What is the Point of the Tort Remedy?

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AVIHAY DORFMAN∗

ABSTRACT

A tort remedy, as the conventional wisdom has it, might serve any number of masters (ranging from justice to economic efficiency) by vindicating the status quo ante the tort. I shall argue that this view forces one to accept the proposition that the duty to restore the victim to the status quo ante the wrong done her represents a contingency—that is, one among different permissible extensions of the core of the remedial regime animating tort law. Anything outside the core of the remedial regime of tort law, which is the victim’s entitlement to have her rights vindicated by a court of law, is fundamentally a matter of legal engineering; designing the best overall institution to resolve infringements of rights and their lasting, material consequences. In these pages, I shall develop a novel account of this remedy, maintaining that, apart from the contingent services it may render whatever masters are deemed appropriate, the remedial process in tort law is in itself a source of value. The connection that this process establishes between tortfeasors and victims generates a special form of attending to other persons as such—that is, as free and equal agents. The tort remedy, on this account, expresses the intrinsically social character of a legal practice (of torts) grounded in a liberal vision of coexisting with others in the world. It re-establishes and, therefore, engenders a valuable relationship of respectful recognition—a form of a thin solidarity—between parties in a tort dispute.

The account that I shall articulate does not only provide a more sympathetic interpretation of the essential core of tort law and remedy than the one implicit in the conventional view and in the various approaches that dominate contemporary theoretical discourse. Rather, it also aspires to illuminate important questions in positive tort law and remedy. Pursuing this task piecemeal, I shall deploy the ideal of re-establishing respectful recognition through the tort remedy in the service of explaining the mysterious category of punitive damages. Accordingly, I shall show that, in taking the form of private law, this category can make sense insofar as it is viewed as a conceptually plausible extension of the proposed ideal.

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INTRODUCTION

The Restatement (Second) of Torts observes that “[w]hile the law of contracts gives to a party to a contract as damages for its breach an amount equal to the benefit he would have received had the contract been performed …, the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.”¹ This observation reflects the conventional view of the remedial regime animating the law of torts.² A tort remedy, on this view, purports to make the victim of a wrong whole by providing him with the compensatory damages necessary for redirecting him, economically if not physically, from his post-wrong position back to the position he occupied in the pre-wrong status quo. Moreover, this idea is nicely captured by the civil law principle of restitutio in integrum (meaning restoration to the previous condition).

As I shall seek to show, the conventional view may not be able to resist the reductionist conclusion, according to which the tort remedy—and tort law, more broadly—is a mere legal technology for allocating costs. Indeed, the Restatement allows for the reductionist tendency when it observes, in the Section following the one just cited, that compensatory damages for a tort are “an award made to a person by a competent judicial tribunal in a proceeding at law or in equity because of a legal wrong done to him by another.”³ At best, the wrongdoer—the “another” just mentioned—plays an evidentiary role in this picture. The wrong for which damages are awarded is attributed to this person, to be sure, but there is no mention of her in connection with the obligation to restore the victim. Nor does the quotation identify her as the ultimate source of the damages awarded to the victim, regardless of whether or not she incurs, in addition, a duty of repair owed to the victim. That is, the Restatement expresses the thought that the necessary core of the tort remedy is the victim whose eligibility to be put in his pre-wrong position is thereby legally recognized. Left out, and so unexplained, are the questions of whether it is the responsibility of the wrongdoer in particular to furnish the remedy and, if not, whether the proper agent (say, the state) responsible for compensating

¹ RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979).
² See, e.g., John C.P. Goldberg, Two conceptions of Tort Damages: Fair V. Full Compensation, 55 DEPAUL L. REV. 435, 435 (2005) (observing that, on the standard account, “[t]he point of tort damages is to compensate, to restore the status quo ante, to make the plaintiff whole”). Although the conventional view enjoys widespread support, it does not garner unanimous approval. See Jane Stapleton, The Normal Expectations Measure in Tort Damages, 113 L.Q.R. 257 (1997) (rejecting the conventional view and characterizing the tort remedy in terms of a compensation for loss of “normal expectancy”). See also John C.P. Goldberg, Ten Half-Truths about Tort Law, 42 VAL. U. L. REV. 1221, 1255-58 (2008) (criticizing the standard account and advocating a measure of fair compensation instead). I am not sure, though, whether Goldberg denies the point of tort remedy being the restoration of the status quo ante. His emphasis on fair and reasonable compensation can be seen as an alternative interpretation of what it means for the tort remedy to restore the victim to the pre-wrong condition.
³ RESTATEMENT (SECOND) OF TORTS § 902 cmt. a (1979).
the victim can collect from the wrongdoer the monetary equivalence needed to make the victim whole again.

Were the conventional view correct, it would imply that there is nothing morally fundamental about the relational character of the duty to make reparation currently recognized by tort law. Thus, the fact that tort law imposes on the wrongdoer the duty to restore the victim to his status quo ante the wrong done him represents a contingency—that is, one among different permissible extensions of the core of the remedial regime animating tort law. Anything outside the core, which is (once again) the victim’s entitlement to have his rights vindicated by a court of law, is fundamentally a matter of legal engineering; designing the best overall institution to resolve infringements of rights and their lasting, material consequences.

The picture portrayed by the conventional view—tort law as a mere legal technology—has given rise to a growing movement of tort abolitionists. Even among the friends of tort there arises a trend toward acknowledging the plausibility of reforming tort law, including radical reform if necessary. Many leading textbooks on the subject contain substantial sections devoted to in-depth inquiries into alternatives to tort law, a phenomenon unfamiliar to students from the departments dealing with other forms of private law (say, contract). Unsurprisingly, defining tort as being a technology (legal or otherwise) warrants, perhaps even requires, the constant search for more advanced alternatives. This is, after all, the fate of a technology. Accordingly, a fungible conception of tort law is born.

But this conclusion is unnecessary and, as I shall seek to show, unattractive when compared to another view—that the actual tort remedy distinctively engenders a valuable relationship, a form of a thin solidarity, between parties in a tort dispute.

The argument will run through the following stages. In Part I, I shall investigate the question with which the paper commences, discussing whether tort law is a mere legal technology. I shall argue that the conventional view implies that the essential core of tort law is captured exclusively by the victim’s entitlement to have his rights vindicated by a court of law; that and nothing more. I shall then offer in Part II a better interpretation of the tort remedy and, thus, a form of a solution that purports to cast the distinctive morality of torts into sharp relief. I shall argue that the tort remedy, rather than restoring the victim and wrongdoer to their respective positions of strangers prior to the tort, underwrites the re-establishment of the respectful recognition (of the former by the latter)

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5 See Jules Coleman, *Risks and Wrongs* 401-04 (1993) (acknowledging that tort law may, at best, be compatible with the demands of justice, not a requirement thereof) [hereinafter COLEMAN, RISKS AND WRONGS]; Jules Coleman, *Second Thoughts and Other First Impressions*, in *Analyzing Law* 257, 297 n.56 (Brian Bix ed., 1998) (same) [hereinafter Coleman, Second Thoughts]; ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 19-20 & n.24, 83-84 (1999) (suggesting that tort law may be replaced by other schemes of loss allocation insofar as they prove more successful in the implementation of a liberal conception of justice).

that should have been formed had the latter discharged a tort duty of appropriate care. This emphasis on the social character of the remedial process in tort law allows for a more precise understanding of the intimate connection between the legal obligations we owe one another and the morality involved in living in a society of others. In Part III, I shall deploy the doctrine of punitive damages in the service of developing this thought in concrete terms, elaborating on its grounds. This elaboration is particularly needed, because I maintain that punitive damages are anything but compatible with the conventional view, that the point of the tort remedy is the restoration of the status quo ante and, moreover, that this restoration reflects a mere technology of cost allocation.

I. THE REDUCTIONIST STANCE TOWARD THE TORT REMEDY

In this part I shall seek to show why accepting the first statement (concerning the object of the tort remedy being the restoration of the victim to his ex-ante position) amounts to accepting the second one (concerning the necessary core of the tort remedy) and, hence, the view that tort law is a mere legal technology. To set the stage for my argument, I shall commence with a brief discussion of remedies in private law, their point and nature, with particular emphasis on the comparison between the typical remedies in the laws of tort and contract.

A. Compensatory Damages: A Preliminary Analysis

Remedies in private law are mechanisms by which the law intervenes with the natural passage of time. For instance, private law’s most prominent remedy—compensatory damages—seeks to re-position the plaintiff to the place he would have occupied had the defendant not wronged him by either breaching a contractual promise or violating a duty of care owed to the former. Talk of re-positioning, or intervening with a given course of events more generally, is of course metaphorical to an important extent. The wrong committed is now an ineliminable datum of human history. Legal remedies, no matter how powerful they purport to be, cannot create the state of affairs that should have resulted had the plaintiff honored the promise or discharged the duty of care. What legal

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7 For a classical statement, see Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25, 39 (per Lord Blackburn) (characterizing the general measure of damages as “that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.”); see also ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 17 (2nd ed. 1994) (observing that “the usual aim of contractual and tortious damages is respectively to put the plaintiff in as good a position as he would have been in if the contract had been performed, or if no tort had been committed.”).

8 See, e.g., Castle v. St. Augustine’s Links Ltd, 38 T.L.R. 615, 616 (K.B. 1922) (“No money that [the defendant] could give would put the plaintiff back into the same state as before the accident”).
remedies can do, instead, is to reshape the present (and, by implication, the future) so as to make it appear in a better light, which is to say as if a past wrong had never happened.\(^9\)

To the extent they can make a successful intervention (in the sense just described) in the natural passage of time, compensatory damages exercise their influence on the relevant parties to a private law dispute by allocating wealth among them. The allocation characteristic of damages in contract law involves the wealth that could have been generated by way of a successful contractual engagement between the promisor and his disappointed promisee.\(^10\) The latter, in other words, is entitled to the monetary value of the former’s contractual promise—the “benefit of the bargain”\(^11\) as it is often called.\(^12\) And the tort remedy allocates wealth, conceived as the costs befallen the victim of a wrongdoing quite apart from any beneficial expectation formed by contract.\(^13\)

In both cases, the allocation of wealth attempts to make it as though the wrong—of breaking a promise and violating the duty of care, respectively—had never visited the injured party. This abstract way of describing compensatory damages, because it cannot even help in distinguishing the two obviously different kinds of compensatory damages mentioned above, serves as a formal statement only. Understanding the tort remedy requires a step inward (just as a parallel move is required in the area of contract damages).\(^14\) In particular, an appropriate account of the tort remedy depends on a precise explication of what it is for the law to re-position the victim as though the injurer had not committed a wrong.

### B. An Inessential Tort Remedy

Now, according to the conventional view, to repeat, the tort remedy re-directs the victim to a position “as nearly as possible equivalent to his position prior to the tort.”\(^15\) This view must, then, presuppose that the victim’s pre-wrong position is essentially the same (in the sense relevant for the law of torts) as the position he could have occupied post the wrong, save for the wrong. For otherwise it would be odd to hold the view, the conventional view, that to make it as if the wrong has never happened is to restore the

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12 See, e.g., Mason v. Mortgage Am., 792 P.2d 142, 146 (Wa. 1990) (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to give that party the benefit of the bargain”).

13 W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 2, at 7 (5th ed. 1984) (the “primary purpose” of a tort action is “to compensate for the damages suffered, at the expense of the wrongdoer.”).

14 See Stapleton, *supra* note 2, at 260 (explaining that an abstract measurement of damages for both torts and contract is unhelpful, and a further specific elaboration of either kind of damages is therefore necessary).

15 *RESTATEMENT (SECOND) OF TORTS* § 901 cmt. a (1979).
victim to his position ante the tort. As I shall argue below, however, it is odd and must therefore be replaced by a better interpretation of the remedial process characteristic of tort law. The interpretation must account for the special normative relationship established by discharging due care which, upon a failure to discharge the appropriate care which results in harm, is re-established by requiring the tortfeasor, and no one else, to fulfill an obligation to compensate the victim for the wrong done. But it is necessary to investigate the conventional view before elaborating on my proposed interpretation of the tort remedy.

