in the modern legal system. As the civilized substitute for these barbaric forms of private revenge, the negative reciprocity of compensatory damages provided a remedy only for the victim of a crime. Although these norms were the source of the early common law, they are utterly irrelevant for determining whether tort law should award compensatory damages to those accidentally harmed by noncriminal behavior, the fundamental problem faced by the modern tort system.

B. The Self-Help Model Within the Holmesian Conception of Tort Law

The modern tort system did not fully develop until the writ system was eliminated in the latter half of the nineteenth century. Legal actions no longer could be categorized in the procedural terms of writs; they had to be categorized in substantive terms. During this period, torts developed into one of the recognized substantive fields of the common law. "The first American treatise on Torts appeared in 1859; Torts was first taught as a separate law school subject in 1870; the first Torts casebook was published in 1874."[35]

The new field of tort law was not comprised of newly created legal rules. The abolition of the writ system was intended to be no more than a procedural innovation. Freed from the formalistic pleading requirements, courts were supposed to rely on the substantive bases of liability that had been implicit in the various writs.[36] The formal nature of the writ system, though, made it extraordinarily difficult to identify the substantive bases or principles of tort law.[37]

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[35] G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3 (1980) (citations omitted).

[36] *See* Grey, *supra* note 3, at 1231 ("In fact the term and even the concept 'substantive law,' conceived as the opposite of 'law of procedure,' was first brought to prominence by the mid-century movement to reform civil procedure.").

[37] *E.g.*, D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 11 (1999) ("The medieval Common law was a law of actions and procedure. . . . This formalism tends to conceal substantive principles, but there is no reason to doubt that medieval law was undershot by substantive ideas. The problem is to identify what they were.").

History did not offer a readily available answer. To compensate the victim of a crime with a damages remedy levied against the criminal wrongdoer, the writ system centuries ago adopted rules that are now part of tort law. Legal claims based on these rules continued to be quasi-criminal until the late seventeenth century.[38] Consequently, the early common-law courts "approach[ed] the field of tort through the field of crime."[39] But insofar as the criminal law wholly determined whether conduct was subject to liability, tort law was not a proper substantive field of primary behavioral obligations and instead was remedial only—or so concluded Oliver Wendell Holmes, the intellectual architect of modern tort law.[40]

A few years later, Holmes famously reached the opposite conclusion after realizing that torts is the only field of the common law to address the problem of accidental injury with a distinctive set of behavioral obligations.[41] The problem was of pressing concern in the latter half of the nineteenth century when Holmes first formulated his theory of tort law. In the wake of the Industrial Revolution, unprecedented numbers of workers and others in society suffered accidental harms.[42] Holmes recognized that most of these injuries were not caused by criminal wrongdoing, yielding an important insight about

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[38] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 8 (5th ed. 1984) ("[A]s late as 1694 the defendant to a writ of trespass was still theoretically liable to a criminal fine and imprisonment.").

[39] 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 530 (2d ed. 1968).

[40] In an anonymous book review, for which he subsequently claimed authorship, Holmes stated that "[w]e are inclined to think that Torts is not a proper subject for a law book." O.W. Holmes, Jr., *Book Notices*, 5 AM. L. REV. 340, 341 (1871) (reviewing C.G. ADDISON, THE LAW OF TORTS (London, Stevens & Haynes 1870)); *see also* Felix Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 717 app. 1 at 797 (1931) (attributing the review to Holmes). In briefly explaining why he held this view, Holmes observed that the so-called tort actions for trespass and fraud only provided remedies for the breach of underlying primary duties involving real property (trespass) or estoppel (fraud). Because an "entire body of the law" encompasses both the behavioral obligations of the primary duty and the remedies for breach, Holmes's conclusion that "Torts is not a proper subject for a law book" was based on his belief that tort claims were remedial only. *Cf.* O.W. Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 659 (1873) [hereinafter Holmes, *Torts*] ("The worst objection to the title Torts . . . is that it puts the cart before the horse, that legal liabilities are arranged with reference to the forms of action allowed by the common-law for infringing them.").

[41] *See* Holmes, *Torts*, *supra* note 40, at 659–60 (concluding that "an enumeration of the actions [neither criminal nor based on contract] which have been successful, and of those which have failed, defines the extent of the primary duties imposed by the [tort] law"). Holmes more fully developed his theory of torts in THE COMMON LAW, *supra* note 6.

[42] *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 26 (2004) ("Accident rates in the United States . . . appear to have increased dramatically during the mid and late nineteenth century, especially in the Northeast and Midwest.").

the nature of tort liability. As Thomas Grey has explained, Holmes understood that "[t]he 'law of bodily security' and its correlative 'law of personal liberty' is made up of the rules of tort and criminal law, and because tort is the less drastic mode of the two modes of coercion, it draws the law's most basic line between freedom and protection."[43] Noncriminal accidental harms pose a distinct social problem governed exclusively by tort law, making it not only a worthy substantive field of the common law, but also one of vital importance.

Having defined the unique subject matter of tort law, Holmes then had to identify the principle that guides the legal decision of whether an accidental harm is subject to tort liability. To address this question, Holmes first looked to primitive law. His interpretation of these practices is based on the self-help model of evolutionary legal development for reasons made clear at the outset of his discussion in *The Common Law*:

> It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that the Roman law started from the blood feud, and all the authorities agree that the German law begun in that way. The feud led to the composition, at first optional, then compulsory, by which the feud was bought off. The gradual encroachment of the composition may be traced in the Anglo-Saxon laws . . . . *But as the compensation recovered . . . was the alternative of vengeance, we might expect to find its scope limited to the scope of vengeance*. Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. *It can hardly go very far beyond the case of a harm intentionally inflicted*: even a dog distinguishes between being stumbled over and being kicked.[44]

As per the self-help model, Holmes characterized the emergence of compositions (or compensatory damages) as nothing more than a civilized substitute for the barbaric self-help remedy of revenge. By tying this primordial form of tort liability to cases calling for revenge—those that "import[ ] a feeling of blame"—Holmes could then conclude that the early common law largely limited liability to subjectively culpable behavior—"[i]t can hardly go very far beyond the case of a harm intentionally inflicted"—even though the associated writs did not expressly limit liability to such conduct.[45]

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[43] Grey, *supra* note 3, at 1274–75.

[44] HOLMES, *supra* note 6, at 2–3 (emphasis added).

[45] *Compare* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 450–51 (1899) ("The first stage of torts embraces little if anything beyond those simple acts of violence where the appeals of death, of wounding or maiming, of arson and the like had taken the place of self-help, to be succeeded by the modification known as the action of trespass."), *with* Holmes, *Torts*, *supra* note 40, at 653 (recognizing that under the

This characterization of the early common law frames the Holmesian conception of modern tort law. Insofar as the early common law simply substituted compensatory liability for primitive forms of barbaric revenge as per the self-help model, Holmes could persuasively argue that as the common law evolved to govern conduct that did not "import[ ] a feeling of blame" and merit revenge, the liability rules no longer had to be limited by the morality of subjective culpability:

> [I]n the main the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests, of morals. But as the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external [and objective], because they have considered, not the actual condition of the particular defendant [as required by subjective culpability], but whether his conduct would have been wrong [or objectively culpable] in the fair average member of the community, whom he is expected to equal at his peril.[46]

Once freed from the constraints of subjective culpability that are "nearest to the feeling of revenge," tort liability was no longer limited to the redress of criminal wrongs. One could incur tort liability by engaging in noncriminal behavior that violated an objective legal standard and accidentally harmed another. The evolutionary account embodied in the self-help model provided the means by which Holmes could explain how the modern tort system resolves the problem of accidental harm caused by noncriminal conduct, the distinctive subject matter of tort law.

And what determines the substantive content of this objective legal standard? "Holmes' great breakthrough . . . was his decision to organize tort law around the principle of liability for negligence," which "gave torts a conceptual and doctrinal center."[47] He conceptualized a general rule of negligence liability as requiring the violation of an objective standard of reasonable conduct formulated in terms of public policy: "[W]hile the law does still and always, in a certain sense, measure legal liability by moral standards," ultimately "[e]very important principle which is developed by litigation is in fact and at bottom

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early common-law writ of trespass, liability "is determined by certain overt acts or events alone, irrespective of culpability").

[46] HOLMES, *supra* note 6, at 161–62.

[47] Grey, *supra* note 3, at 1257.

the result of more or less definitely understood views of public policy."[48]

The relevant policy inquiry is wholly untethered from the normative origins of the common law. As Holmes understood the historical record, the early forms of legal liability were based on the talionic norms of reciprocal revenge; these practices were limited to intentional wrongdoing that merited a punitive response, rendering them irrelevant to the fundamentally different problem of determining responsibility for the widespread accidental harms caused by noncriminal behavior in a rapidly industrializing society.

The same conclusion was reached by scholars who otherwise disagreed with Holmes about important aspects of talionic revenge. In rejecting Holmes's claim that retaliatory revenge was largely limited to intentional wrongdoing, John Wigmore famously argued that primitive law originated as a form of strict liability that did not distinguish between the morality of accidental and intentional harms, with modern tort law then evolving into more moral standards that recognize the difference.[49] But like Holmes, Wigmore characterized primitive law as "irrational" and barbaric, unworthy of continued existence.[50] Numerous other scholars have also agreed with Holmes's general point that "the law has grown, without a break, from barbarism to civilization."[51] Due to widespread agreement that the barbaric norms of talionic revenge are utterly irrelevant to the modern tort system, the conventional account maintains that "[i]n the late Nineteenth and early Twentieth Centuries, . . . the character of the typical tort suit changed fundamentally. . . . In substance it was a new creature entirely."[52]

C. The Fundamental Ambiguity of Modern Tort Law

The Holmesian theory of tort law has profoundly shaped the modern conceptualization of the field, including "the placement of liability for negligence at the doctrinal and practical center of the law of torts"; "the division of tort law into three parts: intentional, negligence-based, [and] strict liability"; and the formulation of the under-

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[48] HOLMES, *supra* note 6, at 35, 38.

[49] *See generally* John H. Wigmore, *Responsibility for Tortious Acts: Its History* (pts. I–III), 7 HARV. L. REV. 315, 383, 441 (1894) [hereinafter Wigmore, *Responsibility for Tortious Acts*].

[50] *Id.* at 316.

[51] HOLMES, *supra* note 6, at 5. For discussion of numerous other scholars who have adopted this characterization of primitive law, see Nelson P. Miller, *An Ancient Law of Care*, 26 WHITTIER L. REV. 3, 8–18 (2004).

[52] Goldberg, *supra* note 7, at 522–23 (describing and then criticizing the conventional historical account).

lying substantive problem as one "of conflicting considerations of policy, in particular the prevention of harm and the freedom to engage in valued activity."[53] Within this conceptualization, the barbaric norms of talionic revenge are not relevant to the policy problem confronted by the modern tort system, which must instead adopt a more civilized solution for resolving conflicts between one individual's security interest in being protected from harm and another's liberty interest in engaging in socially valuable but risky behavior.

By formulating the normative problem of tort law in these terms, Holmes helped to create the fundamental ambiguity of modern tort law: What is the appropriate public policy for mediating the conflicts among individual interests? As a leading treatise observed in the 1980s, "[i]t is a simple matter to say that the interests of individuals are to be weighed against one another in the light of those of the general public, but far more difficult to say where the public interest may lie."[54] The resultant ambiguity explains why "[i]n determining the limits of the protection to be afforded by the law, the courts have been pulled and hauled by many conflicting considerations, . . . no one of which can be said to always control."[55]

To be sure, Holmes did not define the policy problem in only these terms; he also recognized that "[t]he purpose of the law is to prevent or secure a man indemnity from harm at the hands of his neighbors."[56] By emphasizing the functions of "prevention" or deterrence and "indemnity" or compensation, Holmes became the "grandfather" of "compensation-deterrence theory" that was subsequently developed by the "most influential torts scholars in the Twentieth Century" who have "largely defined the universe of torts for thousands of lawyers and judges through their books, treatises, and articles."[57]

Reformulating the rationale for tort law by reference to the functions of compensation and deterrence, however, does not straightforwardly resolve the normative problem confronted by modern tort law. Compensation-deterrence theory would seem to be incoherent for the obvious reasons described by Ernest Weinrib. The need for compensation depends only on the occurrence of injury, regardless of its source: "[N]othing about compensation as such justifies its limitation to those who are the victims of deterrable harms."[58] By contrast, the need for

53 Grey, *supra* note 3, at 1257.

54 KEETON ET AL., *supra* note 38, § 3, at 17.

55 *Id.*

56 HOLMES, *supra* note 6, at 146.

57 Goldberg, *supra* note 7, at 521.

58 ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 5 (1995).

deterrence exists whenever someone has engaged in undesirable behavior: "[N]othing about deterrence as such justifies its limitation to acts that produce compensable injury."[59] Any injury is an appropriate candidate for compensation, whereas any form of undesirable behavior is an appropriate candidate for deterrence. The functions of compensation and deterrence are not mutually dependent and can be decoupled—either function can be arbitrarily invoked in a particular case, making this formulation of compensation-deterrence theory an unsatisfactory rationale for tort law.

Not surprisingly, tort scholars have since developed other approaches, yielding rationales for tort law such as the efficient minimization of accident costs or the implementation of corrective justice.[60] The details of this ongoing debate are not relevant for present purposes; the important point is that the rationale for tort law continues to be contested.

This problem, according to John Goldberg and Benjamin Zipursky, stems from the Holmesian conception of tort law as a response to the social problem of accidental harm: "Holmes's writings on torts are commonly taken to mark the birth of modern tort theory . . . *because* they provide perhaps the first effort to offer a comprehensive account of the field in terms of losses and accidents."[61] As Goldberg and Zipursky insightfully observe, the leading theories of tort law throughout the twentieth century all rely on the Holmesian definition of the tort problem, even though each invokes a different rationale for allocating accident costs through tort liability:

> Some assert that a defendant is morally responsible for a harm he has caused and therefore can be held liable for the costs associated with it. Some say that it is fairer for a defendant who has caused a loss to bear it, and that is when and why tort law reallocates a loss. Some focus on the better capacity of certain risk creators to pay for and to insure against such costs. Some say that loss shifting will permit efficient deterrence.[62]

All of the prominent theories, despite their considerable differences, accept the Holmesian premise that tort law is largely defined by the problem of allocating accident costs. According to Goldberg and Zipursky, this is a "huge mistake."[63]

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[59] *Id.*

[60] *See generally* Goldberg, *supra* note 7 (describing the leading theories of tort law that were developed during the twentieth century).

[61] John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 921 (2010) [hereinafter Goldberg & Zipursky, *Torts as Wrongs*].

[62] *Id.* at 927.

[63] *Id.* at 978.

To properly reorient our understanding of tort law, Goldberg and Zipursky claim that "one must abandon the notion, now deeply entrenched, that tort law is law for allocating the costs of accidents. As its name indicates, tort law is about *wrongs*."[64] Once conceptualized as a law of wrongs, tort liability has a rationale that is made evident by the role it first played within the legal system:

> The reason the court system makes available rights of action in tort cases is that the system is built on the idea that those who have been wronged are entitled to some avenue of recourse against the wrongdoer. But, in a civil society, private violence is not permitted, even where there has been a legal wrong. The state therefore ordinarily must make some avenue of recourse available to the victim. It does this through the courts, via the tort system.[65]

By emphasizing that tort law provides individuals with a mode of civil recourse for redressing the wrongdoing of others, Goldberg and Zipursky seek to uncover the rationale for modern tort law by reference to the normative origins of the common law: "Tort law is a law of civil recourse precisely because it substitutes a regime of legal rights, duties, and powers for a regime of retaliatory harming."[66] Goldberg and Zipursky accordingly emphasize a continuity that runs from the talionic norms to the present, which is quite distinct from other theories that invoke the talionic norms in only negative terms—as something flatly rejected by modern tort law.

But by assuming that redress through the law first served as a substitute for retaliatory harming, Goldberg and Zipursky adopt the Holmesian premise that the early forms of tort liability were effectively limited to the types of wrongdoing that, as Holmes put it, "import[ ] a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done."[67] When interpreted in this manner, the talionic norm of retaliatory harming is not relevant to the modern tort system. As Zipursky explains, "although the notion of *lex talionis*—an eye for an eye—retains appeal to some criminal law theorists, who theorize about the state's capacity to seek retribution, the

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64 *Id.* at 918.

65 John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1643 (2002). Put differently, "[t]he normative idea at the root of the principle of civil recourse is not dependent upon social-contract theory, but it is illuminated by it." Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 61, at 974. "An individual relinquishes the raw liberty to respond aggressively to having been wronged and receives in return a certain level of security against responsive aggression by others, plus the assurance that a civil avenue of redress against wrongdoers will be supplied." *Id.*

66 John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341, 345 (2011) [hereinafter Goldberg & Zipursky, *Civil Recourse*].

67 HOLMES, *supra* note 6, at 3.

notion of *lex talionis* as a principle of private retaliation is widely rejected, and its rejection is treated as the first step towards a tolerably civil notion of political society."[68]

Having adopted this convention of modern tort scholarship, Goldberg and Zipursky end up formulating the theory of civil recourse in a manner that inevitably suffers from the fundamental ambiguity of modern tort law. If tort law wholly rejected the behavioral norms of the talion, then on what normative basis has tort law developed?

According to Goldberg and Zipursky,

> Tort law has always been about a victim's right to have the state's assistance in holding a wrongdoer accountable, or responsible, for what he did, and the wrongs of tort law, as a matter of formal law and informal legal practice, have tended to track social norms of acceptable and unacceptable conduct.[69]

The normative source of tort law is not adequately defined by a "tendency" to track social norms. Negligence—the default rule of modern tort law—is defined by an abstract behavioral norm of reasonable care, not concrete norms of customary behavior (like jaywalking in New York City). Consequently, "[c]ourts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."[70] What, then, is the metanorm for determining which particular behavioral norm should constitute reasonable care in a negligence case? What is the normative source of modern tort law?

To resolve this issue, courts cannot simply conceptualize tort law as a form of civil recourse that redresses a wrong suffered by the plaintiff at the hands of the defendant. A wrong is the violation of a right, and without prior specification of the right, courts cannot determine whether a defendant owes redress to the plaintiff. By conceptualizing liability as a form of civil recourse for redressing a rights-violation, courts will engage in an inquiry that only requires them to account for the rights-based nature of tort liability; the theory of civil

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[68] Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 623, 643 (Jules Coleman & Scott Shapiro eds., 2002).

