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INTRODUCTION

For decades, Professors John Goldberg[1] and Benjamin Zipursky[2] have been developing the thesis that the primary purpose of tort law is to implement the principle of civil recourse.[3] In *Recognizing Wrongs*, they "aim" to provide "a systematic statement" of this position (p. 52).

As they forthrightly recognize, civil recourse embodies "an apparently obvious truth about its subject" (p. 83). Tort law is a civilized form of dispute resolution that uses liability to redress a defendant's violation of the plaintiff's tort right, with redress typically taking the form of compensatory damages for the harm caused by the wrongdoing. Tort liability, therefore, patently satisfies "the principle of civil recourse," which "can be summarized as follows: A person who is the victim of a legal wrong is entitled to an avenue of civil recourse against one who wrongs her" (p. 3).

To provide an adequate account of tort law, the principle of civil recourse cannot simply describe the formal structure of tort liability; it must also explain the substantive nature of wrongdoing and identify the reasons why the legal system redresses the violation of the associated rights through the tort system. In taking up this challenge, Goldberg and Zipursky emphasize how civil recourse relies upon common-law processes and empowers victims to seek redress through the legal system and not through self-help. Civil recourse, they conclude, is a "[c]onstitutional [p]rinciple" (p. 30). Consequently, tort law "is a readily justifiable feature of a liberal-democratic re-

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1. Carter Professor of General Jurisprudence and Deputy Dean, Harvard Law School.

2. James H. Quinn '49 Chair in Legal Ethics, Fordham University School of Law.

3. For some of the earlier works in which Professors Goldberg and Zipursky develop the principle of civil recourse, see Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010); and John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341 (2011).

gime, akin in many respects to law that provides individuals with the right and the power to vote" (p. 341).

These wide-ranging claims—along with a host of other interesting ideas—are insightfully developed in the book, but one can reject many of them while still finding that Goldberg and Zipursky have developed the principle of civil recourse in a manner that helpfully illuminates the substantive nature of tort law. Most of the book strives to provide such an account, successfully tying the principle of civil recourse to a particular conception of tort law wholly defined by conduct-based duties of noninjury, the breach of which necessarily involves prohibited behavior. By engaging in such prohibited behavior, the defendant mistreated the plaintiff, even if the defendant's conduct was entirely blameless. Tort law accordingly gives victims a right to redress from those who have mistreated them, leading Goldberg and Zipursky to conclude that "the point of tort law is to define and prohibit certain forms of mistreatment, and to provide victims of such mistreatment with the ability to use civil litigation to obtain redress from those who have mistreated them" (p. 266).

This conception of tort law is highly contestable. As this Review shows, civil recourse readily accommodates an alternative interpretation of tort law that substantially limits the relevance of mistreatment, which in turn limits the importance of civil recourse to the remedial aspects of modern tort law. Although undoubtedly important, the redressive structure of tort liability does not supply the "point of tort law."

Goldberg and Zipursky depict tort law in a manner that is faithful to its historical origins but is now anachronistic. The role of mistreatment within the early common law stems from the customary norms that governed behavior in the state of nature. Lacking protection of centralized government, individuals needed to defend their honor in order to ward off future attacks. Suffering injury at the hands of another necessarily involved a form of mistreatment that entitled the victim to obtain redress from the injurer. By enforcing these norms, the early common law was fully animated by the principle of civil recourse.[4]

Over time, social conditions have changed. Physical security no longer depends on one's honor. To protect individuals from physical harm, modern tort law focuses on the prevention and compensation of injury.[5] Mistreatment matters only insofar as it involves highly culpable wrongdoing—a distinctive threat to physical security redressed by punitive damages. Outside of this extraordinary remedy, mistreatment is not relevant to tort liability in cases of accidental physical harm. Tort liability still formally satisfies the principle of civil recourse—plaintiffs receive redress from defendants who violated their tort rights and thereby wronged them—but the primary purpose of modern tort law is defined by its substantive rights and correlative obligations, not by the remedial structure of civil recourse.

4. *See infra* Section II.A.

5. *See infra* Section II.B.

Nevertheless, the principle of civil recourse sharpens our understanding of how tort law responds to the mistreatment of one individual by another. This aspect of tort liability has been masked by the long-running debates over tort reform and the like. By focusing on the structural features of tort liability, Goldberg and Zipursky identify valuable attributes of the tort system within a liberal democracy, an important contribution that has shaped and will continue to influence how we think about tort law.

I. A RIGHT IMPLIES A REMEDY

[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.

—*William Blackstone*[6]

The rule identified by Blackstone, embodied in the maxim *ubi jus ibi remedium*, captures the core meaning of civil recourse according to Goldberg and Zipursky because it "expresses our legal system's commitment" to that "important substantive principle" (p. 15). The logic behind this conclusion drives their interpretation of tort law.

Tort law is largely state law in the United States. As Judge Thomas Phillips has helpfully catalogued, the "most widespread and important" of the individual rights contained in state constitutions "is probably the guarantee of a right of access to the courts to obtain a remedy for injury. It is one of the oldest of Anglo-American rights, rooted in Magna Carta and nourished in the English struggle for individual liberty and conscience rights."[7] This right "expressly or implicitly appears in forty state constitutions."[8] The *ubi jus* maxim is firmly entrenched within our legal culture in many other ways that Goldberg and Zipursky identify, beginning with the Declaration of Independence (pp. 35–36).

The meaning of the *ubi jus* maxim is contestable, however, as illustrated by the range of interpretations that state courts have given to the right when deciding whether legislative limitations of tort liability are constitutional.[9] Of the state constitutions that recognize the right, twenty-seven require that an individual "shall" have a remedy for "injury done him in his person" or "property," with another eleven pronouncing that individuals "ought" to have such a remedy.[10] Regardless of the exact formulation, these provisions all expressly declare that an injury creates a right to a remedy, which is one way of formulating the *ubi jus* maxim: an individual has a right not to be in-

6. 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (footnote omitted).

7. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003) (footnote omitted).

8. *Id.*

9. *See id.* at 1311–14 (discussing this case law and concluding that it reaches "disparate results" that "are essentially inexplicable").

10. *Id.* at 1311 (discussing two major variants of these provisions).

jured by another, and so the occurrence of injury entitles him to a remedy from the wrongdoer. This formulation of the maxim is literally satisfied by a rule of strict liability that entitles one to the remedy of monetary damages for "injury done him" by another,[11] but no state court has concluded that strict liability is constitutionally required in all cases of injury. The substantive implications of the right to a remedy are unclear.

For reasons further illustrated by strict liability, the substantive importance of the *ubi jus* maxim is also unclear. Strict liability entitles the right-holder to receive compensatory damages from a duty-bearer who caused her injury, turning the *ubi jus* maxim into a tautology—the right is nothing other than an entitlement to the compensatory damages remedy, so there can be no such right if it has no remedy. Strict liability straightforwardly satisfies the *ubi jus* maxim while rendering it substantively unimportant: all the interesting action resides in the reasons that justify the compensatory liability rule, not in the abstract right to a remedy.

According to Goldberg and Zipursky, tort rules do not have this property. Relying on doctrinal analysis, they conclude that tort rules obligate duty-bearers to avoid specified behaviors that cause injury to right-holders, thereby instantiating the "conduct-rule theory of legal rights" (p. 97). One who acts in a manner prohibited by a duty of noninjury mistreats the right-holder, who is then empowered to seek interpersonal redress for the wrongdoing through the courts (pp. 162–63). Consequently, "[a] tort is a violation of a relational legal directive enjoining one person from mistreating another in a certain manner" (p. 181). A tort right, on their account, is not just an entitlement to compensatory damages; it also prohibits the duty-bearer from acting in certain ways that cause injury—the mistreatment that merits redress through the tort system.