To begin with, the notion that the tort remedy renders the victim whole (as if no wrong had occurred) by restoring him to the position he occupied prior to the wrong finds strong theoretical support. In fact, there exists overlapping consensus about this view among the leading accounts of tort law, whose competing theories normally clash at almost every turn. The consensus originates from the thought that the base-line against which to identify a wrong—viz., a departure from tort law’s conception of what is due to others—is fundamentally individualistic and, indeed, asocial (though not necessarily anti-social) as some brief illustrations will demonstrate.

There are different ways to fix the content of the base-line that imposes duties of care and repair. I shall offer a very brief outline of certain familiar elaborations of this base-line. James Gordley has cast tort law in terms of a conception of corrective justice that aims at defending each person’s initial holdings, a base-line grounded in distributive justice, against the interference of others. According to Gordley, the principle of distributive justice “gives every citizen a fair share of resources,” whereas corrective justice (or, as Gordley prefers, commutative justice) “preserves the share that belongs to each.” Other accounts of tort law committed to corrective justice, however, reject the normative subsumption of corrective justice into distributive justice, and thus overcome the embarrassment involved in defending a tort system that sanctions the material status quo ante even when in reality it is flatly inconsistent with the principle of distributive justice. Thus many familiar accounts of tort law falling under the category of corrective justice articulate base-lines that, to an important extent, are indifferent to concerns of distributive justice.

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16 See infra Part III for an elaborated account.
17 See infra text accompanying notes 38-59.
18 I borrow the term overlapping consensus from JOHN RAWLS, POLITICAL LIBERALISM 133, 144-50 (1993).
20 GORDLEY, FOUNDATIONS, supra note 19, at 104.
22 These base-lines need not be entirely indifferent to distributive justice because corrective justice and distributive justice are, after all, forms of justice. Consider an extreme case of a very poor tortfeasor (striving to provide shelter for his infant) whose immensely rich victim has no morally legitimate claim to the building trespassed upon by the former.
For instance, on the Kantian elaboration of corrective justice marshaled by Ernst Weinrib, the base-line sustained by tort law is thoroughly normative, rather than material, as it reflects “one’s due under the justifications that obtain within corrective justice.”

Fixing the content of ‘one’s due’, according to Weinrib, finds its most powerful expression in the natural right of self-determined agents to pursue, separately, their own courses of action to the extent compatible with the rights of others to pursue their own. Thus for Weinrib, the base-line on which tort law operates is the a-priori-settled normative equilibrium between the distinct freedoms of choice and action exercised, equally, by multiple agents. Another influential version of corrective justice emphasizes the political nature of the rights to engage in certain activities deemed valuable by a liberal society and, thereby, worthy of legal protection through the system of torts. On this approach, tort law secures (and, moreover, operates on) the base-line of protected interests in liberty and security insofar as they are “necessary or important to living a life in a liberal political culture.”

A libertarian elaboration of tort law, still within the broadly-conceived philosophical tradition of corrective justice, defends a pre-political base-line fixed by the entitlements each person might have in virtue of historical distributions and secured by the minimal state. Of course, not every historically-evolved distribution can serve as a base-line for tort law. In particular, there can exist historical injustices originating in illegitimate acquisition and exchange of resources that, unless rectified, undermine the possibility of a defensible libertarian base-line for tort law. Setting past injustices to one side, however, tort law operates on a base-line that aspires to allow maximal freedom in this precise sense: unlimited freedom of action on the part of risk-creators; and absolute

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24 See id. at 84-113.
27 Coleman and Ripstein, supra note 26, at 97.
29 The most recent and familiar libertarian defense of the base-line mentioned in the main text above is ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).
30 For the principles of justice in acquisition and exchange, see id. at 150-53. For the principle of rectification of past injustices, see id. at 231.
31 This sense of freedom appears, for instance, in Richard A. Epstein, A Theory of Strict Liability, 2 J. LEG. STUD. 151, 203-04 (1973) (“In effect, the principles of strict liability say that the liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses, and need not take into account the welfare of others”). See also Stephen R. Perry, Libertarianism, Entitlement, and Responsibility, 26 PHIL. & PUB. AFF. 351, 352 (1997) (noting that, as regards the libertarian ideal of tort law, “[t]he primary duty is an ex post duty to pay compensation after harm has occurred”).
security on the part of risk-takers, which is the unlimited freedom from being subjected to the harmful consequences of others’ exercising their (unlimited) freedoms of action.\textsuperscript{32}

Lastly, the law and economic approach casts tort law in terms of promoting efficient allocation of (scarce) resources through the imposition of optimal rules of liability.\textsuperscript{33} Or, to put the point in the classical statement once made by Guido Calabresi, tort law (and especially its dominant branch, accident law) aims to “reduce the sum of the costs of accidents and the costs of avoiding accidents.”\textsuperscript{34} To make good on efficiency, tort law observes a base-line that protects the rational pursuit of each individual’s well-being against the nonconsensual, adverse effects (i.e., negative externalities) generated by a similar pursuit of others. Tort law, that is, selects a base-line that promotes efficiency by informing the deliberation toward action of the rational maximizer by way of imposing liability for failing to take cost-justified precautions.\textsuperscript{35}

Even this rough sketch renders vivid the highly diverse ways in which the underlying base-line figuring in the law of torts is articulated and, indeed, defended. This very partial list features, among other things, straightforward oppositions such as those between consequential and non-consequential commitments, natural and political idealizations, liberal and libertarian ideologies, private and public legal ordering, and more.\textsuperscript{36} But in spite of this, the approaches just mentioned are in complete agreement insofar as their respective base-lines emphasize the strict, normative separateness of the individuals whose distinct, autonomous activities are regulated, separately, by tort law. These \textit{individualistic} base-lines, that is, purport to protect people from each other by sustaining the distinct positions they happened to occupy \textit{qua} strangers.\textsuperscript{37} Thus they aspire to preserve the \textit{status quo ante} by securing the entitlements of both the risk-creator and risk-taker, viewed separately, to engage in their own practical affairs detached from the affairs of the other, which is to say as complete strangers. A wrong, then, represents a failure on the part of the tortfeasor to keep her normative separateness from the victim, coercing the person or property of the latter into interacting with the former. Accordingly, the duty of

\begin{itemize}
\item \textsuperscript{32} Two clarifications are in order. I use the adjective absolute (as in absolute freedom) as the right correlative to the absolute duty of the risk-creator, rather than strict duty, to compensate for the causal upshots of her deeds. Secondly, I say that, so far as tort law is concerned, one is free to harm another in the limited sense that under the libertarian account of strict liability there are no duties of care (of whatever sort), only duties of repair.
\item \textsuperscript{33} The authors of the leading positive economic analysis of tort law even suggest that the “logic of the common law is an economic logic.” WILLIAM M. LANDES & RICHARD A. POSNER, \textit{THE ECONOMIC STRUCTURE OF TORT LAW} 312 (1987).
\item \textsuperscript{34} GUIDO CALABRESI, \textit{THE COSTS OF ACCIDENTS} 26 (1970).
\item \textsuperscript{35} I use liability, rather than duty, in characterizing the kind of normative pressures exerted by the base-line selected by tort law in order to keep within the framework of the law and economic vocabulary. ‘Duty’, the concept and the legal doctrine, is by and large neglected in the economic analysis of tort law. As Coleman has observed, “[d]uty and wrong, as independent categories, are doing no work in the story [told by the standard economic account].” JULES L. COLEMAN, \textit{THE PRACTICE OF PRINCIPLE} 35 (2001).
\item \textsuperscript{36} The sets of oppositions can also take a methodological turn, emphasizing the diverse methodological commitments displayed, e.g., within the framework of corrective justice, and between it and the economic account.

\item \textsuperscript{37} The protection need not be absolute (as in a regime of absolute liability). In the case of negligence, for instance, tort law provides protection of the base-line to a reasonable extent only.
\end{itemize}
repair imposed by any one of the base-lines mentioned a moment ago calls for a remedial response in the form of restoring the post-wrong position of the victim to the one he would have occupied had the injurer not disturbed the relevant base-line—that is, the position he occupied as a complete stranger to his injurer.

Thus, to return to the positions sketched above, the Aristotelian description of the remedial process consists of subtracting the injury befallen the victim and returning it, economically if not anatomically, to the injurer to bear, and thus allows for the victim to regain precisely the same entitlements he happened to hold prior to any interaction with the injurer. Indeed, as Weinrib explains, Aristotle’s corrective justice “focuses on a quantity,” and that it “represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner.”

The Kantian account of corrective justice seeks to restore the victim and his injurer to a “normative equilibrium” in which each is entitled to his or her freedom of action without being constrained by the act that the other is equally free to pursue. As a result, the victim and injurer are being put, by means of a remedy, back into their preexisting positions as individuals pursuing coexisting courses of action that are, nonetheless, completely independent of one another.

Certain political versions of corrective justice (such as those defended, separately and jointly, by Jules Coleman and Arthur Ripstien) draw on the libertarian metaphor of ownership, either of risk or cost ownership, or something sufficiently close to ownership to capture the sense in which the remedy heals the disturbed base-line. On this view,

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38 The relevant passage reads:

The judge restores equality, as though a line had been cut into unequal parts, and he removes from the larger part the amount by which it exceeds the half of the line, and adds this amount to the smaller part. And when the whole has been halved, then they say that each person has what is properly his own, when he has got an equal share.


39 WEINRIB, supra note 23, at 62.

40 Id. (emphasis added).

41 Zipursky, supra note 25, at 695.

42 See WEINRIB, supra note 23, at 117 (arguing that “the court … restores the parties to the equality that would have prevailed had the norm been observed.”).

43 Thus, the remedy restores the victim’s freedom, defined by Kant as “independence from being constrained by another’s choice.” IMMANUEL KANT, THE METAPHYSICS OF MORALS 30 (Mary Gregor trans. & ed., 1996) (1797). See also id. at 23-24 (“The concept of Right … has to do … only with the external and practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect) influence on each other”).

44 The metaphor of risk or cost ownership has its libertarian roots, to be sure. But, as mentioned in the main text, certain leading corrective justice theorists outside the political framework of libertarianism have also embraced it. Coleman and Ripstien, supra note 26, at 113 (noting that, insofar as the imposition of tort liability on an injurer is concerned, “[c]onsequences of his or her wrong are his or hers to own”); RIPSTEIN, supra note 5, at 46 (setting out to develop in a nonlibertarian way the libertarian “idea that people come to own misfortunes they wrongfully create”). But see
the tort remedy is, in essence, an official pronouncement as to who owns the cost of misfortune, the victim or his injurer, and consequently whose problem or bad luck it is.\textsuperscript{45} Thus, to illustrate, the metaphor of risk ownership suggests, with Arthur Ripstein, that “[t]hose who impose additional risks [viz., beyond the level of fair risk] can be thought of as owning the risks.”\textsuperscript{46} Accordingly, the right inference from the ownership metaphor reads: “[i]f those risks ripen into injuries, [the risk-creators] own the injuries, and the payment of damages serves to return those injuries to their rightful owners.”\textsuperscript{47} The resort to the language of ownership carries proprietary overtones, to the effect that the owned object—the injury suffered by the victim initially—had never been the problem of the victim in any legally relevant sense. For, just like any property right to a given resource, the injury is always the injurer’s, regardless of the person—the victim or otherwise—in (factual) possession of it. Now, talk of ownership may also be supplemented with another libertarian-originated concept, that of self-injury.\textsuperscript{48} There, the tort remedy restores the base-line by considering the victim’s injury as though it is the wrongdoer’s person or property that experienced the setback.\textsuperscript{49} Indeed, as Ripstein and Zipursky observe, tort law “allows aggrieved parties to demand that those who are careless with the safety of others be treated as though they had been careless with their own safety.”\textsuperscript{50} Thus talk of ownership and self-injury cast restoration of the base-line in terms of requiring the injurer to take back what \textit{always} has been hers: what, in other words, is fundamentally her problem.

