RISK DISTRIBUTION AND THE LAW OF TORTS: CARRYING CALABRESI FURTHER

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I
INTRODUCTION

Just over fifty years ago, in a seminal article called *Some Thoughts on Risk Distribution and the Law of Torts*, Guido Calabresi addressed the claim made by leading scholars that the "central policy issue in tort law is whether the principal criterion of liability is to be based on individual fault or a wide distribution of risk and loss."[1] As Calabresi pointed out, "to say 'risk distribution' is really to say very little."[2] Risk distribution, he explained, is an ambiguous concept that can refer to the manner in which tort liability for accidental harms affects the allocation of scarce resources, the spreading of losses across society, or the attainment of normatively desirable distributive outcomes. Calabresi then systematically employed economic analysis to show how these different conceptions of risk distribution affect the formulation of tort rules, a novel approach that made the article one of the (two) founding documents of the new economic analysis of law.[3]

The first two conceptions of risk distribution identified by Calabresi—the allocation of scarce resources and risk spreading—are combined in the (now) conventional economic analysis of tort law. Under this analysis, tort rules should minimize the social cost of accidents first by incentivizing risky actors to exercise cost-effective care, and then by spreading the residual risks to minimize insurance costs.

Although the conventional economic analysis of minimizing accident costs can be traced to *Some Thoughts on Risk Distribution and the Law of Torts*, Calabresi has not embraced the approach with the same fervor as others.

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1. 70 YALE L.J. 499, 499 (1961) (quoting CHARLES O. GREGORY & HARRY KALVEN, CASES AND MATERIALS ON TORTS 689 (1st ed. 1959)).

2. *Id.*

3. *See* Richard Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 758–59 (1975) (characterizing the publication of articles by Calabresi and Ronald Coase in the early 1960s as giving birth to the "new" economic analysis of law, which differs from prior economic analyses that did not "apply economic analysis in a *systematic* way to areas of law that did not purport to regulate economic relationships").

Drawing in part on the scholarship of Ronald Dworkin, Calabresi explained in a subsequent article that an inquiry exclusively concerned with minimizing accident costs in order to attain allocative efficiency, "defined narrowly to mean wealth maximization," is a "meaningless concept" without a basis in the normatively appropriate "starting points or distributional values."[4] Calabresi also made the same type of point in his highly influential book *The Costs of Accidents*: "I do not treat [justice or fairness] as a goal of the same type as cost reduction but as a veto or constraint on what can be done to achieve cost reduction."[5] As implied by Calabresi's repeated emphasis on the fundamental importance of entitlements and their associated distributive values, the only issue of risk distribution that ultimately matters is whether tort rules distribute risk in the manner required by the governing distributive norms of fairness or justice, a matter not adequately addressed by the conventional economic analysis of tort law.[6]

Calabresi's concern for distributive matters is most fully expressed in a later article, *The Pointlessness of Pareto: Carrying Coase Further*.[7] Calabresi first showed that society must always be at a Pareto-optimal point, or one at which no change is possible that would gain unanimous consent: "Transaction costs (including problems of rationality and knowledge), no less than existing technology, define what is currently achievable in any society—the Pareto frontier. It follows that any given society is always or will immediately arrive at a Pareto-optimal point *given* transaction costs."[8] Calabresi accordingly concluded "that the Pareto criterion is of no general use as a normative guide,"[9] a limitation that makes it necessary for economists to account for distributive concerns:

> For if where we are *is*, for the moment, Pareto optimal and, absent innovations, all improvements must, ex ante, entail some losers, then we can also do away with . . . "convenient" assumptions designed to negate the existence of losers. Distributional analysis becomes inevitable and hence essential, and economists must, at a minimum, become explicit about the distributional judgments (or guesses) that they are making. Decisionmakers can then accept or reject such judgments and guesses as they choose.

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4. Guido Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, 69 IOWA L. REV. 833, 833–34 (1984) [hereinafter Calabresi, *First Party, Third Party, and Product Liability Systems*] (citing other scholars who had reached a similar conclusion, including Ronald Dworkin, *Why Efficiency*?, 8 HOFSTRA L. REV. 563 (1980) [hereinafter Dworkin, *Why Efficiency?*]). In an earlier exchange with Dworkin, Calabresi stated that "I found myself substantially in agreement" with Dworkin's position. Guido Calabresi, *An Exchange: About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 554 (1980) (discussing Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980)).

5. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24 n.1 (1970).

6. Although the conventional economic analysis of tort law maintains that the redistribution of wealth from the rich to the poor can be attained at least cost by tax transfers rather than by tort rules, these wealth redistributions do not fully exhaust the other forms of redistribution that might be required as a matter of justice or fairness. *See infra* Part IV.

7. 100 YALE L.J. 1211 (1991) [hereinafter Calabresi, *The Pointlessness of Pareto*].

8. *Id*. at 1212.

9. *Id*. at 1216.

> *But economists need no longer use terms in ways that, however unintentionally, can easily be misunderstood by decisionmakers as leading to conclusions that have normative validity independent of their distributional effects!*[10]

As Calabresi had recognized in an earlier article, the normative validity of a distributional outcome is determined by initial entitlements: "[A]bsent such a notion of starting points, we cannot say anything about distribution or equality either. We cannot meaningfully say that we have treated Marshall and Taney equally, or justly favored Marshall over Taney, without a concept of what it is to treat them equally."[11] The just distribution of risk depends on the initial specification of legal entitlements, which in turn depends on the principle of equality that guides (and constrains) the legal system.

Having recognized that the principle of equality determines the just distribution of risk in tort law, Calabresi then maintained that the issue can be informed by economic analysis:

> For it seems to me that economists and lawyer-economists can have a great deal to say, as scholars, about what is distributionally desirable. We need not simply make our distributional judgments clear and let political decisionmakers accept them or not. We can develop scholarly definitions of just distributions, both theoretical definitions, and definitions based on empirical studies of particular societies. But a further discussion of such distributional studies . . . must await subsequent articles.[12]

The subsequent articles never appeared for reasons amply explained by the demands of a law-school deanship followed by those of a federal judicial appointment. Although Calabresi has underscored the importance of distributive economic analysis, this methodological approach remains largely undeveloped.

In this article, I try to carry Calabresi further by more rigorously showing how distributive economic analysis can be relevant to the normative evaluation of tort law. In contrast to Calabresi's conclusion about the "pointlessness of Pareto," I argue in part II that the Pareto principle embodies an autonomy-based compensatory norm that tort law can rely on to implement corrective justice under nonideal conditions that foreclose fully compensatory consensual exchanges. Because the compensatory decision rule governs forced exchanges, it must be limited to those nonconsensual interactions that adequately respect the autonomy of the two interacting parties. Within the context of these forced exchanges, a compensatory payment satisfies a compensatory obligation, which in turn is defined by the correlative compensatory right. In part III, I identify the substantive properties of a compensatory tort right and then show how the right holder's compensatory demands can be fully satisfied by the duty holder's exercise of reasonable care in a wide range of cases. A compensatory norm can be fully implemented by the distribution of risk without requiring an

10. *Id*. at 1228.

11. Calabresi, *First Party, Third Party, and Product Liability Systems*, *supra* note 4, at 850 (emphasis added).

12. Calabresi, *The Pointlessness of Pareto*, *supra* note 7, at 1228; *see also* Calabresi, *First Party, Third Party, and Product Liability Systems, supra* note 4, at 843 ("In choosing among systems of auto accident avoidance we . . . must take the distributional preferences of our society into account.").

entitlement to compensatory damages in the event of injury, a conclusion that sheds new light on Calabresi's original insight about the varied meanings of risk distribution within tort law.