For this type of tort system, civil recourse is especially valuable because it provides an interpersonal remedy for instances in which one person has mistreated another, explaining why Goldberg and Zipursky insist that tort rules enjoin specified forms of injury-causing behavior. Absent such prohibition, wrongdoing lacks the element of mistreatment that motivates their account of civil recourse.

No other theory of tort law places such a fundamental emphasis on mistreatment, which is both a strength and a weakness. The framework is original and shows that a persuasive interpretation of tort law ought to account for interpersonal relations of mistreatment. The importance of this behavior, however, depends on how it is defined. Goldberg and Zipursky conceptualize mistreatment in a way that begs important questions, considerably weakening their claims about the significance of civil recourse.

The problem, not surprisingly, arises from the various tort rules that function as forms of strict liability, including those not expressly denominated as such. A good example is provided by the objective standard of reasonable care that requires individuals to make safety decisions based on

11. *Id.*

ordinary knowledge and intelligence, even if they don't have that wisdom or the associated mental capabilities.[12] Goldberg and Zipursky recognize that these objectively defined behavioral obligations can be quite "unforgiving" and thereby subject "blameless" defendants to liability (p. 197). Nevertheless, they assert that the defendant in these cases engaged in a form of conduct prohibited by the plaintiff's tort right and "thus mistreated the plaintiff in a manner that counts as a legal rights-violation" (p. 196; emphasis omitted).

By defining the forms of no-fault liability so that they are "almost always strict in the unforgiving sense" (p. 192), Goldberg and Zipursky bear the burden of explaining how and why courts decide to adopt an "unforgiving" standard for some types of behavior and not others. Though they provide rationales for the practice in general (pp. 197–98), they do not demonstrate that courts have adopted "unforgiving" standards in a consistent or defensible manner across cases.

In any event, without an adequate anchor in behavioral reality, the *mistreatment* of a plaintiff by a defendant who engaged in *prohibited* behavior is only definitional wordplay. If a defendant does not have the mental or physical capacity to behave in the manner required by an "unforgiving" tort duty, in what substantive respect does such behavior mistreat the plaintiff?

The prohibition that purportedly attaches to this behavior is also problematic. According to Goldberg and Zipursky, behavior is prohibited only if it proximately causes injury to a right-holder—the duty is one of noninjury (pp. 186–87). But a defendant who engages in risky behavior does not know whether her conduct will accidentally injure the plaintiff. Unable to guarantee compliance with the "unforgiving" behavioral obligation in the first instance, the defendant had only one choice to ensure that she would not be acting in a prohibited manner—avoid engaging in the risky activity altogether. Insofar as one should not act in a legally prohibited manner, the duty posited by Goldberg and Zipursky implies that those who cannot always comply with an "unforgiving" behavioral obligation should not engage in the risky activity—an extreme obligation that would prevent most of us from driving automobiles.[13]

Rather than shoehorn these cases into the category of "prohibit[ed] . . . forms of mistreatment" (p. 266), an alternative interpretation recognizes that blameless defendants incur a purely compensatory form of no-

12. *See, e.g.*, Burch v. Am. Fam. Mut. Ins. Co., 543 N.W.2d 277, 280–81 (Wis. 1996) (applying the objective standard of reasonable care to a fifteen-year-old girl diagnosed with cerebral palsy and found to have the "mental and cognitive capacity . . . of a normal child between ages three and six").

13. *See* Carrie Huisingh, Russell Griffin & Gerald McGwin Jr., *The Prevalence of Distraction Among Passenger Vehicle Drivers: A Roadside Observational Approach*, 16 TRAFFIC INJ. PREVENTION 140, 141, 144 (2015) (summarizing various empirical studies finding that drivers engaged in distracting activities anywhere from 31 to 44 percent of the total time the vehicle was moving, and providing results from a roadside observational study of passing vehicles which found that at that point in time, "one third of drivers were engaged in one or more distracting activities while driving").

fault or strict liability. Consider the rule of strict liability for abnormally dangerous activities,[14] which originated in the famous case *Rylands v. Fletcher*.[15] This rule does not prohibit duty-bearers from engaging in abnormally dangerous activities like blasting; it only obligates them to pay compensation for the associated injuries.[16] The rule cannot be plausibly interpreted in terms of an "unforgiving" behavioral standard, as Goldberg and Zipursky recognize (p. 191). Because it lacks any behavioral obligation not to injure right-holders in the first instance, this purely compensatory form of strict liability does not involve the type of prohibited mistreatment required by Goldberg and Zipursky.

After admitting that this form of liability challenges their interpretation of tort law, Goldberg and Zipursky sidestep the problem: "*Rylands* is recognized as an exceptional case. True, it is a staple of Torts courses. But that is precisely because the terms on which it imposes liability are so distinctive as to locate it at or beyond tort law's conceptual boundaries" (p. 191). Having denied that a purely compensatory form of strict liability is properly characterized as a rule of tort law, Goldberg and Zipursky define tort liability so that it always involves prohibited mistreatment—the failure to comply with an obligatory, often unrealistic "unforgiving" behavioral standard not to cause injury.

Their argument thus far only provides a theory of tort *liability*. It omits the contours of tort *law*—the specification of rights, the violation of which constitutes the wrongs subject to tort liability. "[T]he civil recourse principle does not itself provide an account of tort law's wrongs (although it does limit the range of possible accounts)" (p. 230). Goldberg and Zipursky accordingly recognize that "[a] theory of torts must not only constrain the possible ways of fleshing out tort law's wrongs, but also must capture and help guide judicial reasoning about what shall count as wrongs" (p. 231).

Goldberg and Zipursky propose a theory of "dual constructivism" as a "fresh attempt to theorize tort law's wrongs" (pp. 232–33). Unlike the instrumental approach that interprets tort law by straining to conjoin the functions of compensation and deterrence in furtherance of some objective like allocative efficiency, dual constructivism directly integrates the two properties by "elucidating the norms of tort law, rather than in positing or enacting them" (pp. 238–39).

Rather than representing a new framework, dual constructivism is an elegant restatement of substantively sound analogical reasoning, the character-

14. RESTATEMENT (SECOND) OF TORTS §§ 519–520 (AM. L. INST. 1977).

15. Rylands v. Fletcher (1868) 3 LRE & I. App. 330 (HL) (appeal taken from Eng.).

16. *See, e.g.*, Spano v. Perini Corp., 250 N.E.2d 31, 34–35 (N.Y. 1969) (observing that the question in these cases is "not *whether* it was lawful or proper to engage" in the activity but "*who* should bear the cost of any resulting damage—the person who engaged in the dangerous activity or the innocent neighbor injured thereby").

istic form of common-law analysis.[17] Reasoning by analogy, courts have developed the modern law of torts from its origins in the medieval writ of trespass, which subsequently spawned the writ of trespass on the case:

> [A]s did medieval judges when they expanded the menu of actionable injurious wrongs via the writ of trespass on the case, modern common-law courts are in significant part elucidating and expanding upon norms of conduct that are already in tort law, . . . and thereby *recognizing* duties and rights that had not been clearly recognized before. (p. 240)

At times, judges "must make what is inevitably a loaded judgment about whether the social norm being imported into the law actually does fit the precedential common-law framework that it supposedly exemplifies" (p. 253). But this reasoning is neither policymaking writ large nor "'naked' moralizing" about the common law of torts:

> Inchoate norms of conduct and inchoate expectations are, so to speak, elevated to legal status (or not) through common-law adjudication. To the extent that these norms of conduct already exist in social mores and in indiindividuals' expectations and dispositions, common-law courts are not making them up out of whole cloth. On the other hand, it is the nature of common-law reasoning that judges possess the power to say whether such norms exist, to call upon them as extant norms and expectations, and then to decide whether to entrench them in an institutional system that generates significant practical consequences. (p. 252)

As Goldberg and Zipursky subsequently observe in a telling passage, "[t]o the extent we have been laconic about substance, it is perhaps because this aspect of tort law is arguably its least mysterious feature" (p. 266). Their theory, however, leaves it mysterious as to how judges who engage in common-law reasoning derive the substantive obligations of tort law by selectively enforcing "prevailing norms" of social behavior (p. 114).