And finally, the economic analysis of tort law emphasizes the tort remedy as a mechanism through which the injurer internalizes the costs she imposed on society by

\textsuperscript{45} COLEMAN, \textit{ supra} note 35, at 53 (arguing that fairness, rather than ownership, is the organizing principle of corrective justice); Arthur Ripstein, \textit{ Philosophy of Tort Law}, in \textit{THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW} 656, 657 n.2 (Jules Coleman & Scott Schapiro eds., 2002) (“the point of [tort remedy] is to make it as though the parties had interacted on appropriate terms, that is, to make it as though the wrong had never occurred.”).
\textsuperscript{46} COLEMAN, \textit{RISKS AND WRINGS}, \textit{ supra} note 5, at 478-79 n.1; Coleman, \textit{Second Thoughts}, \textit{ supra} note 5, at 302 (“Tort law is about messes… and the only question before the court is, who is to clean it? This is often cast as the problem of identifying whose mess it is”).
\textsuperscript{47} RIPSTEIN, \textit{ supra} note 5, at 46.
\textsuperscript{48} Id. at 46-47.
\textsuperscript{49} The self-injury depiction of the tort remedy is famously employed in Epstein, \textit{ supra} note 31, at 158.
\textsuperscript{50} Opponents of libertarianism, however, have invoked the self-injury depiction, as well. See, e.g., Arthur Ripstein and Benjamin C. Zipursky, \textit{Corrective Justice in an Age of Mass Torts}, in \textit{PHILOSOPHY AND THE LAW OF TORTS} 214, 224 (Gerald J. Postema ed., 2001). \textit{See also infra} note 50.
\textsuperscript{50} Id. at 224. The entire passage reads:

[T]ort law does corrective justice by permitting those who have been wrongfully injured to demand that the costs of their injuries be borne by those who are responsible for them, and by enforcing these demands. It allows aggrieved parties to demand that those who are careless with the safety of others be treated as though they had been careless with their own safety.

\textit{Id.}
The economic theory further insists that, for the tort system successfully to achieve deterrence, cost internalization will typically involve compensating the victim for his entire loss so as to eliminate the incentives of the injurer toward sub-optimal precautions, and thus the victim must be rendered whole again.

Thus, as with the diverse, and often competing, articulations of the tort base-line, there are many ways to depict the operation of the tort remedy in connection with undoing (wrongful) departures from the preferred base-line. Nevertheless, these depictions are of a piece insofar as they require the restoration of the victim to the position he could have occupied but for the tort, which is the position ante the wrongful interaction. That is, the remedy reverts the parties to a tort, in an economic rather than temporal sense, to the stage of being mere strangers, as if they had never come into contact but, instead, pursued their respective, private ends without any (direct or indirect) involvement with one another.

Were this the best interpretation of the tort remedy, it would therefore cast the conventional view into sharp relief. For, if the remedial process in tort law purports to put the parties back into their positions as strangers, the conventional view must have been right to suppose that the victim’s pre-wrong position is essentially the same, normatively and not just economically, as the position he could have occupied post the wrong, save for the wrong. Indeed, the conventional view is (presumably) right to measure the tort remedy by comparing the victim’s post-wrong position to the one he occupied prior to the wrong, because (unlike contract law’s expectation damages) tort law, according to the accounts briefly mentioned above, features no additional position against which remedial claims might be measured other than those of being either a stranger to or a victim of another person.

Thus collapsing the remedied, post-wrong position of the victim (‘as if the wrong has never been committed’) into his pre-wrong position (‘as if no connection had been formed between victim and injurer’) can explain why the conventional view renders permissible, but inessential, the direct involvement of the wrongdoer in making the victim whole again. The explanation is this. Since the remedial claim of the victim is to be restored to the status quo ante the wrong, which is the position he occupied as a stranger vis-à-vis the wrongdoer, the point of the tort remedy does not turn on any special connection between the two. Indeed, a restoration to the state of being strangers just is the negation of every connection, rightly or wrongly created, that might have arisen between them. After all, if one allows that as a result of the remedy the victim and wrongdoer are no longer connected to one another, one must also acknowledge that for

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51 E.g., STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 127 (1987) (All else equal, the “optimality of parties’ behavior under liability rules” requires that tortfeasors pay for the loss resulted in their respective behaviors).

52 The qualifier typically is warranted because, on certain occasions, the economic account departs substantively from the traditional commitment of tort law to making the victim whole. See, for example, id. at 148 (recommending extra-compensatory damages even in cases that do not involve the traditional remedy of punitive damages).

53 See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 192 (7th ed. 2007) (noting that “the credibility of the tort system” depends on the tortfeasor paying for the loss she caused another).
the same reason there is no special ground, viz., inherent to the wrongdoer-victim relation, to single out the former as the exclusive agent for delivering the tort remedy to the latter. Certainly, not every involvement on the part of the wrongdoer in the process of remedying the victim need amount to being placed under an obligation owed to and owned by the victim with the content of making the latter whole. In this regard, contemporary tort law’s preference—to impose on the wrongdoer an obligation owed to and owned by the victim—is sufficient, but not necessary, for the purpose of restoring the victim to the status quo ante the tort. In principle, anyone (the state included) can see to it that the appropriate funds be allocated to move from the wrongdoer to the victim; for instance, by suing the wrongdoer for her misdeed and transferring the awarded damages to the victim, or by compensating the victim and filing for reimbursement from the wrongdoer, or by imposing an administrative or criminal fine on the wrongdoer while disbursing public insurance funds to the victim. This partial list of alternatives may strike us as somewhat cumbersome, to be sure, and it may well be the case that it is best overall to follow the current arrangement of tort law. But the point of my argument is conceptual, not empirical or technological—that is, there is nothing in the victim-wrongdoer relation that, according to the individualistic accounts just sketched, requires any one of these or other alternatives in particular. Moreover, there is nothing in the nature of vindicating the ideals traditionally associated with the tort system—e.g., correcting injustice, responsibility for wrongdoing, equality and reciprocity, optimal allocation of resources—that singles out the victim-wrongdoer form of restoring the initial status quo. And insofar as the tort remedy looks backward to the position the victim and wrongdoer occupied, separately, as strangers, administering such a remedy need not take the precise form it actually takes in our tort law.

Weinrib, who takes a particularly rigorous approach regarding the bipolar structure of tort litigation, will surely disagree with this conclusion, arguing that the bipolarity of tort law is an ineliminable aspect thereof since this aspect of the law is a living institutional expression of corrective justice. But it is an open question whether the demands of corrective justice must by their very nature single out the injurer-victim structure of tort litigation. Stephen Perry and Benjamin Zipursky have, separately, observed that Weinrib does not supply an explanation to tort law’s insistence on the bilateral form taken by the tort remedy. As I shall argue presently, Weinrib’s account is not only missing this piece of explanation, but (more dramatically) it may not be able to appeal to corrective justice to fill out the explanation. In principle, anyone can see to it that the injustice is corrected and the ex-ante equilibrium is restored; this must be true

54 New Zealand, for instance, has opted for abolishing substantial parts of traditional tort law in favor of a scheme of public insurance for personal injuries. For a comprehensive overview by a leading figure in the New Zealand tort reform, see Sir Geoffrey Palmer, New Zealand’s Accident Compensation Scheme: Twenty Years On, 44 U. TORONTO L.J. 223 (1994).
55 I elaborate on this claim in the infra text accompanying notes 79-85.
56 See, e.g., WEINRIB, supra note 23, at 5 (“the purpose of private law is to be private law”); see also id., at 6 (“private law is just like love” in rejecting attempts to explain its point by reference to instrumental arguments).
because corrective justice, however distinctive a form of justice it (arguably) is, just is a form of justice. Doing justice, any justice at all, is a pressing concern for every one of us, not just the victim. And doing away with the public character of corrective justice robs this form of justice of its initial appeal; that is, as being a member of the distinguished family of various forms of justice (distributive, retributive, etc.), the demands of which the entire society as a whole constantly aspires to meet. Of course, this is not to say that there are no good reasons for the tort remedy to take the bipolar form it actually takes, and I shall offer one below. The argument, rather, is that corrective justice fails to render the connection between justice and the tort remedy sufficiently precise. For the purpose of correcting injustice by restoring the parties to the ex ante positions they occupied as strangers, a direct engagement between the victim and injurer may at best be permissible, but it is not strictly speaking necessary.

Is there a way out of the difficulty of rendering the connection between the base-line and the characteristic tort remedy sufficiently precise? More specifically, is there an individualistic case for making this connection tighter? Zipursky has developed (independently and jointly with John Goldberg) an account that attempts to bridge the gap between the tort base-line and the remedy. Zipursky criticizes the accounts just sketched (and various others) for ignoring a core structural feature of tort law that is logically and normatively prior to the tort remedy—the right of action conferred upon certain victims to vindicate their primary rights against tortious interference with their person or property. While there are reasons to reject the centrality he attributes to rights of action, on the ground that they are a feature of private law more generally and as such fail to account for tort law’s distinctive moral center, it is important to note why Zipursky’s account is consistent with redressing torts in ways that depart substantially from traditional tort law’s preference for the tort remedy (and from tort law’s preference for private rights of action, more generally). Tort law, on this account, is a civilized, private law form of redressing wrongs done to individuals, rather than to society as a whole. The core intuition behind this idea reads: “if one has been wronged, one ought,  

58 At times, corrective justice is cast in terms of “private justice,” “individual justice,” or as giving rise to “agent-specific reasons” for rectifying wrongs (or wrongful losses). See, respectively, G. Edward White, TORT LAW IN AMERICAN: AN INTELLECTUAL HISTORY 338 (2nd ed. 2003); Jason M. Solomon, Equal Accountability through Tort Law, 103 NW. L. REV. (forthcoming 2009); Coleman and Ripstein, supra note 26, at 93. This language is misleading insofar as it implies that justice is a “private” matter of the parties to a tort interaction or that it does not give all of us reasons for action (particularly, reasons to see to it that injustice be corrected).
60 See Benjamin C. Zipursky, Philosophy of Private Law, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 632-36, esp. 635 (Jules Coleman and Scott Shapiro eds. 2002) (“The notion that a plaintiff is entitled to a right of action is … centrally important to the idea of private law.”).
61 Zipursky employs the term ‘civil recourse’ to denote three different defining features of tort law: civil vis-à-vis barbaric; civil law vis-à-vis criminal law; and civil legal system vis-à-vis self-made method of resolving disputes and enforcing justice. Zipursky, supra note 57, at 83. I shall use the term as it applies to the first two contrasts depending on the context.
in fairness, to have some recourse through the state against the wrongdoer.” Zipursky insists on a state-sponsored recourse because the more primitive alternative—brute vengeance—is flatly unconscionable. Thus tort law responds to the demands of fairness that “an opportunity for redress be provided by the state.” However, a state-sponsored form of recourse picks out any number of ways to satisfy the demands of fairness mentioned above, including those connected to the provision of a more civilized form of redress in place of brute vengeance. As I shall demonstrate below (in the Section dealing with the doctrine of punitive damages), a third-party revenge in which the state (or some other entity) gets back at the injurer on the victim’s behalf might not only be conceptually possible, but sometimes preferable even from the victim’s own standpoint. More specifically, I shall argue that a civilized form of redressing private wrongs can be carried out fully by the state to the satisfaction of the victim’s need to see, and indeed experience, the injurer making up for the wrong she has done to him.

C. Tort Remedy: A Mere Legal Technology?

Against this backdrop, there arises what perhaps is the greatest challenge to modern tort law: the claim that tort law is a mere legal technology. Apart from the restoration of the victim of a tort to his status quo ante the tort, certain other salient features of tort law (including, in particular, the bilateral structure of the tort practice and the duty of repair it underwrites) represent idiosyncrasies of one particular elaboration of the essential core of this body of law, which may be compatible with it, but is not required. These idiosyncrasies, in other words, do not account for the basic morphology of tort law. Instead, they illuminate the point that there are many different ways—different forms of technology—to develop the underlying core of this law.