As I have argued at length elsewhere, such a compensatory norm persuasively explains the important tort doctrines governing physical harm,[13] and so in part IV, I employ distributive economic analysis to show how the tort system can be conceptualized as a compensatory mechanism. Tort compensation is not merely a form of accident insurance as assumed by the conventional economic analysis of tort law; it fits readily into Calabresi's taxonomy of desirable legal innovations that shift the Pareto frontier outwards.[14] By expanding the feasible set of fully compensatory outcomes that can be attained under existing social conditions, the tort system enables individuals to engage in new risky activities while adequately compensating those who are disadvantaged by the risky behavior. The tort system has a normative dimension that is brought into sharp relief by the type of distributive economic analysis championed by Calabresi but neglected by the conventional economic analysis of tort law.

II
THE PARETO PRINCIPLE AS A NORMATIVE GUIDE UNDER NONIDEAL CONDITIONS

Under the Pareto principle, the allocation of resources in state *B* is (Pareto) superior to an alternative allocation in state *A* if and only if the move from *A* to *B* would make at least one person better off and no one worse off. Those who would benefit from the change would support it, and no one else would disagree because none of them would be harmed by the change. Consequently, the Pareto test "is a simple unanimity requirement."[15]

Within welfare economics, the Pareto criterion provides a method for overcoming the limitations of utilitarianism. In the late nineteenth and early twentieth centuries, traditional welfare economists compared alternative situations by assuming that individual utilities can be quantified (as cardinal measures) and then compared across individuals. This decision rule selects utility-maximizing outcomes, and so its normative justifiability depends on the validity of utilitarianism.[16] By the late 1930s, the need to make interpersonal utility comparisons troubled welfare economists.[17] To solve this problem,

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13. *See generally* MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS (2008) [hereinafter GEISTFELD, TORT LAW].

14. *Cf.* Calabresi, *The Pointlessness of Pareto*, *supra* note 7, at 1230 (discussing different types of innovations, including those that can result in shifts of the Pareto frontier "which create winners and may or may not create losers as well").

15. *Id.* at 1215.

16. *See, e.g.*, Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349, 351–52 (1999) (tracing origins of traditional welfare economics to Jeremy Bentham's utilitarianism).

17. *Id.* at 352 (discussing the influence of L. Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 ECON. J. 635 (1938)).

prominent economists rejected the utilitarian decision rule in favor of the new welfare economics, which posits that interpersonal utility comparisons are impossible or otherwise outside the scope of economic analysis. The new welfare economics compares alternative economic situations by relying on the Pareto principle, which evaluates policies in terms of unanimous choice rather than interpersonal utility comparisons. "[A]ll the important conclusions of welfare economics can be made to follow from" an analysis reformulated in terms of individual choice rather than the cardinal measures of individual utility or welfare required by utilitarianism.[18]

In order for a change to satisfy the Pareto criterion, those who would otherwise be disadvantaged by the change must be fully compensated by those who would benefit from it. The compensatory exchange requires the actual consent (or unanimous approval) of all concerned parties, yielding an outcome in which no one is made worse off (due to the receipt of full compensation) and at least one person is made better off (one's willingness to make a compensatory payment implies the proposed change must, on balance, make her better off).

As is widely recognized, however, the requirement of actual consent to fully compensatory exchanges turns the Pareto principle into a practically unattainable ideal.[19] What, then, should be made of the Pareto principle under nonideal conditions in which actual consent to fully compensatory exchanges is not feasible? The answer depends on whether the governing principle of equality is welfarist or instead accounts for nonwelfarist concerns of individual autonomy or equal freedom.

A. Welfarism and the Pareto Principle

A welfarist principle of equality, such as utilitarianism, is only concerned about welfare; it values change only insofar as it would increase individual welfare, and by extension, social welfare. Within a welfarist system, the Pareto principle has only instrumental value: Any change that would be Pareto superior must also increase social welfare. The Pareto principle is merely an instrument for identifying welfare-enhancing policy changes. Aside from this role, the Pareto requirement of unanimous approval has no independent normative value under welfarism.

For example, suppose there are 100 individuals in a community that is considering two tort rules. "Rule 1" would make each person in the community better off by one unit of welfare, satisfying the Pareto principle. "Rule 2" would make ninety-nine people better off by 1.10 units of welfare, while making one person worse off by eight units of welfare. Suppose the social-welfare function is utilitarian (a form of welfarism), so that the social planner gives equal weight to each unit of individual welfare. The planner will choose Rule 2, which has a

18. I.M.D. LITTLE, A CRITIQUE OF WELFARE ECONOMICS 36–37 (2d ed. 1957).

19. *E.g.*, *id.* at 95–96.

total welfare gain of 100.9 units, whereas Rule 1 has a total welfare gain of 100 units. The unanimous approval of Rule 1 is irrelevant to the utilitarian planner. Welfarism in general, like utilitarianism in particular, merely compares total welfare under the two rules and places no weight on the fact one rule is unanimously approved and the other is not.[20]

Within a welfarist system, individual consent matters only because without the ability to "measur[e] utility directly, the only way to demonstrate that a change in the allocation of resources is Pareto superior is to show that everyone affected by the change consented to it."[21] When governed by a welfarist principle of equality, the Pareto criterion merely provides a reliable way to determine whether a change would increase social welfare. The criterion has no other value.

For this reason, the welfarist rationale for the Pareto principle extends to nonideal conditions in which transaction costs prevent fully compensatory consensual exchanges. For any proposed change that would benefit some individuals and harm others, if the winners would be willing to fully compensate the losers, the change must be welfare-enhancing per the logic of the Pareto principle, regardless of whether the exchange actually occurs. The welfare properties of the Pareto principle are not altered by the absence of fully compensatory exchanges.

But in contrast to the ideal formulation of the Pareto principle, the nonideal formulation relies on hypothetical compensation and hypothetical consent. A hypothetical compensatory exchange poses no problem for welfarism, however, as long as there is a reliable method for monetizing the costs and benefits of the proposed change.[22]

Known as the Kaldor–Hicks criterion, this decision rule forms the basis of cost-benefit analysis. It tries to replicate the welfare-enhancing properties of the Pareto principle under nonideal conditions in which policy changes cannot be implemented by fully compensatory consensual exchanges. Social conditions that block consensual agreements pose no intractable problem for a welfarist conception of the Pareto principle.

This version of the Pareto principle is embodied in the conventional economic analysis of tort law, which employs cost-benefit analysis (the Kaldor–Hicks criterion) to formulate liability rules that minimize the social cost of

20. To be sure, the utilitarian planner could select the welfare-maximizing outcome and then obtain unanimous approval by redistributing the welfare gain to ensure that everyone is made better off. Doing so could only be justified, however, if the redistribution would increase social welfare. Once again, the utilitarian decision is governed by the increase in social welfare and not unanimous approval.

21. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488–89 (1980) [hereinafter Posner, *The Ethical and Political Basis of the Efficiency Norm*].

22. *Cf. id.* at 490 ("[I]f the utilitarian could devise a practical utility-metric he could dispense with the consensual or transactional method of determining whether an allocation of resources was Pareto superior; indeed, he could dispense with the concept of Pareto superiority itself.").

accidents.[23] The welfarist version of the Pareto principle accordingly supplies a normative rationale for cost-minimizing tort rules.

B. Individual Autonomy and the Pareto Principle

Welfarism is not the only plausible method for specifying the requirements of equality. If the principle of equality instead requires the government to give each citizen an equal opportunity to lead a life of his or her own choosing, then the Pareto principle is normatively valuable for nonwelfarist reasons of individual autonomy and equal freedom.

The relation between the Pareto principle and individual autonomy has been famously discussed by Richard Posner:

> [I]t is also possible to locate Pareto ethics in a different philosophical tradition from the utilitarian, in the tradition, broadly Kantian, which attaches a value over and above the utilitarian to individual autonomy. One ethical criterion of change that is highly congenial to the Kantian emphasis on autonomy is consent. And consent is the operational basis of the concept of Pareto superiority.[24]

Having recognized that the normative appeal of the Pareto criterion can be defined by the promotion of individual autonomy through consensual exchange, Posner then made the more provocative claim that a *potential* Pareto improvement—one that satisfies the Kaldor–Hicks criterion of hypothetical compensation—also furthers the normative value of autonomy because individuals would hypothetically consent to such changes.[25] On Posner's view, both the Pareto principle and the Kaldor–Hicks criterion can be justified in the nonwelfarist terms of individual autonomy, eliminating any normative difference between the two and the concomitant need to define one as the normatively ideal decision rule (the Pareto principle) and the other as its nonideal counterpart (the Kaldor–Hicks criterion).