Tort law does not enforce all social norms because some customs (like jaywalking in New York City) are not reasonably safe.[18] What, then, is the more abstract normative source of tort law that courts draw upon to determine whether a particular social norm should be "elevated to legal status (or not) through common-law adjudication"? What justifies the "unforgiving" behavioral demands that effectively function as forms of no-fault or strict

17. *See generally* Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (explaining that analogical reasoning is not based on a priori first principles, but can nevertheless coherently develop the law, because analogies depend on placing a case within its proper category and over time courts can develop increasingly general principles for categorizing cases); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 13 (1982) ("The most powerful engine of change in the common law was, strangely enough, the great 'principle' that like cases should be treated alike. Courts acting on that principle could change law, indeed make law, without arrogating to themselves undue power because they always seemed to apply past precedents or principles in new ways to situations *made* new by the world around them.").

18. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 13(a) (AM. L. INST. 2010).

liability? Because compliance with an "unforgiving" standard of conduct does not have to be behaviorally realistic, what prevents courts from adopting the "unforgiving" standard "never harm another," thereby placing purely compensatory forms of strict liability within the domain of tort law? After all, if someone injures another and does not provide compensation, why isn't the failure to do so a form of mistreatment properly governed by the principle of civil recourse?

The principle of civil recourse does not have the resources to answer these questions, because it only "informs but does not determine the content of tort law" (p. 234). A right may imply a remedy, but the remedies that satisfy the principle of civil recourse do not entail a unique set of tort rights.

II. COMPENSATION, MISTREATMENT, AND CONDUCT-BASED WRONGS

"Thou shalt do no hurt to thy neighbor." Our law of torts, with all its irregularities, has for its main purpose nothing else than the development of this precept.

—Sir Frederick Pollock[19]

In developing the precept that one "shalt do no hurt to thy neighbor," tort law does not have to prohibit individuals from injuring others, an impossible demand across the full range of social interactions. A behaviorally realistic formulation of the precept simply requires individuals to compensate others they have accidentally injured by their affirmative acts, in which case they have not "hurt" their neighbor.

To be sure, the term "injury" was employed by early legal scholars to refer to "*a completed wrong* that has been committed by one person against another."[20] One completes a wrong by violating another's right, and a tort right can be formulated in various ways that do not necessitate a rule of strict liability requiring injury compensation in all cases.[21] Pollock, however, was not describing specific rights and their correlative duties, which are governed by the different "precept" to "render every man his due" as a matter of his particular right and your corresponding obligation.[22] By referencing a distinct "precept" not to "hurt" another, Pollock apparently recognized a distinct normative obligation to compensate those you have harmed.

A compensatory norm is not limited to the redress of prohibited forms of mistreatment. One can incur the compensatory obligation based on the

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19. FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 13 (James Avery Webb ed., St. Louis, F.H. Thomas L. Book Co. 1894) (1887) (footnote omitted).

20. John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 437 (2006).

21. For this same reason, the state constitutional right to a remedy for "injury" does not necessarily entail a rule of strict liability. *See supra* notes 14–16 and accompanying text.

22. POLLOCK, *supra* note 19, at 12 n. ("*Honeste vivere* (to live honorably), *alterum non laedere* (not to injure others), and *suum cuique tribuere* (to render to every man his due), were the three general precepts to which Justinian reduced the whole doctrine of the law.").

fact of hurting or harming another—the type of obligation embodied in a compensatory rule of strict liability that is not formulated in terms of an "unforgiving" behavioral standard not to cause injury in the first instance.

According to Goldberg and Zipursky, "if strict tort liability routinely took the form of licensing-based liability, there would indeed be grounds for rejecting our contention that torts are wrongs" (p. 191). Unless one violates a behavioral prohibition not to injure another in a specified way, there is no mistreatment justifiably redressed by tort liability, or so they maintain.

A compensatory tort obligation, however, satisfies the structural requirements of civil recourse. These requirements, according to Goldberg and Zipursky, involve legal "redress for injury-inclusive, relational legal wrongs" (p. 116). A compensatory duty and its correlative compensatory right are relational, the duty is breached and the right violated only in cases of injury, and tort liability requires the defendant to compensate the plaintiff as legal redress for the wrong or failure to compensate the injury in the first instance. Like the conduct-based, prohibitory duties of noninjury invoked by Goldberg and Zipursky, a compensatory tort obligation also satisfies the principle of civil recourse.

The violation of this compensatory duty, moreover, is a form of mistreatment in the sense that the injurer's failure to offer compensation violates the precept that one "shalt do no hurt to thy neighbor." In these cases, as Adam Smith observed, an injurer with "any sensibility . . . necessarily desires to compensate the damage," for to "offer no atonement[] is regarded as the highest brutality."[23]

Mistreatment can take various forms, much in the same way that "hurt" or "injury" can have various meanings. Although the principle of civil recourse responds to instances of mistreatment, it cannot determine what constitutes mistreatment in the first place. Whether mistreatment is limited to prohibited forms of behavior, or whether it also encompasses the failure to compensate another's injury, depends on the substantive properties of tort law.

A. *Mistreatment and the Early Common Law*

As Goldberg and Zipursky properly emphasize, understanding the development of tort law "requires understanding how judges have applied the common law and moved it forward by virtue of their reflective entrenchment in existing law and the social norms it embodies" (p. 234). Through the process of common-law adjudication, courts since medieval times have been

23. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 104 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759); *see also* Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 234 (2011) ("A further difficulty for Goldberg and Zipursky is that if resentment of a blameless injurer is defensible at all, it should be equally defensible when legal liability is strict rather than fault-based. In either case, what triggers resentment is not the injurer's initial conduct toward the victim (which does not invite blame), but the injurer's failure to suffer its consequences.").

invited to "build out, through a process of analogy, from the collection of wrongs initially actionable under the writ of trespass" (p. 235; emphasis omitted).

The first forms of the common law "simply codified existing custom" that governed behavior in the state of nature, a term legal historians use to connote society not subject to centralized governmental authority.[24] Unlike the anarchic "state of nature" analyzed by social-contract theorists such as Hobbes and Locke, social life prior to the emergence of centralized governance was ordered by norms that structured social interactions.[25] With the transition to centralized government, the state began to enforce these norms as the common law of England.

Following the lead of Oliver Wendell Holmes, modern tort scholars have largely ignored these customary practices, relying on the assumption that the norms were inherently barbaric and could not withstand the evolving demands of an increasingly civilized society. As Holmes observed, "in 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."[26] In the state of nature, instances of intentional wrongdoing were governed by the retaliatory norm commonly paraphrased as "an eye for an eye, a tooth for a tooth." For Holmes and the ensuing generations of tort scholars, the retaliatory norm's relevance for the modern legal system is limited to issues concerning the amount of punishment to be meted out by the criminal justice system, making it irrelevant for tort law.[27]

Goldberg and Zipursky also focus on the early forms of liability involving intentional harms, but unlike Holmes and others, they claim these forms of liability have ongoing relevance for the modern tort system. These original wrongs "were selected *because of their widespread recognition as serious forms of mistreatment*" (p. 234). Modern tort law then evolved from these "basic forms of injurious wrongdoing—batteries, false imprisonments, and trespasses to property—[that] probably formed the bulk of English tort law circa 1300" (p. 234). Mistreatment has always been integral to tort liability, they argue, leading them to conclude that the primary purpose of tort law is to provide redress for prohibited mistreatment.