It is not surprising to notice, then, the growing trend among tort commentators toward radical reforms in the law of tort, including even insistent suggestions to abolish tort law

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62 Id. at 84.
63 Id.
64 See the analysis in infra Section III.C. esp. text accompanying notes 127-35.
65 Zipursky further cites two reasons why, from a social contract perspective, it is best to devise a civilized form of redress through the law of torts. Zipursky, supra note 57, at 85-86. The second of these is purely contingent—that too much criminal law (in place of tort law) would over-deter parties in the stage of negotiating the social contract from entering the civil society because it places too burdensome a constraint on the liberties of these persons. The first, however, suggests that criminal law “do[es] not ensure that a violation will never occur, and if it does occur, the victim's need for redress will not necessarily be satisfied by the imposition of punishment on the rights-violator.” Id. at 85. Violations of primary rights cannot be eliminated by criminal law, nor by tort law. The main point, therefore, is that punishment may not satisfy the “need for redress.” I am not sure whether the tort remedy will necessarily satisfy this “need” (whatever it means) either. In fact, the civilizing factor of tort law, according to Zipursky, is cashed out in terms of a moderate mode of private retribution, and thus by definition does not purport to satisfy the need for redress of all rights violations. Perhaps tort law is, for the most part or on average, the most competent institution in matters of satisfying the need in question, but this can hardly meet the burden of explaining why the tort remedy (and the right of actions it presupposes) is not merely a legal technology in the service of antecedent values (such as retribution for private wrongs and fairness or, as recently suggested promoting individual accountability; see Solomon, supra note 58).
altogether. Moreover, the notion that tort law is a mere legal technology exercises its influence on the way actual legal doctrines and principles are re-shaped from within, that is, by the courts and other practicing agents. As a leading casebook on torts observes, “there is renewed insistence, which today is often expressly articulated in the cases, that the compensation of injured parties is in itself a valid end of the tort law and that the doctrines of tort law that frustrate that objective must be hedged with limitations or totally eliminated unless strong justification is given for their retention.”

As I have asserted above, however, there are reasons to suspect that the picture portrayed under the influence of the conventional view cannot sustain an appealing account of tort law. The trouble, of course, is not with tort law itself. It is the conventional view and the theoretical articulations of tort law that miss the moral center of tort law as it is felt by the lived experience of this legal practice. In particular, they may be correct to note that parties to a tort interaction are strangers to one another at the get-go stage. But, as I shall claim below, the duty to exercise care is in fact an obligation on the part of risk-creators to form, as opposed to refrain from forming, relations of respectful recognition with others and, at least in some measure, to take the points of view of these others as freestanding, moral constraints on our own practical affairs. Discharging this obligation successfully cannot therefore be explained, rather than explained away, as just another instance of individuals acting in concert but, nonetheless, remaining fundamentally in isolation from one another. And the tort remedy, on this account, does not merely provide economic replacement that restores the victim to the position he occupied prior to the tort. Rather, it provides for the reestablishment of a relation of respectful recognition—an intrinsic value informing the base-line set by tort law—that should have been formed had the wrongdoer discharged appropriately her duty of care toward the victim; that is, had the former taken the activity (and, therefore, intentions) of the latter as being a freestanding constraint on her own risk-generating affairs.

I offer these preliminary reflections with the modest purpose of giving a very rough sense as to why viewing tort law as a mere technology may lead us astray and, indeed, away from the lived experience of this body of law. However, setting these reflections to one side, nothing I have said so far renders the picture of tort law and remedy as a form of legal technology problematic. More specifically, my argument only shows, negatively, that conceiving the tort remedy along the lines of the conventional view (i.e., as purporting to reinstate the victim of a tort to the position he occupied prior to the wrong) implies that a seemingly salient feature of the practice of torts, the duty of repair running exclusively from the wrongdoer to her victim, is purely contingent—that is, it does not form an ineliminable aspect of a practice that emphasizes the restoration of victims to their positions ante the tort. But this argument cannot explain, affirmatively,

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66 See text accompanying supra note 4.
why we should insist on the contrary view, according to which the connection between the victim and wrongdoer, rather than being merely a piece of legal technology, lies at the moral foundations of the practice of torts. Why, in other words, would we not be able to make sense of tort law without first acknowledging this necessary feature? Merely to say that contemporary tort law focuses almost exclusively on the bilateral structure of the remedial process amounts to restating the question. An appropriate answer to the question, instead, must explain this focus in terms of its distinctive value and reasons for action. Thus, only by insisting on its freestanding force is it possible to reject the otherwise harmless reduction of contemporary tort law’s focus on the victim-wrongdoer connection into one alternative among others.

II. THE REMEDIAL PROCESS IN THE LAW OF TORT

To make good on my argument, I shall argue that the special duty of repair and the tort remedy it underwrites engender a connection between victim and wrongdoer that is truly social and thus irreducible to the individualistic picture drawn by the conventional view. This social character arises in respect to the moral arena that tort law maps onto and to which it gives public expression. Accordingly, the argument will investigate the practical difference that tort law makes in the lives of victims and wrongdoers who form, in and around the remedial process, relations of respect and recognition, relations that carry their constituents beyond the initial positions of mere strangers. More specifically, I shall seek to identify the distinctive characteristic of the tort remedy by asking what practical significance it has; that is, how (in what ways and to what extent) it bears on the reasons for action both victim and wrongdoer have uniquely in relation to one another. As I shall show, insofar as it is cast in terms of an interaction for re-establishing in a second-best way a relationship that went wrong (rather than restoring the parties to their supposed ex-ante equilibrium), the tort remedy is qualitatively different from any other alternative regime of tort remedy, in that it engages the wrongdoer and victim in a truly social relation.

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68 I say almost exclusively in recognition of exceptional cases such as Himowitz v. Eli Lilly Co., 539 N.E.2d 1069 (N.Y. 1989) (dispensing with individualized causation altogether).

69 It is important to note, if only to forestall misunderstanding, that the prevalence of liability insurance does not undermine the connection between victim and wrongdoer that I shall seek to develop in the main text below. Liability insurance severs the wrongdoer from the victim in one important respect—the payment of the awarded damages. However, my account does not turn on the actual identity of the person whose signature appears on the check made out to the victim. In particular, there are three main reasons why I take liability insurance to be a fairly trivial aspect of the tort practice (if it can be an aspect thereof at all). First, liability insurance can have a point only insofar as the underlying tort duties are such that the wrongdoer owes an obligation (of a sort I shall specify in detail below) to the victim. Thus, it is by virtue of the normative relationships that this tort obligation engenders that insurance companies may pay the damages. And it can be seen that the wrongdoer’s obligation remains intact even when she purchases liability insurance, since it is always her responsibility to see to it that the insurance company pays the damages and, when this company refuses or when it defaults on the payment, to pay the award herself. Second, the fact that a putative wrongdoer is covered by insurance has nothing to do with the reasons for action that tort law purports to give her; in particular, these are reasons to exercise care and reasons to render the victim whole when appropriate. Insurance may affect the wrongdoer’s motivation to comply
A. Introducing the Caring Relation: A Preliminary Account

Begin with a rough sketch of the primary duty (of care) that underlies the base-line in tort law. Since my current argument emphasizes the remedial process and duty found in tort law, I shall only outline the main themes of the former duty. Of course, these themes require a more precise and more articulate account than I can offer at present, and an effort to construct this account is well under way. Nevertheless, the basic idea behind the account of the grounds of the primary duty (of care) and the mode of respectful recognition it features is straightforward enough. This roundabout way of proceeding might sound awkward. After all, the primary duty comes logically, if not also normatively, prior to the remedial duty since the latter operates on the base-line selected by the former. Can there be a compelling reason, therefore, to focus (as I do) on the remedial process first without giving a similar attention to the interactions that fall within the arena of the primary duty? I think there is one. Whereas the notion of respectful recognition that my account emphasizes already figures at the stage of discharging due care (as I shall suggest below), it is most intensively felt at the remedial stage. Indeed, the social and moral significance of respectful recognition exercise their most lively and concrete draw on our minds only after the fact—when the carelessness of one person resulted in injury to another (or even when an injury was luckily escaped at the last minute). These circumstances allow us to see most clearly the kind of expectations we hold of those exposing us to certain risks of harm by failing to comply with the primary duty, expectations to be respected and recognized as persons constituting distinctive points of view. And while this form of attending to others makes its first appearance (in tort law) when risk-creators are required to comply with the duty of due care, it often remains so ubiquitous to the way persons interact with one another (by way of discharging due care) that it mostly goes unnoticed.

To set the scene, consider the following passage from a garden-variety case in negligence law in which the court reflects on the kind of requirements placed on motorists and pedestrians by the duty of care:

with these reasons (just as the presence of police officers may affect motorists’ motivations to comply with speed limit laws), but it does not change them, nor can it change the normative relationship established between wrongdoer and victim in the light of them. The last point is particularly important because my account is critically normative in the sense that it aspires to capture what it is that participants in tort practice are doing or, on appeal to their critical capacities to reason, judge, and intend, have most reason to do while acting on the duty of due care and on the duty to make reparation to their tort victims. And third, liability insurance is not, after all, indifferent to tort law obligations. Indeed, the premium and different other elements of the insurance policy reflect the insured person’s expected liability. In other words, purchasing liability insurance is possible, economically speaking, only because it can and does create incentives toward complying with preexisting tort duties. See, in this regard, Shavell, supra note 51, at 213 (noting, for the reason just mentioned, that “liability insurance does not necessarily dilute injurers’ incentives to reduce risk”).

“The rights of one operating a vehicle and a pedestrian on a public highway are mutual, reciprocal, and equal. Neither may use it in disregard of the right of the other to use it, and each must accommodate his movements to the other's lawful use of it, each must anticipate the other's possible presence, and each must recognize the dangers inherent in the manner in which it may lawfully be used by the other.”

To keep matters simple, consider a unilateral version of the interaction just depicted, featuring a risk-creator, on the one hand, and a risk-taker, on the other. Accordingly, the interaction takes a much thinner form than before since only one participant is active while the other remains passive throughout, and thus does not engage the former in any meaningful way. This characterization could then be extended, by implication, to capture the reciprocal interaction involving both participants engaging, separately, the points of view of one another. Now, in the italicized part of the quote, the court breaks down the obligation to display vigilance toward another person into three elements, two of which merit attention at present. The court alludes to the foreseeability requirement (“each must anticipate the other’s possible presence”), which is a prerequisite for the very possibility that the risk-creator could attend to the risk-taker, let alone respectfully recognize his course of action as a freestanding constraint on her own conduct. The second requirement goes to the essence of what it literally means to discharge care toward another person—that is, the need to constrain one’s own movements in the face of the movements of the other; for example, the motorist must slow down (and stop when appropriate) in the face of a pedestrian beginning to cross to the other side of the street. The need to take some measure of consideration of another person, to make the appropriate accommodations, might not give rise to any affective attitude on the part of the care-discharger toward the cared-for. Nor might it lead the former to make an acquaintance with the latter, as the accommodation of her movements to the latter’s need not presuppose any engagement between them over and above the exercise of appropriate care—the identities of the two, their respective names and faces, may remain unknown to each other. That said, the very idea of a risk-creator adjusting her course of action in order to allow another person to pursue his is, nonetheless, morally important.

Indeed, when a person moderates her conduct in the light of the activity of another, she thereby implicitly acknowledges the freestanding worth of the latter’s intentions as regard the activity at stake. The motorist who takes the pedestrian’s activity of crossing the street as one which should trigger a response on her part to slow down does not merely display an impartial concern for the well-being of the latter. Rather, she also (and more importantly) acknowledges the pedestrian as such, as a person who executes his intentions to cross the street (and when intentions and objective well-being come into conflict, as in medical battery cases, tort law insists on the former being the exclusive

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72 The third one being the requirement that “each must recognize the dangers inherent in the manner in which it may lawfully be used by the other.” Id.
object of the primary duty of care). The motorist thereby respects him, to an appropriate extent, as she finds him, that is, on his own terms. In this sense, the motorist recognizes, again to some extent, the distinctive point of view of the pedestrian, which is the mark of his subjectivity through which he forms intentions and, indeed, negotiates the world as a free and equal agent. Bluntly put, by requiring the motorist to accommodate her movements to the pedestrians’, the court asks the former to recognize the intentions of the latter (in favor of crossing) as a constraint on her own practical affairs. And this form of attending to others by way of discharging care represents a fundamentally social act—that of an opening up to the intentions (and, therefore, points of view) of others, appreciating their judgments (say, to cross the street) as freestanding sources of claims to respect. This is most strikingly apparent when the motorist, while deeply disagreeing with the judgment of the pedestrian (concerning his decision to cross the street here and now), nevertheless accommodates her driving plan to meet this judgment.