Numerous scholars have forcefully rejected this claim, including both Calabresi and Dworkin. Both rejected the claim for similar reasons pertaining to ambiguities in the hypothetical construct assumed by Posner's analysis.[26] Dworkin also pointed out that without the requirement of actual consent, "the Pareto criterion . . . simply collapses into the utilitarian criterion."[27] The relevant decision rule is reduced to the form of cost-benefit analysis entailed by the Kaldor–Hicks test, which is comparable to the Pareto criterion only insofar as each identifies policy proposals that promote social welfare. Only the requirement of actual consent differentiates the two tests, leading Dworkin to

23. *See* sources cited *supra* notes 3–4 and accompanying text.

24. Posner, *The Ethical and Political Basis of the Efficiency Norm*, *supra* note 21, at 489–90.

25. *Id.* at 491–94.

26. *Compare* Calabresi, *The Pointlessness of Pareto*, *supra* note 7, at 1223 ("The moment we deal with a real situation, we know something more about who wins and who loses. Once we are no longer ignorant, any number of differences may cause us to believe that losses or gains to *some* matter more than losses or gains to *others*."), *with* Dworkin, *Why Efficiency?*, *supra* note 4, at 579 ("But since Posner has in mind a counterfactual rather than an actual choice, any selection of a degree or date of ignorance must be wholly arbitrary, and different selections would dictate very different rules as fair.").

27. Dworkin, *Why Efficiency?, supra* note 4, at 582.

conclude that without such a requirement, "the Pareto justification is not simply weakened; it is destroyed."[28]

If the governing principle of equality is not welfarist but instead centers on individual autonomy or equal freedom, the Pareto criterion would seem to have value only insofar as actual consent enables individuals to exercise their autonomy. But actual consent is not feasible under nonideal conditions, and so the Pareto criterion would seem to be "pointless," as Calabresi concluded.[29]

Although one could understandably dismiss the Pareto principle for these reasons, doing so would be a mistake. In the same manner that welfarism has extracted the relevant welfare properties of the Pareto principle in order to guide decision making under nonideal conditions (the Kaldor–Hicks criterion), a nonwelfarist principle of equality can extract the relevant normative properties of the Pareto principle to formulate a decision rule governing cases in which transaction costs block fully compensatory consensual exchanges.

Within a nonwelfarist system, the Pareto principle is appealing due to the way in which it equates socially cohesive outcomes with the individual autonomy furthered by fully compensatory consensual exchanges. The linkage of social cohesion, individual autonomy, and full compensation is still desirable under nonideal conditions lacking actual consent. The problem accordingly reduces to whether it is possible to construct a decision rule that furthers these values for cases in which the affected parties cannot enter into fully compensatory consensual exchanges.

When actual consent is not feasible, the autonomy rationale for the Pareto principle can be retained by a decision rule that limits (nonconsensual) compensatory exchanges to forms of risky behavior that do not disvalue the autonomy of those threatened by the behavior. The normative linkage between autonomy and compensation would be lost if the decision rule relied on compensation as the sole means to regulate forms of behavior (like rape) that do not adequately respect the victim's autonomy. The nonideal decision rule, therefore, must be limited to those highly common forms of social interaction that further the autonomy of risky actors without disvaluing or inherently disrespecting the autonomy of those threatened by the risk. As a matter of autonomy, the decision rule can permit these risky activities (like automobile driving) despite the absence of actual consent. When limited to social interactions of this type, a nonideal decision rule derived from the Pareto principle would then require risky actors to compensate those who are disadvantaged by the behavior.

This compensatory decision rule requires further limitation. As Lawrence Sager has persuasively argued, the Pareto principle does not reliably identify all potentially justice-enhancing improvements because it does not account for

28. *Id.*

29. *See* Calabresi, *The Pointlessness of Pareto*, *supra* notes 7, at 1212, 1216; *supra* text accompanying notes 7–9.

issues of distributive justice.[30] "[J]ustice is a multi-attributed quality" and "Pareto optimality is a relatively minor attribute of that quality."[31] As Sager further explained, the Pareto principle cannot reliably track the requirements of justice because it focuses on pair-wise comparisons: How does the status quo compare to a proposed alternative state of affairs? Such a decision rule is path dependent—it depends on the order in which the pair-wise comparisons are made—and can therefore lead to results that depart from the "true path" required by justice.[32] Because "there is no readily apparent correlation between Pareto optimality and more central attributes of justice, like distributional equality," Sager concluded that reliance on the Pareto principle for resolving all issues of justice is deeply problematic.[33] To avoid the problems identified by Sager, a compensatory decision rule derived from the Pareto principle should not be applied to cases in which issues of distributive justice are presented or in which pair-wise comparisons otherwise create a long-term problem of path dependence.

A decision rule satisfies these requirements when limited to the implementation of corrective justice, a form of justice that is exclusively concerned with the attainment of justice or equality between two interacting parties. In addition to addressing concerns distinct from those of distributive justice or equality across society, corrective justice is case specific and not subject to the longer-term problem of path dependence. Because it corrects an injustice or rights violation caused by a specific interaction between a right holder and duty holder, corrective justice can also be called "compensatory justice."[34] Consequently, issues of corrective justice can be defensibly addressed by a rights-based compensatory decision rule that seeks to implement the normatively appealing attributes of the Pareto principle under nonideal conditions.

When guided by this decision rule, the welfare economist analyzes the distributive outcomes that would be produced by two alternative states of affairs and then identifies how a change from one state to the other can be corrected to ensure that those who would otherwise be disadvantaged by the change are adequately compensated. This form of distributive economic analysis is relevant only for those cases in which the underlying principle of equality justifies the corrective compensatory measure as being appropriate for

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30. Lawrence G. Sager, *Pareto Superiority, Consent, and Justice*, 8 HOFSTRA L. REV. 913, 916 (1980).

31. *Id.*

32. *Id.* at 927.

33. *Id.* at 916. A Paretian decision rule is also limited even within a welfarist system. *See* Giuseppe Dari-Mattacci & Nuno Garoupa, *The Unsolvable Dilemma of a Paretian Policymaker*, 16 SUP. CT. ECON. REV. 117 (2008) (providing a formal analysis showing "that a consistent welfarist method of policy assessment, that is, one that never violates the Pareto principle, may be incomplete in the sense that it is incapable of providing a solution to important social welfare problems").

34. *See* generally Loren E. Lomasky, *Compensation and the Bounds of Rights*, *in* NOMOS XXXIII: COMPENSATORY JUSTICE 13, 34 (John W. Chapman ed., 1991) (discussing case where requiring an actor to compensate an unwilling victim restores the victim's losses).

protecting those who are disadvantaged by the change (recall the problem of rape). So conceptualized, distributive economic analysis is constrained by the normative requirements of equality while being integral to the implementation of (corrective) justice in concrete cases, the type of economic analysis advocated by Calabresi.[35]

Such a decision rule can justifiably govern tort cases for reasons identified by liberal egalitarians: "Treating people with equal concern requires that people pay for the costs of their own choices."[36] As a matter of equality, tort law can require risky actors to pay for the cost of their autonomous choices by obligating them to compensate those who are disadvantaged by the interaction. This type of compensatory norm, embodied in the autonomy-based Pareto principle, can be implemented by a compensatory tort right and its correlative compensatory duty, making tort liability a form of corrective justice based on a first-order duty of compensation. A compensatory tort norm can also be limited to cases in which the nonconsensual interaction adequately respects the autonomy of the two parties, thereby satisfying the constraints of equality and extending the normative appeal of the Pareto principle to nonideal conditions. So formulated, the compensatory norm embodied in the Pareto principle can help to resolve tort disputes in cases lacking fully compensatory consensual exchanges.