Although Goldberg and Zipursky are undeniably correct that the original wrongs of battery and the like involve "serious forms of mistreatment," they do not otherwise discuss the customary norms of behavior that first shaped the early common law. In this respect, they follow the convention of

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24. 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, 53 (1995).

25. *Id.* at 41–42.

26. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 146 (Harvard Univ. Press 2009) (1881).

27. *See* Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U. L. REV. 1517, 1526–27 (2016) (providing more detailed description of the conventional understanding of the norms first enforced by the common law). The ensuing discussion in this Part is largely drawn from this article.

modern torts scholarship, a limitation of their approach that I have previously identified within the corpus of their work that they have now refined into *Recognizing Wrongs*.[28] To understand how the early common-law rules governing batteries, false imprisonments, and trespasses have shaped the development of modern tort law, we must first identify the social norms that the early common law enforced with the original writ of trespass.

Customary social practices in the state of nature were based on "the principle of reciprocity" that "pervade[d] every relation of primitive life and is exemplified in many other ways."[29] This moral code, according to William 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."[30]

In cases of intentional wrongdoing, the reciprocity norm attained equitable balance by entitling the victim to respond with reciprocal aggression—the "eye for an eye." In a world without centralized governmental authority, individuals had to protect themselves with self-help remedies. By responding with reciprocal aggression, the victim restored his moral balance with the attacker and deterred future acts of aggression by sending the message that assaults of this sort will be responded to in kind. Redress for mistreatment characterized this normative practice for reasons that are hardly barbaric.

The norm of reciprocity, however, was not limited to revenge. Relying on an extensive body of evidence, Miller concluded that "[r]evenge always coexisted with a compensation option" in the state of nature.[31] The reasons, as Holmes recognized, are obvious: "even a dog distinguishes between being stumbled over and being kicked."[32] Or as another historian put it, "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)?"[33]

The normative logic of compensation, though, is not limited to the return of stolen property. An injurer can "take" the eye of a victim by causing him to "lose" his sight. In the event of an accident, however, the injurer did not take the victim's eyesight in an act of aggression—the loss was an unintended byproduct of the injurer's risky behavior. Reciprocity does not demand that the victim must respond in kind by aggressively taking an eye from the injurer. By exacting compensation for the accidental harm, the vic-

28. *See id.* at 1533–36.

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

30. WILLIAM IAN MILLER, EYE FOR AN EYE 4 (2006).

31. *Id.* at 24; *see also* Whitman, *supra* note 24, at 70–71 ("Some 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.").

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

33. DAVID DAUBE, STUDIES IN BIBLICAL LAW 103 (1947). "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." *Id.* at 102–03.

tim would cause the injurer to suffer the same amount of loss—a reciprocal act that would restore equitable balance. Compensation would also ensure that the injurer did not benefit at the expense of the victim's person or property, thereby deterring others from engaging in such risky conduct in the future: *don't expect to benefit at my expense*.[34] For readily understandable reasons, enforcement of the compensatory obligation in cases of accidental harm enabled victims to maintain their honor. Within the biblical tradition, an "eye for an eye" was interpreted to mean the *value* of an eye for an eye.[35]

The reciprocity norm accordingly recognized two different remedies to redress two normatively distinct types of mistreatment that victims suffered at the hands of their injurers. An act of aggression directly attacked the victim's body or property, whereas the failure to compensate in cases of accidental harm directly attacked the victim's honor. The first type of mistreatmistreatment—to be called "culpable mistreatment"—required redress by the remedy of retaliatory revenge, whereas the normatively different type of "honor-based mistreatment" only required compensation to restore equitable balance.

These two types of mistreatment were then redressed by the early common law through its enforcement of the reciprocity norms governing revenge and compensation. A plaintiff was entitled to the appropriate form of redress—punishment or compensation—that was tailored to the type of mistreatment inflicted by the defendant. "According to the lawyers [of this era], victims who preferred vengeance over compensation prosecuted their wrongdoers for crime. Victims who preferred compensation over vengeance sued their wrongdoers for tort."[36] By channeling these self-help remedies from the state of nature into the legal system for civilized resolution by impartial decisionmakers, the early common law was fully structured by the principle of civil recourse.

The early common law shows that the principle of civil recourse is not inherently "tied to notions of retribution or vengeance," as Goldberg and Zipursky correctly emphasize (p. 65). In addition to providing victims with the remedy of punishment as redress for culpable mistreatment, the early common law also provided victims with compensation as redress for honor-based mistreatment. Goldberg and Zipursky, however, do not recognize the different types of mistreatment. By exclusively discussing the intentional harms of "batteries, false imprisonments, and trespasses to property" that involved "*serious forms of mistreatment*" (p. 234), they largely define the early common law in terms of culpable mistreatment, thereby ignoring the honor-based mistreatment that justified compensation as redress for accidental harms.

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34. For more extensive discussion, see Geistfeld, *supra* note 27, at 1543–46.

35. *See* DAUBE, *supra* note 33, at 102–07.

36. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59–60 (1996).

Unlike the portrayal drawn by Goldberg and Zipursky, the early common law continued to recognize the compensatory norm. "Throughout the medieval and early modern periods there is a strong focus on the loss suffered by the plaintiff rather than on the wrongful conduct of the defendant: 'If a man suffers damage it is right that he be compensated'. . . ."[37] A defendant who caused accidental harm only mistreated the plaintiff's honor by not compensating the injury, placing the focus on the uncompensated loss rather than on the (nonculpable) injury-causing conduct. A focus on wrongful conduct was only relevant in cases of culpable mistreatment that triggered the normative concern for punishment.

The early common law enforced the compensatory norm (the value of an eye for an eye) with the principle that "a man *acts* at his peril," which "seems" to have been "adopted by some of the greatest common-law authorities" according to Holmes.[38] In his famous critique of this principle, Holmes showed that liability is limited to the injuries foreseeably caused by one's risky conduct.[39] Such a limitation is embedded in the relational responsibility entailed by the reciprocity norm of compensation.[40] The associated compensatory duty expresses the precept that one "shalt do no hurt to thy neighbor," confirming Pollock's observation that that "[o]ur law of torts, with all its irregularities, has for its main purpose nothing else than the development of this precept."[41]

Over time, the link between compensation and honor-based mistreatment fundamentally changed. In the state of nature, honor was essential for survival; without it, one was vulnerable to attack. Consequently, for the first form of compensatory tort liability—the writ of trespass—"[i]t is . . . possible to identify from the early records two ideas at work: affronts to honour, and

37. D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 58 (1999) (quoting Hulle v. Orynge (The Case of Thorns) YB 6 Edw. 4, fol. 7a, Mich., pl. 18 (1466) (Eng.)).

38. HOLMES, *supra* note 26, at 76; *cf.* 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 82 (Boston, Little, Brown & Co. 1859) ("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."); Francis H. Bohlen, *The Rule in* Rylands v. Fletcher (pt. 1), 59 U. PA. L. REV. 298, 309 (1911) ("There is every reason to believe that the original conception was that legal liability for injury 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").

39. HOLMES, *supra* note 26, at 87–88.

40. In a case of nonfeasance or failure to rescue, the reciprocal response is one of nonfeasance or doing nothing. The requirement of foreseeable harm, in turn, sets apart the injurer subject to the reciprocal response from the much larger class of individuals, including parents of the injurer, whose affirmative acts were also causes of the injury. For more extensive discussion, see Geistfeld, *supra* note 27, at 1551–55.