Certainly, this social structure of accommodating one’s movements to those of another does not require that persons be motivated to so act out of their benevolence or any other form of other-regarding attitude. The motorist from the example above may come to respect and recognize the pedestrian as constituting a freestanding constraint on her activity partly because of the incentives provided by the law (including, of course, tort law) or due to social pressure of some sort. However, insofar as respectful recognition captures the moral center of the duty to discharge appropriate care, risk-creators have an independent reason—over and above all other reasons—to accommodate their movements to those of others. And this reason is grounded in the good of attending to others on their own terms, according their points of view the status of freestanding constraints on one’s own course of action. This reason is most straightforwardly felt when the motorist fails to exercise appropriate care toward nearby pedestrians, ramming into them. Were the sole reasons for discharging due care connected to the self-centered rationality of doing so, it would then be odd to expect the injured pedestrians to resent the motorist, and it would likewise be odd to explain the blame (and often shame) that the motorist is likely to feel with respect to the pedestrians she wronged. At best, self-centered reasons might justify criticizing the motorist for failing to promote her own ends or for failing to act efficiently, but (again) it cannot account for the naturalness of the

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73 The famous eggshell skull doctrine can therefore be seen as an extension of the principle of taking the persons as one finds them to the doctrinal area of proximate cause.

74 Of course, the respect for and recognition of the pedestrian’s point of view is no less real when the motorist is in agreement with the latter’s judgment to cross the street.

75 The conception of rationality I am employing here adheres to the common, contemporary usage of this (strictly construed) conception in political and moral philosophy—that is, a concept free from moral criteria. As Scanlon observes, "the (most) rational thing to do' has most commonly been taken to mean "what most conduces to the fulfillment of the agent's aims." THOMAS SCANLON, WHAT WE OWE TO EACH OTHER 191-92 (1998). For an instructive elaboration of the reasonable care standard in negligence law based on the Rawlsian conception of the reasonable, rather than rational, see Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 STAN. L. REV. 311 (1996).

76 Nothing I have said is indeed odd, of course, insofar as gross false-consciousness is attributed to virtually all of us. I assume, however, that in most of the cases related to the practice of discharging due care we are not misled (by some socio-psychological forces) to acquire reactive attitudes (such as resentment) and self-reactive ones (such as shame).
resentment and other reactive attitudes which are felt by the pedestrians against the motorist’s failure to respect them, tout court.77

To conclude this outline, discharging care involves the special practical attitude associated with adjusting one's intentions and plans in order to allow, at least in some measure, for another person to pursue his intentions, plans, and activities. The person discharging care (hereinafter: the carer) embraces at face value, and again to some extent, the course of action of the cared-for as a freestanding constraint on her practical life.78 She thereby grants the cared-for a measure of control over her practical affairs. This way of relating to others generates respectful recognition—a form of social living that allows a person (i.e., the carer) to appreciate her fellow creatures as such, on their own terms, as possessors of distinctive intentions and plans, irrespective of any other contingent facts about them (such as their beliefs or conceptions of the good life). Accordingly, the value of respectful recognition, which arises organically from engaging in the exercise of due care (as just illustrated), gives rise to reasons for entering into a relation of care, which is to say, reasons for acting on a primary duty of due care.79

77 An argument along these lines, applied in different contexts, can be found in, e.g., THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM 85 (1970); PETER F. STRAWSON, FREEDOM AND RESENTMENT 24 (1974); JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 216 (1990); Samuel Scheffler, Doing and Allowing, 114 ETHICS 215, at 224 n.7 (2004).
78 A semantic qualification is in order. The word ‘care’ picks out at least two different meanings in ordinary language usage, and it is important to understand my use of this word. The notion of care can, first, be expressed by a person caring about or for a thing (including ideals, projects, persons, and so on). It can be one's caring about religion or a mother's caring for her baby. This attitude is most prominent within circles of intimacy (such as the mother-baby circle) or within idiosyncratic (cultural, ethical, or other) associations. Unsurprisingly, these two subcategories have sought sustained philosophical elaborations in the fields of ethics of care and virtue ethics (see, e.g., VIRGINIA HELD, THE ETHICS OF CARE: PERSONAL, POLITICAL, GLOBAL (2006)); and Harry Frankfurt’s insistence on the question of what to care about as a freestanding question for philosophy of mind and action. See HARRY FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 80 (1988); HARRY FRANKFURT, NECESSITY, VOLITION, AND LOVE 155 (1999). The other way in which the word ‘care’ figures in our ordinary speech refers to caution or judiciousness. By using 'care’, 'carer', 'cared-for', and 'caring relation', I seek to make some space for an activity that incorporates a thin (very thin indeed) notion of the former meaning of care which is nonetheless emptied of any expression of affection in instances of judiciousness. That is, I argue that even in certain occasions of acting cautiously, persons come to care about other persons, including most importantly strangers with whom neither intimacy nor an idiosyncratic-shared view obtains. Thus, acting cautiously may imply some measure of caring for the intentions and, therefore, personhood of another. In any case, the point of making this semantic qualification is to make some space for thinking about discharging care toward other persons as something which, negatively, resists reduction to the notion of risk management (or risk minimization or optimal risk allocation) and, positively, endorses a special communal ideal—a community of persons, tout court. I insist on this qualification since it is important to avoid overloading 'care' and 'caring relation' with the thick notions of intimacy and affection.
79 A second-order question concerns the content of due care—should it amount to reasonable vigilance or perhaps take a stricter measure of care. The argument in the main text does not turn on the precise content of the duty of due care. Rather, it is the very idea of discharging care that concerns me at present. This is not to say that my argument is endlessly open to any degree of care. In fact, it insists that due care must be fixed objectively. A subjective judgment of what counts as appropriate care must, therefore, be avoided. Respect for others as determined, subjectively, from the respecting person’s point of view is nothing more than respecting them on one’s own terms. But to respect others as free and equal agents, one should not set the terms of the respect according to one’s own view of what respecting others requires.
With this very rough characterization at hand, I shall return to the main issue with which these pages are concerned—the tort remedy. What reasons exist for acting on tort law’s remedial duty in particular? Since (as I asserted a moment ago) the base-line in tort law is the establishment of respectful recognition, the remedial process governed by the remedial duty must be understood in terms of the appropriate response to such a base-line once it is disturbed by a tort. More specifically, I shall seek to show that the remedial duty is best explained in terms of efforts at re-establishing respectful recognition.

B. Reestablishing Caring Relations

The account I shall offer distinguishes between three stages in the development of the relations of care and repair that are formed in and around the practice of torts: separation, connection, and rupture; the remedial duty, I shall argue, purports to heal a rupture by recreating the state of being connected (in the right way). Prior to the risky event calling for the discharge of due care, the point of view of the would-be carer does not make special reference to the point of view of the cared-for. Insofar as the former is concerned, the latter is a stranger, standing apart from her (i.e., his point of view is not yet recognized by her as constituting freestanding constraints on her affairs). In this preliminary stage, the parties to the might-be tort interaction are in total separation from each other. In discharging appropriate care, the carer embraces the point of view of the cared-for as a freestanding guide to conduct, especially in terms of the accommodations she introduces to her course of action in the face of his activity. The carer therefore establishes a special connection (of respectful recognition) between her point of view (from which she forms intentions in favor of adjusting her conduct to accommodate the actions and intentions of the cared-for) and the point of view of the cared-for. As mentioned above, this connection may be transparent (epistemologically speaking) to her only, featuring a unidirectional flow of attitudes from the carer to the cared-for. But such a connection does not render the engagement of the former with the point of view of the latter less real; it is just that, in some cases, there may not be attitudes on the part of the cared-for (such as reliance) referring back to the carer. Discharging the primary duty, then, establishes a temporary connectedness between the practical personality of one person (the latter) and that of the other (the former).  

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80 I mention reliance in its strict sense only in recognition of the important distinction offered by Mathew Smith between internal and external reliance. Matthew Noah Smith, Reliance, Noûs (forthcoming 2009). As Smith argues, we constantly rely (on pain of irrationality) on others even when it involves nothing by way of forming a psychological state, which is the fact of external reliance.

81 Certainly, the account of the tort relation I seek to develop in the main text addresses individual persons on either side of the relation. Many economic actors, especially firms and other forms of business organization, do not possess the prerequisite traits of human personality on which my account turns. In particular, these entities do not constitute a point of view in the same natural sense that I have been referring to in the main text above, and yet they do participate in the practice of torts as wrongdoers as well as victims. But this self-conscious limitation on the scope of my account need not count as a theoretical failure on my account’s behalf. Rather, it reflects the notion that, on my account, the moral center of tort
Upon failing to discharge the primary duty, a failure to enter into a relation of care with the putative cared-for, the carer’s point of view does not merely retain its *ex-ante* separateness from the cared-for (as if her conduct never disregarded the ongoing activity of the cared-for). Indeed, a careless or intentional disregard of the person of the cared-for—of the freestanding constraints placed on the carer by the cared-for—is a wrong because it involves disrespecting him as an agent with a distinct subjectivity. In place of embracing it as a guide to conduct, the carer *disengages* the point of view of the cared-for from her own, rendering them inconsistent, not merely distinct. In this sense, the former alienates (as opposed to solidifies) the point of view of the latter. Thus, the possibility of establishing respectful recognition, once the primary duty has been breached, has not been fulfilled.

Against this backdrop, the morality of tort law requires, in the case of breaching a primary duty, a remedial effort that must not only undo the transition from the *ex-ante* status of being mere strangers to the post-breach status of being disconnected. It must also reestablish respectful recognition (as it should have been established, save for the breach)—i.e., transforming the points of view of the parties from a state of law, if there is one, lies in the social forms of respectful recognition that tort law intrinsically generates among members of a cosmopolitan, complex society. Organizations as such cannot participate in these forms. However, this is not to say that organizations are indifferent or, worse still, hostile to tort law’s commitment to the solidaristic account I shall develop in the main text (and in future work). In fact, organizations can contribute significantly, though indirectly, to the solidaristic ideal immanent in tort law. While I leave the full elaboration of this observation for another occasion, I shall outline the main intuitions behind it here. These intuitions can be separated into two.

First, most if not all the organization’s acts are, at the same time, the acts (or omissions) of their agents—owners, managers, employees, etc. In this way, the agency of these agents is naturally exposed to all those norms, including tort duties, that the agents would have been exposed to outside the organizational context. Additionally, a victim-organization implicates its agents in the wrongdoer’s failure to discharge care and to make reparation (when necessary) in two important ways: many torts against an organization are at the same time wrongs against specific agents of the organization; and, even when this is not the case, torts against organizations almost always reduce their profits, and thus harm their agents.

Secondly, and more importantly, rather than inhibiting the solidaristic ideal of tort law, organizations can bolster this ideal, at least when properly regulated. Indeed, agents of an organization, by virtue of being associated with an organization, participate in tort interactions within and across the boundaries of their organization, engaging the points of view of their colleagues and associates as well as many other persons (such as customers and suppliers). Organizations, on this view, allow their agents to be implicated in the tort relations of respect and recognition well beyond the lived experience of a private individual person.

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82 See Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1423 (2004) who considers a typical case of lying as giving rise to incompatibility between the points of view of the liar and his audience. Markovits analyzes this case in connection with developing an account of the collaborative grounds of promise and contractual promise. To be sure, the wrongness of lying as such (i.e., quite apart from promise and, of course, contract relations) can be naturally incorporated into torts such as misrepresentation (intentional and, in some measure, negligent as well), irrespective of its place in the articulation of the morality of promise and contract. Thus, whatever service the case of lying renders the articulation of a theory of contract, the notion of incompatible points of view (as a result of breaching a preexisting duty against wronging-through-lying) is not distinctive of the thicker form of society that contracts might (arguably) establish.

83 Note that, rather than being a psychological description of the affective attitudes of the parties to the failure in caring, alienation picks out the practical contradiction between their points of view.
incompatibility to a relation featuring the respectful recognition (of the carer) of the point of view of the cared-for.