Conceptualizing tort liability in terms of a compensatory norm, however, would seem to create an insurmountable problem: Tort law does not ordinarily entitle accident victims to compensatory damages. The problem, though, may be more apparent than real; it rests on the unexamined premise that compensation is limited to the damages remedy. Any evaluation of a compensatory tort norm must begin with a more complete statement of a compensatory tort right and its implications for tort liability.

III

TORT COMPENSATION AS RISK DISTRIBUTION

Within the context of a nonconsensual interaction or forced exchange, a compensatory payment is comprised of the resources required to satisfy a compensatory obligation. One's compensatory obligation, in turn, is defined by the correlative compensatory entitlement held by the other party. Consequently, the attributes of a compensatory entitlement or tort right (and its correlative compensatory obligation or tort duty) determine the compensatory properties of tort law.

35. *See* sources cited *supra* notes 4–12 and accompanying text. It is a separate question whether this particular form of distributive economic analysis would be embraced by Calabresi. His emphasis on the need for economic analysis to consider norms of justice or fairness would be satisfied by a welfarist conception of justice, which yields a different formulation of the Pareto principle under nonideal conditions for reasons previously discussed in part II.A.

36. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 75 (1990).

Under at least one formulation, a compensatory tort right can explain why tort law has adopted a default rule of negligence liability that does not entitle accident victims to compensatory damages unless the defendant breached the duty to exercise reasonable care. In a wide range of cases, the default rule of negligence liability can distribute risk in a manner that fully satisfies the demands of a compensatory right holder, yielding outcomes in which the duty holder makes the full compensatory payment through the exercise of reasonable care, thereby eliminating any further compensatory obligation to pay damages in the event of accidental harm. In the remaining cases, the compensatory norm justifies a rule of strict liability that must be supplemented by the default rule of negligence to ensure that risk is distributed in the manner required by the compensatory tort right. The compensatory properties of risk distribution can justify the default rule of negligence liability.

A. A Compensatory Tort Right

According to the *Restatement (Second) of Torts*, an individual interest that "is protected against any form of invasion . . . becomes the subject matter of a 'right.'"[37] The specification of such a right necessarily prioritizes the protected interest of the right holder over the conflicting interest of the duty holder, making it possible for the tort rule to burden the subordinate interest of the duty holder in order to protect the prioritized interest of the right holder. For example, a rule that protects the individual interest in physical security gives the security interest of the right holder some sort of legal priority over the conflicting or invading liberty interest of the duty holder. To do so, the tort rule must first distinguish these interests in a manner that justifies a priority for the security interest. The nature of the priority then defines the substantive content of the tort right and correlative duty. Rights-based tort rules, therefore, can be characterized by the manner in which they prioritize the legally protected interests of the right holder over the conflicting or invading interests of the duty holder.

Leading justice theorists have argued that tort law can prioritize one's interest in physical security over another's conflicting liberty interest for the basic reason that an individual must be adequately secure in order to live a meaningful life.[38] The exercise of liberty is also essential for living a meaningful life, and so a priority of a right holder's security interest cannot defensibly ignore or negate the duty holder's conflicting liberty interest. The priority is justified by a principle of equality that values individual autonomy or self-determination. This general principle holds that each person has an equal right

37. RESTATEMENT (SECOND) OF TORTS § 1 cmt. b (1979).

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

to autonomy (or freedom or self-determination) and then gives different values to the individual interests in physical security and liberty, depending on their relative importance for the exercise of the general right.[39] In this respect, a tort right of security is relative to the right of liberty, a property that explains why courts have long recognized that "[m]ost of the rights of property, as well as of person . . . are not absolute but relative."[40] A relative right to physical security is based on a relative priority of the right holder's security interest over the conflicting liberty interest of the duty holder, with the nature of that priority or relation being determined by the more general right to autonomy (or equal freedom or self-determination).[41]

Based on a relative priority of the security interest, tort rules can be formulated "to give compensation, indemnity or restitution for harms"—the first purpose of liability according to the *Restatement (Second) of Torts*.[42] If a duty holder's exercise of liberty foreseeably causes physical harm to a right holder, a compensatory obligation burdens the duty holder's subordinate liberty interest to compensate harms it caused to the prioritized security interest of the right holder; legal fault or an unreasonable liberty interest is not required to justify liability. The compensatory duty permits individuals to engage in risky behavior by relying on compensation to protect the right holder's security interest, the type of outcome required by a right to security that is relative to a right to liberty.

A compensatory duty does not limit liability to blameworthy behavior and is abstract in that sense. For cases in which both the duty holder and right holder are blameless, "it is a fait accompli that *some* innocent party will be burdened. . . . Therefore, it cannot be a moral requirement that no innocent party lose out as a consequence of his own blameless conduct. All that remains open for decision is how the loss is to be apportioned."[43] An abstract compensatory norm allocates that burden to the duty holder as risky actor based on the relative priority of the right holder's legally protected interest in physical security.

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39. *See, e.g.,* Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 97 (1995) (arguing that tort law mediates and protects interests in liberty and security depending on the extent to which they are "necessary or important to living life in a liberal political culture"); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 354 (1996) ("For social contract theory, the interests at stake in accidental risk impositions are not mere preferences properly measured in dollars, but interests in liberty. These interests represent the background conditions necessary for the pursuit of conceptions of the good over the course of complete lives. Accordingly, proper evaluation of risks and precautions requires the *qualitative* assessment of the way particular risks and precautions burden the liberties necessary for persons to pursue the aims and aspirations that give meaning to their lives.").

40. Losee v. Buchanan, 51 N.Y. 476, 485 (1873).

41. *Cf.* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 104 (2001) ("No basic liberty is absolute, since these liberties may conflict in particular cases and their claims must be adjusted to fit into one coherent scheme of liberties.").

42. RESTATEMENT (SECOND) OF TORTS § 901(a) (1979).

43. Lomasky, *supra* note 34, at 34 (discussing cases of necessity).

To be justifiable, a compensatory norm must account for any normative problems created by the right holder's lack of consent and the poor manner in which compensatory damages might otherwise protect the right holder's autonomy. Most obviously, a tort duty limited to the payment of monetary compensation for a nonconsensual physical harm can be deeply corrosive of the right holder's autonomy (as in a case of rape). To ensure that a duty holder avoids behavior that disvalues the right holder's autonomy, a compensatory tort norm can prohibit behavior of this type, justifying extracompensatory damages that punish the duty holder for having engaged in such reprehensible behavior.[44] A compensatory tort norm can determine the types of behavior for which a compensatory obligation adequately respects the right holder's autonomy.

In most cases, however, risky behavior entails no disrespect for the autonomy of others; the risk is an unwanted byproduct of the activity. To establish liability in these cases, a compensatory norm does not require culpability or personal fault. Instead, the duty holder's exercise of liberty establishes the requisite form of responsibility for the foreseeable outcomes of the autonomous choice.[45] The occurrence of foreseeable injury, not any moral shortcoming in the behavior itself, can then trigger the obligation to pay compensatory damages.

This form of outcome responsibility is clearly reflected in the common law maxim *sic utere tuo ut alienum non lædas*, which for present purposes loosely translates into the principle "[u]se your own so as not to injure another."[46] The maxim locates the compensatory duty in the injury-causing conduct rather than the unreasonableness of the injurer's behavior, and so it has frequently been invoked by courts and commentators to justify rules of strict liability.[47]

Such a compensatory norm can be used not only to justify rules of strict liability, but also to explain why the tort system relies on a default rule of negligence liability to govern cases of accidental physical harm. The reason involves the manner in which the distribution of risk affects the compensatory properties of a tort rule.