[69] Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 61, at 983.

[70] The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 13(a) (AM. LAW INST. 2010) ("An actor's compliance with the custom of the community . . . is evidence that the actor's conduct is not negligent but does not preclude a finding of negligence.").

recourse does not otherwise specify the substantive content of the right requiring protection by the law.[71]

The theory of civil recourse completes a circle of intellectual history by returning us to the normative origins of the common law. As per the self-help model of evolutionary legal development, tort scholars have recognized that the primitive behavioral norms of talionic revenge were the source of the early common law. As per the self-help model, scholars have also assumed that these norms governed forms of aggression that are largely irrelevant to the problem of accidental harm confronted by the modern tort system. Without any normative origins of relevance, tort scholars have been forced to identify some immanent policy or principle that has guided the normative development of the field—an invisible hand that essentially defines the fundamental ambiguity of modern tort law.

This impasse could be avoided if the underlying premise were invalid. Do the behavioral norms that governed conduct in the state of nature have relevance for resolving the modern tort problem of accidental harm? If so, then tort law was initially based on norms that have ongoing relevance, yielding an evolutionary narrative quite different from the one assumed by the varied theories of modern tort law.

To evaluate this possibility, we need to take another look at legal history. Doing so makes it possible to recover the full logic of the talionic behavioral norms that is missing from the self-help model. Tort scholars may have made a "huge mistake" by not adequately accounting for the civil-recourse origins of modern tort law as Goldberg and Zipursky have argued.[72] The mistake, however, could stem from the widely shared assumption that the reciprocity of talionic revenge was a barbaric norm that could not satisfy the jurisprudential demands of a civilized tort system.

II
Recovering the Normative Origins of Tort Law

The self-help model of evolutionary legal development accurately describes the historical record in numerous respects. In a wide-ranging evolutionary account of the decline of violence over time, Steven Pinker has documented the extent to which death rates dropped with

[71] *Cf.* Goldberg & Zipursky, *Civil Recourse*, *supra* note 66, at 346 n.20 ("We do not mean to suggest that courts can or should simply deduce proper decisions from the principle of civil recourse. Although tort cases occasionally raise issues that implicate the principle directly . . . in most instances, the principle constrains the ways in which courts should reason about the issues before them rather than dictating a unique result.").

[72] Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 61, at 978.

the shift from the state of nature (small nomadic clans or tribes of hunter-gatherers) into one of centralized authority (agricultural civilizations governed by chiefdoms that had brought other, less powerful chiefdoms and tribes under their control). "[H]olding many factors constant, we find that living in a civilization reduces one's chances of being a victim of violence fivefold."[73] When judged by contemporary standards, the state of nature was quite violent as per its characterization in the self-help model of evolutionary legal development.

The shift from the state of nature to centralized governance, moreover, did not occur in the manner depicted by the social-contract theories of the Enlightenment, another central tenet of the self-help evolutionary model.[74] As Pinker explained, "[i]t's not that any early state was (as Hobbes theorized) a commonwealth vested with power by a social contract that had been negotiated by its citizens."[75] Pinker made this point to show that the early states were also barbaric, "more like protection rackets, in which powerful Mafiosi extracted resources from the locals and offered them safety from hostile neighbors and from each other."[76] Yet this depiction of the early state also accords with the self-help model (which is never explicitly discussed by Pinker). According to that model, the early state afforded its citizens protection from one another first by supervising and then by monopolizing the practice of talionic revenge.[77] By enforcing the barbaric norms of talionic revenge, the early state would necessarily be quite violent in this regard when judged by contemporary standards.

This intervention by the early state, however, would still improve matters over the state of nature. Within the primitive practices of talionic revenge, the victim (or associated kinship group) was often the prosecutor, judge, and enforcer. Lacking any neutral or objective assessment of the disputed matter, the inherently subjective practice of talionic revenge suffered from self-serving biases, which "make all parties believe they are on the side of angels."[78] When "who deserves

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[73] STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 51 (2011). In addition to measuring the proportion of deaths attributable to violence, Pinker calculated another measure involving the proportion of deaths within the living population. "Modern Western countries, even in their most war-torn centuries, suffered no more than around a quarter of the average death rate of nonstate societies, and less than a tenth of that for the most violent one." *Id.* at 52.

[74] *See supra* notes 15–19 and accompanying text (explaining that the self-help model was developed to correct the erroneous depiction of the historical record within the social-contract models of the Enlightenment).

[75] PINKER, *supra* note 73, at 42.

[76] *Id.*

[77] *See supra* Section I.A (describing the self-help model and discussing the early state's role in enforcing norms of talionic revenge).

[78] PINKER, *supra* note 73, at xxvi.

what" is the subject of ongoing disagreement, blood feuds and other escalations of violence are the inevitable outcomes of talionic revenge.[79] Consequently, by emphasizing the shift from a purely subjective determination of "who deserves what" to an objective or legal determination of liability, the self-help model can explain how the early state could considerably reduce violence (by circumventing self-serving biases) while enforcing a practice that was otherwise inherently barbaric.[80]

Based on these assumptions, the self-help model depicts an evolutionary process that would necessarily drive the talionic behavioral norms into legal extinction. An inherently barbaric practice could not survive the evolving demands of an increasingly civilized legal system.

An evolutionary account of the law invokes important similarities between political and biological development (variance and selection) while also recognizing their critical differences.[81] In particular, "human institutions are subject to deliberate design and choice, unlike genes; they are transmitted across time culturally rather than genetically; and they are invested with intrinsic value through a variety of psychological and social mechanisms, which makes them hard to change."[82] Because institutional and related social traits are transmitted culturally rather than genetically, changed circumstances do not necessarily cause political institutions to adapt (unlike biological evolution), and so the "inherent conservatism of human institutions . . . explains why political development is frequently reversed by political decay."[83] The selection mechanism for political or legal development is altogether different from the one governing biological evolution, creating the potential for decay rather than development.

The self-help model of evolutionary legal development assumes a mechanism of "natural selection" that has caused the law to advance

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[79] As contrasted to a prior practice of unlimited revenge, the talion substantially reduced the incentives for long-term feuds; it did not, however, eliminate incentives leading to short-run escalations of violence. *See* Francesco Parisi, *The Genesis of Liability in Ancient Law*, 3 AM. L. & ECON. REV. 82, 87–103 (2001) (providing a functional and economic analysis of the effect of the talion on the dynamics of retaliation).

[80] *See supra* notes 24–25 and accompanying text (describing the role of objective legality within the self-help model).

[81] *See* Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 647 (1985) ("[E]volutionary jurisprudence refers only to those jurisprudential theories that explicitly focus on legal change, or that make use of a particular model to explain how legal change occurs. . . . Jurisprudence is about ideas rather than organisms. Darwin need not be an essential ingredient in evolutionary jurisprudence, even if the approach uses the model of natural selection.").

[82] FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION 23 (2011).

[83] *Id.*

normatively over time instead of decaying. For our purposes, the mechanism is supplied by the process of common-law adjudication. To survive this process, legal norms must not only adapt to changing social circumstances, they must also be justified in substantive terms rather than merely by their conventional or historical status (the inherent conservatism that can cause decay). The absence of any compelling substantive justification for the talionic reciprocity norm accordingly explains why it was driven into extinction within the self-help model of evolutionary legal development.

In a crucial respect, however, the self-help model does not adequately account for the full historical record. Whereas the self-help model characterizes the talion as only a barbaric or irrational practice of retributive revenge, the available evidence also supports the conclusion that the talion recognized a reciprocity norm of compensatory exchange. By permitting the injured party to seek compensation rather than revenge, the talion was much more civilized than assumed by the self-help model.

Once the self-help model is revised to account for the reciprocity of compensation, the normative origins of the common law take on new significance. The early state did not merely license or supervise barbaric talionic revenge as assumed by the self-help model; the early state also made innovations that facilitated the civilized compensatory practice. This conclusion finds further support in the subsequent development of tort law, which has continued to invoke the reciprocity norm while also refining it. Contrary to the self-help model as conventionally formulated, the primitive moral code of talionic revenge—though undeniably problematic in many respects—generated a behavioral norm worthy of continued existence within tort law.

A. A Revision to the Self-Help Model of Evolutionary Legal Development

The conventional formulation of the self-help model depends on some important premises that have been challenged by legal historians. As Geoffrey MacCormack has explained, within the self-help model,

> [t]he notion of revenge itself is generally not subjected to analysis. But it seems to be conceived as an irrational, psychological urge to inflict as much harm as possible upon a person from whom one has received an injury. Hence the supposition that originally the right to revenge was unlimited, restrictions gradually coming to be imposed by custom and the state. *A corollary is the assumption that revenge and compensation are antithetical notions*. The law is depicted as progressing from a primitive, irrational stage in which people simply

> expressed their feelings of revenge to a stage marked by the rational conviction that for every injury there is an appropriate compensation measured in economic terms.[84]

Rather than inquiring into the reasons why individuals exacted talionic revenge, the self-help model in its conventional formulation simply assumes that there were no reasons—the practice was primitive and therefore presumptively irrational.[85]

The study of neurobiology has found that "[r]evenge is, quite literally, an urge."[86] This finding could be sufficient to explain why "[b]lood revenge is explicitly endorsed in 95 percent of the world's cultures,"[87] but it hardly follows that revenge is only an irrational impulse as assumed by the conventional formulation of the self-help model.

Instead of assuming that the primitive practices of talionic revenge were irrational, a number of legal historians have tried to determine why individuals engaged in the practice, leading them to reject important premises of the self-help model.[88] A critical finding involves the role of compensation. Whereas the self-help model assumes that (barbaric) talionic revenge is antithetical to (civilized) compensation, the talion, according to William Miller, recognized a "compensation principle" that fundamentally alters our understanding of the talionic behavioral norms:

> The once dominant view of legal historians—a view that arose in the nineteenth century and that is untenable in the face of evidence, although one still hears it recited as gospel in law schools—is that revenge systems gave way to compensation systems, which then paved the way for state-delivered justice, amidst general rejoicing at the progress. The fact is that revenge in blood invariably coexisted with means of paying off the avenger by transfers of property or money-like substances in lieu of blood. *Revenge always coexisted with a compensation option. The conceptual underpinning was exactly the same in either case: both revenge and compensation were*

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84 MacCormack, *supra* note 13, at 75–76 (emphasis added).

85 According to Whitman, historians largely accepted this assumption without question due to the "strong, and suspect influence of one figure: G.W.F. Hegel," who "led nineteenth-century legal historians to focus far too much on the problem of the evolution of subjective legal consciousness, to the exclusion of the problem of the nature and goals of the early state." Whitman, *supra* note 15, at 44–45.

86 PINKER, *supra* note 73, at 530.

87 *Id.* at 529 (footnote omitted).

88 *See* MILLER, *supra* note 23, at 19–46 (discussing scholarship showing that archaic law was not wholly irrational and immoral but instead sensitive to moral concerns); Whitman, *supra* note 15, at 43, 66–67, 70–75 (discussing scholarship that has criticized the self-help model).

> *articulated solely in idioms of repayment of debts and of settling scores and accounts*.[89]

This revision to the historical account does not deny the importance of talionic revenge as retribution; it instead recognizes that compensation provided a normative alternative to revenge. As James Whitman has explained, "[s]ome sort of vengeance system very probably does lie in the background of the archaic sources. But in the dynamic of that system, it is likely that money compensation and talionic mutilation always co-existed. At least where talionic mutilation existed, there must also have existed a ransom option."[90] Consequently, "archaic enactments often establish monetary penalties. In particular, many archaic sources establish monetary penalties for the very cases of bodily mutilation that other sources treat talionically."[91] Within the biblical tradition, for example, an "eye for an eye" was interpreted to mean the "value of an eye for an eye."[92] Talionic revenge and compensation were not antithetical practices as conventionally assumed by the self-help model of legal development; the two norms instead co-existed within the state of nature.

"Is it surprising that the notion of having to give back what you have unlawfully taken away (compensation) should have arisen as early as the notion of hitting again if you have been hit (punishment)?"[93] The obvious logic of compensation, though, is not limited to the return of stolen property. One can "take" another's eye through accidental injury. Compensation in these cases would not literally return something that the injurer took from the victim (the lost eye), but the compensatory transfer of other resources could still satisfy an underlying normative obligation triggered by the fact that one party had taken something belonging to the other.

As compared to revenge, compensation could benefit both parties.[94] Compensation would often provide value to the victim that exceeded any gain he might otherwise obtain by exacting revenge (the extracted eye, after all, has no other value). Compensation would also provide value to the injurer by enabling him to avoid suffering a more highly valued loss (extraction of his eye). Compensation offered a

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[89] MILLER, *supra* note 23, at 24–25 (emphasis added).

[90] Whitman, *supra* note 15, at 70–71 (footnote omitted).

[91] *Id.* at 49.

[92] *See generally* DAVID DAUBE, STUDIES IN BIBLICAL LAW 102–47 (1969); *id.* at 102–03 ("An impartial analysis of the sources suggests . . . that criminal law notions and civil law notions, the principle of punishment and that of compensation, are of equal age.").

[93] *Id.* at 103.

[94] *See* Parisi, *supra* note 79, at 111–12 ("[T]he talionic sanction imposed costs on the wrongdoer, without giving any direct patrimonial benefit to the victim's clan, thus leaving an unexploited surplus obtainable through alternative remedies.").

prospect for mutual gain, creating incentives for the practice to emerge within talionic cultures.

Moreover, talionic revenge is not inherently incompatible with a norm of compensation. As Jeremy Waldron has observed, the talionic revenge of "an eye for an eye" cannot require that the punishment must fully replicate the conduct calling for revenge: "In almost every case it is evident that the action visited as punishment is to take place at a different time and with different *dramatis personae* from those of the original offense."[95] Consequently, talionic revenge "does not require the act of punishment to exhibit features of the offense that are irrelevant to its wrongness."[96]

The features of the offense that are irrelevant to its wrongness depend on

> our best sense of what made the action wrong in the first place. If all we have is an intuitive list of quite specific forbidden act-types, with no deeper explanation of their wrongness, then the list of punishments that [*lex talionis*] requires will be similarly specific. If all our moral theory tells us is that it is wrong to knock teeth out and that it is wrong to gouge out eyes, if it offers no further account of *why* these assaults are wrong, then the only advice [*lex talionis*] can offer is "An eye for an eye; a tooth for a tooth." But if we have a moral theory that is sophisticated enough to explain what is wrong about these superficially diverse instances of wounding, then that theory may provide the proponent of [*lex talionis*] with a repertoire of possible punishments that is less crude than that required by the Mosaic injunction [of an eye for an eye].[97]

Thus, if the talion were based on a moral theory that looked beyond the superficial fact of injury (the loss of an eye) and inquired into the reasons why that injury constituted a wrong that justified redress, then talionic revenge could entail remedies "less crude" than inflicting that same injury (extraction of an eye) on the injurer. The less crude or more civilized norm of compensation for an accidental harm is not necessarily antithetical to the moral code of talionic revenge.

The moral code of the talion, according to Miller, was based on the "notion . . . that justice is a matter of restoring balance, achieving equity, determining equivalence, making reparations, paying debts, taking revenge—all matters of getting back to zero, to even."[98] The talionic norm of equitable balance, therefore, justified a behavioral

[95] Waldron, *supra* note 5, at 32.

[96] *Id.* at 37.

[97] *Id.*

[98] MILLER, *supra* note 23, at 4.

obligation of reciprocity: "Reciprocity, paying back what you owe, means everything to your moral standing, to your character."[99]

To attain equitable balance for cases in which one individual took the person or property of another, reciprocity entitled the wronged individual to take equal advantage of the other. The negative reciprocity of offsetting disadvantage—"getting back to zero, to even"—did not solely depend on the injury in question (the loss of an eye). The talion governed both intentionally inflicted injuries and accidental harms.[100] The two types of behavior would have been clearly distinguishable within talionic cultures, at least in principle if not always in practice. As Holmes bluntly observed in another context, "even a dog distinguishes between being stumbled over and being kicked."[101] The obvious difference between these two cases explains why under the talion, "you have a choice about how to be made whole: by taking some form of [compensatory] property transfer as we do today, or by deciding that your moral wholeness requires that the person who wronged you should again be your equal and look the way you look."[102] For cases in which the injurer intentionally took the victim's sight, the requisite moral balance would be restored by removal of the injurer's eyes; in cases of accidental injury, equitable balance could merely require the injurer to compensate the victim. Revenge and compensation were alternative reciprocity norms that straightforwardly map into the self-evidently different categories of intentional and accidental harms, each of which involves an essential difference in the manner by which the injurer benefitted at the expense of the victim.

Such a normative scheme naturally fits within the evolutionary dynamics of social violence. According to Thomas Hobbes, the three

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[99] *Id.* at 202; *see also* R.G. Apresian, *Talion and the Golden Rule: A Critical Analysis of Associated Contexts*, 41 RUSSIAN STUD. PHIL. 46, 51 (2003) (providing a "generalized expression of talion in order to demonstrate that within the framework of early normative value systems talion was a rule in which a more general principle was *concretized*—the principle of equal recompense, equal responsive action").

[100] *See* Whitman, *supra* note 15, at 65 ("The spirit [Geist] of archaic law is the spirit of vengeance, of getting satisfaction for every wrong that befalls one. Not only for intentional wrongs or wrongs where guilt lies, but also for unintentional wrongs and wrongs in which there is no question of guilt.") (quoting VON JHERING, *supra* note 34, at 118–20); *see also* MILLER, *supra* note 23, at 62 (observing that pleas of accident as an excuse for avoiding liability "are available in vengeance cultures but mostly only to the old, to children, or to those who do not matter"); Parisi, *supra* note 79, at 111 (describing "the irrelevance of subjective factors (i.e., no-fault liability)" within *lex talionis*); Wigmore, *Responsibility for Tortious Acts* (pt. I), *supra* note 49, at 316 ("[T]he indiscriminate liability of primitive times stands for an instinctive impulse . . . to visit with vengeance the visible source, whatever it be—human or animal, witting or unwitting.").

[101] HOLMES, *supra* note 6, at 3.