Because this solidaristic value is intrinsic to the relation of the carer to the cared-for (i.e., the source of the value originates in the carer’s practical attitudes toward the cared-for), no other person or institution besides the two can bring this remedy about. All that others, including the state, can do is support the two by facilitating their engagement concerning the remedying of alienation. As I explain in greater detail below, the remedial process is relational all the way down to the reestablishment, in the case of a breach of primary duty, of respectful recognition. In what follows I unpack this observation.

It is a truism, but the problem which immediately presents itself is that we cannot really bring back the past—the resurrection of the unsuccessful instance of discharging due care is not a feasible option. (In this sense, the relation between carer and cared-for is different from a contractual interaction as the latter, at least in certain jurisdictions, can rather easily be 'resurrected' after a breach of contractual obligation through the remedy of specific performance). Accordingly, in its basic level, the remedial process requires some sort of an acknowledgment (on the part of the carer) of the initial breach of the primary duty to reestablish successfully the failed relation of care toward the cared-for. Whereas the reason that grounds this remedial duty (to repeat, reestablishing respectful recognition) remains constant, the precise mode of reestablishing the care must be sensitive to the consequences that may flow from the breach of the primary duty (of care). For the mode of remedying an unsuccessful formation of a relation of care must account for the difference between breaches of the base-line (i.e., a breach of respectful recognition) that result in no consequences at all and breaches that do result in loss; moreover, it must account for different kinds of loss, including, inter alia, psychological, dignitary, physical, and economic losses, insofar as they bear differently on the possibility of reestablishing relations of care. Thus, the precise content of the acknowledgement must be fixed by reference to the question what 'acknowledging' requires in a given case. At this stage of the argument, I shall identify three non-exclusive modes of discharging the remedial duty (whereas, in the next Part I shall consider a fourth one which will then be tied to the doctrine of punitive damages); each of them can be understood as expressing a judgment as to what ‘acknowledging’ requires in the case at stake. The three are mere acknowledgment, apology, and compensation. They may not span the full range of extensions involved in 'acknowledging' the breach of the primary duty, but they do represent the central modes of reestablishing the solidaristic ideal of respectful recognition in modern, complex societies.
C. Remediing Alienation in No-Harm Cases

In the case of a failure to attend to the intention of another to proceed safely in his plan—a failure to discharge an appropriate care—that, luckily, results in no harm whatsoever, the re-construction of respectful recognition may need no more than the sincere acknowledgment from the carer of the primary duty she owed others. Such a simple or mere acknowledgment may be illustrated in a sentence like 'I should have been more attentive to the demands of care placed on me by the cared-for'. (This is not to deny, of course, that society can demand more than this, by subjecting the carer to criminal, administrative, or social sanctions). An acknowledgment, of the appropriate kind, places the parties to the unsuccessful relations of care where they should have been placed, post the breach, save for the breach. Indeed, the only obstacle that stands between reestablishing a sense of solidarity in lieu of alienation is, until acknowledgment is given, the shortcoming on the part of the carer to recognize the value of adjusting her conduct to the demands of the cared-for, which is to say, a failure to acquire and act on the practical attitude associated with the primary duty of appropriate care. Therefore, acknowledging the value of what was lost upon failing to engage properly in a relation of care with the cared-for, represents the consummation of the (missing) practical attitude associated with discharging care.

Still, within the category of failure to discharge the primary duty that results in no harm, mere acknowledgment may not always render respected the alienated point of view of the cared-for. Hence, it may not succeed in reestablishing the solidarity reflected in respectful recognition. Consider, for example, a reckless or even intentional disregard of the activity of another that happens to inflict no harm. Our moral intuitions seem to suggest that the acknowledgment needed here may often take a stronger version than mere acknowledgment; namely, apology. An apology, then, adds a component of self-abasement to the act of acknowledgment. That is, the carer recognizes that he should have cared for another, supplemented by feelings of remorse and possibly shame. At this stage of theoretical development, I do not worry precisely when a remedial activity calls for apology, rather than mere acknowledgment. I have only observed what may be seen as a paradigmatic case, according to which the thicker notion of acknowledgment, apology, is warranted. After all, the purpose of introducing apology is to suggest that the activity of discharging the remedial duty, while grounded in an ideal of a relation of care,

85 While I use the past tense owed, rather than owes, it is also possible to characterize the remedial duty (and thus its basic feature of displaying acknowledgment) in terms of an ongoing primary duty.

86 Whether the cared-for will in fact except the acknowledgment is another question. What is important for present purposes is that acknowledgment is, in principle, the suitable mode for rendering incompatible points of view (i.e., alienation) not just compatible again but also respected.

87 The combination of mere acknowledgment and remorse (or other forms of self-abasement) is commonly observed in the philosophical literature of apology. See, e.g., Kathleen Gill, The Moral Functions of an Apology, 31 THE PHILOSOPHICAL FORUM 11, 12 (2000) (arguing that the “fullest version” of apology consists of, among other elements, “an acknowledgment that the incident was inappropriate in some way” and “the expression of an attitude of regret and a feeling of remorse”).
admits different remedial modes and that these modes can be cast in the context-dependent idea of acknowledging the breach of the primary duty.

Because these two modes of rectifying alienation and reestablishing respectful recognition make sincere acknowledgment and authentic apology the defining principle of the actions prescribed by the remedial duty, there is nothing in particular the coercive force of the law could or should do about them.\textsuperscript{88} For, just like norms of politeness (to give one example), legal enforcement of sincere acknowledgment and apology just is a contradiction in terms. The cared-for \textit{qua} plaintiff, accordingly, cannot be put in his post-breach position (save for the breach) by resorting to the force of the law to compel the carer \textit{qua} defendant to place him in such position. In the absence of any sort of harm to the cared-for (including even the absence of a setback to the cared-for's property rights\textsuperscript{89}), the remedial duty remains outside the margins of the law. Indeed, this is where the informal, social practices of care and respect step in to fill this gap by enlisting their enforcement mechanisms (such as the display of reactive attitudes, like resentment and indignation, against the carer or the resort to other forms of social pressure) in the service of elevating the practical importance of sincere acknowledgement or apology into their practical lives.\textsuperscript{90}

\textbf{D. Remediying Alienation in Harm Cases}

When they stand alone, the remedial modes of mere acknowledgment and apology are much less adequate for repairing a breach of a relation of care resulting in consequences such as (but not limited to) physical harm. For, neither mere acknowledgment nor apology will be capable of placing the two persons where, \textit{but for} the failure to discharge care, they could and should have stood—in a relation characteristic of a successful discharge of care. Indeed, the normal or right progress of the relation between the carer and the cared-for, beginning with the \textit{ex-ante} status of mere strangers and culminating in a relation of care, should have resulted in respectful recognition (of the cared-for by the carer), not alienation. And to rectify alienation, the

\textsuperscript{88} There are many different and sophisticated ways to express the logical and normative contradictions between legal and ethical norms (such as the norm of apologizing). It is possible, for example, to draw on Kant’s distinction between officia iuris and officia virtutis. \textsc{Kant}, \textit{supra} note 43, at 31. I find the more sophisticated arsenal of distinctions unnecessary for the purpose of presenting the fairly simple and uncontroversial argument against the enforcement of mere acknowledgment and apology by law.

Less dramatically, the enforcement of authentic acknowledgment or apology through the law raises a series of pragmatic problems; for example, the law ordinarily treats apologies as admissions of wrongdoing. For discussion of the pragmatic concerns of incorporating authentic apology into the law, see Lee Taft, \textit{Apology Subverted: The Commodification of Apology}, 109 \textsc{Yale L.J.} 1135 (2000).

\textsuperscript{89} In a much-quoted passage, the Supreme Court of North Carolina has observed that “the law infers some damage [from every trespass onto the land of another]; if nothing more, the treading down grass or herbage, or as here, the shrubbery.” Doughtry v. Stepp, 18 N.C. 371, 371 (1835).

\textsuperscript{90} That said, I do not need to deny that the state may initiate criminal proceedings against the carer. Moreover, apology may figure in the criminal process (especially as a factor relevant for the severity of the punishment), though not as the purpose for which a person is put on trial.
cared-for must be presented (by the carer) with a 'replacement' that reflects the right kind of transformation—from *ex-ante* separateness to the liberal form of solidarity reflected in respectful recognition. Accordingly, to be put where they should have been, without alienation and with respectful recognition, the carer must adjust her plans (whatever they are) to bring about this solidaristic position. As I shall explain below, this requirement, placed on the carer by the cared-for, is ordinarily of making the latter whole—that is, rectifying the loss he suffered from the former's breach of the primary duty. In the case of loss accompanying the failure to discharge the primary duty, the kind of 'acknowledging' required by this account involves rectifying the loss in addition to apologizing.

At first glance, my insistence on comparing the position of the parties *ex-ante*, as mere strangers, with their position save for the breach, a position of respectful recognition and solidarity, may seem superficial; the replacement needed in order to shift alienation into solidarity has the almost-identical economic value to the *ex-ante* position of the cared-for. Thus, connecting the remedial duty to the value of liberal solidarity (i.e., urging a special duty of redress owed to and owned by the cared-for with the content of placing him in the *post*-breach position) does not do any work, for the remedial duty actually brings the cared-for to his *ante*-breach position as a mere stranger to the carer as if nothing has ever happened. In other words, the worry is that, in contrast to my announced ambition, my argument actually reinforces the conventional view.

I do not deny that in economic terms, the remedial duty can produce equal results for *ante*- and post-breach positions. However, it is not the mere economic value that is morally decisive in the distinction between being strangers and forming the solidarity of respectful recognition. As I have observed above, the provision of economic replacement as such is not distinctive of the relationship between the carer and cared-for since, in principle, restoring their respective post-wrong positions to the ones they occupied, separately, as strangers, is more a question of technology than of a special relationship between the parties concerned that underwrites the particular remedial process in our tort law. Rather, it is the *intrinsic value of the normative relation* between the carer and the cared-for that aims at (negatively) eliminating the alienation produced by the wrong and (positively) re-establishing the respectful recognition that best approximates the solidarity of a relation of care. I shall now explain how these negative and positive features of the remedial duty render attractive the solidaristic view that respectful recognition grounds the *special* remedial duty in the legal practice of tort.

To repeat, the carer and cared-for must engage one another for the alienation to drop and for the solidarity characteristic of a relation of care to take over. Indeed, since the value the relation of care underwrites is *intrinsic* (i.e., it can be generated only though the formation of such a relation), the vindication of this value by a remedy, when a primary duty has been breached and harm resulted, requires an *engagement* that would be capable of reestablishing the lost intrinsic value. For such an engagement to arise, the carer must

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91 Furthermore, this picture is incomplete for it overlooks the supercompensatory measure of punitive damage. See *infra* Part III for further analysis.

92 See supra text accompanying notes 53-65.
embrace the point of view of the cared-for in an effort to re-construct, via the payment of compensation, their failed relation of care. The carer must attend to the demand placed on her by the cared-for, a demand to act so as to make him whole again. Just as the cared-for has the (moral and legal) standing to compel the carer to discharge the primary duty (he can, say, demand the latter not to batter him or not to drive carelessly around him), so does he possess the standing to commend the other, upon satisfying certain evidentiary and procedural requirements, to place him where he could have been had the carer not disregarded his intentions in the first place. This kind of engagement at the remedial level enables the carer to perfect her practical attitude toward the cared-for, an attitude characteristic of taking the intentions of the cared-for as her guide to action (which, in the present sense, is the action of making him whole).

Thus, in following the remedial engagement, the carer can undo her initial disregard of the intentions and plans of the cared-for. Moreover, this engagement places the two where they should have been standing but for the disregard—in a relation of respectful recognition of the intentions of the cared-for. Accordingly, the unsuccessful relation of care is replaced with an engagement that places the cared-for and the carer in the ideal post-breach position not just in terms of the cared-for’s lost economic value but, more importantly, the practical attitude, and indeed value, characteristic of such a position. Against this backdrop, the remedial duty governs a process that quite literally remedies a pathology in the otherwise invaluable sequence, the sequence of moving from strangers to members of a special solidaristic connection, by removing alienation and allowing for respectful recognition to reestablish itself.