41. *See supra* note 19 and accompanying text.

the causation of loss."[42] As centralized government became increasingly capable of protecting individuals from being harmed by others, the maintenance of one's honor became less important for deterrence purposes. Lacking a deterrence rationale, the concern for dishonor waned over time so that "liability for wrongdoing was exclusively focused on the causation of loss. This became the central feature of the action of trespass, and it has remained the central feature of the English law of tort."[43] In cases of accidental harm, the fact that one has caused another to suffer loss—and created the concomitant need for compensation—now shapes the reciprocity norm of equitable balance, leaving any deep-rooted concern about honor-based mistreatment in the distant past.

To defend their thesis that the main purpose of tort law is to implement the principle of civil recourse as redress for prohibited forms of mistreatment, Goldberg and Zipursky claim that any purely compensatory form of liability is "locate[d] . . . at or beyond tort law's conceptual boundaries" (p. 191). A compensatory norm, however, has formed the core of tort law from the outset. It generates interpersonal obligations that are a form of civil recourse, relying on compensation to attain equitable balance between right-holders and duty-bearers. Modern tort liability still satisfies the principle of civil recourse as Goldberg and Zipursky maintain, but legal history belies their claim that tort rules are still formulated to provide interpersonal redress for prohibited forms of mistreatment.

B. *The Unity of Compensation and Deterrence*

Since it originated in the state of nature, the reciprocity norm of compensation has always accounted for the value of deterrence—the manner in which the compensatory obligation can induce duty-bearers to avoid injuring right-holders in the first instance. The compensatory norm unifies the functions of injury compensation and deterrence in a manner that produces different types of behavioral obligations. Having identified those obligations, we can then pinpoint the importance of mistreatment within modern tort law.

In general, "the concrete demands [of reciprocity] change substantially from situation to situation and vary with the benefits which one party receives from another."[44] Across the full range of social interactions governed by tort law, variations in the mutuality of benefits and costs alter the concrete demands of reciprocity, justifying a diversity of liability rules.

For any given interaction, the mutuality of costs and benefits depends on facts that are unique to that particular case. Compensatory obligations tailored to such highly individuated circumstances cannot realistically gov-

42. IBBETSON, *supra* note 37, at 14.

43. *Id.* at 17.

44. Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOCIO. REV. 161, 175 (1960).

ern the risky behavior of individuals continually interacting with different sets of strangers across the changing conditions characteristic of modern society. A behaviorally sound formulation of the norm must instead be defined in an objective manner that can be readily understood by the interacting parties in a wide range of settings. An objective formulation of the norm yields behavioral obligations fully corresponding to those enforced by the modern tort rules governing accidental physical harms caused by noncriminal conduct outside of contractual relationships.[45]

The reciprocity rationale for negligence liability is straightforward: When engaged in activities creating risks no greater than the ordinary or background level of risk in the community, individuals must make the same decisions regarding the safety of others that they would make for their own protection. This normative obligation to exercise reciprocal care toward oneself and others is embodied in the duty to exercise reasonable care. This tort obligation is no different from the (ordinary) care that individuals take for their own protection, a formulation expressed by some jury instructions[46] and substantively equivalent to the influential Hand formula for reasonable care.[47] Courts have recognized that under these conditions, each individual is compensated by the right that he or she has to impose such risks on others without having to pay compensation for their injuries.[48]

Once extended across the full range of risky interactions, the reciprocity norm also justifies complementary rules of strict liability: When individuals who exercise ordinary care are engaged in activities creating risks significantly above the ordinary or background level of risk in the community, they must compensate others for their resultant injuries. A nonreciprocal risk creates an imbalance between the parties, justifying a purely compensatory obligation enforced by a rule of strict liability. But this compensation, though valuable, cannot fully repair bodily injuries and other irreparable harms. To offset the imperfect compensation afforded by the damages remedy, the risky actor must also exercise care above the ordinary amount in order to further reduce the risk of irreparable injury. This method for attaining equitable balance is enforced by the rule of strict liability for abnormally

45. For more extensive analysis in support of these conclusions, see Geistfeld, *supra* note 27, at 1571–82. The normative properties of contractual relationships are different for reasons discussed in Section II.C below.

46. *E.g.*, UJI 13-1603 NMRA (2020), https://nmonesource.com/nmos/nmra/en/item/5680/index.do#!b/13-1603 [https://perma.cc/KHF7-TC5V] (" 'Ordinary care' is that care which a reasonably prudent person would use in the conduct of [that] person's own affairs.").

47. For conduct that threatens self-injury, individuals minimize their total costs by taking any precaution with a burden less than the associated reduction in their expected injury costs—the same decision rule required by the Hand formula. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) ("[I]f the probability [of injury] be called *P*; the injury, *L*; and the burden, *B*; liability depends upon whether *B* is less than *L* multiplied by *P*: i.e., whether $B < PL$." (emphases added)).

48. *See, e.g.*, Losee v. Buchanan, 51 N.Y. 476, 485 (1873).

dangerous activities[49] and is consistent with the findings of empirical studies seeking to identify how lay individuals determine the requirements of reasonable care.[50]

Thus, for noncriminal risky interactions outside of contractual relationships, liability depends on the reciprocity of risk. Negligence liability involves one party who injured another with an objectively defined nonreciprocal risk created by her unreasonably dangerous behavior, whereas strict liability applies to injuries caused by an objectively defined nonreciprocal (abnormally dangerous) risk that existed despite the actor's exercise of reasonable care. Reciprocity, however, is only a behavioral norm that is enforced by the legal system for reasons of policy or principle. Based on these reasons, tort law can justifiably limit liability for injuries caused by nonreciprocal risks.[51]

Within a compensatory tort system, liability is not necessarily tied to prohibited mistreatment, creating a clear-cut rationale for the forms of no-fault or strict liability. By contrast, Goldberg and Zipursky contend that these forms of liability are based on the defendant's failure to comply with an "unforgiving" behavioral obligation to not injure the plaintiff (p. 63).

A good example of such a rule is that "[a]n actor's mental or emotional disability is not considered in determining whether conduct is negligent."[52] Though labeled as a rule of negligence liability, this obligation functions as a form of no-fault or strict liability for an obvious reason: individuals with a mental disability are not always capable of acting like a reasonable person with ordinary mental capabilities. But even when individuals with mental disabilities cannot satisfy this unrealistic behavioral demand, Goldberg and Zipursky nevertheless claim that a defendant's failure to do so mistreated the plaintiff.

The rationale for liability instead is made clear by the behaviorally realistic requirements of reciprocity. If a mental disability prevents one from exercising the amount of care taken by those with ordinary capabilities, then the

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49. *See* RESTATEMENT (SECOND) OF TORTS § 519(1) (AM. L. INST. 1977) ("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*." (emphasis added)). The failure to exercise "utmost care" would subject the defendant to negligence liability, so a duty-bearer who fully complies with the compensatory obligation exercises utmost care and pays (under the rule of strict liability) for the injuries that are nevertheless caused by the abnormally dangerous or nonreciprocal risk.

50. Geistfeld, *supra* note 27, at 1560–61, 1576 n.232 (describing studies finding that lay individuals (jurors) and judges evaluate the standard of reasonable care for risky conduct threatening bodily injury by requiring precautions in excess of the amount required by the Hand formula). *See generally* Mark A. Geistfeld, *Folk Tort Law*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 338 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) (providing extensive empirical evidence supporting the conclusion that jurors rely on the reciprocity norm for determining the requirements of reasonable care in negligence cases).

51. *See* Geistfeld, *supra* note 27, at 1585–88.

52. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 11(c) (AM. L. INST. 2010).

risky actor has created an objectively defined nonreciprocal risk fairly governed by a rule of strict liability; personal fault or blameworthiness is irrelevant for compensatory purposes. The objectively defined negligence rule contains other pockets of no-fault liability with this same property.[53]

Mentally incapacitated individuals who are not institutionalized have the same right as everyone else to participate in society. They must comply with the same rules applicable to everyone else, but their inability to fully comply with these objectively defined rules does not justify a prohibition of that behavior—the normative message sent by Goldberg and Zipursky's formulation of the tort duty.[54] A compensatory duty normatively differs from conduct-based, prohibitory duties of noninjury.

Consistent with this reasoning, tort law prohibits behavior in only a subset of cases, not in all cases as Goldberg and Zipursky maintain. Conduct-based tort duties can be quite "unforgiving" as they put it, so the mere breach of the duty to exercise reasonable care does not necessarily mistreat the plaintiff (as in the aforementioned cases involving defendants with mental incapacities). Instead, a defendant mistreats the plaintiff by reprehensibly disregarding or rejecting the obligation to exercise reasonable care. Tort law prohibits this type of behavior and enforces the prohibition with the remedy of punitive damages.

A defendant can be subject to punitive damages for engaging in "morally culpable conduct" that "shows flagrant indifference to the safety or rights of others."[55] Such conduct culpably mistreats the plaintiff for reasons inherent in the ordinary damages remedy.

Compensatory damages do not fully repair bodily injuries and even damage to important forms of personal property. These physical harms are "irreparable injur[ies], and for centuries the common law has recognized that the prevention of such an injury is better than compensation via the damages remedy."[56] Consequently, a duty-bearer does not have the option of paying compensatory damages instead of attempting to exercise reasonable care—and thereby prevent injury—in the first instance.[57] Having reprehensibly disregarded or rejected the duty and the plaintiff's associated tort right, a defendant responsible for an irreparable injury does not fully satisfy her tort obligation by paying compensatory damages. The defendant's culpable

53. MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 180–91 (2008) (showing why duty-bearers who are unable to comply with the objectively defined standard of reasonable care are subject to no-fault or strict liability for nonreciprocal risks).

54. *See supra* notes 12–13 and accompanying text.

55. 3 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 483 (2d ed. 2011).

56. Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 158, 159–65 (2011).

57. *Id.* at 165–69.

mistreatment of the plaintiff merits a punitive response through an award of extracompensatory damages that fully vindicates the plaintiff's right.[58]

Culpable mistreatment still merits redress within the modern tort system, but only through an award of punitive damages.[59] Punitive damages are exceptional, however, because the ordinary case of accidental harm does not involve either culpable mistreatment or honor-based mistreatment. Without any reason for redressing mistreatment, the tort rules governing accidental harms protect the tort right solely through the functions of deterrence and injury compensation. Mistreatment is only relevant to the remedial aspects of modern tort law for reasons confirmed by the rules governing product-caused injuries.

C. *The Example of Strict Products Liability*

Manufacturers and other product sellers are subject to strict liability when their products contain defects that cause physical harm to consumers.[60] This rule further illustrates the substantive differences between a compensatory tort right and the conduct-based, prohibitory duties of noninjury posited by Goldberg and Zipursky. On their account:

> Like the directives in trespass, negligence, and other torts, this directive—"Do not cause injury to a consumer by sending into commerce a dangerously defective product"—sets a standard of conduct that is unforgiving. It can be violated even if a seller takes "all possible care" to prevent a defective product from entering commerce.[61]

Having defined strict products liability as a form of interpersonal redress for prohibited mistreatment that applies even to "conscientious and diligent actions" (p. 193), Goldberg and Zipursky conclude that the "instrumental rationales emphasizing loss-spreading, compensation, and deterrence" only "support" this rule of tort law and are "distinct from the rule itself" (p. 195).

When strict products liability is derived from a compensatory tort right, the substantive nature of the liability rule is cast in a very different form. The concerns for compensation and deterrence do not "support" the rule; they instead fully shape its substantive content, providing another example of how the prevention and redress of injury are integrated in the manner that Goldberg and Zipursky otherwise seek to attain with their interpretive theory of "dual constructivism" (pp. 238–39).

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58. *See generally* Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263 (2008) (demonstrating how punitive damages can be formulated in manner that punishes a defendant for having reprehensibly violated the plaintiff's compensatory tort right).

59. *See supra* text following note 35 (describing how the early common law provided a punitive remedy for the victims of culpable mistreatment).

60. RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

61. P. 193 (quoting RESTATEMENT (SECOND) OF TORTS § 402A).

Unlike ordinary tort cases such as those involving drivers and pedestrians, product cases are situated within a contractual context that inherently affects the distributive properties of the liability rules.[62] For the equilibrium in a market governed by tort rights and their correlative obligations, the manufacturer is entitled "to generate a sustained profit, above the cost of doing business."[63] The manufacturer's tort obligations—the required safety investments and compensation for product-caused injuries—factor into the manufacturer's cost of doing business and result in either higher product prices or decreased product functionality. Hence the costs of the manufacturer's tort obligations are fully borne by consumers.[64] Leaving aside cases of bystander injuries, the liability rule only affects consumer interests, justifying a tort duty limited to the protection of consumer expectations regarding safe product performance—the duty embodied in the rule of strict products liability.[65]

The ordinary consumer reasonably expects manufacturers to invest in product safety only if the benefit of risk reduction (fully accruing to consumers) exceeds the cost of the safety investment (also fully borne by consumers via higher prices and the like).[66] The efficient liability rule, which maximizes the net benefit that the ordinary consumer reasonably expects to derive from product use, fully satisfies the compensatory demands of the ordinary consumer.

This liability rule integrates the functions of compensation and deterrence or injury prevention. In market contexts, injury compensation is a form of loss spreading or insurance, because the costs of the manufacturer's compensatory liability are impounded in product prices and spread among

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62. For more extensive analysis of the issues addressed in the following discussion, see MARK A. GEISTFELD, PRINCIPLES OF PRODUCTS LIABILITY 39–63 (3d ed. 2020). Much of the ensuing discussion in this Section is drawn from this book.

63. Tincher v. Omega Flex, Inc., 104 A.3d 328, 385 (Pa. 2014).

64. Costs and benefits cannot be determined until the associated legal entitlements have first been specified; that baseline then determines how a tort rule distributes costs and benefits among duty-bearers and right-holders. *See* Mark A. Geistfeld, *The Tort Entitlement to Physical Security as the Distributive Basis for Environmental, Health, and Safety Regulations*, 15 THEORETICAL INQUIRIES L. 387, 392–98 (2014). For the market equilibrium that obtains at the normatively appropriate baseline, the manufacturer must cover all of its costs, including liability costs. Consequently, the price that consumers pay for the product covers the full costs of manufacturer tort liability.

65. Sellers are strictly liable for products that are both defective and "unreasonably dangerous." RESTATEMENT (SECOND) OF TORTS § 402A. To satisfy the latter requirement, the product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* cmt. i. Once situated within the entire claim, the "unreasonably dangerous" requirement determines whether the tort duty justifiably displaces contract law in order to protect uninformed consumers from unexpected product risks, with the defect then breaching that duty when it proximately causes physical harm. *See* GEISTFELD, *supra* note 62, at 45–52. As this formulation suggests, cases of bystander injuries require a different formulation of the duty based on the ordinary negligence principle. *See id.* at 349–62.

66. *See* GEISTFELD, *supra* note 62, at 39, 56.

all consumers. Injury compensation supplied by the tort system is substantially more expensive than other insurance mechanisms (consider legal fees alone). Consequently, consumers expect that manufacturers will incur liability only when doing so creates the necessary financial incentives for them to supply reasonably safe products.[67] The ordinary consumer's expectations of compensation are completely determined by the value of deterrence, which is why liability rules that protect consumer expectations of safe product performance inherently unify these two attributes of tort liability.