[102] MILLER, *supra* note 23, at xii (summarizing thesis of book).

principal causes of "quarrel" in the state of nature involved aggression for self-gain, fear of being victimized by such aggression, and defense of one's honor in order to ward off future attacks.[103] The resultant dynamics of social violence have been further developed by Steven Pinker, who has explained that the incentives for violence stem from the evolutionary advantages to be gained by taking scarce resources (like food, water, land, and reproductive capacity) from other individuals (competitors).[104] This "competition breeds fear. If you have reason to suspect that your neighbor is inclined to eliminate you from competition by, say, killing you, then you will be inclined to protect yourself by eliminating him first in a preemptive strike."[105] To avoid the resultant "Hobbesian trap," you can engage in another form of behavior: "Don't strike first; be strong enough to survive a first strike; and retaliate against any aggressor in kind."[106] To make such a threat of deterrence credible, however, you must be "committed to disprove any suspicion of weakness, to avenge all trespasses and settle all scores. Thus we have an explanation for the incentive to invade for trifles: a word, a smile, and any other sign of undervalue."[107] These behavioral dynamics sufficiently explain why the talion recognized the two norms of retribution and compensation.

When one has been harmed by another's aggression, the victim's honor—and concomitant need to maintain a credible threat for deterring others from such behavior—requires more than compensation. The aggressor took advantage of the victim by exercising dominion over his person or property (such as by gouging out his eye). For the victim to restore his moral worth, he must exercise a comparable dominion over the attacker's person or property (by extracting his eye). The retributive response makes the attacker bear the cost of aggression and credibly deters others from future aggressions by sending a clear message—*if you attack me, I'll retaliate in kind*. By exacting revenge, the victim asserted his self-worth, restored the moral balance, and credibly signaled to others that they should not expect to benefit from any future attacks, thereby deterring them.

Accidental injuries have different attributes. In the event of an inadvertent harm, the injurer did not take advantage of the victim by exercising dominion over his person or property. The injurer was

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[103] Hobbes identified three principal causes of quarrel—competition, diffidence, and glory: "The first maketh men invade for Gain; the second, for Safety; and the third, for Reputation." THOMAS HOBBES, LEVIATHAN 88 (Richard Tuck ed., 1996).

[104] *See* PINKER, *supra* note 73, at 33–34.

[105] *Id.* at 34.

[106] *Id.*

[107] *Id.*

acting for self-gain, but he did not require the victim to suffer injury in order to attain that end—the injury was an unintended byproduct of the behavior and not a necessary component of the injurer's objectives (unlike aggressive behavior seeking to take scarce resources from the victim). The occurrence of such an accident would not require the victim to respond in kind with retaliatory aggression. Instead, the victim could maintain his honor by subjecting the injurer to a compensatory obligation. Compensation in cases of accidental harm would restore equitable balance—*the injurer did not benefit at the expense of the victim's person or property*—while deterring others from engaging in such risky conduct in the future—*don't expect to benefit at my expense*.

To be sure, the talion was not expressly limited in this manner—the blinded victim was entitled to extract the eyes of the injurer in all cases. Moreover, talionic revenge was not always practiced in a rational manner, as the concern for honor was often elevated far beyond the amount plausibly required for deterrence purposes. (Consider the infamous duel between Aaron Burr and Alexander Hamilton.[108]) Nevertheless, this retaliatory entitlement has a number of compensatory attributes that have been identified by Miller.

As discussed, the threat of retaliation has deterrence value for the injured party: "If I can rightly take your eye, you will be scared of me. That [deterrence] is worth something; it makes the compensatory regime of the talion one that cannot help but keep honor firmly in its sights, for fear is bound up in some nontrivial way with respect."[109]

The credible threat of retaliation would have value to a victim not only for deterrence reasons, but also for facilitating a compensatory exchange. "Compensation is a possibility only if revenge is a very likely probability. Who is going to pay you enough to assuage your honor if he does not fear your ability to reclaim your honor by killing him if he does not pay up?"[110]

In addition to providing a means for enforcing the compensatory norm, the threat of revenge also framed settlement negotiations.

> The talion structures the bargaining situation to simulate the hypothetical bargain that would have been struck had I been able to set the price of my eye *before* you took it. It does this by a neat trick of substitution. Instead of receiving a price for the taking of my eye, I

[108] For an engaging account, see RON CHERNOW, ALEXANDER HAMILTON 672–74, 680–709, 714–22 (2004).

[109] MILLER, *supra* note 23, at 23; *see also id.* at 101 ("Honor was what provided the basis for your counting for something, for your being listened to, for having people have second thoughts before taking your land or raping you or your daughter.").

[110] *Id.* at 105.

> get to demand the price you will be willing to pay to *keep* yours. . . . You will in fact play the role of me valuing my eye before it was taken out, and the talion assumes that you will value yours as I would have valued mine. The talion works some quick magic: as soon as you take my eye, in that instant your eye becomes mine; I now possess the entitlement to it. And that entitlement is protected by a property rule. I get to set the price, and you will have to accede to my terms to keep me from extracting it.[111]

The talion structured the compensatory transaction in a manner that is crude by modern standards, but it nevertheless facilitated compensatory practices by relying on the threat of retaliation to create a much-needed medium of exchange. The "classic formulation of the talion arose before coinage was general, before there was easy and ready money . . . whose value was clear."[112] Consequently, "[t]he problem for early talionic culture was not the conceptual one of being too primitive to understand notions of exchange, but the practical one of how to measure value and then how to find an appropriate means of payment once value had been determined."[113] Lacking a commonly accepted medium of exchange, the talion facilitated compensation by ensuring that there would be at least one means of payment: "Revenge was compensation using blood, not instead of money, but as a kind of money."[114]

An entitlement to talionic revenge promoted deterrence and facilitated compensatory practices for other reasons as well,[115] but its relation to the social problem of money is particularly important. While recognizing that it is difficult to fully comprehend the fragmentary archaic sources that are still available to us, James Whitman concludes that the self-help model does not adequately account for "the problem of the meaning and function of weighed metal and money."[116] The self-help model mistakenly assumes that the first forms of law only codified existing customary practices, whereas the first forms of law also involved "innovative legislative activity on the

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111 *Id.* at 49–50.

112 *Id.* at 26.

113 *Id.* at 25.

114 *Id.*

115 For example, "[l]egal claims were themselves a kind of money, traded back and forth, given and sold, in the way that debt instruments are among us." *Id.* at 120. By functioning as a medium of exchange, talionic revenge also addressed the problem of insolvency: "For what the talion does is to give the poor assets to satisfy claims. The rule does much to help solve the social problem of the insolvent wrongdoer whose poverty makes him judgment-proof. Not having sheep to pay his debts he now has his body or body parts." *Id.* at 22.

116 Whitman, *supra* note 15, at 44.

part of the state."[117] In particular, "the earliest activity of the state involves, not the supervision of violence [as per the self-help model], but the setting of prices; for it is with the setting of prices and wages that those sources are largely concerned."[118]

As Whitman then elaborates:

> On their face, the archaic codes belong, not to a modern world characterized by the policing of streets, but to a premodern world characterized by the deeply felt need to set just prices. What early authorities arguably clamped down upon was, not violence, but the market; the great issue was not safety in the streets, but the ever-mysterious psychosocial dynamic of money—a dynamic easily linked to magico-religious beliefs.[119]

Insofar as the evidence suggests that the self-help model may be overly narrow because of its exclusive focus on violence, that limitation is not a problem for us—an analysis limited to "safety in the streets" is fully appropriate for tort purposes. We can also recognize that the archaic codes are hard to interpret with modern sensibilities while still concluding that the extant historical evidence provides an evolutionary account of the common law that fundamentally differs from the one provided by the self-help model.

As previously discussed, an evolutionary model of the common law requires a norm that courts could initially adopt from the state of nature and then substantively justify and refine over time through the process of common-law adjudication.[120] The courts could initially adopt such a norm without fully understanding the customary ways in which primitive societies interpreted and enforced the normative practice. As J.H. Baker explains:

> Given the many vicissitudes of the tribes and peoples which inhabited Britain before the Normans, any search for the laws or customs of England before the emergence of the nation itself is bound to fail. *To the extent that common features may be discerned in the customs of different peoples and places, the unifying force is not a common law but the general social and moral assumptions of the age, or even the natural instincts of mankind at particular stages of development: broad parallels are often found to transcend national and geographical boundaries*.[121]

Based on the available historical sources, the "general social and moral assumptions" of primitive societies included a normative

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[117] *Id.* at 53.
[118] *Id.* at 80.
[119] *Id.* at 81.
[120] *See supra* notes 81–84 and accompanying text.
[121] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 1–2 (4th ed. 2002) (emphasis added).

requirement of reciprocity or equitable balance that could have been readily identified and then enforced by the early common law. In principle, the victim's honor or moral wholeness for a lost eye determined whether the victim would invoke the reciprocity norm of revenge (extraction of the injurer's eye) or compensation (enforced by the threat of extraction). Insofar as the victim's honor or moral wholeness required retribution, then revenge would be the normative choice for attaining equitable balance. But if the injury had been caused by an accident or did not otherwise merit retribution, then compensation would be the appropriate norm. This compensatory norm explains why the early state did not merely supervise talionic revenge as conventionally assumed by the self-help model, but also made innovations that facilitated this normative practice.

The legal innovations addressed two substantial problems with the primitive practices of the talion. First, because the victim (or associated kinship group) was often the prosecutor, judge, and enforcer, the practice suffered from self-serving bias. Within the psychology of revenge, "[p]eople consider the harms they inflict to be justified and forgettable, and the harms they suffer to be unprovoked and grievous."[122] A victim's claim for vengeance would not always be recognized as being valid by the injurer, and so the victim's exaction of revenge could provoke a retaliatory response and an ensuing escalation of conflict (the blood feud). The problem was further exacerbated by the absence of a commonly accepted medium of exchange—the second basic problem undermining talionic practices, which made it even more difficult for the parties to settle upon an acceptable amount of compensation in lieu of revenge. To address these two problems, the early state engaged in innovative legislative activity that facilitated and improved the practice of talionic revenge by providing a neutral arbitrator and specifying the amount of compensation or just price for a given injury.[123]

Consistent with this account of legal development, victims who had rights under the early common law of England made the type of normative choice entailed by the moral theory of the talion. Under the early common law,

> [t]he 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

[122] PINKER, *supra* note 73, at 537.

[123] *See* Whitman, *supra* note 15, at 80 (observing that the early state's establishment of the amount of compositions for injury was a component of the broader category involving the establishment of just prices).

> 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*.[124]

To account for the role of the talionic compensatory norm, the self-help model of evolutionary legal development must be revised. In addition to ignoring the reciprocity of compensation, the conventional formulation of this model mistakenly assumes that the early state (of stage 2) only licensed the existing practices of talionic revenge,[125] whereas the historical record shows that the early state played an innovative role in facilitating the practice. The historical record, therefore, supports the following revision to the self-help model:

Stage 1: The State of Nature. Prior to the emergence of centralized governmental authority, individuals protected themselves from injury with retaliatory self-help remedies. Instead of being lawless, the state of nature was governed by "the law of the talion, the law of retaliation, of tit for tat, whose classic formulation is the biblical eye for an eye, tooth for a tooth."[126] The talion was based on a moral theory of reciprocity or equitable balance, entitling a victim to exact either retributive revenge or compensation from the injurer. The victim's normative choice depended on how he had been taken advantage of by the injurer. To attain the equitable balance embodied in the negative reciprocity of offsetting disadvantage, the victim in cases of aggression would exact retribution (extraction of the eye or tooth) and thereby restore his honor and credibly deter others from future attacks, whereas compensation adequately restored equitable balance for accidental harms caused by nonaggressive conduct.

Stage 2: Emergence of the Early State. Instead of merely adopting the talionic norms from the state of nature, the early state engaged in "innovative legislative activity"[127] that facilitated and improved the normative practice by providing a neutral arbitrator and specifying the just price or amount of compensation for a given injury.

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[124] *See* David J. Seipp, *The Distinction Between Tort and Crime in the Early Common Law*, 76 B.U. L. REV. 59, 59–60 (1996) (emphasis added). The distinction between a remedy of punishment or compensation was practical and not formal. "Punishment was a consequence of conviction on a writ of trespass for breach of the king's peace, but it received little attention from the lawyers. When victims obtained judgments for compensation, wrongdoers also found themselves 'in mercy' to the king for their breaches of his peace." *Id.* at 70. For other reasons that explain why victims were effectively forced to choose between compensation or revenge, see *id.* at 71–72.

[125] *See supra* Section I.A (explaining the conventional formulation of developmental stages).

[126] MILLER, *supra* note 23, at 20.

[127] Whitman, *supra* note 15, at 53.

The aggrieved party could still reject compensation in favor of retribution. "Thus, the early state assumes a kind of licensing power over acts of talionic vengeance, requiring that injured parties seek formal state sanction before avenging themselves."[128]

Stage 3: From Licensing to Enforcement. Over time, the early state began to exact revenge on behalf of injured parties, seeking to enforce talionic norms rather than merely to license them.

Stage 4: From Revenge to Monetary Compensation. Having accumulated sufficient power by this point, the early state finally prohibited private violence, instituting a system of "compositions" that substituted "money damages for talionic vengeance."[129] Behavior that merited retributive revenge was subject to criminal liability and punishment by the state, whereas the first forms of tort law provided compensation to the victim as a form of "civil recourse."[130] At this stage, the "elements of revenge have disappeared and the principle is established throughout the law that for every injury compensation should be paid."[131]

On this account, the normative origins of common law stem from the talionic reciprocity norms that could achieve equitable balance by either retributive revenge or compensation, depending on the nature of the wrongdoing in question. When these self-help norms were first channeled into the legal system, the practices of retributive revenge became the province of the criminal law, with the reciprocity of compensation providing the normative source of early tort law.

B. Evolution of the Reciprocity Norm

According to the eminent nineteenth-century legal scholar Rudolf von Jhering, "[t]he spirit [*Geist*] of archaic law is the spirit of vengeance, of getting satisfaction for every wrong that befalls one. Not only for intentional wrongs or wrongs where guilt lies, but also for unintentional wrongs and wrongs in which there is no question of guilt."[132] Once the talion is recharacterized to include compensation as a normative alternative to retributive revenge, then von Jhering's description requires modification: "[t]he spirit [*Geist*] of archaic law is the spirit of . . . getting satisfaction for every wrong that befalls one. Not only [retribution] for intentional wrongs or wrongs where guilt

128 *Id.* at 42.

129 *Id.*

130 *See supra* Section I.C (discussing the evolution of revenge-based tort law into a model of civilized conflict resolution based on the civil recourse formulation of Goldberg and Zipursky).

131 MacCormack, *supra* note 13, at 74.

132 Whitman, *supra* note 15, at 65 (quoting VON JHERING, *supra* note 34, at 126).

lies, but also [compensation] for unintentional wrongs and wrongs in which there is no question of guilt." The talion governed both intentional and accidental harms, and in the latter cases the victim could attain the requisite satisfaction by way of compensation, even if there were "no question of guilt."

These "general social and moral assumptions of the age" could be readily identified and enforced by the early common law,[133] explaining why it gave individuals the right to pursue punishment or compensation—the same normative choice recognized by the talionic moral code.[134]

The further evolutionary development of the reciprocity norm can be traced down two paths covering different components of the modern tort system. The first involves the influence of reciprocity on the baseline choice between negligence and strict liability, while the second involves the role of reciprocity within the practice of modern negligence law.

1. Reciprocity and the Fundamental Choice Between Negligence and Strict Liability

The early common-law courts initially translated the talionic compensatory norm into the principle that "under the common law a man *acts* at his peril," which "seems" to have been "adopted by some of the greatest common-law authorities" according to Holmes.[135] If a man acts at his peril, as Holmes explained, then "the whole and sufficient ground for such liabilities" is "that he has voluntarily acted, and that damage has ensued. If the act was voluntary, it is totally immaterial that the detriment which followed from it was neither intended nor due to the negligence of the actor."[136] This principle of strict lia-

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[133] *See* BAKER, *supra* note 121, at 1 (explaining why the early common law proceeded on this basis).

[134] *See supra* note 124 and accompanying text (explaining that the early common law gave plaintiffs the normative choice to subject the defendant to either punishment or a compensatory obligation).

[135] HOLMES, *supra* note 6, at 82; *cf.* FRANCIS HILLIARD, 1 THE LAW OF TORTS OR PRIVATE WRONGS 84 (Boston, Little, Brown & Co. 2d ed. 1861) ("The liability to make reparation for an injury is said to rest upon *an original moral duty*, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another." (footnote omitted)); Francis H. Bohlen, *The Rule in* Rylands v. Fletcher *Part I*, 59 U. PENN. L. REV. 298, 309 (1911) ("There is every reason to believe that the original conception was that legal liability for injuries of all kinds depended not upon the actor's fault, but upon the fact that his act had directly caused harm to the plaintiff."); Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1412 (1961) (observing that there was "a deep sense of early common law morality that one who hurts another should compensate him").

[136] HOLMES, *supra* note 6, at 82.

bility instantiates the compensatory obligations entailed by the talionic reciprocity norm in cases of accidental harm.

To be sure, Holmes famously showed that this principle, at least as he had formulated it, could not be correct. Under the early common law, a man did not simply act at his peril and incur liability for the ensuing consequences.

> If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage . . . . Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.[137]

In this passage, Holmes effectively identified a necessary development in the legal evolution of the talionic compensatory norm. Whether the reciprocity norm could survive the evolving demands of the newly emergent legal system depended not only upon its ability to adapt to changed circumstances; the norm also had to be justified in substantive terms and not merely by its conventional or historical status.[138]

In a tort case, the state is adjudicating the claim that the defendant is legally responsible for the plaintiff's injury, requiring courts to develop the relevant conception of responsibility. As Holmes explained, the common law did so by limiting liability to the foreseeable consequences of one's voluntary acts.

The limitation of liability to one's voluntary acts (the requirement of feasance) is a direct implication of the reciprocity norm. In cases of nonfeasance, as when I choose not to rescue you from impending harm, reciprocity simply requires that you not rescue me. A reciprocal behavioral response to inaction would only be one of similar inaction. An obligation to rescue in cases of nonfeasance would instead have to be generated by some other type of behavioral norm, such as a norm of solidarity that presumably would only require one to rescue others within the same kinship group. The reciprocity of compensatory liability is limited to cases in which one individual's affirmative conduct caused injury to another.