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93 The discussion in the text above does not consider the contribution of the adversary-based litigation process itself to the reestablishment of the parties’ relations of care. On this see Lynn Mather and Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 L. SOC’Y REV. 775, 784 (1980-1981) (noting that common law tort actions feature “transformation of disputes over injuries into disputes over money”). My neglect should not plague the argument, I believe, since my discussion aims at explicating the grounds distinctive of the tort law, regardless of whatever communal ideals are also underwritten by litigation as such.

94 It is revealing to note that the social character of the tort remedy, in addition to striking an important legal cord, might also line up with, and therefore naturally exemplify, the social reality of our informal remedial practices. Needless to say, the best place to look for this is in the socio-anthropological studies of Erving Goffman. Indeed, throughout his impressive work on human encounters, Goffman pays particular attention to what he calls “remedial interchanges” (*ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* 95 (1971) (hereinafter *GOFFMAN, RELATIONS*), which are the processes through which persons (including even those who are initially strangers but whose separate activities exert pressure toward conflict) seek the “re-establishment” of their interaction. (*ERVING GOFFMAN, INTERACTION RITUAL* 19 (1967) hereinafter *GOFFMAN, INTERACTION*). The basic morphology of these interchanges, according to Goffman, consists of an engagement (or, as Goffman prefers, involvement) among the participants featuring the three modes of acknowledging mentioned above: acknowledgment of the wrong done (*GOFFMAN, RELATIONS*, at 113), apology (*id. at 113-114), and (when necessary) the provision of compensation to the injured participant. (*GOFFMAN, INTERACTION*, at 19-23, esp. 21). Moreover, Goffman provides a careful elaboration of these modes in action. For instance, in his study of apology, Goffman explains that this act of reestablishing a respectful encounter with another involves a “splitting” of the subjectivity of the wrongdoer into the part that failed to relate appropriately to her victim and the part that “stands back” and recognizes this shortcoming. (*GOFFMAN, RELATIONS*, at 113). As with the remedial process in tort law, which can now be viewed as a species of the genus ‘remedial interchange’, Goffman’s observation (including the metaphor of the splitting subjectivity)
This argument explains that there are compelling reasons for acting on the precise form and content of the remedial duty that figure in the practice of tort and that the source of these reasons is intimately connected, indeed required by, the ideal underpinning the relation of care. The complaint raised above about the superficiality of introducing the remedial duty in terms of bringing the cared-for (and the carer) to the post-breach position is proved wrong since it fails to appreciate the intrinsic value of the remedial interaction between the cared-for (the plaintiff) and the carer (the defendant).

In fact, recalling my argument against the conventional view of the tort remedy, without appreciating the value of the parties’ engagement at the remedial level, it is unclear why the special remedial duty is required by, rather than just compatible with, the law of tort. After all, if the economic value of making the cared-for whole is similar across the ante- and post-breach positions, we should be morally indifferent between the remedial duty and other schemes of rendering the cared-for a same-value-replacement for his loss (such as a comprehensive insurance scheme, government subsidies, or even administrative agencies that extract the appropriate sum of money from the carer and transfer it to the cared-for).

Moreover, we can also display this moral indifference with respect to the role of the carer in the process of making the cared-for whole. Indeed, there are other mechanisms, (such as criminal, administrative, market-based, and communal measures) for subtracting the gain of the carer from the breach (if there was any), teaching her a lesson about the significance of reciprocity and responsibility, vindicating the principles of equality and freedom, forcing her to internalize the costs of her activity in an optimal fashion, and so on.

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In summary, only by appreciating the worth of the remedial engagement between the carer and the cared-for can one make sense of the insistence of tort law on the remedial duty (and not on other forms of responding to wrongs). Any theory of the morality of tort that fails to account for the intrinsic value of the remedial engagement between the carer and the cared-for as governed by the remedial duty, and further fails to connect this engagement to the wrong done, cannot explain the reasons for insisting on this particular form of redressing wrongs. Once again, the special avenue of redress that the law of tort provides is only one among a rich and attractive repertoire of alternatives. Nevertheless, its form and content single out the importance of the normative relation of respectful recognition standing at the moral center of tort. And insofar as the conventional view insists on the point of the tort remedy being the restoration of the status quo ante the tort as though the wrongdoer and victim had remained complete strangers, the idea that tort law is a mere legal technology can be seen as not only unwarranted but, in fact, mistaken.

emphasizes the forward-, rather than backward-, looking perspective of the remedial interchange. Simply put, our social, remedial practices are about re-establishing (in a second-best way) a relationship or interaction that went wrong, not about restoring the parties to their supposed equilibrium ex-ante as if nothing, no interaction at all, has or should have occurred between them.
Indeed, the remedial process (as I have characterized it) features wrongdoer-victim engagement aiming at the elimination of alienation and the reestablishment of respectful recognition. On this account, the tort remedy operates on a past wrong but, crucially, looks forward to the society it thereby forms between the two.

III. ELABORATION: PUNITIVE DAMAGES

So far the argument has traveled at a highly abstract and formal level of analysis. Its abstractness was inevitable, I believe, to capture the core features expressed in the remedial process of tort law. But stopping at this level leaves intact too many puzzles and too much obscurity; therefore, I now attempt to connect the account of the remedial process just sketched to the concrete law of torts. I shall not seek, however, to propose a general account of the legal principles and doctrines pertaining to the remedial process (for example, I shall leave for another occasion the question of the implementation of damages caps through state legislative reforms). Instead, I shall take one doctrinal puzzle—the case of punitive damages—and seek to explain why my account of the remedial process illuminates, and perhaps even possesses the right normative ingredients to settle, this unyielding mystery.

Punitive damages, it is important to stress at this point, are intimately related to the preceding argument in two important ways. First, this doctrine straightforwardly contradicts the conventional view concerning the point of the tort law and remedy. Indeed, a tort system embracing punitive damages, on top of compensatory ones, cannot be explained by reference to any supposed commitment to restoring the status quo ante the tort—punitive damages do anything but restore the victim to the position he occupied prior to the tort (and the same holds for the wrongdoer). And second, as I shall explain in detail below, the doctrine of punitive damages, because it involves the imposition of punishment by private persons rather than the state, raises critical suspicions of illegitimacy insofar as it is cast, along with tort law more generally, in terms of mere legal technology. The argument going forward can thus be understood as an attempt to elaborate on these two points using the concrete theoretical and doctrinal materials of punitive damages. I shall commence my analysis with a threshold explanation concerning the conceptual importance of punitive damages (III.A). Then I shall explain the particularly puzzling feature about punitive damages—how it is that they take the form of a remedial process characteristic of private law (III.B.). Following a brief consideration of leading accounts of the doctrine of punitive damages (III.C.), I shall set out to reconstruct this doctrine as a plausible extension of the basic remedial question articulated above, namely, what ‘acknowledging’ requires in the case at hand (III.D).
A. Are Punitive Damages Important At All?

At first glance, punitive damages do not seem to pose any serious worry for a successful reconstruction of the morality of tort law and remedy. To begin with, punitive damages, unlike compensatory damages, figure only seldom in the everyday life of tort law. This is true not only for common law jurisdictions that insistently avoid, though not absolutely, awarding punitive damages in tort law cases.\textsuperscript{95} For even in the most hospitable complex of jurisdictions nowadays, the United States, a tort remedy of punitive damages is, according to a leading casebook on torts, “rare.”\textsuperscript{96} Moreover, for obvious reasons, punitive damages are rarely awarded for the paradigmatic tort of negligence,\textsuperscript{97} which means that these damages figure at the fringes of the legal practice of tort law. Against these truisms, the theoretical and practical services that an account of punitive damages can render tort law are picayune. Thus, even if it is puzzling (as many believe\textsuperscript{98}), the doctrine of punitive damages should not inform our understanding of the actual legal practice. Or so one may come to believe.

Nevertheless, punitive damages lie at the doctrinal center of tort law. Their significance (or, for that matter, insignificance) cannot be inferred from empirical data, but rather from the way they (partly) shape the form of tort law and remedy. Dissolving the mysterious foundations of punitive damages (to be analyzed in detail below) is therefore necessary for a successful account of the morality of tort law. Bluntly put, an account of tort law and remedy that cannot even make, in principle, conceptual space for punitive damages as a remedial response to wrongdoing fails to capture the actual practice. Note that the explanatory burden here is rather relaxed—viz., showing that punitive damages are, in principle, compatible with, though not necessarily required by, the normative structure of tort law. In particular, an account of tort law must entertain the normative materials necessary to explain why it is appropriate at least in some cases to supplement the ordinary measure of damages—compensatory damages—with an extra-compensatory component to which, but for the doctrine of punitive damages, a victim of a tort would never be entitled.

\textsuperscript{95} English common law is a notable representative of this class. See Rookes v. Barnard [1964] A.C. 1129, 1226-27 (H.L.) (per Lord Devlin) (restricting punitive damages to cases of “arbitrary or unconstitutional action by state agents, torts commissioned for the purpose of profit-making at the victim’s expense, and a residual category of statutory-based punitive damages).

\textsuperscript{96} John C.P. Goldberg, Anthony J. Sebok, and Benjamin C. Zipursky, Tort Law: Responsibilities and Redress 478 (2004). It is further noted that “[s]tudies of recent tort litigation suggest that they are awarded in less than 5 percent of all tort cases that go to verdict.” Id. For further details, see Anthony J. Sebok, Punitive Damages: From Myth to Theory, 92 Iowa L. Rev. 957, 964-74 (2007) (discussing and rejecting the thought that punitive damages have grown substantially since the 1980s).

\textsuperscript{97} See, e.g., Rugg v. Tolman, 117 P. 54, 57 (Ut. 1911) (“The law does not, and in the nature of things cannot, allow exemplary or punitive damages for mere negligence”).

\textsuperscript{98} See, e.g., Fay v. Parker, 53 N.H. 342, 382 (1873); Ketton et al., supra note 13, § 2, at 9 (characterizing the incorporation of punishment into tort law “anomalous”).
Consider, for example, the corrective justice account of tort law developed by Weinrib. According to this account, recall, the point of the tort remedy is the restoration of a preexisting normative equilibrium between wrongdoer and victim. This way of accounting for tort law and remedy, as Weinrib notes, leaves no conceptual space whatsoever for punitive damages. This shortcoming suggests that tort law, because it actually does endorse punitive damages, cannot be adequately explained by reference to a principle of justice that underwrites compensatory damages only. Tort law, in other words, expresses the judgment that doing (corrective) justice between wrongdoer and victim may be open to a remedial process other than the one accounted for in Weinrib’s theory (or in any other traditional theory of corrective justice). In order to make sense of tort law one must render this judgment intelligible, which is to say consistent with the general account of tort law. This task is highly demanding as it stands for the idea that tort law envisions a baseline or a normative equilibrium different from the one picked out by corrective justice (at least on Weinrib’s account of this form of justice). These different equilibriums may overlap to an important extent, to be sure, but they can never be identical insofar as super-compensatory damages are deemed flatly illegitimate by the theory of corrective justice.

B. The Puzzle of Punitive Damages

Going beyond the threshold level of making conceptual space for punitive damages, the main challenge for a theory of punitive damages lies in explaining the following: how it is that a system of punishment such as punitive damages takes the form of the private law of torts. That is to say, on what grounds, if any, would it be possible to have the state assist one party to a tort dispute (the plaintiff) to seek the punishment of another (the defendant) and, moreover, assume lawful possession of the monetary value of this windfall.