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44. *See generally* Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263 (2008) (discussing the role of punitive damages within a compensatory tort system and showing that this role persuasively explains the relevant tort rules).

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

46. BLACK'S LAW DICTIONARY 1238 (5th ed. 1979). As applied to risky behavior not involving the use of property, the maxim yields a common law principle that "under the common law a man acts at his peril." OLIVER WENDELL HOLMES, THE COMMON LAW 82 (1881) (stating that "some of the greatest common law authorities" held this view); *see also* Commonwealth *ex rel*. Attorney Gen. v. Russell, 33 A. 709, 711 (Pa. 1896) ("'Sic utere tuo non alienum lædas' expresses a moral obligation that grows out of the mere fact of membership of civil society. In many instances it has been applied as a measure of civil obligation, enforceable at law among those whose interests are conflicting.").

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

B. Compensation and Cost-Minimizing Tort Rules

In a compensatory tort system, the appropriate formulation of liability rules critically depends on context. Different types of risky interactions create different types of compensatory problems. The different compensatory problems have different solutions, most of which do not include an entitlement to compensatory damages in all cases. Tort rules can instead distribute risk in a manner that fully satisfies the demands of a compensatory right holder.

A compensatory tort right entitles the right holder to prioritize her interest in physical security over conflicting liberty interests of the duty holder. If that priority applies to an interaction between the two parties, it justifies the right holder's entitlement to compensatory damages in the event of injury. Such an *interpersonal* conflict of security and liberty interests, however, does not exist in all cases. The structure of the social interaction can result in the right holder internalizing both the benefits and burdens of the tort duty, creating an *intrapersonal* conflict of the right holder's security and liberty interests. The right holder does not prioritize the security interest in these cases, and so the compensatory right no longer entails an entitlement to compensatory damages in the event of accidental harm.

This outcome occurs when the right holder and duty holder (1) are engaged in reciprocally risky interactions or (2) are otherwise in a direct or indirect contractual relationship. In these cases, the right holder expects to derive a net benefit from the risky interaction, and that form of compensation is maximized by a negligence rule requiring the duty holder to exercise the cost-minimizing amount of reasonable care. Satisfaction of this duty distributes risk in a manner that satisfies fully the right holder's compensatory demands. No entitlement to compensatory damages is necessary.

First, consider tort rules governing reciprocal risks. For example, as two automobiles go past one another on the road, each driver simultaneously imposes a risk of physical harm on the other. For perfectly reciprocal risks, the interacting individuals are identical in all relevant respects, including the degree of risk each imposes on the other, the severity of injury threatened by the risk, and the liberty interests advanced by the risky behavior. Very few risky interactions will actually satisfy these conditions. However, due to the requirement of equal treatment, tort law evaluates risky behavior under an objective standard that in this instance asks whether the activity is common in the community.[48] Automobile driving is such an activity, so, as an objective matter, tort rules governing automobile accidents apply to reciprocally situated

48. *Compare* GEISTFELD, TORT LAW, *supra* note 13, at 93–95 (explaining why the autonomous choices made by a right holder—such as the decision not to drive automobiles—would violate the principle of equal treatment if these choices were to determine unilaterally whether the duty holder would be subject to negligence or strict liability, and further explaining that this result necessitates a rule that evaluates reciprocity in the objective terms of whether the activity is common in the community), *with* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS § 20 cmt. j (2010) ("Whenever an activity is engaged in by a large fraction of the community, the absence of strict liability can be explained by considerations of reciprocity.").

parties, even for cases in which the victim was walking or riding a bicycle.

Reciprocity eliminates any relevant differences between the interacting parties. For example, each automobile driver has the identical right against the other, each owes an identical duty to the other, and each expects to derive a net benefit from the risky activity (the automobile trip in question). In these circumstances, neither party prioritizes the security interest over the liberty interest. Instead, each interacting individual reasonably prefers to formulate the tort rule so its benefits (fully accruing to the individual as reciprocal right holder) exceed its burdens or cost (also fully borne by the individual as reciprocal duty holder).[49] By minimizing accident costs, the tort rule maximizes the net benefit that each expects to gain by participating in the activity. Reciprocity transforms the compensatory problem into one of cost minimization.

For this reason, neither of the reciprocally situated parties prefers to use tort liability as a form of insurance. The associated costs of liability or third-party insurance (equally borne by each party as reciprocal duty holder) significantly exceed the total cost of first-party insurance and self-insurance (equally borne by each party as reciprocal right holder).[50] To minimize costs, each reciprocally situated party prefers a tort rule formulated for deterrence purposes only, justifying a default rule of negligence liability that requires a safety precaution only if the benefit of risk reduction (fully accruing to each individual as reciprocal right holder) exceeds the burden or cost of the precaution (also fully borne by each individual as reciprocal duty holder).

Presumably, the interacting parties would consent to such a rule prior to their risky interaction if they had the opportunity to do so. However, the rule's normative rationale is based on individual autonomy and not hypothetical consent. A tort rule that rejected each individual's preference for a cost-minimizing negligence rule by instead prioritizing the security interest would be unreasonable or contrary to the autonomy of both parties to the risky interaction. For this class of cases, a negligence rule requiring the duty holder to exercise the cost-minimizing amount of care fully satisfies the reasonable demands of the compensatory right holder—those conforming to the underlying value of equal autonomy that justifies the compensatory right in the first instance.

Despite exercising the amount of reasonable care required by the compensatory tort right, the duty holder does not necessarily eliminate risk, creating the possibility the interaction might accidentally injure the right holder.

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49. 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).

50. *See* Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 625–33, 639–46 (1998) (relying on empirical data and a heuristic assessment to conclude that for each dollar of injury compensation, the individual would have to pay roughly forty percent more for third-party insurance than for the optimal mix of first-party insurance and self-insurance).

In that event, however, the compensatory tort right does not entitle the victim to an award of compensatory damages—the duty holder's exercise of reasonable care has already distributed risk in a manner that fully satisfies the right holder's compensatory demands. A compensatory tort obligation does not entail the payment of compensatory damages in all cases of accidental harm.

A cost-minimizing negligence rule also fully enforces the compensatory tort right in a second set of cases: those in which the right holder and duty holder seller are in a direct or indirect contractual relationship, as in product cases involving consumers and manufacturers.[51] The consumer–right holder purchases or uses a product on the expectation that doing so will be, on balance, advantageous. By selling the product, the manufacturer creates a risk of physical injury to which the consumer is exposed. A tort rule that makes the manufacturer liable for these injuries will affect product costs, price, aggregate demand, and net profits. To identify the distributive effects of liability, one must first specify the appropriate baseline for analysis. This baseline cannot be derived by economic analysis, because cost-benefit analysis depends on prices, which in turn depend on the initial allocation of legal entitlements or property rights.[52] The initial allocation requires normative justification, and so the normatively justified tort rule defines the appropriate baseline for evaluating the distributive impact of tort liability. At this baseline, the consumer pays for the full cost of tort liability, as the equilibrium product price must cover all of the seller's costs, including its liability costs. Consumer interests are the only ones that factor into the distributive analysis required by the normatively justified tort rule, explaining why products-liability law recognizes that "it is not a factor . . . that the imposition of liability would have a negative effect on corporate earnings or would reduce employment in a given industry."[53] For risks not threatening injury to bystanders, product cases only implicate an intrapersonal conflict of consumer interests, those involving physical security, liberty (regarding product use), and money (product price and other financial costs of product use).[54]

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51. Unlike the consumer–manufacturer relationship discussed in the text, in other types of contractual relationships, the right holder sells something to the duty holder. The most important example is the employment relationship (the sale of labor), in which the employee must be compensated for facing work-related risks either by an increase of wages or receipt of compensation for work-related injuries. The employer minimizes the total compensatory obligation by minimizing accident costs and compensating workers for the residual risks. Employees currently receive both forms of compensation, albeit outside of the tort system. (Workplace injuries are governed by workers' compensation schemes that provide guaranteed compensation for work-related injuries.) Consequently, workplace injuries provide further support for the conclusion that the law regulates accidental harms in a compensatory manner, with the different compensatory legal rule in these cases (one of strict liability) stemming from the different form of the contractual relationship (the right holder as seller rather than buyer).