By directly unifying compensation and deterrence within the reasonable expectations of consumers, this form of analysis is considerably more incisive than the arguments by Goldberg and Zipursky that attempt to unify these two properties with a conduct-based formulation of strict products liability that purportedly prohibits certain forms of mistreatment.[68] To be sure, they are correct that compensation and deterrence are "distinct" from the conduct formally required by the rule of strict products liability (p. 195). But the condition of the product as required by tort duty is wholly shaped by consumer expectations of safe product performance, not by an independent concern about mistreatment.[69]

The same is true for remedies, including punitive damages.[70] Aside from the impact on compensation and deterrence, what is the point of giving consumers redress for mistreatment by manufacturers when the liability costs are ultimately borne by consumers in the form of higher prices and the like?

Courts effectively recognize as much: "Strict products liability, unlike negligence doctrine, focuses on the nature of the product, and not the nature of the manufacturer's conduct."[71] Whether the manufacturer's conduct mistreated the consumer is not substantively relevant for strict products liability, even though these liability rules formally satisfy Goldberg and Zipursky's definition of mistreatment as the violation of an "unforgiving" standard of behavior.

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67. *See* GEISTFELD, *supra* note 62, at 65–72.

68. For example, this analysis shows why consumers reasonably expect product designs to pass the risk-utility test. *Id.* at 40, 52–57. By contrast, Goldberg and Zipursky interpret the risk-utility test largely in terms of the negligence concept of faulty behavior that otherwise has no necessary connection to consumer expectations. Pp. 310–11. Once the risk-utility test is wholly unmoored from consumer expectations, jurors will routinely misapply the test by requiring excessively costly investments in product safety. See GEISTFELD, *supra* note 62, at 123–26.

69. *See generally* GEISTFELD, *supra* note 62 (showing how the important doctrines of strict products liability can all be derived from consumer expectations about product safety and compensation of product-caused injury).

70. *See id.* at 285–312.

71. Kim v. Toyota Motor Corp., 424 P.3d 290, 298 (Cal. 2018) (citing Barker v. Lull Eng'g Co., 573 P.2d 443, 457 (Cal. 1978)).

III. RECOGNIZING RIGHTS

Civil recourse is an historical fact rooted in the early common law, explaining why the bill of rights in state constitutions across the country typically require that individuals either "shall" or "ought" to have a remedy "for an injury done him in his person" or "property."[72] The right can be adequately protected, however, even if the scope of tort liability is considerably reduced. With the rise of the administrative state, tort liability no longer necessarily serves the vital role it once did, which is why legislative limitations of tort liability are not necessarily unconstitutional. These developments do not make tort law any less valuable. The primary purpose of modern tort law is to recognize the rights that should be protected by either tort liability or alternative modes of legal regulation—a purpose far removed from the early common law's imposition of liability for prohibited forms of mistreatment, a concern that is largely irrelevant in contemporary society.

A. *The Limited Importance of Civil Recourse for Modern Tort Law*

As Goldberg and Zipursky acknowledge, "civil recourse theory informs but does not determine the content of tort law" (p. 234). To support their thesis that the primary purpose of tort law is to implement the principle of civil recourse, Goldberg and Zipursky require a conception of substantive tort law that powerfully connects to civil recourse.

Reconsider their interpretation of tort law in this light. "In our parlance, 'redress' refers to a special case of civil recourse. It is the fulfillment—*recognition*—of a legitimate demand by an injury victim for responsive action from a wrongful injurer" (p. 17). Their account specifies only one version of civil recourse, a "special case" that gives pronounced importance to the compensation of victims by those who have wrongfully mistreated them. The linchpin of their argument, therefore, is based on the distinctive properties of interpersonal redress for prohibited mistreatment, not on the properties required by civil recourse. Recognizing as much, Goldberg and Zipursky helpfully explain that the label "civil recourse theory" is "potentially misleading. Ours is a redress-for-wrongs (or wrongs-and-redress) theory" (p. 263).

Having defined substantive tort law with a redress-for-wrongs theory that clearly calls for interpersonal remedies, Goldberg and Zipursky then conclude that the primary purpose of tort law is to implement the principle of civil recourse. Everything else is secondary.

> On our view, the primary point of supplying rights of action to those who have been wronged is *not* to facilitate the public vindication of the plaintiff's standing as a rights-bearer, or to promote public deliberation over our moral responsibilities, or to ensure that injustices are rectified. Instead, it is to provide certain legal powers to victims as against tortfeasors. (p. 277)

72. *See supra* notes 7–10 and accompanying text.

Goldberg and Zipursky recognize that tort law can be supported by other reasons. "The doing of justice—like deterrence and compensation—is something that tort law can sometimes deliver. But this is quite different from saying tort law is a system for the doing of justice. It is not" (p. 357). Tort law basically delivers civil recourse, full stop.

These claims are overblown. Like any other body of law, tort law is constrained by the requirements of equality and justice.[73] By definition, a constraint does not define the objective that one is trying to attain; it only places limits on how one can achieve that objective. Even if the primary purpose of tort liability is to provide injury victims with civil recourse, this form of governmental coercion must still be just and treat everyone—both right-holders and duty-bearers—equally. Tort liability must be delivered by a system that "does justice," even if doing so is not its primary purpose.

A compensatory tort right satisfies these requirements.[74] This conception of substantive tort law also shows why liability is not tethered to redress for prohibited forms of injury-causing behavior, the type of mistreatment required by Goldberg and Zipursky.

A tort right is defined by the legal protection it provides to certain interests of the right-holder, such as the interest in physical security.[75] For reasons provided in Part II, a compensatory right to physical security generates the rules of negligence, strict liability for abnormally dangerous activities, and strict products liability. Each type of rule embodies the compensatory obligation translated into the amount of care (deterrence) and injury compensation that fairly protect the right-holder's interest in physical security, which is not the same as prohibiting a duty-bearer from mistreating the right-holder. For purposes of the tort right to physical security, mistreatment only matters to the extent that it threatens the right-holder's legally protected interest in physical security.

In the state of nature, injury-causing behavior always mistreated the victim's honor and consequently threatened his interest in physical security, explaining why the right to physical security within the early common law can be accurately characterized as a right to be free from mistreatment—the type of right required by Goldberg and Zipursky.[76] In modern society, the loss of honor is not invariably tied to one's interest in physical security. To be relevant, the mistreatment in cases of physical harm must be culpable, which considerably diminishes the importance of civil recourse for modern tort law.

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73. *See* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 1 (2000) ("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.").

74. *See* Mark A. Geistfeld, *Compensation as a Tort Norm*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 65, 66 (John Oberdiek ed., 2014).

75. RESTATEMENT (SECOND) OF TORTS § 1 cmt. d (AM. L. INST. 1965).

76. *See* HOLMES, *supra* note 26.

As previously discussed, culpable mistreatment threatens a right-holder's interest in physical security because compensatory damages do not fully repair bodily injuries and other physical harms.[77] The modern tort right to physical security accordingly empowers plaintiffs to seek extracompensatory or punitive damages to adequately remedy reprehensible rights violations, regardless of whether the defendant is otherwise subject to punishment under the criminal law. In these cases, tort law provides a distinctive form of interpersonal redress for mistreatment that can be attained only through tort liability. But outside of these exceptional cases, the manner in which tort law protects the right to physical security turns on issues of compensation and deterrence, the analysis of which is not helpfully advanced by a focus on prohibited mistreatment and the related emphasis on civil recourse.