By limiting liability to voluntary acts that foreseeably cause harm, tort law has adopted a conception of responsibility that has since been

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137 *Id.* at 95.

138 *See supra* notes 81–84 and accompanying text (discussing evolutionary models of the common law).

substantively defended by legal philosophers, with a particularly powerful formulation provided by Stephen Perry: "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."[139] The individual is responsible for a foreseeable outcome because she "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."[140]

The relevant conception of outcome responsibility, however, requires further elaboration for reasons given by Arthur Ripstein: "Foreseeability does not link agents with actual outcomes. A consequence does not become mine just because I (or an ordinary person) could have foreseen it. Instead, *norms* link agents with consequences."[141] The relevant norm, according to Ripstein, is one of reciprocity: "The reciprocity conception views responsibility as a relation between persons with respect to expected consequences. As a result, nonrelational facts about a person's agency and the circumstances in which she acts will never settle questions of responsibility as accountability."[142] For purposes of tort law, responsibility is a relational matter. One's responsibility writ large is not at issue; rather, the tort inquiry asks whether the defendant's affirmative conduct has made her responsible for plaintiff's injury.

This type of relational responsibility is embedded in the talionic reciprocity norm that relies on compensation to attain equitable balance in cases of accidental harm. One's affirmative exercise of agency would establish the requisite form of outcome responsibility with respect to another whose person or property was foreseeably injured by the conduct. The ensuing obligation to pay compensatory damages is based on the consequential bodily injury or property damage, not any moral shortcoming in the behavior itself. Instead of somehow dis-

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[139] Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72, 92 (Gerald Postema ed., 2001); *see also* TONY HONORÉ, *Responsibility and Luck: The Moral Basis of Strict Liability*, *in* RESPONSIBILITY AND FAULT 14 (1999) (developing concept of outcome responsibility as a justification for strict liability); Nils Jansen, *Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability*, 24 OXFORD J. LEGAL STUD. 443, 443 (2004) (arguing that liability based on outcome responsibility, as opposed to blameworthiness, "is constitutive for the modern European law of extracontractual liability").

[140] Perry, *supra* note 139, at 92.

[141] Arthur Ripstein, *Justice and Responsibility*, 17 CAN. J.L. & JURIS. 361, 377 (2004).

[142] *Id.* at 362.

proving the validity of the common-law principle that "a man acts at his peril," the tort requirements of feasance and foreseeability enforce the talionic compensatory norm in a substantively defensible manner.

Apparently recognizing as much, Holmes at this point in his argument sought to disprove this common-law principle with other reasons: "Here we reach the argument from policy."[143] Holmes then reached his renowned conclusion that tort law had rejected the general rule of strict liability—that "a man acts at his peril"—in favor of the default rule of negligence liability that was based on "more or less definitely understood views of public policy."[144] The talionic compensatory norm, on this account, had been displaced by a negligence rule that limited the compensatory damages remedy to cases of objectively unreasonable conduct for reasons of public policy.

Tort law could adopt the default rule of negligence liability, however, without wholly rejecting the talionic compensatory norm. As Holmes recognized, modern tort law had supplemented the default rule of negligence liability with limited rules of strict liability,[145] most notably the rule derived from the nineteenth century English case *Rylands v. Fletcher* that imposed strict liability on the owner of a reservoir that flooded the plaintiff's property.[146] Did this strain of strict liability mean that tort law still enforced the talionic compensatory norm that "a man acts at his peril"?

Not according to Holmes, who argued that "[i]t may safely be stated that all the more ancient examples [of strict liability] are traceable to conceptions of a much ruder sort, and in modern times to more or less definitely thought-out views of public policy."[147] In particular, the *Rylands* rule of strict liability was based "on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders."[148] Like the default rule of negligence liability, the supplemental rule of strict liability was justified by policy rather than the "much ruder" principle that "a man acts at his peril."

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143 HOLMES, *supra* note 6, at 95.

144 *Id.* at 35.

145 *See generally* DAVID ROSENBERG, THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY 118–23 (1995) (discussing various forms of foresight-based strict liability that Holmes recognized within modern tort law).

146 Fletcher v. Rylands (1865) 159 Eng. Rep. 737, 737–44 (Bramwell J).

147 Holmes, *Torts*, *supra* note 40, at 652.

148 *Id.* at 653. The public policies furthered by negligence liability can be attained only if the rule is adequately enforced. The difficulties of proving negligence, therefore, can justify rules of strict liability by reference to the same policies that justify the inadequately enforced rule of negligence. *See* HOLMES, *supra* note 6, at 117 (explaining how strict liability can be justified as a means of overcoming "a limit to the nicety of inquiry which is possible in a trial").

The same conclusion could be expressed in terms of morality. For example, James Barr Ames concluded that "the old law has been radically transformed" insofar as "[t]he ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."[149] The "unmoral" standard—the talionic compensatory norm—could not survive the ethical demands of the modern tort system, the same conclusion entailed by the conventional formulation of the self-help model of legal development.[150]

Like the self-help model, the conventional evolutionary account of modern tort law requires revision. The conventional account depicts the talionic behavioral norms in a wholly barbaric manner that only find expression in an unmoral rule of strict liability. On this account, the talionic norm cannot be the source of the modern default rule of negligence liability, nor is it even relevant to the limited rules of strict liability. In both respects, the conventional account is mistaken.

Within primitive cultures, the normative practice of negative reciprocity was not limited to a monolithic rule of strict liability.

> Since the early part of the twentieth century many . . . scholars have . . . demonstrate[d] that rules for intentional torts and torts of negligence, as well as strict liability, indirect causation, and fixed and variable compensation, all existed not only through history to the mosaic laws [of talionic revenge], but in even earlier pre-mosaic sources.[151]

Due to the diversity of obligations that were generated by the talionic reciprocity norms, the modern rule of negligence liability is not necessarily inconsistent with the principle that "a man acts at his peril." The issue instead depends on whether courts could defensibly invoke reciprocity to justify the modern default rule of negligence liability supplemented by limited rules of strict liability.

In justifying the rules of negligence and strict liability, courts did not exclusively engage in policy analysis, nor did they reject strict liability as an unmoral form of liability—a development sharply at odds with the conventional evolutionary account of modern tort law. This aspect of the conventional account has been debunked by Jed Shugerman, who has documented the extent to which courts devel-

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149 James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908).

150 *See supra* Section I.A (describing the self-help model's conclusion that the strict demands of the talionic compensatory norm are unfit for a civilized legal system).

151 Miller, *supra* note 51, at 5. For an early statement of this position, which disputes the proposition that trends to increasingly link fault and liability were always positively correlated with the passage of time, see Nathan Isaacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954, 960 (1918).

oped modern tort law with "moralistic" reasoning.[152] In Shugerman's view, this development was historically contingent,[153] but his account (like the conventional one that he challenges) does not recognize the reciprocity norm of compensation. Doing so shows that reciprocity has continued to influence the normative development of tort law from the state of nature up to the present.

The focal point of this development involved *Rylands*, a mid-nineteenth century case that made courts confront the question of whether modern tort liability always requires fault or could instead be based on strict liability under the appropriate conditions. The writ system had just been abolished. For the first time, courts had to justify their interpretation of the rules that formed the early common law within the writ system.[154] Courts initially invoked the concerns of public policy as per the Holmesian account, but they ultimately relied on the reciprocity norm.

Shortly after *Rylands* was decided, two states immediately adopted it, followed by a string of rejections.[155] When Francis Bohlen surveyed this case law in 1911, he concluded that "the intense antagonism of the majority of American courts appears to be, at bottom, based on their belief that such a rule would be economically harmful."[156] This rationale for rejecting strict liability mirrored the policy reasoning that Holmes had previously used to justify negligence liability: "As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."[157] Policy reasons could fully explain why modern tort law limits liability with the negligence rule, justifying the rejection of the early common-law rules of strict liability that, as one court disparagingly observed, "were certainly introduced in England at an immature stage of English jurisprudence."[158]

An influential decision in 1873, however, redeployed the equitable logic of reciprocity to explain why the negligence rule is not

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152 Jed Handelsman Shugerman, *A Watershed Moment: Reversals of Tort Theory in the Nineteenth Century*, 2 J. TORT L., no. 1, 2008, at 1, 20–36 (providing examples of courts that relied upon moralistic reasoning to justify a form of strict liability).

153 *Id.* at 6 ("This historical study . . . suggest[s] . . . that tort law and judges' underlying theories for its rules . . . are contingent upon events and context.").

154 *See supra* Section I.B (explaining that the abolition of the writ system was intended to be procedural only, thereby requiring courts to formulate the common law in substantive terms).

155 *See* Shugerman, *supra* note 152, at 14–20 (describing Massachusetts's and Minnesota's adoption of *Rylands*, and subsequent rejections by New York, New Hampshire, New Jersey, and Pennsylvania).

156 Bohlen, *supra* note 135, at 304.

157 HOLMES, *supra* note 6, at 95.

158 Brown v. Collins, 53 N.H. 442, 450 (1873).

unfair. In rejecting the application of *Rylands* to an exploding steam boiler, the New York Court of Appeals in *Losee v. Buchanan* concluded that under the negligence rule, each injured plaintiff "receives his compensation for such damages by the general good, in which he shares, and the right which he has to [engage in the risky activity]."[159] Whereas the talion started with an "eye for an eye" and then abstracted that exchange into "the value of an eye for an eye," *Losee* made that exchange even more abstract by incorporating reciprocal benefits into the normative calculus. *Losee* recognized that a liability rule will affect an individual in two different ways—one in his role as a rightholder who is threatened by the risky conduct of others, and the other in his role as a dutyholder who engages in risky conduct threatening injury to others. Negligence liability limits the rightholder's entitlement to compensatory damages, but as *Losee* concluded, the individual is nevertheless adequately compensated by the manner in which the negligence rule enables him as a dutyholder to engage in reasonably risky behavior without incurring liability to others. Individual rightholders can be adequately compensated by the reciprocal benefit that the negligence rule confers on them as dutyholders—an outcome of equitable balance that eliminates the reciprocity rationale for compensating via the damages remedy under the rule of strict liability.

After *Losee*, courts increasingly relied on the compensatory logic of reciprocity to justify negligence liability,[160] although this reasoning could also justify a rule of strict liability under certain conditions. The trigger of liability in *Rylands* involves a "non-natural" use of the land that is "likely to do mischief if it escapes."[161] By definition, most individuals do not engage in "non-natural" or unusually dangerous uses of the land, nor do they engage in other uncommon, abnormally dangerous activities. In these extraordinary cases, the benefit that the negligence rule confers on the ordinary person—the freedom to engage in such conduct as a reciprocally situated dutyholder—is not adequately offset by the threat of injury that the individual faces as a rightholder. Lacking an adequate reciprocal benefit under the negli-

159 51 N.Y. 476, 485 (1873).

160 *See* Bohlen, *supra* note 135, at 319 ("Another influence may perhaps be mentioned. The underlying theory upon which the Declaration of Independence and the Constitution of the United States and of the several states rest is that of the 'Social Contract'—That 'by becoming a member of civilized society one is compelled to give up many of his natural rights, recovering in return more than a compensation in the surrender by every other man of the same rights and the protection for the rights which remain given thereby.'" (quoting *Losee*, 51 N.Y. at 484)).

161 Rylands v. Fletcher (1868) 3 LRE & I App. 330 (HL) 339 (Earl Cairns LC) (appeal taken from Eng.).

gence rule, the reciprocity norm can justify a rule of strict liability to supply the compensation necessary for equitable balance in cases of extraordinary danger.

Following the Johnstown Flood in 1889, "a strong majority of states [have] approved of *Rylands*."[162] The courts in these cases, according to Shugerman's survey, did not rely on the instrumentalist reasons of public policy; they instead employed "moral arguments in favor of strict liability,"[163] all of which can be easily recast in terms of reciprocity.

Shugerman characterizes these "moral" rationales for strict liability as "an argument from choices that create higher duties; an argument from fairness (those who profit from an activity should pay those they hurt); a social contract argument of reciprocity; and a rights argument in favor of the natural user over the unnatural innovator."[164] The "higher duties" based on choice are nothing other than the principle that "a man acts at his peril," which makes one outcome responsible for voluntary acts that foreseeably harm the person or property of another. As a matter of "reciprocity," it is equitable or "fair" to compensate others who are foreseeably injured as a result of one's choice to engage in an "unnatural" or uncommonly dangerous activity. The reciprocity norm attains equitable balance by preventing such a self-interested actor from "profiting" at the expense of another's person or property, justifying a rule of strict liability for these extraordinarily dangerous forms of social behavior. The reciprocity norm readily generates all of the moral rationales for strict liability that Shugerman identified in his survey of the case law.

Consistent with this reasoning, courts often invoked "the Latin maxim *Sic utere tuo ut alienum no laedas* ('So use what is yours so as not to harm what is others')" to justify the plaintiff's "right to compensation and a strict degree of culpability on those whose activities cause harm, even without carelessness."[165] This maxim essentially restates the early common-law principle that "a man acts at his peril," which in turn directly evolved from the talionic compensatory norm.

The ensuing development of this case law resulted in a body of jurisprudence that has recently been restated into the following black-letter rule by the *Restatement (Third) of Torts*: One is subject to strict liability for engaging in an "abnormally dangerous" activity that (1)

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162 Shugerman, *supra* note 152, at 3.

163 *Id.* at 5.

164 *Id.*

165 *Id.* at 34–35. In other contexts, courts have invoked the related compensatory maxim that if "one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it." Seals v. Snow, 254 P. 348, 349 (Kan. 1927).

"creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors," and (2) is "not [a matter] of common usage."[166] One who engages in an abnormally dangerous activity that causes physical harm to another is fairly subject to strict liability for these injuries because

> [t]his position 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.[167]

These deep-seated public attitudes express the idea of fairness embodied in a behavioral norm of reciprocity. To attain the fair or equitable balance required by reciprocity, individuals pursuing their own ends must act in a manner that equitably compensates those who suffer bodily injury or property damage as a foreseeable consequence of the dangerous behavior. As the early common law put it, "a man acts at his peril."

According to the *Restatement (Third)*, the rule does not apply to common activities because "[w]henever an activity is engaged in by a large fraction of the community, the absence of strict liability can be explained by considerations of reciprocity."[168] Like the courts in *Losee* and its progeny, the *Restatement (Third)* recognizes the reciprocity of the negligence rule as applied to activities that are common in the community. Any cost that the ordinary individual incurs by virtue of being a rightholder (facing the threat of injury from others) is more than offset by the reciprocal benefit that he or she receives as a dutyholder (imposing these risks on others). When each party exercises reasonable care, the two are in equitable balance as required by the reciprocity norm, eliminating the normative rationale for a supplemental rule of strict liability.

For these same reasons, an abnormally dangerous activity is also not subject to strict liability "if the person suffers physical or emotional harm as a result of making contact with or coming into proximity to the defendant's . . . abnormally dangerous activity *for the*

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166 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 20 (AM. LAW INST. 2010).

167 *Id.* cmt. f. *See also id.* cmt. e (justifying the rule of strict liability for abnormally dangerous activities in cases of blasting on the ground that "the defendant chooses to engage in blasting for reasons of its own benefit"); *id.* cmt. i ("In such a situation, it can be said that the defendant is deliberately engaging in risk-creating activity for the sake of the defendant's own advantage.").

168 *Id.* cmt. j.

purpose of securing some benefit from that contact or that proximity."[169] As is true in cases of common activities, the rule of strict liability does not apply for a normatively justifiable reason: the abnormally dangerous activity when reasonably conducted confers an adequate reciprocal benefit on this particular rightholder, creating equitable balance that would be upset by the additional obligations of strict liability.

The reciprocity norm accordingly justifies the modern tort rule limiting strict liability to the abnormal dangers or nonreciprocal risks created by uncommon activities that do not otherwise confer an adequate reciprocal benefit on the plaintiff rightholder (like blasting or the domestication of vicious animals). As a matter of reciprocity, this limited rule of strict liability supplements the default rule of negligence liability. Ordinary activities conducted in a reasonably safe manner only create ordinary or reciprocal risks, immunizing them from liability. But if these activities are conducted in an unreasonably dangerous manner, they create nonreciprocal risks that normatively obligate the actor to compensate others who are foreseeably injured as a result of such conduct, justifying the imposition of negligence liability. Like the limited rule of strict liability, the modern default rule of negligence liability can be justified by the reciprocity norm of compensation.

This normative dynamic explains the results obtained by a recent empirical study, which found that both students and members of the general public who were not guided by jury instructions nevertheless tended to impose liability under conditions that roughly accord with the rule of strict liability for abnormally dangerous activities.[170] However, when the injury was caused by "an activity that was conducted in its proper place, by a noncorporate actor, and that posed only a normal and reciprocal risk—most participants imposed no liability, and most of the remainder imposed only partial liability."[171] To evaluate the equity of a distributive outcome, most of these individuals

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[169] *Id.* § 24(a) (emphasis added); *see also id.* cmt. a (explaining why strict liability does not govern claims made by airline passengers for plane crashes "[b]ecause the passengers are deliberately benefiting from the activity of flying"); *id.* ("[I]f the plaintiff is a veterinarian or a groomer who accepts an animal such as a dog from the defendant, the plaintiff is deriving financial benefits from the acceptance of the animal, and is beyond the scope of strict liability, even if the dog can be deemed abnormally dangerous."); *id.* ("Likewise, if at the plaintiff's request the defendant blasts on the plaintiff's land, or if the defendant treats the plaintiff's home with an insecticide, the plaintiff has no strict-liability claim if the blasting damages a structure on the plaintiff's property or the insecticide injures the plaintiff.").

[170] *See* Joseph Sanders et al., *Must Torts Be Wrongs? An Empirical Perspective*, 49 WAKE FOREST L. REV. 1, 10–41 (2014).

[171] *Id.* at 2.

apparently relied on a compensatory norm that is deeply influenced by reciprocity not only with respect to injurious outcomes, but also with respect to the risky behavior itself.