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

53. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. f (1998).

54. For risks threatening injury to bystanders, the analysis involves the interpersonal mediation of security and liberty interests characteristic of more general forms of tort liability. *See* MARK A.

In comparing her own security and liberty interests, the consumer gives no special priority to either one. The consumer prefers to pay for product safety only if the benefit of risk reduction (fully accruing to the consumer) exceeds the cost of the safety investment (also fully borne by the consumer via the associated price increase or product-functionality decrease). Consumers reasonably expect product-safety decisions to be governed by a cost-benefit calculus, because that decisional rule maximizes the net benefit that consumers expect to derive from the product. A product that does not satisfy reasonable consumer expectations is defective and subjects the seller to liability under the widely adopted rule of strict products liability.[55] This rule does not entitle consumers to compensatory damages in all cases. Due to the relatively high cost of tort compensation as compared to other forms of insurance, consumers do not reasonably expect to receive tort compensation for injuries caused by nondefective products.[56] Cost-minimizing tort rules that limit liability to the physical harms caused by defective products fully satisfy the reasonable compensatory demands of consumer–right holder.[57]

As in cases of objective reciprocity, the duty holder in product cases fully satisfies the compensatory obligation by making the cost-minimizing investments in product safety required by the compensatory tort right. Doing so does not necessarily eliminate risk, but the duty holder (having fully satisfied the compensatory tort right) is not obligated to pay compensatory damages for injuries caused by the residual (or reasonable) risks inherent in most nondefective products. Thus, in the contractual context, just as in the reciprocal-risk context, the demands of the compensatory right holder are fully satisfied by the manner in which the tort duty distributes risk. Tort law can fully enforce the compensatory right without granting an entitlement to compensatory damages in all cases.

C. Risk Distribution as Nonideal Compensation

In a wide range of cases, the negligence rule can attain the ideal compensatory outcome by distributing risk to maximize the net benefit that a right holder expects to derive from the risky interaction, so the right holder is not made worse off, ex ante, than she would otherwise be in a world without the risk (and the associated benefit to be gained from participating in the risky activity). The only remaining cases involve right holders who are not in a direct or indirect contractual relationship with a duty holder who creates an

GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 309–20 (2d ed. 2011).

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

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

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

objectively defined nonreciprocal risk of physical harm. In these cases, the negligence rule can still distribute risk in the manner reasonably required by the compensatory tort right, but the compensation is not ideal, even when supplemented by a rule of strict liability.

These cases involve activities that are not common in the community and create risks above the ordinary level of background risk. A paradigmatic example involves the use of dynamite for construction purposes, although objectively defined nonreciprocal risks are also created in myriad other ways, including instances in which the duty holder's lack of intelligence or skill creates dangers above the background level (defined by ordinary intelligence and skill). For this class of cases, the tort rule must mediate an interpersonal conflict between the duty holder's interest in liberty and the right holder's interest in physical security. A compensatory tort rule entitles the right holder to prioritize the security interest, justifying a right to compensatory damages for these injuries—the same outcome that is attained by the rule of strict liability for abnormally dangerous activities and the pockets of strict liability within the objectively defined negligence standard.[58]

The compensation afforded by these forms of strict liability, however, does not fully satisfy the compensatory obligation. In the event of a fatal accident, the duty holder is not legally obligated to pay compensatory damages for the decedent right holder's loss of life's pleasures because the monetary award cannot compensate a dead person.[59] This limitation of the damages remedy substantially reduces and potentially eliminates the award of compensatory damages for wrongful death.[60] The most severe type of physical harm cannot be adequately redressed by a rule of strict liability, creating a compensatory shortfall.

To solve the compensatory problem inherent in a rule of strict liability, the right holder reasonably prefers to supplement this rule with a behavioral obligation of reasonable care that depends on the harm actually threatened to the right holder (premature death) as opposed to the amount of compensatory damages available in such cases (zero for a decedent's loss of life's pleasures). When justified by a compensatory right, such a safety obligation must be derived from the correlative compensatory duty, which can be defined by reference to the total burden a duty holder would incur under ideal conditions

58. *See* GEISTFELD, TORT LAW, *supra* note 13, at 92–97.

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

60. *Cf.* Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 811 (Ct. App. 2003) (ruling on a punitive damages award in a wrongful death case for which the decedent's estate received no compensatory damages); Edward A. Adams, *Venue Crucial to Tort Awards: Study: City Verdicts Depend on Counties*, N.Y. L.J., Apr. 4, 1994, at 1, 5 (reporting results of empirical study finding, among other things, that the average tort award in New York City between 1984 and 1993 was three times higher for brain damage than for wrongful death, which in turn was only twice as much as the average damage award for a herniated disc).

in which the right holder is always fully compensated.[61] The duty holder does not bear this entire compensatory burden under a rule of strict liability, because the monetary-damages remedy cannot compensate a dead right holder for the loss of life's pleasures. To eliminate this shortfall, the tort rule can shift that component of the compensatory obligation from the damages remedy into the duty to exercise reasonable care. These safety expenditures, when added to the cost-minimizing precautions that the duty holder would otherwise take under ideal compensatory conditions, further reduce risk or the likelihood that the right holder will suffer injury, a benefit or form of compensation for the right holder. Such a negligence rule requires the duty holder to satisfy the compensatory obligation, in part, by incurring these expenses through the exercise of reasonable care. The supplemental rule of strict liability then fulfills the compensatory obligation with respect to the remaining or residual risks that are not eliminated by the exercise of reasonable care and threaten injuries that are compensable with the damages remedy. These abnormally dangerous, nonreciprocal risks are subject to strict liability, but the default rule of negligence liability also continues to distribute risk in the manner reasonably required by the compensatory tort right.[62]

Nonetheless, the risk distribution in these cases is not ideal for the right holder, unlike the distribution in cases of reciprocal risks and products liability. As developed above, risk distribution is fully compensatory for right holders who (1) incur the burdens of the compensatory duty (as reciprocally situated duty holder or consumer) and (2) participate in the risky activity engaged in by the duty holder (such as driving or selling a product) on the expectation that doing so will be advantageous (defined by the net benefit the right holder expects to derive from her automobile trip or use of the product sold by the duty holder).[63] For nonreciprocal risky interactions that occur outside of contractual relationships, neither condition applies. In these cases, the right holder does not bear the full burden of the compensatory duty or otherwise derive a sufficient benefit from the risky activity engaged in by the duty holder, so it is not possible for tort law to distribute risk in a manner that would fully compensate the right holder.

For example, a right holder who faces the risk of injury created by the duty holder's blasting at a construction site does not bear the full burden of the duty or otherwise sufficiently benefit from the abnormally dangerous activity. These interactions will disadvantage the right holder unless she is fully compensated for any resultant injuries, an outcome that cannot be attained by the

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

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

63. *See supra* Part III.B.

compensatory-damages remedy for fatal accidents and other irreparable injuries. The duty holder's compensatory shortfall can be eliminated by redirecting these expenditures from the damages remedy to the exercise of reasonable care, but the right holder will still ordinarily face some risk of injury that cannot be fully compensated by the damages remedy. Tort law cannot structure these risky interactions to ensure that the right holder is not made worse off, ex ante, than she would otherwise be if the interaction did not occur.