This point is underscored by the role of liability insurance. To accommodate this practice within their theory, Goldberg and Zipursky basically rely on the argument that "if a person owes a duty to another, it is . . . possible for her to make a contractual arrangement with a third party to assist her in fulfilling the duty" (p. 274). This argument is puzzling. Liability, on their account, always involves prohibited mistreatment that merits the interpersonal remedy of redress. Why does the plaintiff's power to seek *interpersonal redress for prohibited mistreatment* result in a form of liability that the defendant can fairly satisfy with an insurance contract that *shifts the obligation onto a third party*? The interpersonal remedy of apology cannot be satisfied by liability insurance, nor can the criminal penalties that apply to legally prohibited behaviors. Why is the interpersonal civil redress for prohibited mistreatment fundamentally different? Liability insurance substantially influences the practice of modern tort law,[78] yet it fits awkwardly—at best—within a tort system designed to deliver interpersonal redress for prohibited forms of mistreatment.

Once mistreatment is eliminated as a necessary condition for tort liability, the role of liability insurance can be justified. To protect the individual right to physical security, modern tort law focuses on the compensation and prevention of injury, each of which is affected by liability insurance. A duty-bearer who purchases liability insurance facilitates compensation by creating an asset for satisfying a tort judgment, but she will also have reduced financial incentives for avoiding injuries covered by the policy (moral hazard). The benefits of coverage obviously extend to right-holders, who also incur the costs of moral hazard by facing the increased risk of injury. Liability insurance is structured in a manner that provides the maximum amount of coverage with limitations designed to combat moral hazard in a cost-

77. *See supra* text accompanying notes 55–56.

78. *See generally* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008) (describing the symbiotic relationship between the growth of tort liability and the development of liability insurance).

effective manner.[79] By ensuring that the benefits of coverage exceed the costs of moral hazard, liability insurance confers a net benefit on right-holders and justifiably satisfies the associated tort obligations.

Matters are normatively different when a defendant reprehensibly disregarded or rejected the obligation to exercise reasonable care, a difference recognized by courts in deciding whether to enforce insurance policies covering liabilities for punitive damages.[80] This type of culpable mistreatment triggers the concern for interpersonal redress that can rule out liability insurance, which otherwise is a normatively sound arrangement for defendants to satisfy the compensatory obligations they owe to plaintiffs for their injuries.

Outside of the punitive-damages remedy, the modern tort rules governing accidental physical harms are not substantively determined by the normative properties of interpersonal redress for prohibited mistreatment. These rules still satisfy the requirements of civil recourse—they empower injury victims to receive compensation from their injurers. The redressive structure of liability is undoubtedly valuable, but the primary rationale for modern tort law resides in the reasons that shape the substantive content of the liability rules, not in the remedial structure of those rules.

B. *The Value of Tort Liability and the Value of Tort Law*

A right that protects individuals from physical harm does not necessarily require tort liability. Injury compensation can be provided by insurance mechanisms; deterrence, by regulatory agencies and the criminal law. In a world without tort liability, individuals could still be adequately protected from physical harm, even though they would have no right to civil recourse against their injurers.

As Goldberg and Zipursky correctly point out, this "public-enforcement" option will not ensure perfect compliance, and the ensuing concentration of government power could easily result in the unequal treatment of citizens (pp. 132–33). They are also on solid ground in arguing that, unlike administrative regulation, the process of common-law adjudication "helps keep the law in touch with social norms and positive morality" (p. 344). Though valid, these points only show that tort liability has certain comparative institutional advantages over regulatory alternatives. The comparative institutional advantages of tort liability do not make the tort system an essential component of a just liberal democracy, unlike the right to vote.

By contrast to the wrongs redressed by tort liability, the rights recognized by tort law are more essential. Unlike medieval times, when the common law provided the primary way to protect individuals from physical

79. *See* Mark A. Geistfeld, *Interpreting the Rules of Insurance Contract Interpretation*, 68 RUTGERS U. L. REV. 371, 383–87 (2015).

80. *See generally* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409 (2005) (describing the disagreement among courts as to whether liability insurance for punitive damages is enforceable as a matter of public policy).

harm, different departments of law now protect the health and safety of citizens.[81] From the individual's perspective, the extent to which the law protects against physical harm depends on how the government regulates risky behavior in its entirety. Even if tort law ensured that individuals were adequately safe while traveling on the highway, their overall security would be unduly threatened if environmental regulations did not adequately ensure the purity of the water they drink at home. What is adequate for this purpose depends on the underlying safety norm that determines the protection to which individuals are entitled—the very same issue addressed by the substantive rights recognized by tort law.

For reasons of history and federalism, the individual right to physical security can be derived from the common law of torts.[82] Tort law enforces safety obligations that fairly mediate conflicts between the right-holder's interest in physical security and the duty-bearer's interest in liberty. The manner in which tort law mediates these conflicting interests provides adequate guidance for the formulation of federal regulatory standards. For example, federal regulations governing autonomous vehicles will adequately protect individuals from harm while optimally solving the federalism problem when based on the safety performance required by the widely adopted rule of strict products liability.[83] More generally, regulatory reliance on the substantive content of the tort right promotes consistency across different bodies of law and makes it possible to answer the hard distributive questions involved in the promulgation of any health-and-safety regulatory standard, including those based on cost-benefit analysis.[84]

The individual entitlement to physical security was first recognized by the common law in a world quite different from our own. Although other legal institutions can now protect this right, it has significance that extends far beyond the imposition of liability through the tort system. This entitlement shows why the primary purpose of tort law involves the recognition of individual rights, not the imposition of liability.

CONCLUSION

As indicated by the title of their book, Goldberg and Zipursky maintain that "[t]ort law is all about recognizing wrongs" (p. 350). Tort law, on their account, limits liability to the interpersonal redress for prohibited forms of mistreatment, leading them to conclude that the primary purpose of tort law is to implement the principle of civil recourse. To defend their thesis, Gold-

81. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (describing the development of regulatory institutions over time).

82. *See* Geistfeld, *supra* note 64, at 389–91.

83. *See generally* Mark A. Geistfeld, *The Regulatory Sweet Spot for Autonomous Vehicles*, 53 WAKE FOREST L. REV. 337 (2018) (explaining why this type of federal regulatory standard optimally solves the federalism problem of ensuring national uniformity while respecting the state interest in tort rules that protect individuals from product-caused harms).

84. *See* Geistfeld, *supra* note 64, at 408–14.

berg and Zipursky invoke an antiquated rationale for tort liability that is no longer relevant to the modern tort system.

The early common law inherited a world in which mistreatment, honor, and physical security were all entwined, generating a reciprocity norm that used compensation to redress the mistreatment or loss of honor that necessarily occurred when one individual accidentally injured another. Modern tort law governs fundamentally different social conditions. Instead of depending on one's honor, physical security now largely depends on the prevention and compensation of injury, limiting the relevance of mistreatment to egregious forms of culpable misconduct. Courts have accounted for these changed conditions. Relying on common-law reasoning, they have used the reciprocity norm of compensation to derive modern tort rights and their correlative obligations in a manner that unifies the functions of compensation and deterrence,[85] a dynamic largely consistent with Goldberg and Zipursky's "fresh attempt" to interpret the development of tort law in this manner (p. 213). Although mistreatment once had the prominence ascribed to it by Goldberg and Zipursky, that concern is now largely irrelevant in most cases of accidental physical harm, contrary to their characterization of modern tort law.

The substantive content of tort law determines the importance of civil recourse, not the other way around. Tort liability continues to satisfy the formal requirements of civil recourse, but that principle does not provide the primary reason for having the modern tort system. The book's thesis founders by conflating tort *liability*—how wrongs are redressed—with tort *law*—the specification of tort rights and their correlative obligations. Instead of recognizing wrongs, the modern tort system is all about recognizing rights, a core property not captured by this provocative book.

85. *See generally* Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383 (2012) (discussing the importance of unifying compensation and deterrence within a theory of tort law and demonstrating how a compensatory tort right attains that unity).