These empirical results are consistent with those obtained by an earlier study (involving active and retired judges, economists, environmental activists, and students) seeking to identify the extent to which individual judgments are motivated by a consequentialist concern for deterrence or instead rely on "the intuition that injurers must compensate those that they injure and by the intuition that cause is the relevant criterion for payment."[172] The study found that intuitions about these matters "are variable from person to person," but that "[m]any subjects regard penalties [the imposition of a compensatory obligation on the injurer] as an automatic consequence of causing injury (perhaps only with some negligence) . . . . Likewise, many people assign compensation . . . in terms of setting the balance right between the injurer, if any, and the victim."[173] Once again, many individuals were apparently motivated by a reciprocity norm that relies on compensation to attain equitable balance—normative behavior that has been further confirmed by a substantial number of other empirical studies.[174]

For reasons suggested by these studies, reciprocity appears to be the behavioral norm that is enforced by modern tort law. In addition to providing a norm that courts invoked to justify the rules of negligence and strict liability, reciprocity is central to the practice of modern negligence law.

2. Reciprocity and the Practice of Modern Negligence Law

To evaluate a negligence claim, the jury must determine whether the defendant violated a behavioral norm defined by the conduct of the hypothetical reasonable person.[175] The jury's resolution of this

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[172] Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17, 21 (1993).

[173] *Id.* at 31.

[174] Experimental studies have found that many individuals are motivated by norms of inequity aversion or strong reciprocity, each of which evaluates the fairness of any given interaction by evaluating the equitability of the resultant payoff structures. An injurer's payment of compensation yields an equitable payoff distribution—the injurer has not benefitted at the victim's expense, satisfying the concern for inequity aversion. *See id.* at 20. Having compensated the victim, the injurer has also exhibited the fairness of intent that merits a fair (nonpunitive) response by strongly reciprocal actors. *See* Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, *in* MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE 151, 151–54 (Herbert Gintis et al. eds., 2005).

[175] For a survey of jury instructions finding that the reasonable-person standard is by far the most common, see Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About*

normative issue is the "de facto standard that determines the final outcome in tort suits."[176] Nevertheless, "the reasonable person standard is given to the jury without elaboration."[177] How the jury exercises this normative discretion is arguably the most important question in tort law, yet there is very little scholarship addressing the issue.[178]

As Kenneth Abraham has observed, "[d]espite the extensive efforts of legal scholars to define negligence and to explore the relation between negligence and other standards of conduct, the character of negligence liability remains incompletely recognized."[179] This lacuna, according to Abraham, is deeply problematic:

> In my view, close examination of the negligence standard reveals that it is more troubled than its apparently central place in tort law implies. Far from being an appropriate default rule to be used when we are unsatisfied with the alternatives, the negligence standard is often flawed even in the ordinary cases involving liability for physical damage that are at its core.[180]

The trouble with negligence, Abraham concluded, resides in "unbounded cases" in which the standard of reasonable care is derived solely by "the finder of fact's own general normative sense of the situation, informed by individual experience and by the evidence submitted by the parties."[181]

This type of norm is deeply problematic for reasons established by Alan Miller and Ronen Perry. If the norm of reasonable care is determined by jurors in an unbounded or wholly subjective manner, then as a matter of formal analysis (social-choice theory), such "a positive definition of reasonableness is a logical impossibility."[182] Individual judgments of this type cannot be aggregated within a pool of jurors without violating at least one presumptive requirement of reasonableness (respect for unanimity, responsiveness, anonymity, neutrality, and minimal functionality), making it impossible to formulate

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Negligence: A Review of Pattern Jury Instructions, 77 CHI.-KENT L. REV. 587, 595–612 (2002).

176 Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 646 (2003).

177 Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1019 (1994) (footnote omitted).

178 *See* Hetcher, *supra* note 176, at 633–34 ("Given the jury's important role in the actual practice of tort law, it is puzzling that leading tort theorists pay so little attention to its impact and function.").

179 Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1188 (2001).

180 *Id.*

181 *Id.* at 1190.

182 Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 326 (2012).

the legal standard of reasonable care in terms of each juror's own subjective understanding of the problem.[183] Such a behavioral norm at the core of modern tort law would be quite troubling for any number of reasons.

Negligence is troubling within the conventional evolutionary account that ignores the normative origins of the common law, thereby forcing tort scholars to explain why modern tort law would give normative discretion to the jury in making the fundamental determination of reasonable care. After all, as Francis Bohlen observed in the early twentieth century, "[t]he concept universal among all primitive men, that an injury should be paid for by him who causes it, irrespective of the moral or social quality of his conduct . . . still dominates the opinion of the sort of men who form the average jury."[184] Bohlen characterized the primitive talionic norm in the barbaric manner assumed by the conventional account, but his observation actually underscores a substantial problem faced by that evolutionary narrative. If the norm is so unmoral and yet widely embraced, why does modern tort law give the jury discretion to rely on it for determining the behavioral requirements of reasonable care, particularly if all important tort rules are ultimately based on public policy as per the Holmesian formulation?[185]

Modern negligence practice is no longer so troubling when located within an evolutionary account that recognizes the reciprocity norm of equitable balance. The standard of reasonable care must be applied in a "bounded" manner as Abraham put it, for which "the source of this content is a pre-existing, concrete norm that exists independently of the finder of fact's individual sense of the situation."[186] The reciprocity norm easily satisfies this requirement. Extensive study has shown that reciprocity—"treating others as they treat you"—is a "basic, polymorphic and pervasive pattern of human social conduct."[187] Given the ongoing, pervasive influence of reciprocity, it readily provides the type of bounded normative judgment that jurors

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183 *See generally id.* at 370–91 (providing a formal proof of this conclusion and extensive discussion of the reasoning).

184 Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 118 (1924).

185 *Cf.* Gilles, *supra* note 177, at 1039–52 (concluding that if tort law is supposed to further the policy of minimizing accident costs via the cost-benefit formulation of reasonable care as per the Hand formula, then there is no compelling reason why courts continue to instruct juries without elaborating on the reasonable person standard).

186 Abraham, *supra* note 179, at 1190; *see also* Miller & Perry, *supra* note 182, at 390 (recognizing that a norm of reasonable care is logically possible if the law were to "incorporate objective criteria into a definition of reasonableness").

187 SERGE-CHRISTOPHE KOLM, RECIPROCITY: AN ECONOMICS OF SOCIAL RELATIONS 11 (2008).

must exercise when determining the behavioral requirements of reasonable care in a negligence case. The behavioral core of modern negligence law can be easily explained by reciprocity, unlike other accounts that reject this normative source of the common law. The issue further reflects the extent to which the normative importance of reciprocity has been hidden in plain sight.

III
Tort Law and the Paradigm of Compensatory Reciprocity

The importance of behavioral norms for the practice of tort law is undeniable; the problem is to identify the source of these norms.

> Norms are ubiquitous in social life. Every time we enter a room, open our mouths to speak, walk down the street, conduct a meeting, play a game of cards, write an email, or wage a war, norms are in play. All our interactions with others are mediated by a complex multiplicity of norms. . . .
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> Yet in spite of their ubiquity, norms are mysterious beasts. . . . Some norms are relatively universal, whereas others vary from one community to another and, of course, over time. They don't seem to be part of the fundamental fabric of the universe, yet it is not entirely clear where norms come from and why some exist and others don't.[188]

These observations help to explain why the normative source of modern tort law is mysterious. Based on the assumption that tort law only became modern after it rejected the norms that governed conduct in the state of nature, scholars have since struggled to identify the normative rationale for tort law.[189]

Rather than being the source of new behavioral norms, however, modern tort law has continued to develop the talionic reciprocity norms that first defined the early common law. Norms can change over time, but studies from a wide range of disciplines have shown that individuals continue to be guided by a metanorm of reciprocity that generates polymorphic behavioral obligations fitted to the circumstances of particular social interactions.[190] Within the "grand tra-

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[188] Geoffrey Brennan et al., Explaining Norms 1 (2013).

[189] *See supra* Section I.C (explaining that the Holmesian formulation of tort law created a fundamental ambiguity: What public policy should mediate conflicting interests in cases of accidental harms?).

[190] For a collection of essays documenting the role of reciprocity norms in social life, see Handbook of the Economics of Giving, Altruism and Reciprocity (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006); and Gintis et al., Moral Sentiments and Material Interests, *supra* note 174. *See also, e.g.*, Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 Am. Soc. Rev. 161, 161–62 (1960)

dition of social science," reciprocal behavior involves the exchange of "gifts or favours" as one of "the primary integrative forces of society."[191] Reciprocity in the negative sense of either retaliatory harming or compensatory liability also promotes cooperation, although it has a structure different from positive reciprocity.[192] The norms of negative and positive reciprocity, though, share important similarities: "The requirement of balance, of evening things out, and the sentiments of duty, deserts or merit, and justice, are present in both cases."[193] Reciprocity norms that attain equitable balance for reasons of desert, duty, and justice were adopted by the early common law for good reason.

In general, "the principle of reciprocity . . . pervade[d] every relation of primitive life and is exemplified in many other ways."[194] For example, "[a]ncient societies relied heavily upon various forms of reciprocity for the conduct of economic, political, and social affairs, where personalized reciprocal interactions fulfilled the role taken in the modern world by state and private institutions."[195]

Of the myriad reciprocity norms that governed behavior in the state of nature, three different types were particularly important for the early common law. Each governed a different paradigmatic form of social interaction—aggression, accidental injury, and mutual advantage. Each reciprocity norm and its underlying behavioral paradigm then framed an important field of the early common law, with the paradigm of compensatory reciprocity defining the distinctive normative domain of tort law.

The state of nature as famously depicted by Thomas Hobbes was "solitary, poore, nasty, brutish, and short."[196] The latter adjectives describe the social conditions that predictably ensue from the constant threat of aggression and the induced responses of fear and the concomitant desire to maintain one's honor to deter future aggressions.

(discussing a number of leading sociologists who have recognized the fundamental importance of the reciprocity norm); Volker Grossmann, *Is It Rational to Internalize the Personal Norm that One Should Reciprocate?*, 23 J. ECON. PSYCHOL. 27, 27–28 (2002) (describing "[v]arious sociological theories [that] have been proposed to explain reciprocal behavior"). For one of the few accounts that recognizes the ongoing legal relevance of negative reciprocity norms, see Rebecca Taibleson, *Negative Reciprocity and Law*, 35 L. & PSYCHOL. REV. 1 (2011).

191 KOLM, *supra* note 187, at 89.

192 *Id.* at 89–93 (explaining the asymmetries between negative and positive reciprocity).

193 *Id.* at 24.

194 RICHARD THURNWALD, ECONOMICS IN PRIMITIVE COMMUNITIES 106 (1932).

195 Neil Coffee, *Reciprocity*, *in* 1 THE ENCYCLOPEDIA OF ANCIENT HISTORY 5747, 5747 (Roger S. Bagnall et al. eds., 2013).

196 HOBBES, *supra* note 103, at 89.

The paradigm of aggression spawned the moral code of talionic revenge.[197]

The state of nature, however, was not "solitary" as Hobbes had claimed. "People in nonstate societies cooperate extensively with their kin and allies," involving activities such as "foraging, feasting, singing, storytelling, childrearing, tending to the sick, and the other necessities and pleasures of life."[198] These cooperative activities define the paradigm of mutual advantage, in which individual interactions are a source of expected mutual benefit.

The paradigmatic difference between these two types of interactions generated different reciprocity norms. Whereas aggression merited the negative reciprocity of punishment in kind (the eye for an eye), mutual advantage involved the positive reciprocity of giving in kind, such as "the reciprocal exchange of vegetables and fish between inland communities and fishing villages."[199] The paradigm of mutual advantage was governed by a norm of positive reciprocity different from the norm of negative reciprocity that governed the paradigm of aggression.

Whether cooperating with others or acting for their own nonaggressive purposes, individuals can accidentally harm third parties. For interactions of this type, the talion could attain reciprocity through compensatory exchange. These normatively required transactions frame the paradigm of compensatory reciprocity, in which a compensatory payment restores equitable balance by ensuring that the injurer did not benefit at the expense of the victim's person or property.

In a spectrum defined by inherently noncooperative social interactions at one extreme, and inherently cooperative social interactions at the other, the paradigm of compensatory reciprocity occupies an intermediate position. An inherently noncooperative interaction involves one individual (the attacker) who can gain only by taking something owned by another (the victim)—the paradigm of aggression. An inherently cooperative interaction requires the participation of each party to attain the expected benefits—the paradigm of mutual advantage. The remaining social interactions are not inherently cooperative or noncooperative and accordingly require a reciprocity norm of equitable balance that is both shaped by and yet different from those governing the paradigms of aggression and mutual advantage—the paradigm of compensatory reciprocity.

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197 *See supra* Section II.A (describing how in a society characterized by scarce resources and competition, there were strong incentives for violence, and so talionic revenge served as a means of protection against such aggression).

198 PINKER, *supra* note 73, at 56.

199 Gouldner, *supra* note 190, at 170.

The paradigm of compensatory reciprocity encompasses interactions between individuals who are each acting independently and each pursuing his or her own purposes that do not require the other's participation. For example, the benefit that one expects to gain from traveling on a public road does not require the presence of an oncoming traveler. The interactions within this category are not inherently cooperative and must accordingly be governed by a cooperative social norm to avoid conflict or aggression in the event that the interaction causes one party to suffer an accidental injury. Cooperation is attained by the reciprocity of compensation, which does not require the outcome that is characteristic of mutually advantageous behavior, but instead relies on compensation to ensure that one party does not benefit at the expense of another's person or property, thereby avoiding the noncooperative outcome that is characteristic of aggressive behavior.

To function in this manner, these three normative paradigms require a shared conception of ownership. In the paradigms of aggression and compensatory reciprocity, one party intentionally takes or accidentally harms the property or bodily integrity of another, whereas in the paradigm of mutual advantage, the interacting parties each voluntarily transfer things they otherwise own or control. To generate shared expectations of behavior, each of these norms requires that the interacting parties have a shared understanding of who owns what.

These shared expectations of ownership limited the normative paradigms of reciprocity to only certain types of behavior, excluding, for example, competitive interactions within markets that did not give anyone a right to future profits and the like. One could inflict business losses on a competitor without taking something that he otherwise owned, placing the conduct outside the ambit of the reciprocity norms.

But even though these talionic reciprocity norms did not encompass all forms of social behavior, they nevertheless influenced the development of the early common law. The paradigm of mutual advantage was governed by a norm of positive reciprocity that informed the common law of contracts. "In medieval law informal contracts were enforceable only if they were reciprocal: the debtor must have received something in exchange, *quid pro quo*. . . . In popular etymology this was the very essence of the idea of contract."[200] The criminal law, in contrast, was initially shaped by the paradigm of aggression as per our earlier revision to the self-help model of legal

[200] IBBETSON, *supra* note 37, at 141 (footnote omitted).

development,[201] making the paradigm of compensatory reciprocity the distinctive normative source of tort law, conventionally defined as civil liability not based on contract.[202] Like the talionic reciprocity norms that preceded them, these three fields of the common law depend on a shared conception of ownership—the common law of property.

An evolutionary account, therefore, can explain why the first forms of tort law enforced the norm of compensatory reciprocity. As we have found, the norm then continued to influence the development of tort law, resulting in a body of case law that relies on reciprocity to justify the modern rules of negligence and strict liability in a manner recognized by the *Restatement (Third) of Torts*.[203]

This account also shows why tort law is so normatively complex. In addition to governing risky interactions between strangers, tort law also applies to aggressive behavior and to mutually advantageous interactions. In the latter two cases, the tort rules are respectively shaped by the normative paradigms of aggression and mutual advantage. In cases of aggression, the defendant's behavior is reprehensible for compensatory purposes. For example, one cannot sexually assault another and simply pay compensation as the "just price" for such behavior. In these cases, the defendant can be punished for the aggressive behavior by a tort award of punitive damages, with the extracompensatory remedy supplying the means for the plaintiff to vindicate the reprehensible violation of his or her compensatory tort right.[204] Similarly, to support the norm of mutual advantage, various tort rules protect the contractual relationship from third-party interference.[205] The norm of mutual advantage then dictates how tort law governs behavior within contractual settings, justifying cost-minimizing tort rules that protect the rightholder's reasonable expec-

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[201] *See supra* Section II.A (describing how, under the talion, accidental injuries did not require retaliatory aggression, but could be remedied through compensatory obligations, which evolved into the domain of tort law).

[202] BLACK'S LAW DICTIONARY 1717 (10th ed. 2014) (defining tort as "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages").

[203] *See supra* Section II.B (discussing the development of the reciprocity norm and showing how it can justify the modern rules of negligence and strict liability).

[204] *See generally* Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 293–95 (2008) (showing that the tort rules governing punitive damages can be justified by the manner in which they vindicate reprehensible violations of the compensatory tort right).

[205] *See* DAN B. DOBBS ET AL., HORNBOOK ON TORTS 1089–1112 (2d ed. 2016) (describing the main tort rules protecting against third-party interference with contractual relationships).

tation of mutual advantage.[206] Tort law becomes normatively distinct only when it applies to behavior within the paradigm of compensatory reciprocity.

Despite its obvious importance for modern tort law, the reciprocity norm has been roundly rejected by tort scholars. By addressing this critique, we can see why the normative practice of reciprocity ultimately reveals the substantive rationale for modern tort law.

A. The Critique of Reciprocity as a Normative Rationale for Tort Liability

The logic of reciprocity within tort law played no meaningful role in tort scholarship until it was famously identified by George Fletcher in the 1970s.[207] As Fletcher observed, tort liability attaches to injuries resulting from the nonreciprocal risks created either by unreasonably dangerous behavior (negligence liability) or abnormally dangerous activities (strict liability), whereas no liability attaches to injuries resulting from the reciprocal risks created by ordinary forms of reasonably risky behavior.[208] Fletcher accordingly concluded that "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant—in short, for injuries resulting from unexcused nonreciprocal risks."[209] Liability is equitably limited to injuries caused by nonreciprocal risks for reasons developed by Gregory

[206] *See id.* at 1113–49 (describing the main tort rules protecting a contracting party against misrepresentations, falsehoods, and economic harms in special contractual relationships). In general, tort law protects the rightholder's contractually created expectation interest when the ordinary rightholder does not have the information required to adequately protect those interests by contracting, with products liability being a prominent example. Due to the contractual relationship, the dutyholder passes the cost of the tort obligations onto the rightholder by way of higher prices and the like, and so the rightholder's interests or reasonable expectations are equitably protected by cost-minimizing tort rules—the same obligations that the rightholder would demand if he or she were well-informed about the matter. *See generally* MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 37–308 (2d ed. 2011) (showing how the important rules of strict products liability protect the ordinary consumer's reasonable or well-informed expectations of product safety by minimizing his or her accident costs); Mark A. Geistfeld, *The Contractually Based Economic Loss Rule in Torts: Endangered Consumers and the Error of* East River Steamship, 65 DEPAUL L. REV. 393 (2016) (showing that the tort duty for pure economic loss is limited within contractual settings whenever the ordinary rightholder has enough information to protect those interests by contracting).