This compensatory problem, however, does not justify a ban of the risky behavior. The compensatory right is based on a relative priority of the security interest, not an absolute priority that negates or gives no value to conflicting liberty interests.[64] By exercising reasonable care and paying compensatory damages for the harms foreseeably caused by the residual nonreciprocal risks, the duty holder fully satisfies the compensatory obligation. This exercise of liberty furthers the autonomy of the duty holder and has normative value that is not negated simply just because social conditions or transaction costs sometimes make it infeasible to attain the ideal compensatory outcome. The *reasonable* compensatory demands of the right holder—those that give equal concern to the autonomy of the duty holder—do not justify a ban of the duty holder's exercise of liberty. These interactions can leave the right holder worse off than she would otherwise be, but tort law still distributes risk in the manner that fully satisfies the reasonable demands of the compensatory right holder.

D. Breaches of the Compensatory Duty

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

The most severe physical harm governed by tort law is wrongful death, and yet monetary damages cannot compensate a dead right holder for the premature loss of life. Compensatory damages also do not make the plaintiff–right holder "whole" in cases of bodily harm, nor does this remedy strive to do so.[65] Premature death and bodily injury are paradigmatic examples of an irreparable injury, although this common-law category also encompasses damage to real or tangible property.[66] The entire category of physical harms—

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64. *See supra* Part III.A.

65. *See* RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1979) (stating that a damage award for the loss of life's pleasures is not supposed to "restore the injured person to his previous position" but should instead only "give to the injured person some pecuniary return for what he has suffered or is likely to suffer").

66. Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 164 (2011) [hereinafter Geistfeld, *The Principle of Misalignment*] (discussing the rule of irreparable injury and explaining why it ordinarily encompasses damages to real or tangible property).

bodily injury or damage to real or tangible property—is comprised of irreparable injuries that ordinarily cannot be fully compensated by the damages remedy.

In a case of irreparable injury, breaches of the primary compensatory obligation to exercise reasonable care will usually not be remedied in a fully compensatory manner. The exercise of reasonable care is the only way for a duty holder to fully satisfy the reasonable compensatory demands of the right holder. The superior compensatory attributes of risk distribution accordingly explain why negligence is a "behavioral rule" defined by a first-order behavioral obligation that is substantively more important than the second-order duty to pay compensatory damages for a breach.[67]

To protect the integrity of the first-order duty, tort law prohibits the duty holder from consciously rejecting or recklessly ignoring the primary duty to exercise reasonable care. A defendant who engaged in this prohibited conduct and breached the primary duty is subject to punitive damages, regardless of whether the defendant was always willing and able to pay compensatory damages.[68] The extracompensatory award of punitive damages is required to vindicate the plaintiff's compensatory tort right due to the inherent inadequacy of the compensatory-damages remedy.

But even in these cases, a duty holder breaches the primary duty only if the unreasonable conduct proximately caused the right holder to suffer compensable harm. The duty holder's failure to exercise reasonable care, no matter how reprehensible, creates no compensatory obligation in the absence of injury. There is simply nothing to compensate. In cases of injury, by contrast, the duty holder's breach of the primary compensatory duty to exercise reasonable care creates a compensatory shortfall that triggers the second-order duty to pay compensatory damages. Tort liability is based on the occurrence of injury for obvious compensatory reasons that accord with "ordinary moral evaluation" that careless behavior causing injury is "deemed worse" than careless behavior that does not ripen into harm.[69]

The the inability to compensate fully an irreparable injury explains why the primary concern of a compensatory negligence rule is to prevent physical harm by obligating the compensatory duty holder to exercise reasonable care. According to a leading nineteenth century treatise, in cases of irreparable injury, "[J]udges have been brought to see and to acknowledge . . . that a remedy which *prevents* a threatened wrong is in its essential nature better than a

67. *See* Mark A. Geistfeld, *Tort Law and the Inherent Limitations of Monetary Exchange: Property Rules, Liability Rules, and the Negligence Rule,* 4 J. TORT L. 1, 15 (2011).

68. Geistfeld, *The Principle of Misalignment, supra* note 66, at 165–69 (identifying the types of behavior prohibited by the negligence rule and providing citations to cases holding that a defendant who engaged in such behavior cannot avoid liability for punitive damages even if fully willing and able to pay compensatory damages).

69. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 942 (2010) (arguing in favor of interpretations of tort law that can incorporate this "framework of moral thought that people deploy regularly in their daily lives").

remedy which permits the wrong to be done, and then attempts to pay for it . . . ."[70] In seeking to prevent irreparable injuries, the common law has also long recognized the principle that the tort obligation cannot impose undue hardship on the duty holder.[71] When derived from a compensatory duty, a primary obligation to reduce the risk of irreparable harm through the exercise of reasonable care does not impose undue hardship on the duty holder. Compliance with this duty distributes risk in the manner reasonably demanded by the holder of the compensatory tort right, making it possible for tort law to compensate right holders for physical harms that cannot be fully repaired by the damages remedy.

IV
THE DISTRIBUTIVE ECONOMIC ANALYSIS OF TORT LAW

As I have shown, if the Pareto principle is justified by the normative value of individual autonomy or equal freedom, then its normative properties can be maintained under nonideal conditions with a compensatory decision rule for regulating nonconsensual risky interactions.[72] I then argued that such a decision rule is plausibly instantiated in the default tort rule of negligence liability that distributes risk in the manner required by the reasonable demands of a compensatory right holder.[73] The Pareto principle is not "pointless" as Calabresi concluded,[74] although my analysis confirms his more important conclusion that the economic analysis of risk distribution can inform our understanding of the distributive concerns of justice—in this instance, of corrective justice.[75]

Notwithstanding Calabresi's exhortations about the importance of distributive economic analysis, the conventional economic analysis of tort law only addresses the efficient allocation of scarce resources. This approach assumes the government's only valid distributive concern involves the principle of distributive justice, which governs how wealth should be distributed across society (by reallocation from the rich to the poor, for example). Wealth distributions of this type ordinarily can be attained at the least cost through the tax system.[76] Once this distributive concern is rendered irrelevant for tort

70. 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 1357 (1883); *see also* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990) ("Judges act on these premises, whether or not they consciously acknowledge all that Pomeroy imputed to them.").

71. *Cf.* Laycock, *supra* note 70, at 732–39 (discussing the rule that monetary damages provide the remedy for harms that would otherwise be irreparable when equitable relief would interfere with countervailing rights or impose undue hardship on the duty holder).

72. *See supra* Part II.

73. *See supra* Part III.

74. *See supra* notes 7–9 and accompanying text.

75. *See supra* note 10 and accompanying text.

76. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 993–94 (2001) ("[W]hen legal rules do have distributive effects, the effects usually should not be counted as favoring or disfavoring the rules because distributional objectives can often be best accomplished directly, using the income tax and transfer (welfare) programs. One reason economists have tended to

purposes, compensation has value only as a form of insurance for accidental injury (otherwise compensation merely shifts a loss from one party to another without increasing social wealth). The provision of insurance, in turn, is also more effectively accomplished outside of the tort system, in this instance through systems of private or government insurance.[77] Because other institutions are more efficient both at redistributing wealth and supplying insurance, the conventional economic analysis of tort law is limited to a search for the allocatively efficient rules that would minimize the social cost of accidents. Compensatory questions are irrelevant.

However, the conventional economic analysis of tort law departs from modern welfare economics by disregarding the Pareto principle.[78] The conventional analysis only recognizes distributive justice, which governs the appropriate redistribution of resources across society (from the rich to poor, for example), whereas the Pareto principle is concerned about compensation within a group of interacting individuals (those affected by the change in question). How someone is disadvantaged by an interaction defines the need for compensation, not the individual's relative wealth. A primary compensatory obligation owed to another is a matter of corrective or interactive justice, not distributive justice. The compensation required by the Pareto principle fundamentally differs from the redistribution of wealth required by a principle of distributive justice, and yet that distinctive distributive concern is ignored by the conventional economic analysis of tort law.