[207] George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

[208] *See id.* at 551–56 (discussing the connection between the tort victim's ability to collect compensation and the reciprocity of the risk involved in the relevant activity or behavior).

[209] *Id.* at 542.

Keating: "When risks are perfectly reciprocal, each person's freedom of action is equally benefitted, each person's security is equally burdened, and each person gains more in the way of freedom than she loses in the way of security."[210] Reciprocal risky interactions instantiate the conditions of equality or equitable balance between interacting individuals, whereas nonreciprocal interactions involve an inequality that can be fairly redressed with the compensation supplied by tort liability.

But even though reciprocity is a defensible behavioral metanorm that has been recognized by numerous courts and the *Restatement (Third) of Torts*, the proposition that tort law can be plausibly interpreted with a reciprocity rationale is widely rejected. The underlying problem has been underscored by Keating, an otherwise strong proponent of the reciprocity rationale, who observed that the reciprocity of risk "is neither precise enough, nor attainable enough, to serve as a master 'test' for the appropriate liability rule."[211] What, exactly, distinguishes a reciprocal risk from a nonreciprocal risk? As one critic sharply concluded, "[t]he distinction between reciprocal and nonreciprocal risks is chimerical and one would have thought that it was refuted years ago."[212] Even if such a distinction could be defensibly drawn, another critic concluded that "to the extent it is offered as a descriptive claim about when the law will in fact impose liability, reciprocity theory is quite suspect."[213] For example, as yet another critic observed, nonnegligent automobile drivers impose nonreciprocal risks on pedestrians, but "[t]ort law does not allow recovery in such cases, and the reason cannot be that the pedestrian and the motorist impose reciprocal risks on one another."[214] According to the critics, the reciprocity rationale for tort liability either does not adequately describe existing tort doctrine or can do so only by deeming risks to be reciprocal if they are reasonable (as with careful drivers), which has nothing to do with reciprocity and instead "is a fault-based inquiry."[215]

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[210] Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1310 (1997).

[211] *Id.* at 1320.

[212] PETER M. GERHART, TORT LAW AND SOCIAL MORALITY 153 (2010); *see also, e.g.*, Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 66 (1980) ("[W]hat actually constitutes a nonreciprocal risk? . . . This approach necessarily transforms the idea of reciprocity and fairness into a mere formal criterion devoid of any substance.").

[213] Goldberg, *supra* note 7, at 569.

[214] JULES COLEMAN, RISKS AND WRONGS 268 (1992) (concluding that reciprocity of risk cannot "provide a plausible explanation of the cases").

[215] GERHART, *supra* note 212, at 154.

The chorus of critics now includes the first proponent of reciprocity theory, George Fletcher, who has acknowledged that "[t]his is all fair criticism, but there is just as much vagueness in trying to compute the factors that enter into assessing whether risks are reasonable or not."[216] Having conceded that reciprocity depends on a prior specification of reasonable risks, Fletcher was forced to identify how tort law resolves the predicate issue of reasonable care. He argued that the law of torts is "informed" by the "paradigms of efficiency, reciprocity, and aggression," with the requirements of reasonable care being determined by the paradigm of efficiency that "expresses the principle of cost-benefit analysis, both in the analysis of negligence and in taking the aim of the system as a whole to be the optimal management of accidents."[217] After making the normative importance of reciprocity dependent on the prior specification of reasonable (efficient) risks, Fletcher then concluded that "[b]oth the paradigms of reasonableness and of reciprocity arguably place too much emphasis on ex ante risk analysis and are less than faithful to the rules that actually operate in tort cases."[218]

Due to the widespread criticism that has been leveled against the reciprocity rationale for tort liability, it gains no credibility from being recognized by the *Restatement (Third)*. The intuition that reciprocity matters within tort law follows from its pervasive role within social life. Critics nevertheless maintain that "it is incumbent on those of us who promulgate restatements and write clarifying comments, and on judges who rationalize legal doctrine, to explain why that intuition oversimplifies the issues."[219] For the critics, a more scholarly explication of the matter would show legal decisionmakers that intuitions of reciprocity are overly simplistic or misleading when applied to tort law. The relevance of reciprocity continues to be hidden in plain sight.

B. Behavioral Properties of the Reciprocity Norm

Blinded by a misunderstanding of legal history, scholars have failed to recognize that reciprocity is a behavioral norm and not a theory of tort law. When analyzed in behavioral terms, the reciprocity norm is not parasitic on the underlying specification of reasonable risks, nor is it incapable of explaining why the interaction between an automobile driver and a pedestrian involves reciprocal risks. Contrary

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[216] GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 103 (2008).
[217] *Id.* at 173.
[218] *Id.* at 104.
[219] Kenneth W. Simons, *The Restatement (Third) of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines*, 44 WAKE FOREST L. REV. 1355, 1371 (2009).

to the conventional critique of reciprocity, the norm has properties that can justify the behavioral obligations of modern tort law in cases of accidental harm.

1. Reciprocity and the Requirements of Reasonable Care

Within the paradigm of compensatory reciprocity, the default rule of negligence liability is supplemented by limited rules of strict liability.[220] In order to enforce the compensatory obligation under a rule of strict liability, tort law must prioritize the rightholder's interest in physical security over the conflicting liberty interests of the dutyholder.[221] Based on this priority, the dutyholder's subordinate liberty interest can be burdened with the normative obligation to compensate the foreseeable harms proximately caused to the rightholder's prioritized interest in security, even if the dutyholder's exercise of liberty was reasonable. Such a conflict of interests, however, does not exist in cases of reciprocal risks. In these cases, the reciprocity norm instead justifies a negligence rule with a fully specified standard of reasonable care.

"Reciprocity . . . connotes that *each* party has rights *and* duties."[222] To attain equitable balance, the norm must account for the manner in which it reciprocally affects each interacting party in his or her capacity as both rightholder and dutyholder—the conception of reciprocity recognized long ago by *Losee v. Buchanan* and its progeny.[223] For risky interactions that occur outside of contractual settings, this normative property is determined by the reciprocity of risk.[224]

In the case of reciprocal risks, the interacting individuals are identical in all relevant respects, including the degree of risk that each imposes on the other and the severity of injury threatened by the risk.

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220 *See supra* Section II.B (discussing the evolution of the reciprocity norm in tort law and showing how it justifies forms of strict liability as supplements to modern negligence liability).

221 *See* RESTATEMENT (SECOND) OF TORTS § 1 cmt. b (AM. LAW INST. 1965) (explaining that an individual interest that "is protected against any form of invasion . . . becomes the subject matter of a 'right'"). 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.

222 Gouldner, *supra* note 190, at 169.

223 *See* 51 N.Y. 476, 485 (1873); *see also supra* section II.B (discussing the influence of *Losee*).

224 Contractual relationships are governed by the paradigm of mutual advantage, which differs from the paradigm of compensatory reciprocity. *See supra* notes 205–06 and accompanying text (discussing how tort rules governing the contractual relationship are formulated to protect the rightholder's expectation interest).

Such a case can be represented by an interaction between two automobile drivers in which each is simultaneously a rightholder (who might be injured by the other) and a dutyholder (who might injure the other). Due to the reciprocity of the two risks, there are no relevant differences between the interacting parties. Each automobile driver has the identical right against the other, each owes an identical duty to the other, and each expects to derive a benefit, on balance, by engaging in the activity of driving.

Under these conditions, neither party prioritizes his or her security interest over the liberty interest of the other. Each interacting individual instead reasonably prefers a cost-minimizing duty of reasonable care that requires a safety precaution only if the benefit of risk reduction (fully accruing to the individual as reciprocal rightholder) exceeds the burden or cost of the precaution (also fully borne by the individual as reciprocal dutyholder).[225] By minimizing accident costs, the negligence rule maximizes the net benefit that each driver expects to gain by engaging in the social activity.

The care that one must exercise in these cases is "ordinary" in a basic behavioral sense. For conduct that threatens self-injury, an individual rationally determines how safely to behave by comparing the burden of her precautionary behavior to the corresponding safety benefit or reduction in her own expected injury costs. The individual minimizes her total costs by taking any precaution costing less than the associated reduction in expected injury costs—the same decision rule required by the reciprocity norm for cases involving reciprocal risks.

The reciprocity norm accordingly generates a behavioral requirement regarding the safety of others that fully corresponds to the one that individuals otherwise choose for their own safety. *For reciprocal risks, individuals must make decisions regarding the safety of others that are ordinary or not fundamentally different from the decision they would make to protect themselves from that same risk of injury*.

The normative baseline obligates risky actors to exercise reciprocal care toward themselves and others. Under this obligation, the talionic reciprocity norm, treat others like they have treated you, becomes the Golden Rule, "do unto others as you would have them do unto you"—an ethical standard "endorsed by nearly every religion and culture."[226]

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[225] For more rigorous demonstration, see Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 851–52 (1995).

[226] HARRY J. GENSLER, ETHICS AND THE GOLDEN RULE, at vii (2013). Many versions of the Golden Rule are indefensible. *See id.* at 1–33 (describing fallacies in different

The normative baseline or equilibrium is upset by a nonreciprocal risk. In cases of nonreciprocal risky interactions, one individual imposes a risk of physical harm on another that is greater in degree (an increased probability of accident) or kind (a more severe loss) than the risk to which she is exposed. The risks do not balance out, creating an equitable imbalance that must be remedied by other means.

Consider an interaction between a driver and pedestrian. To the extent that the pedestrian's conduct threatens the driver with bodily injury, that risk is considerably lower than the risk that the driver imposes on the pedestrian. Assuming that this risk is nonreciprocal as per the conventional critique of reciprocity,[227] the risks do not offset one another—the driver's risky behavior is benefitting at the pedestrian's expense, thereby upsetting the normative baseline. To eliminate this inequality and attain equitable balance, the driver must pay compensation to the pedestrian in the event of accident, regardless of whether the driver exercised reasonable care. Nonreciprocal risks justify a rule of strict liability.

This normative requirement is subject to an important exception. The compensatory obligation under a rule of strict liability does not attain equitable balance in the case of a fatal accident caused by a nonreciprocal risk. Strict liability gives the pedestran rightholder an entitlement to compensatory damages, but that entitlement provides no redress for a (dead) pedestrian who can no longer be compensated following a fatal accident.[228] Lacking acceptable redress for fatal inju-

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formulations of the Golden Rule). The version entailed by the reciprocity norm, however, is defensible because it requires one to impartially consider the interests of another. *Cf.* W.M. Sibley, *The Rational Versus the Reasonable*, 62 PHIL. REV. 554, 557–58 (1953) ("Reasonableness . . . requires impartiality, 'objectivity'; it expresses itself in the notion of equity.").

227 *See supra* Section III.A (discussing a critique of reciprocity that notes that pedestrians cannot recover in tort against nonnegligent drivers even though, presumably, drivers impose nonreciprocal risks on pedestrians).

228 State legislatures have enacted wrongful death statutes that enable statutorily specified plaintiffs to recover from the defendant for their own injuries caused by the violation of the decedent's tort right. *See generally* Andrew J. McClurg, *Dead Sorrow: A Story About Loss and a New Theory of Wrongful Death Damages*, 85 B.U. L. REV. 1 (2005) (describing wrongful death statutes). The decedent, however, is not compensated. In the event of a fatal accident, the defendant dutyholder does not have to pay damages for the manner in which premature death has caused the decedent rightholder to suffer a loss of life's pleasures. *See id.* at 6–7, 20–22 (finding that decedent's loss of life's pleasures is not compensable by the compensatory damages remedy in the vast majority of states). Indeed, compensatory damages can be zero in a case of wrongful death. *E.g.*, Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 811 (Ct. App. 2003) (upholding a substantial punitive damages award in a wrongful death case in which the decedent's estate received no compensatory damages).

ries under the rule of strict liability, how can the pedestrian receive the compensation to which she is entitled as a matter of reciprocity?

This normative problem must be resolved within the context of the compensatory obligation that the driver owes to the pedestrian. Recall that in cases of perfectly reciprocal risks, the driver as dutyholder is obligated to exercise ordinary care or the amount that she would exercise for risks threatening self-injury. If this obligation were extended to the nonreciprocal risks of fatal accidents, then the driver would receive a windfall at the expense of the pedestrian. The driver would incur only the obligation to exercise ordinary care as in the case of reciprocal risks, but would avoid the additional obligation to pay compensatory damages for the injuries foreseeably caused by the residual nonreciprocal risk (the pedestrian would be killed and can no longer be compensated). Due to the unavailability of the damages remedy, the compensatory shortfall must be addressed by the other component of the compensatory obligation—the standard of care. To attain equitable balance, the norm shifts the unfulfilled component of the compensatory obligation from the damages remedy into a duty to exercise *extraordinary* care.[229]

The additional precautions required by this compensatory obligation, when combined with the normative baseline of ordinary care, further reduce risk or the likelihood that the rightholder will suffer uncompensated injury. The rightholder accordingly benefits from the compensation owed to her by the manner in which the dutyholder's expenditure of these resources on additional precautionary measures reduces the likelihood of fatal accident. The obligation to exercise such extraordinary care eliminates what would otherwise be a compensatory windfall for the dutyholder and is equitable for that reason.

By exercising extraordinary care, the dutyholder fully satisfies the compensatory obligation with respect to the nonreciprocal fatal risk. The resultant rule of negligence liability does not fully compensate the rightholder as in cases of reciprocal risks (the pedestrian still faces the prospect of being killed without being fully compensated by an offsetting reciprocal benefit), but the more demanding standard of extraordinary care provides a defensible method for attaining equitable balance when one individual subjects another to a nonreciprocal risk of premature death.[230]

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[229] For more rigorous development of this argument in terms of welfare economics, see Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle that Safety Matters More than Money*, 76 N.Y.U. L. REV. 114 (2001).

[230] For a more detailed demonstration of this conclusion, see Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 185–87 (2011).

Premature death is an extreme example of an "irreparable injury" that is not fully compensated by the damages remedy. In general, bodily injury and damage to real or tangible property—the category of physical harms—are also irreparable injuries.[231] As in the case of premature death albeit to a lesser extent, these other irreparable injuries create a compensatory shortfall within the damages remedy. To remedy that compensatory inequity, the reciprocity norm obligates risky actors to exercise extraordinary care for reducing the nonreciprocal risks of physical harm.

In contrast to premature death, the dutyholder's exercise of extraordinary care does not necessarily satisfy the compensatory obligation for nonfatal injuries. The duty to exercise extraordinary care requires safety precautions above the ordinary amount only to the extent that such precautions eliminate a compensatory windfall for the dutyholder that would otherwise inhere in the damages remedy. Satisfying this obligation only offsets the inherent inadequacies of the compensatory damages remedy; it does not otherwise affect the obligation to pay compensatory damages in the first instance. There is no such obligation to compensate the rightholder's loss of life's pleasures in a case of premature death. But if the dutyholder's extraordinarily careful behavior still creates a nonreciprocal risk that foreseeably causes the rightholder to suffer a nonfatal physical harm, the dutyholder is obligated to pay compensatory damages.

Once again, the behavioral obligations are readily understandable. To satisfy the reciprocity norm, one who threatens another with a nonreciprocal risk of physical harm cannot act with ordinary care, but must be extra vigilant. *A dutyholder must exercise extraordinary care when subjecting a rightholder to a nonreciprocal foreseeable risk of physical harm and is obligated to pay compensatory damages if such a risk causes the rightholder to suffer a nonfatal physical harm.*

The evident logic of this normative obligation explains the results obtained by numerous empirical studies finding that individuals typically interpret the requirements of reasonable care to mandate safety precautions in excess of ordinary care (the cost-minimizing amount) for risky conduct threatening severe bodily injury to others.[232] Risky

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[231] *Id.* at 163–64.

[232] *See* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107 (2001) (conducting a study in which a sample of jury-eligible individuals assessed awards in tort cases with respect to risk analysis and concluding that cases involving greater risks of injury often result in significantly higher damages awards because of the dutyholder's failure to engage in precautionary measures despite those measures not making economic sense from a cost-benefit perspective); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000) (same); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 40–46 (1999) (analyzing study in

conduct that is nonreciprocal and threatens another with severe bodily injury or premature death—the most severe injury possible—creates a striking imbalance between the parties. Under these conditions, individuals apparently recognize that a defensible way to rectify matters and attain equitable balance is by obligating the risky actor to exercise extraordinary care.

As a matter of reciprocity, the compensatory duty encompasses all individual rightholders who are foreseeably threatened by the risky behavior. Automobile driving, for example, does not ordinarily threaten injury to only a single rightholder pedestrian; the behavior also risks injury to other pedestrians, drivers, and cyclists on the roadway. In these cases, the dutyholder and each of the rightholders mutually benefit from a single duty that encompasses all of the parties. All else being equal, greater risk requires greater care. Formulating the duty to include the foreseeable risks faced by other each of the rightholders, therefore, requires the dutyholder to exercise more care than would be required by a duty limited to the risk faced by each individual rightholder. Not only does this formulation of the duty benefit each individual rightholder, but as a global solution to the compensatory problem, it also minimizes the total compensatory obligation for the risky behavior in question and benefits the dutyholder. A tort duty encompassing all individual rightholders who are foreseeably threatened by the dutyholder's risky behavior accordingly creates a mutuality of benefit within each individual interaction, thereby satisfying the reciprocity norm.

Pursuant to this duty, behavior that foreseeably creates reciprocal risks requires ordinary precautions or the amount of care that one would exercise for his or her own protection; nonreciprocal risks of physical harm require extraordinary precautions; and any remaining nonreciprocal risks entail the additional obligation to pay compensation in the event of a nonfatal accident. Contrary to the conventional critique of reciprocity, the norm is not parasitic on an underlying specification of reasonable care but instead is fully capable of specifying the precautions that risky actors must exercise for the protection of others.

Of course, very few risky interactions actually create perfectly reciprocal risks, leading to the second critique of the reciprocity norm. Nonreciprocal risks would seem to be common, as in the case of risky interactions between automobile drivers and pedestrians. If strict liability ought to govern these nonfatal accidents, what explains why tort

which a sample of judges exhibited similar attitudes toward safety precautions and dutyholder liability in tort cases involving risks of severe personal injury).

law limits liability in these cases to negligent misconduct? The answer, again, depends on the behavioral properties of the reciprocity norm.

2. *Objective Properties of the Reciprocity Norm*

"Norms refer to behavior, to actions over which people have control, and are supported by shared expectations about what should or should not be done in different types of social situations."[233] To generate the shared expectations that support the required forms of social behavior, the reciprocity norm must be defined in terms of rights and obligations that can be easily identified by each of the two interacting parties.

Within the paradigm of compensatory reciprocity, the characteristic interaction is between individuals who are strangers, like drivers and pedestrians. Lacking knowledge of the other's particular traits, each individual must base her safety decision on the common traits of the ordinary person in the community. Each, in turn, reasonably can expect the same conduct of the other, producing the shared expectations that support the norm. *The reciprocity norm must be formulated in objective terms that can be readily identified by strangers who interact with one another.*

This normative requirement explains why tort law imposes a duty on risky actors to exercise the care that would be taken by the reasonable person, a hypothetical construct defined in terms of objective behavioral criteria such as "normal intelligence . . . normal perception, memory, and at least a minimum of standard knowledge."[234] The objective specification of reasonable care enables individuals to determine the conduct that they can expect of strangers with whom they interact. One who violates the objective standard of care creates a nonreciprocal risk and is subject to negligence liability for the foreseeable injuries.

Such a nonreciprocal risk is objective in the sense that it is created by the dutyholder's violation of the objective standard of reasonable care. As in the case of negligence liability, nonreciprocal risks are defined objectively for purposes of strict liability.

Consider a public road containing automobile drivers, bicyclists, and pedestrians. If the reciprocity of risk were subjectively defined by the risks actually created within each particular interaction, then a driver would owe extraordinary care for the nonreciprocal risks imposed on bicyclists and pedestrians. As for other drivers on the

[233] Cristina Bicchieri & Ryan Muldoon, *Social Norms*, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 1, 2011), http://plato.stanford.edu/archives/spr2014/entries/social-norms/.

[234] DOBBS ET AL., *supra* note 205, at 222.

road, any driver would owe ordinary care to those who pose reciprocal risks, and extraordinary care to others who pose lower risks (by driving smaller vehicles, for example).

A driver, however, cannot realistically comply with such a variable standard of care. What type of driving behavior could provide extraordinary protection to some and ordinary protection to others, particularly when the individuated risk characteristics pertain to strangers whose identity continually changes as one proceeds down the road? In general, driving safely protects other drivers, cyclists, and pedestrians; it cannot ordinarily be tailored to different levels of precaution for different strangers within this group. An obligation requiring such individuated care would be behaviorally unrealistic and cannot be justified by the reciprocity norm.

This type of unrealistic behavioral obligation, however, motivates the conventional critique of reciprocity, which mistakenly assumes that the norm entails a comparison of the actual risk created by one party (a driver) with the actual risk created by the other (the pedestrian). This formulation of a reciprocal risk is subjective in the sense that it only considers the individualized or particular interaction as opposed to the broader social context in which the interaction occurs. Social context is critical for a behavioral norm. To generate realistic behavioral obligations, the reciprocity norm must define the reciprocity of risk in a manner that applies equally to everyone within the relevant social category of risky behavior, yielding an objective specification of reciprocal risks for everyone in the category that can differ from the individual (or subjective) risks that are created by each particular interaction within this broader social setting.

As illustrated by the prior example, overly narrow formulations of the social categories create an excessive individuation of risk among rightholders that yields an unrealistic variable standard of care for dutyholders, requiring a broader formulation of the social category. To be normatively appropriate, the social category for evaluating the reciprocity of risk must yield behaviorally realistic requirements that can be readily identified by those who interact within this social context, creating the shared expectations required by the reciprocity norm.

For example, if one of the social categories in the prior example were defined as the activity of driving, then the reciprocity norm would still require an unrealistic, variable standard of care. A driver would owe ordinary care to all other drivers (as per the categorical definition of the risky activity) but extraordinary care to bicyclists and pedestrians (who are not in the social category of driving and impose lower risks). Such a variable standard of care is still behaviorally

unrealistic whenever the driver's safety behavior affects bicyclists and pedestrians in addition to other drivers. A safety obligation that affects a group of individuals cannot be individuated to afford some greater protection and others less.

In order to yield an internally consistent standard of care for safety behavior affecting all three types of individuals (drivers, bicyclists, and pedestrians), the social category for evaluating the reciprocity of risk must be expanded to include all three types of risky behavior. All who participate in this more broadly defined social category of risky behavior (transportation along a public road) impose the same or objective reciprocal risks on one another, requiring each to exercise ordinary care while engaged in that social activity. The behavioral obligations faced by each person in the group do not unrealistically vary from one individual to the next, satisfying the normative requirements of reciprocity.

Perhaps individuals could constantly monitor changing social circumstances to refine the social categories of risky behavior along these lines, but doing so would be quite burdensome. The complexity of the behavioral decision is considerably reduced when the reciprocity of risk is objectively specified in terms of two readily identifiable social categories of risky behavior: (1) activities that pose no more than the ordinary background risk within the community (objective reciprocal risks); and (2) the remaining activities that pose abnormally high risks within the community (objective nonreciprocal risks).

The behavioral rationale for this approach to categorization is explained by Cristina Bicchieri:

> People . . . seem to have a preferred level of categorization. When observing a canary, for example, most people do not categorize it as an animal or a canary; rather, they prefer to include it in the category "bird." The preference for a basic-level categorization appears to be based on the need to maximize inferential, predictive potential. Hence, for someone who is not an ornithologist, the basic-level categorization of a canary will be as a bird, as this way to categorize it maximizes at once distinctiveness and informativeness, allowing meaningful predictions to be made.[235]

Largely for these same reasons, most individuals naturally conceptualize the reciprocity norm in terms of two basic-level social categories that distinguish only between ordinary (reciprocal) risks and abnormal dangers (nonreciprocal risks). These two basic categories of risky behavior "maximize [the] inferential, predictive potential" of any given social interaction, enabling both parties to make "mean-

[235] CRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS 89 (2006) (citation omitted).

ingful predictions" of their respective normative obligations and rights within the shared expectations of reciprocity.

As applied to the social category of risks that are common or ordinary in the community, the reciprocity norm justifies a realistic and easily understood behavioral rule governing risky interactions between strangers: *To attain the equitable balance required by reciprocity, one who engages in an activity posing risks no greater than the ordinary or background level of risk in the community must exercise ordinary care*. By categorizing risky behavior in this basic manner, the norm maximizes the ability of individuals to identify the attribute of a social interaction that distinctly determines their respective rights and obligations within that interaction.

At times, however, individuals engage in conduct that is inherently more risky than is common in the community. To eliminate the imbalance inherent in the creation of extraordinary risks threatening another with physical harm, the risky actor must exercise extraordinary care. Doing so might reduce risk to ordinary levels and thereby attain the equitable balance required by the reciprocity norm. In exceptional cases, though, the risky conduct (like blasting for construction purposes) still poses an extraordinary danger despite the exercise of extraordinary care, obligating the risky actor to pay compensatory damages in the event of accident. *To attain the equitable balance required by reciprocity, one who engages in conduct posing risks above the ordinary or background level of risk in the community must exercise extraordinary care and pay compensation for nonfatal physical harms foreseeably caused by any residual, extraordinarily high risks*. Once again, by categorizing risky behavior in this basic manner, the reciprocity norm makes it easy for individuals to identify the attribute of a social interaction that distinctly determines their rights and obligations within that interaction.

3. Reciprocity and the Behavioral Requirements of Modern Tort Law

Consistent with the normative requirements of reciprocity, modern tort law has adopted an objective measure of reciprocal risks that distinguishes ordinary risks from the abnormal dangers subject to strict liability.

According to the *Restatement (Third) of Torts*, "[m]ost ordinary activities can be made generally safe when all actors take reasonable precautions; when such safety cannot be achieved, there is good

reason to regard the danger as an abnormal one."[236] But "[e]ven if an activity involves a highly significant risk when reasonable care is exercised, the activity is not abnormally dangerous [and subject to strict liability] if it is in common usage."[237]

As per the normative requirements of reciprocity, most ordinary activities conducted with ordinary care create ordinary or objective reciprocal risks subject only to negligence liability. An activity like driving, though still highly risky as compared to other ordinary activities like walking, is quite common, making it part of the ordinary or background risk of the community when conducted in a reasonable manner. By exercising ordinary care, a driver would only create a residual risk of accident that is objectively reasonable or reciprocal within the larger social category of common or ordinary risky behaviors, eliminating the normative rationale for imposing a supplemental obligation of strict liability on reasonably careful automobile drivers.

Strict liability instead only applies to uncommon activities that pose an abnormally high danger despite the exercise of extraordinary care, the same behavior required by the reciprocity norm and the black-letter rule in the *Restatement (Second)*: "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, *although he has exercised the utmost care to prevent the harm*."[238]

Once the properties of the reciprocity norm have been objectively specified in a behaviorally realistic manner, the norm generates the behavioral obligations of negligence and strict liability in the manner first articulated by the courts,[239] then developed by Fletcher,[240] and now recognized by the *Restatement (Third) of Torts*.[241]

C. Reciprocity and the Substantive Rationale for Tort Law

Although the reciprocity norm justifies the behavioral obligations of modern tort law in cases of accidental harm, the critics of reciprocity are ultimately correct about one critical attribute of the norm:

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[236] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 20 cmt. h (AM. LAW INST. 2010).

[237] *Id.* cmt. j.

[238] RESTATEMENT (SECOND) OF TORTS § 519(1) (AM. LAW INST. 1977) (emphasis added).

[239] *See supra* Section II.B (describing how courts relied on the reciprocity norm in supplementing negligence liability with strict liability).

[240] *See supra* Section III.A (summarizing George Fletcher's contributions to reciprocity theory).

[241] *See supra* Section II.B (explaining how the Third Restatement's formulations of negligence and strict liability reflect the reciprocity norm).

Reciprocity does not supply a complete rationale for tort law. Reciprocity is a behavioral norm of equitable balance. Why should the legal system enforce the reciprocity norm? Must it always do so? These questions must be resolved with a substantive rationale for tort law, not with a behavioral norm that is enforced by the law.

We return, then, to the fundamental ambiguity of modern tort law, but the question has now been redefined. Instead of trying to identify the invisible hand that has guided the normative development of tort law, our inquiry is more limited. Which substantive principle or principles can justify the manner in which tort law enforces the normative practice of reciprocity?

We can refine this inquiry even further. Like other bodies of law, the common law of torts must satisfy the principle of substantive equality. "No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance."[242] So, too, the modern tort system can legitimately enforce the normative practice of reciprocity only if that practice gives "equal concern for the fate of all citizens over whom it claims dominion and from whom it claims respect."

To be sure, the abstract idea of substantive equality is highly contested, with different theories of justice or political philosophy disagreeing about "which specific kind of equality is required by the more abstract idea of treating people as equals."[243] Put differently, "the fundamental argument is not whether to accept equality, but how best to interpret it."[244] We need not resolve this difficult issue, however, in order to proceed.

Tort scholars have identified three different principles of substantive equality that could plausibly justify tort law: liberal egalitarianism, libertarianism, and welfarism.[245] Our inquiry accordingly reduces to the question of whether one or more of these principles can justify the manner in which tort law enforces the normative practice of reciprocity.

The practice has two essential attributes of direct relevance to the principle of substantive equality. By addressing each of them, we will have tracked the reciprocity norm from the state of nature to the substantive rationale for modern tort law.

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[242] RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1 (2000).

[243] WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 4 (2d ed. 2002).

[244] *Id.*

[245] *See* Goldberg, *supra* note 7, at 544–78 (discussing interpretations of tort law based on the welfarist principle of allocative efficiency and alternative rights-based interpretations based on liberal egalitarianism or libertarianism).

1. Reciprocity and the Substantive Equality of Compensation

For nonreciprocal risks that foreseeably cause nonfatal physical harms, the normative practice of reciprocity attains equitable balance by relying on the compensatory damages remedy under a supplemental rule of strict liability, which enforces a compensatory tort obligation that makes the defendant's liberty interest subordinate to the plaintiff's legally protected interest in physical security.[246] The compensatory obligation treats the liberty interest of the defendant dutyholder differently from the security interest of the plaintiff rightholder, leading to the question of whether this difference in treatment can be squared with a substantive principle of equality.

The unequal normative weight given to the interests in liberty and security cannot be justified by a welfarist principle of substantive equality such as utilitarianism. Welfarism gives equal treatment to the welfare of all individuals in the community, requiring that one individual's interest in liberty (measured in terms of welfare) be treated no differently from another's interest in physical security (again measured in terms of welfare).[247] This formulation of equality accordingly requires a simple comparison of the costs faced by one party with the costs faced by the other, justifying cost-minimizing tort rules that are allocatively efficient and maximize social welfare.[248]

The normative practice of reciprocity generates cost-minimizing tort rules for ordinary or common risky behaviors (creating reciprocal risks) or those that otherwise occur in contractual settings,[249] yielding a substantial overlap with the cost-minimizing requirements of welfarism. Most risky interactions are of this type, explaining why a welfarist efficiency analysis can plausibly justify substantial swaths of tort law. But for nonreciprocal risky behaviors, the norm departs from the cost-minimizing liability rules by requiring extraordinary care and

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246 *See supra* notes 220–22 and accompanying text (explaining why an individual right entails a priority of the rightholder's protected interest over a conflicting interest of the dutyholder).

247 *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 24–25 (2002) (stating that under a welfarist approach, "social welfare is postulated to be an increasing function of individuals' well-being and to depend on no other factors," which in turn "incorporates a basic notion of equal concern for all individuals" in the sense that "each individual's well-being affects social welfare in a symmetric manner").

248 *See id.* at 85–154 (showing why welfarist principles of substantive equality such as utilitarianism do not justify tort rules based on the reciprocity of risk but instead require cost-minimizing liability rules).

249 *See supra* notes 224–26 and accompanying text (explaining why rightholders who impose reciprocal risks on one another each reasonably prefer cost-minimizing tort rules); *supra* notes 205–06 and accompanying text (explaining why cost-minimizing tort rules that apply to behavior within contractual settings protect the rightholder's reasonable expectation of mutual advantage).

a supplemental rule of strict liability.[250] For this and other equally compelling reasons, the reciprocity norm cannot be squared with welfarist rationales for tort law.[251]

Moreover, the collectivist orientation of welfarism is not easily situated within the rights-based structure of tort liability. To satisify the compensatory requirements of reciprocity, a tort rule governing nonreciprocal risks must prioritize the security interest of the rightholder over the conflicting liberty interests of the dutyholder in order to protect the individual right to physical security. By doing so, the tort system enforces the norm as a mode of civil recourse that permits a rightholder to seek compensatory redress for the rights-violation or wrong committed by a dutyholder who breached the compensatory obligation.[252] The question, then, is whether there is some other principle of substantive equality that justifies this rights-based normative prectice.

To pursue this matter further, we can consider the other essential attribute of the reciprocity norm that has implications for the principle of substantive equality.

2. Objective Reciprocity and Substantive Equality

As we have found, the reciprocity norm requires realistic and readily understood behavioral obligations for governing risky interactions between strangers, thereby justifying tort rules defined in the objective terms of certain practices and individual traits that are common in the community.[253] The standard of reasonable care, for example, is objective in the sense that it is determined by the conduct of the reasonable person possessing average intelligence and skill. The objective components of this liability rule have important implications for the principle of substantive equality.

In diverse communities, the objective attributes of the reasonable person often differ from the actual traits of the parties in a particular case. Once the objective attributes of the reasonable person are com-

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[250] *See supra* Section III.B.1 (deriving the normative requirements of extraordinary care and a supplemental rule of strict liability for nonreciprocal risks threatening fatal injuries).

[251] The manner in which tort law prioritizes the rightholder's interest in physical security also inefficiently limits the duty with respect to pure economic loss and stand-alone emotional harms, further undermining the welfarist interpretation of tort law. *See* Geistfeld, *supra* note 230, at 173–80.

[252] *See supra* Section I.C (explaining why civil recourse involves the enforcement of individual rights and their correlative duties); *supra* notes 129–31 and accompanying text (describing the first forms of tort liability as a mode of civil recourse).

[253] *See supra* Section III.B.2 (discussing the need for easily identifiable, objective norms to govern behavior and explaining the need to categorize behavior as imposing either ordinary or abnormally dangerous risk).

pared to the actual or subjective traits of the parties, it becomes apparent that negligence liability has components of personal fault, no-fault or strict liability, and immunity from liability.

The failure to exercise reasonable care often involves conduct that is personally blameworthy, but the objective component of the liability rule means that some dutyholders will be deemed negligent, even though they cannot be blamed for their conduct in light of their actual capabilities. In the absence of any personal fault or blameworthiness, the imposition of negligence liability functions as a form of no-fault or strict liability for reasons identified by Holmes:

> If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.[254]

In these cases, the liability rule is framed exclusively in terms of negligence—the defendant's failure to comply with an objective standard of reasonable care subjects him to negligence liability for the ensuing injuries—but any rationale for liability must consider how the objective standard applies to individuals who are simply unable to comply. These defendants are not blameworthy for their "congenital defects," but as a matter of reciprocity, there is nothing unfair about subjecting them to negligence liability. One who fails to comply with the objective standard of reasonable care creates an objective nonreciprocal risk and is fairly subject to (strict) liability for the resultant injuries.

For this reason, reciprocity normatively justifies the tort rule that "[a]n actor's mental or emotional disability is not considered in determining whether conduct is negligent."[255] By requiring a person with a mental disability to act like a reasonable person with ordinary mental capabilities, tort law has adopted a rule of negligence liability that functions as a form of no-fault or strict liability, for people with mental disabilities obviously cannot satisfy this unrealistic behavioral

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254 HOLMES, *supra* note 6, at 108.