By introducing a new distributive concern, the Pareto principle alters the economic analysis of tort law for reasons highlighted by Calabresi's discussion of the principle:

> [E]conomists using the Pareto criterion distinguish between moves to the Pareto frontier and moves that shift that frontier outward. The first describes the kind of Pareto superior moves that I have argued do not exist ex ante. The second refers to technological or other innovations that make possible improvements in well-being which previously were not feasible: a better wheat, cheap solar energy, superconductors, manna. What I have been saying is that all changes that we are concerned with are of one of two sorts. First, there are moves in which there are winners and losers, i.e., moves along the frontier. In such moves, winners may win more than losers lose, but compensation is not achievable. These moves can be justified only if one considers who the winners and losers are and what they have won or lost. This, of course, is the implicit basis of much of actual law and economic analysis. *Second, and at least as important, are shifts of the frontier which create winners and may or may not create losers as well. These have been emphasized much less by economic analysis of law*.[79]

Once distributive concerns about "winners" and "losers" have been expressly incorporated into economic analysis via the Pareto principle, a

favor these direct means of redistribution is that they reach all individuals and are based explicitly on income.").

77. *See* source cited *supra* note 50 and accompanying text.

78. *See* sources cited *supra* notes 16–19 and accompanying text (discussing the role of the Pareto principle within modern welfare economics).

79. Calabresi, *The Pointlessness of Pareto*, *supra* note 7, at 1229–30 (emphasis added).

compensatory tort system can readily be conceptualized as an innovation that shifts the Pareto frontier outwards by permitting "changes that do not immediately create new winners and uncompensated losers."[80] Undoubtedly, the tort system made everyone better off as compared to the prior social practices it replaced—blood feuds and so on—but a compensatory tort system can continue to shift the Pareto frontier outwards as society evolves. Given what we now know or reasonably could know about risk and safety precautions as applied to the particular circumstances of a nonconsensual risky interaction, a compensatory tort rule structures the interaction so that this changed social relation does not "immediately create new winners and uncompensated losers." A compensatory tort system can continually shift the Pareto frontier outwards from the existing state of affairs by distributing risk to ensure that those who benefit from new instances of risky behavior satisfy the reasonable compensatory demands of those who would otherwise be disadvantaged.

For these reasons, a compensatory tort rule illustrates how the Pareto principle can be implemented by a rights-based legal rule that is not exclusively concerned about the promotion of social welfare. The existence of such a rule has been called into question by Louis Kaplow and Steven Shavell, who have constructed a proof showing that any "fair" legal rule—defined as one giving evaluative weight to some factor that does not exclusively depend on welfare—necessarily violates the Pareto principle.[81] This definition of fairness encompasses the rights-based compensatory tort rules described above, which entitle the right holder to prioritize the security interest for reasons of individual autonomy and not social welfare. The proof, however, relies on other assumptions about a "fair" tort rule that are not applicable to these compensatory tort rules, and so the conclusion of this proof—that "fair" legal rules necessarily violate the Pareto principle—does not apply.[82] A compensatory tort right can implement the Pareto principle within a nonwelfarist tort system, providing an important counterexample to the Kaplow and Shavell proof while confirming Calabresi's claims about the importance of distributive economic analysis.

The reasons behind this conclusion are worth detailing; they illustrate more fully why Calabresi was correct to conclude that economic analysis can inform important questions of justice.[83] The Kaplow and Shavell proof assumes that in the evaluation of legal rules, the principle of fairness has a constant, significant weight that is independent of welfare.[84] The proof also assumes that the

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80. *Id*. at 1231.

81. *See* Louis Kaplow & Steven Shavell, *Any Non-welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. POL. ECON. 281, 284 (2001); Louis Kaplow & Steven Shavell, *The Conflict Between Notions of Fairness and the Pareto Principle*, 1 AM. L. & ECON. REV. 63, 68–70 (1999).

82. *See* Mark A. Geistfeld, *Efficiency, Fairness, and the Economic Analysis of Tort Law, in* THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 234 (Mark D. White ed., 2009).

83. For more extensive discussion, see generally *id.*

84. The following description of the proof relies on Richard A. Craswell, *Kaplow and Shavell on the Substance of Fairness*, 32 J. LEGAL STUD. 245, 249–57 (2003).

(constantly weighted) principle of fairness can be continuously traded off against some component of welfare. Due to the tradeoff between fairness and welfare, there will be situations in which the choice of a "fair" legal rule comes at the expense of some positive welfare gain that would be created by an "unfair" welfare-maximizing rule. If the savings produced by the welfare-maximizing rule could be costlessly redistributed to all members of society, each person would benefit from the adoption of that "unfair" rule. But this Pareto improvement is barred by the nonwelfarist principle of fairness, creating the conflict between the Pareto principle and "fair" legal rules.

This conflict, however, does not apply to a compensatory tort rule, because the associated principle of fairness is not continuously traded off against some component of welfare. The compensatory tort rule protects the individual right to physical security for reasons of individual autonomy, thereby ruling out the maximization of social welfare as the reason for compromising the right holder's autonomy. In this important sense, the individual right constrains social welfare and can yield allocatively inefficient liability rules.[85] However, the tort right does not constrain social welfare in all possible states of the world. The right only protects the autonomy of the right holder; it does not bar a right holder from exercising her autonomy. A right holder's fully informed exercise of autonomy also promotes her welfare. Thus, when the right holder is exercising her autonomy, fairness (autonomy) is not continuously traded off against welfare. There simply is no tradeoff. Therefore, these rights-based rules do not satisfy the continuity assumption of the Kaplow and Shavell proof, nor do they violate the Pareto principle.

As shown by this example, a rights-based tort system can be justified by some nonwelfarist value such as individual autonomy or equal freedom and still be concerned about the welfare consequences of liability rules across a wide range of cases. Welfare is not the only or even primary value of concern, and so compensatory rights-based tort rules are "fair" as defined by Kaplow and Shavell. The promotion of Pareto improvements is not the same as the promotion of allocative efficiency. But welfare still matters. The governing principle of justice can constrain the role of welfare considerations without eliminating them. Economic analysis has importance within this constrained and yet vitally important space; it helps us figure out what justice requires in the case at hand, confirming Calabresi's claims about the importance of distributive economic analysis for normative evaluation in tort law.

V
CONCLUSION

Much like scholars once discussed risk distribution without adequately defining the concept, the same has been true of compensation. Tort scholars

85. *See supra* Part III.C (explaining why a compensatory norm justifies allocatively inefficient rules governing nonreciprocal risky interactions that occur outside of contractual relationships).

have roundly rejected the proposition that tort liability can be plausibly conceptualized in compensatory terms, relying on a reason that would seem to foreclose further inquiry about the matter: "Measures of compensatory liability sometimes exceed, sometimes fall short of, and sometimes bear no relation to what is required to make the claimant whole."[86] The rejection of a compensatory rationale for tort liability rests on the unexamined premise that compensation is exclusively defined by the compensatory-damages remedy.

But just as Calabresi showed that the concept of risk distribution requires elaboration,[87] one can do the same with respect to a norm of compensation. The payment of compensation by a duty holder can be defined by reference to all expenditures required to satisfy the correlative compensatory right. A rigorous specification of a compensatory tort right shows why the distribution of risk can fully satisfy the compensatory demands of the right holder without an entitlement to compensatory damages in all cases of accidental injury. Such a tort system is not designed to minimize the social costs of accidents. To employ Calabresi's distributive taxonomy, a compensatory tort system instead shifts the Pareto frontier outwards by permitting "changes that do not immediately create new winners and uncompensated losers."[88] For reasons revealed by Calabresi's insights about risk distribution and the importance of distributive economic analysis, the concept of compensation is much more nuanced than scholars have recognized. Tort law can be plausibly interpreted in the compensatory terms of the autonomy-based Pareto principle.

86. Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1388–89 (2003) (arguing that the poor fit between compensation and the damages remedy suggests that compensatory damages seek to counterbalance rather than repair a wrong, giving them a "close affinity to revenge").

87. *See supra* notes 1–3 and accompanying text.

88. Calabresi, *The Pointlessness of Pareto*, *supra* note 7, at 1231.