255 RESTATEMENT (THIRD) OF TORTS § 11(c) (AM. LAW INST. 2010). This rule does not apply to "children" for reasons readily explained by the reciprocity norm. Everyone is a child at some point, and so children create reciprocal risks and should not be subject to (strict) liability for failing to act like the reasonable person of ordinary age. These risks are also common and part of the ordinary background risk within the community, providing further reason for not subjecting them to strict liability. Children who engage in "adult activities," by contrast, create nonreciprocal risks and are subject to (strict) liability for not conforming to the objective reasonable adult standard. *See id.* § 10(c).

demand. When the rule is normatively redefined in terms of the behaviorally realistic requirements of reciprocity, the logic of liability becomes clear. One simply incurs liability because his or her mental disability created a nonreciprocal risk (defined by reference to ordinary intelligence) that foreseeably caused harm to another; personal fault or blameworthiness is irrelevant.

Because the objective negligence standard contains pockets of strict liability, it can also be limited in a manner that creates immunities from these forms of strict liability. For example, individuals with physical disabilities must conform to a standard of acting like a "reasonably careful person with the same disability."[256] Due to their physical disabilities, these individuals can create nonreciprocal risks defined by reference to the ordinary level of risk created by the ordinary (nondisabled) person who exercises reasonable care. But rather than subject individuals with physical disabilities to this form of strict liability, tort law evaluates their conduct with a reasonable person standard that accounts for their physical capabilities, effectively immunizing them from incurring (strict) liability for the nonreciprocal risks attributable to their disabilities.

The immunity for people with physical disabilities cannot be justified by the reciprocity norm. After all, the risks in question are nonreciprocal, and yet the actor does not incur liability for them, unlike the nonreciprocal risks created by people with mental disabilities.

> What can possibly justify judges treating the mentally ill differently than they treat . . . the physically disabled? Surely mental illness is just as cogent an excuse for otherwise blameworthy conduct as . . . physical disability. Surely some forms of mental illness, just like . . . physical disability, may make it practically impossible for the actor to conform his conduct to the ordinarily required standard. The different treatment of the mentally ill seems to be an unjustifiable anomaly in the law.[257]

Regardless of its practical importance, this issue directly implicates the principle of substantive equality, explaining why it continues to be the subject of scholarly critique.[258] As a matter of reciprocity,

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256 *Id.* § 11(a).

257 Patrick Kelley, *Infancy, Insanity, and Infirmity in the Law of Torts*, 48 AM. J. JURIS. 179, 180 (2003); *see also, e.g.*, Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law*, 91 N.Y.U. L. REV. 627, 640 (2016) ("It is something of a mystery why tort law treats the mentally disabled differently from the physically disabled and children.").

258 *See, e.g.*, Ben-Shahar & Porat, *supra* note 257, at 629 (arguing "that with the increasing availability of accurate information about actors' characteristics, negligence law should give up much of its objectivity [as embodied, for example, in the different treatment of the mentally and physically disabled] by allowing courts to 'subjectify' the standard of

those with mental and physical disabilities have conditions resulting in behaviors that create nonreciprocal risks, but only one is subject to (strict) liability. These individuals are equally situated within the normative practice of reciprocity, yet treated differently by tort law. What justifies this difference of treatment by the government?

Although the different treatment cannot be normatively justified by reciprocity, it could still be justified by an underlying principle of substantive equality. Are people with mental and physical disabilities treated differently by the tort system because doing so is required in order for them to be treated equally in some deeper respect? By looking for an egalitarian principle with this property, we can use the normative practice of reciprocity to identify the substantive rationale for tort law.

3. Liberal Egalitarianism and the Normative Practice of Reciprocity

Liberal egalitarianism is the only remaining principle of substantive equality that can justify the modern tort rules governing nonreciprocal risky behaviors, including the rules that have different liability implications for the nonreciprocal risks created by mental and physical disabilities. According to the liberal egalitarian principle, each person has an equal right to autonomy or self-determination, making each responsible for the costs of his or her autonomous choices.[259] This principle of substantive equality justifies the manner in which modern tort law enforces the normative practice of reciprocity.

Under liberal egalitarianism, tort law can give different values to one's interest in physical security and another's conflicting interest in liberty. The different valuations depend on the relative importance of these particular security and liberty interests for individuals to exercise their general right to autonomy or self-determination. For reasons starkly illustrated by the state of nature, individuals must first be adequately secure in order to fully exercise autonomy. Consequently, the default position in tort law prioritizes the individual interest in physical security. The exercise of liberty is also essential for living a meaningful life, so the requirement of equal treatment prevents the

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care—that is, to tailor it to the specific actor's tendency to create risks and her ability to reduce them"); Jean Macchiarioli Eggen, *Mental Disabilities and Duty in Negligence Law: Will Neuroscience Reform Tort Doctrine?*, 12 IND. HEALTH L. REV. 591, 629–33 (2015) (arguing that old justifications, including evidentiary ones, in favor of the bifurcated approach to mental and physical disabilities no longer hold up in the era of neuroscience).

[259] *See* KYMLICKA, *supra* note 243, at 74 (discussing the liberal egalitarian principle that "[t]reating people with equal concern requires that people pay for the costs of their own choices").

rightholder's security interest from having an absolute priority that fully negates the value of the dutyholder's conflicting liberty interest. A relative priority of the security interest equally accounts for the autonomy value of liberty, explaining why "[m]ost of the rights of property, as well as of person . . . are not absolute but relative."[260]

Based on a relative priority of the security interest, one's autonomous choice to engage in risky behavior—an exercise of liberty—entails responsibility for the injury costs that the conduct foreseeably imposes on others.[261] This obligation relies on compensation to protect the rightholder's security interest while permitting the dutyholder to engage in the risky behavior, the type of outcome required by a right to security that is relative to a right of liberty. By enforcing this compensatory obligation, the tort system can engage in a normative practice of reciprocity while also limiting that practice when required by the liberal egalitarian principle.

Under liberal egalitarianism, the government should be morally neutral about different conceptions of the good life.[262] Individuals have diverse ambitions and goals. To respect these individual differences, tort law ordinarily is indifferent to the actor's motivations or reasons for acting.[263] The only necessary requirement is that the individual must have sufficient mental capacity to exercise autonomous agency, a capacity that tort law presumes for individuals who are not young children or otherwise institutionalized for reasons of mental incapacity.[264] Once the individual's purpose is excluded from the tort

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[260] Losee v. Buchanan, 51 N.Y. 476, 485 (1873).

[261] *See supra* notes 138–40 and accompanying text (discussing outcome responsibility); *supra* notes 220–22 (explaining why the compensatory tort right prioritizes the rightholder's interest in physical security over the conflicting liberty interest of the dutyholder).

[262] *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 36 (expanded ed. 2005) ("Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable—and what's more, reasonable—comprehensive doctrines will come about and persist . . . .").

[263] *See* RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (AM. LAW INST. 1965) ("The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons, since the law can have no favorites."). Relatedly, "[a] defendant's motive, if narrowly defined to exclude recognized defenses and the 'specific intent' requirements of some crimes, is not relevant on the substantive side of the criminal law," although "a good motive may result in leniency by those who administer the criminal process." WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.3 (2d ed. 2003).

[264] *Cf.* MAYO MORAN, RETHINKING THE REASONABLE PERSON 21 (2003) ("[L]iability in negligence requires a minimum capacity for rational agency. . . . Because they cannot meet the threshold 'agency' requirement, children of 'tender years' (approximately 5 years and below) are typically totally immune from liability in negligence. But beyond this category, courts and commentators are divided over what is sufficient to negate the presumption of agency and thus preclude liability in negligence."). Unless someone over

inquiry, his or her motives for acting, whether deluded or otherwise, are not relevant, explaining why the objective standard does not account for an autonomous actor's mental disabilities.

This limitation on the scope of governmental power applies to those with mental disabilities but not to those with physical disabilities, enabling tort law to justifiably treat the two groups differently. Liberal egalitarianism strives to rectify inequalities that stem from one's natural endowments and other circumstances beyond control. "People's fate should depend on their ambitions (in the broad sense of goals and projects about life), but should not depend on their natural and social endowments (the circumstances in which they pursue their ambitions)."[265] To the extent that a physical disability limits one's ability to pursue her conception of the good life, that inequality of circumstance ought to be redressed. Tort law does so by accommodating the actor's physical disabilities within the reasonable person standard. Under this rule, people with physical disabilities are "entitled to live in the world and to have allowance made by others for [their] disabilit[ies]."[266] The equal concern for the autonomy interests of physically disabled dutyholders, therefore, overrides the default priority that would otherwise apply to the rightholder's security interest, thereby immunizing these nonreciprocal risky behaviors from (strict) liability.[267]

The equal right to autonomy or self-determination is embraced by both liberal egalitarianism and libertarianism, although each principle of substantive equality otherwise differs in essential respects.[268] The manner in which tort law limits liability for nonreciprocal risky behaviors can be squared with liberal egalitarianism but not libertarianism, the only other relevant principle of substantive equality that can justify rules of strict liability for compensatory reasons.[269]

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five years old is institutionally confined because of a mental disability, he or she presumably is an autonomous agent for tort purposes. Prior to 1991, there were only four reported tort cases imposing liability on an institutionally confined patient. Sarah Light, Note, *Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law*, 109 YALE L.J. 381, 394 n.64 (1999). Since then, "[c]ourts have uniformly held that a mentally incompetent defendant living in an institution *owes no duty of care* to a paid caregiver." *Id.* at 383; *see, e.g.*, Berberian v. Lynn, 845 A.2d 122, 129 (N.J. 2004) ("We are persuaded by the reasoning of [an intermediate appellate judge] and the out-of-state authorities. We hold that a mentally disabled patient, who does not have the capacity to control his or her conduct, does not owe his or her caregiver a duty of care.").

265 KYMLICKA, *supra* note 243, at 74.

266 KEETON ET AL., *supra* note 38, at 176.

267 *See* MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 180–91 (2008).

268 *See* KYMLICKA, *supra* note 243, at 102–65 (contrasting libertarianism with liberal egalitarianism).

269 *See supra* Section III.C.1 (explaining why a compensatory tort right cannot be justified by a welfarist principle of substantive equality).

Within the libertarian conception of tort law, you own your body, and this self-ownership entails an entitlement to compensation from one who has caused you to suffer bodily injury, regardless of personal fault or blameworthiness.[270] This conception of self-ownership also rules out most forms of redistribution through law. For example, "[s]ince I have rights of self-ownership, the naturally disadvantaged have no legitimate claim over me or my talents."[271]

Tort law, however, imposes such a redistributive claim on the individual right to physical security. By immunizing the physically disabled from liability for the nonreciprocal risks created by their condition, tort law relies on one's physical disadvantage to limit another's right to physical security, thereby violating the libertarian conception of equality.

Other tort rules also limit duty and the correlative right to individual security for the same basic reason of protecting risky behavior that is socially valuable due to its importance for the general exercise of individual autonomy within the community.[272] Limiting one's individual right to physical security in order to accommodate the autonomy needs of another violates libertarianism. For these types of conduct, tort law limits liability for reasons that can be justified only by liberal egalitarianism.

So interpreted, tort law provides a mode of civil recourse that enforces the normative practice of compensatory reciprocity for liberal egalitarian reasons of equal autonomy or self-determination. Far from being a barbaric relic of the past, the reciprocity norm is integral to the modern practice of tort law.

Such a tort system is morally coherent with other liberal egalitarian legal institutions.[273] The normative obligation to compensate corrects an interpersonal inequity that is created by one's voluntary

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[270] *See* Goldberg, *supra* note 7, at 564–66 (discussing libertarian tort theory and observing that the compensatory obligation under strict liability is also entailed by the premise that a risky actor "owns his 'bads' as exclusively as he owns his goods," so the actor "owns the loss and must as a matter of justice make good on it by compensating the victim").

[271] KYMLICKA, *supra* note 243, at 109.

[272] *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 this case law and showing why courts limit duty in a manner that it is justified by the social value of equal concern for individual autonomy or self-determination when evaluated across the relevant category of social behavior).

[273] *See* Mark A. Geistfeld, *Compensation as a Tort Norm*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 65, 67–70 (John Oberdiek ed., 2014) (showing why a compensatory tort right is a form of corrective justice that is morally coherent with a liberal egalitarian principle of distributive justice and illustrating the claim with the conception of liberal egalitarianism developed by Ronald Dworkin).

conduct that foreseeably harms another, satisfying the principle of corrective justice. By implementing corrective justice, a compensatory tort system establishes the normatively appropriate baseline of wealth and resources against which the complementary scheme of distributive justice operates. Unjustified inequalities of individual wealth across society and other matters of distributive justice can then be properly and efficiently rectified through other distributive institutions, like the tax and transfer systems.[274] A compensatory tort system, therefore, implements a principle of corrective justice that is distinct from the principle of distributive justice. The two forms of justice are instead complementary or morally coherent in that each finds justification in the same underlying liberal egalitarian principle of substantive equality that gives each individual an equal opportunity to exercise autonomy or self-determination.

Once specified in this manner, the substantive rationale for modern tort law extends far beyond the behavioral norm of reciprocity. But even though the norm does not fully justify tort law, the foundational importance of this normative practice shows why modern tort law is best interpreted as a justifiable form of liberal egalitarianism.

Conclusion

Scholars continue to disagree about the immanent policies or principles of tort law. The reasons can be traced back to the state of nature. According to the conventional historical account, the talionic norms of revenge that governed behavior in the state of nature were the original source of the common law, but then wholly rejected by the modern tort system as an uncivilized form of punishment that is irrelevant to the distinctive tort problem of allocating responsibility for accidental harms. Lacking an identifiable normative starting point, modern tort law has evolved under the guidance of an invisible hand that scholars continue to argue about.

The ongoing debate over the immanent policies or principles of tort law is based on a mistaken understanding of legal history. The historical record, though fragmentary, sufficiently shows that the moral code of the talion employed a reciprocity norm of compensation to attain equitable balance in cases of accidental harm. In a development that does not accord with the conventional historical account,

274 *See* Mark A. Geistfeld, *Efficiency, Fairness, and the Economic Analysis of Tort Law*, *in* Theoretical Foundations of Law and Economics 234, 246–48 (Mark D. White ed., 2009) (explaining how a rights-based tort system can satisfy the equity-efficiency criterion of modern welfare economics if it operates within a broader system of distributive justice that is not welfarist).

the reciprocity norm was then further refined and invoked by courts to justify both the rule of strict liability for abnormally dangerous activities and the default rule of negligence liability for ordinary dangers.[275]

Indeed, the core feature of modern negligence practice—the role of the jury in determining the behavioral requirements of reasonable care—can be readily explained by reciprocity, unlike other accounts that ignore the normative origins of tort law.[276] The standard of reasonable care is formulated in an abstract manner that is not necessarily tied to conventional safety practices. The modern practice of negligence law, therefore, poses the question of whether there is a *metanorm* of socially acceptable behavior that plausibly defines the *abstract* legal norm of reasonable care and the other behavioral obligations of modern tort law. The reciprocity norm has these properties.

Reciprocity is a behavioral metanorm that individuals use to determine appropriate forms of social behavior in particular contexts. The norm attains equitable balance in individual tort cases through a series of polymorphic behavioral and compensatory obligations corresponding to the modern rules of negligence and strict liability.[277] Given the ongoing, pervasive influence of reciprocity as a paradigmatic norm of cooperative behavior, it is a natural focal point for juries to rely upon in determining the behavioral requirements of reasonable care in negligence cases. Reciprocity appears to be the invisible hand that has guided the normative development of tort law from its origins in the state of nature up to the present.

But even though reciprocity is the normative source of modern tort law, it does not fully justify tort liability. Within tort law, the enforceability of the norm depends on an underlying substantive principle that can both justify liability for nonreciprocal risky behaviors and also limit that liability under the appropriate conditions. In this respect, Holmes was correct. Every important tort rule must ultimately find justification in some underlying policy or principle.

For some types of conduct that create nonreciprocal risks, tort law limits liability for reasons that can be justified only by liberal egalitarianism, a principle that each individual has an equal substantive

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[275] *See supra* Section II.B.1 (tracing the evolution of the reciprocity norm and how courts have invoked it to justify both negligence and strict liability).

[276] *See supra* Section II.B.2 (explaining how the reciprocity norm shapes how jurors determine the behavioral requirements of reasonable care in negligence cases).

[277] *See supra* Section III.B.1 (discussing how reciprocity, when conceptualized in behavioral terms, generates behavioral requirements that are enforced by tort law).

right to autonomy or self-determination.[278] Liberal egalitarianism can also justify tort rules that require individuals to bear the costs of their autonomous choices, enabling tort law to rely on a compensatory obligation for attaining equitable balance between individuals who interact within the paradigm of reciprocity. This conception of individual responsibility refines the early common-law principle that "a man acts at his peril," which in turn refined the talionic reciprocity norm of compensation.[279] More generally, the compensatory obligation and its correlative compensatory tort right can persuasively explain the other important doctrines and practices of tort law, including the other significant limitations of liability.[280] The compensatory right unifies the functions of compensation and deterrence, turning compensation-deterrence theory—the most widely held understanding of tort law—into a coherent conception.[281] The behavioral norm of compensatory reciprocity not only "fits" the important practices of modern tort law, it can also be justified in a manner that makes these practices "both intelligible and normatively respectable" as required by interpretive theories of the law.[282]

By enforcing the compensatory right, the tort system engages in a normative practice of reciprocity that can be justified by the liberal egalitarian principle that each person has an equal right to autonomy or self-determination, making each responsible for the costs of his or her autonomous choices. The normative practice of reciprocity has evolved in a manner that clearly reveals the substantive rationale for modern tort law.

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[278] *See supra* Section III.C.3 (explaining how modern tort law enforces the normative practice of compensatory reciprocity for reasons of equal autonomy or self-determination, in line with liberal egalitarianism).

[279] *See supra* Section II.B.1 (tracing the evolution of the reciprocity norm in tort law).

[280] *See generally* GEISTFELD, *supra* note 267, at 81–377 (showing how the important doctrines of tort law can be derived from an autonomy-based compensatory tort right).

[281] *Compare supra* notes 58–59 and accompanying text (explaining why the functions of compensation and deterrence are not mutually dependent and can otherwise yield an unprincipled basis for tort liability), *with* Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383 (2012) (discussing the importance of compensation-deterrence theory and showing how it is rendered coherent by a compensatory tort right).

[282] William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605, 648 (2007). For a highly influential formulation of this approach, see RONALD DWORKIN, LAW'S EMPIRE 67–68 (1986) (arguing that a constructive interpretation of law has two distinct dimensions of "fit" and value, each of which provides a basis for evaluating the plausibility of different interpretations).