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99 Weinrib, supra note 23.
100 See id. at 135 n.25 (“under corrective justice damages are compensatory, not punitive”); Ernest J. Weinrib, Punishment and Disgorgement as Contract Remedies, 78 CHI.-KENT L. REV. 55, 86-93 (2003) (insisting that punitive damages are foreign to the logic of private law as a normative system regulated by corrective justice) [hereinafter Weinrib, Punishment and Disgorgement]. But see Richard W. Wright, Right, Justice and Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 159, 175 (David G. Owen ed., 1997) (arguing for the consistency of punitive damages with the demands of corrective justice).
101 See Zipursky, supra note 25, at 710-13 (criticizing corrective justice theorists for their failure to accommodate punitive damages within their preferred, make-whole picture of the tort remedy).
102 Corrective justice renders illegitimate punitive damages in the sense that these damages depart substantially (and, thus, illegitimately) from the requirements of justice governing the law of torts. However, they need not be illegitimate, tout court. Thus a corrective justice theorist need not criticize their deployment in the arena of criminal law.
103 Throughout, I shall use the terms ‘punishment’, being ‘punitive’, exercising ‘the legal authority to inflict punishment’ and the like in a broad sense to capture more than the mere act of imposing the sanction on the offender. Indeed, these terms will include the entire set of actions and decisions made by the plaintiff-prosecutor in the pursuit of this act of imposing the sanction and in collecting the entire amount of the punitive damages. Thus, this set begins with the victim’s decision to file a tort suit against the tortfeasor, seeking to exact punitive damages (in addition to compensatory ones) and ends in possessing the damages’ windfall.
punishment once it is collected?\textsuperscript{104} Normally, these questions are motivated by worries concerning procedural unfairness resulting from the legal process characteristic of private law disputes which, by definition, lacks the constitutional rights and guarantees provided to anyone who is being put to a criminal trial.\textsuperscript{105} This worry may be serious, to be sure, but it is far less troubling than a conceptually prior one.\textsuperscript{106} And that is that the legal recognition of the doctrine of punitive damages officially invests private individuals with the legal authority to seek and inflict punishments on their fellow citizens—as Benjamin Zipursky has accurately observed, the law confers upon victims of certain torts a “right to be punitive.”\textsuperscript{107} If there is any normative bite to the idea of exiting the state of nature and adopting the rightful condition of a civil society, it must be the rejection of a state delegation of its punitive authority to private individuals.\textsuperscript{108} To see that, substitute a few days ‘prison term’ in the plaintiff’s basement for millions of dollars awarded in punitive damages to this same person. No matter how luxurious this basement really is and how friendly is the plaintiff (the would-be warden), and irrespective of how strongly the defendant would prefer to have the former punishment over the latter (for the simple, rational reason that she may not be able to support her family and pay the awarded damages), the modern state cannot but repudiate this thought at once.

Now, the point of this thought experiment is not to play on the quantitative difference between punitive damages and incarceration, the former representing a less harsh degree of punishment than the latter.\textsuperscript{109} Rather, both sorts of punishment are (qualitatively) the

\textsuperscript{104} See Richard A. Nagareda, Autonomy, Peace, and Put Options in Mass Tort Class Action, 115 HARV. L. REV. 749, 817 (2002) (“within the panoply of tort damages, the punitive damages remedy is unique: only a thin doctrinal thread ties it to individual plaintiffs”); Benjamin C. Zipursky, A Theory of Punitive Damages, 84 TEX. L. REV. 105, 106 (2005) (asking a “basic question in torts: Why are punitive damages part of tort law at all?”).

\textsuperscript{105} See, e.g., Thomas B. Colby, Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages, 118 YALE L.J. 392, 441 (2008) (noting the seeming incompatibility of punitive damages with procedural justice, because the defendant is likely to be denied “a fair opportunity to explain himself – to establish his innocence, to present evidence of mitigating circumstances, or the like”). Lord Reid has famously noted that “[t]o allow pure punishment in this way [i.e., punitive damages] contravenes almost every principle which has been evolved for the protection of offenders.” Cassel & Co. Ltd. V. Broome, [1972] A.C. 1027, 1087 (H.L.).

\textsuperscript{106} See Allan Beever, “The Structure of Aggravated and Exemplary Damages”, 23 OXFORD J. LEG. STUD. 87, 109 (2003) (“Punishment belongs to the criminal and not to the private law, not primarily as a matter of procedure, historical accident, or convenience, but because of the logic of their structures”).

\textsuperscript{107} Zipursky, supra note 104, at 151.

\textsuperscript{108} The language of rightful condition and civil society is unmistakably Kantian. However, the essence of the argument in the main text above is not distinctively Kantian. For a related analysis of the normative difficulties in privatized forms of punishment (such as shaming sanctions), see Alon Harel, Why Only the State May Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions, 14 LEGAL THEORY 113 (2008) (arguing for the distinctive authority of the state in matters of criminal law). Of course, the actual, historical shift from private to public arrangement of criminal law is gradual and, indeed, subtler than the simplistic shift observed in the main text. However, the latter shift is normative, not causal, and thus indifferent to the historical realities. For a historical review of private prosecution in England, U.S., and continental Europe, see Yue Ma, Exploring the Origins of Public Prosecution, 18 INT’L CRIM. JUST. 190 (2008).

\textsuperscript{109} The quantitative question is taken in Dan Markel, Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction, 94 CORNELL L. REV. 239 (2009) (locating punitive damages at an intermediary level on the punitive scale, between compensatory damages and criminal fines); Dan Markel, How Should
same in their character—they are simply punishments. We should therefore not be misled by the different kinds of punishment mentioned above, for they both present the same fundamental problem of individuals asserting normative powers that, as between members in a society of others, are distinctively, perhaps even uniquely, associated with the state. Thus, before getting to the troubling proportion of the punishment in the hypothetical just mentioned (assuming that extraordinary punitive damages are necessarily less offending against one’s freedom than a few days in ‘prison’), we must face the preliminary question of whether private individuals can have the legal authority to impose any criminal sanctions at all. In other words, regardless of whether or not punitive damages could be explained as an appropriate (i.e., proportionate) punitive response to a given wrong, the notion of a private individual entitled to pursue a punitive course of action exerts a far more basic pressure on the legitimacy of the current tort law’s embrace of punishment as such. In the absence of an adequate explanation, punitive damages cannot be said to right a wrong, because they attempt to right the wrong by introducing yet another wrong, which therefore makes matters twice as wrong. This is the puzzle of punitive damages. Any doctrinal question concerning these damages is either derivable from or secondary to it. Failing to solve this puzzle requires abandoning punitive damages, tout court.

C. Some Leading Approaches to Punitive Damages

It is possible to identify in the literature three different ways out of this pressing question: denying the question, challenging the question on first-order normative grounds, and making a conceptual claim for punitive damages by drawing on the individualist (rather than social and, thus, criminal law) nature of punitive damages. As I shall suggest, neither of these is capable of answering the question satisfactorily, thereby failing to make a successful case for punitive damages. I take a stylized version of each in turn.

The deniers. In order to solve the puzzle of punitive damages, it is perhaps desirable to consider whether punitive damages are punitive at all. And so the task of unearthing the non-punitive character of punitive damages is born. Punitive damages, on this account, are actually a form of compensatory damages, purporting to repair a wrongful loss beyond physical injury or property damage. The nature of this loss may be cast in terms of “dignitary injury,”111 “moral injury,”112 or “societal harms,”113 reflecting the idea that

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110 My emphasis on the society of others implies that private forms of punishment may, and in fact do, exist. For instance, within limits, parents may punish their children; members of a religious community may exercise, again within limits, punitive powers over other members. The argument in the main text does not apply to these kinds of context. Instead, punitive damages, and state-inflicted damages, have a universal aspiration, potentially applying to any person as such, irrespective of any idiosyncratic feature about him. It is within this context of civil society, I argue in the main text, that the legitimate authority to impose punishments is characteristically associated with the state.

111 Wright, supra note 100, at 175. See also Richard W. Wright, The Grounds and Extent of Legal Responsibility, 40 SAN DIEGO L. REV. 1245, 1431 (2003) (arguing for the compensatory aspect of punitive
certain wrongs may harm victim (or victims other than the plaintiff) in ways that traditional compensatory awards have largely ignored. Thus, there is no puzzle about punitive damages for they are integral component of making the victim of the tort whole.

This approach, while logically sound, rests on the doctrinal premise according to which there is no significant punitive aspect to punitive damages. This premise seems to stand in contradiction to the lived experience of the practice of tort law. Moreover, and more importantly, it gives rise to a doctrinal confusion: there are dignitary torts (such as assault and battery) addressing the precise injury for which punitive damages, on some of the deniers’ account, seek to compensate. Thus the purpose for which punitive damages are awarded (i.e., compensation for the non-pecuniary loss of dignity or moral worth) is already achieved by familiar common law torts (such as assault and battery and false imprisonment). Awarding damages on the former grounds in addition to the latter grounds will, therefore, amount to counting the same loss twice over. And insofar as there exists a fundamental divergence between compensation and punishment, merely denying this divergence falls far short of explaining the puzzle of punitive damages.

The substantive rejoinders. Another way to solve the doctrinal puzzle is to belittle its role in the justification of punitive damages. According to the rejoinders, garnering the legitimacy of private individuals imposing punishments should not exhaust the range of considerations for (or against) sanctioning punitive damages. Thus, even if the state should normally refrain from delegating its criminal law powers to private individuals, there may be compelling reasons to depart, in certain cases, from this policy. The law and economics of tort law maintains that these reasons apply whenever the benefits to society from employing the doctrine of punitive damages exceed the costs. Two particular cases can be mentioned here. One has to do with striking an optimal division

damages); Martin H. Redish and Andrew L. Mathews, Why Punitive Damages are Unconstitutional, 33 EMROY L.J. 1, 15 (2004) (explaining punitive damages, in its early days, as a partly compensatory mechanism directed at otherwise non-compensable injuries).

112 Sebok, supra note 96, at 1017 (citing with approval Jean Hampton’s term “moral injury”). It seems, however, that Sebok’s justification of punitive damages does not turn on the compensatory argument, but rather on the importance of punishment to the vengeful vindication of the victim’s right to be treated with respect. See also Anthony J. Sebok, What did Punitive Damages Do? Why Understanding the History of Punitive Damages Matters, 78 CHI-KENT L. Rev. 163, 204 (2003) (finding that “punitive damages have never served the compensatory function”) [hereinafter Sebok, What did Punitive Damages Do?].

113 Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347, 402 (2003). In her article, Sharkey argues that punitive damages should serve a non-punitiv e goal of redressing harms to all the victims of the same defendant-wrongdoer (the plaintiff included).

114 See Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2621 (2008) (observing that punitive damages are a form of a sanction, rather than compensation); see also the discussion of common law cases in Sebok, What did Punitive Damages Do?, supra note 112, at 185-90.

115 As to the other member in the deniers class, the societal damages thesis, it is best understood as a reformist agenda rather than an explanation of the common law doctrine of punitive damages. Indeed, it departs substantially from the distinctive private law form of a tort interaction, recommending that the damages should be distributed across the entire class of victims, regardless of whether or not they are parties to the tort dispute between the plaintiff-victim and defendant-wrongdoer. See Sharkey, supra note 112, at 391 n.156 (noting that the author’s “approach combines traditional tort law features with innovative public law-inspired design reforms that are relevant in both the legislative and judicial realms”).
of labor between public and private enforcement of criminal norms.  

Punitive damages provide additional help to the criminal system in the prosecution of criminal behavior at a relatively low cost.  

(An institutional division of labor, moreover, can be defended along non-economic lines as, for example, an arrangement that serves retributive justice using different levels of sanctions (with punitive damages representing an intermediate level).  

Another economic case for punitive damages maintains that these damages correct the otherwise suboptimal structure of incentives toward safety imposed by tort law.  

On this account, in the absence of punitive damages, risk-creators could exploit the chance of escaping liability for losses they cause others carelessly.  

Thus, under-detection of torts, as well their under-enforcement, distorts the incentives to take cost-justified precautions.  

Super-compensatory damages, when calculated properly, literally compensate for the failures in detection and enforcement by increasing the overall amount of damages so as to reflect fully the losses actually resulting from careless conduct (including, of course, the undetected and unenforced ones).  

The economic cases for punitive damages suffer from critical doctrinal inconsistencies.  

For example, the former case (concerning private enforcement of criminal norms) cannot explain why, given that the plaintiff prosecutes on behalf of the state, the entire amount of the punitive damages should go to the plaintiff and not to the treasury.  

And in contrast to tort law’s insistence on “serious misconduct with a bad

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116 The argument from institutional division of labor can involve institutions other than criminal law. According to Rubin, punitive damages are a privatized administrative law regulating the market. See Edward L. Rubin, Punitive Damages: Reconceptualizing the Runcible Remedies of Common Law, 1998 WIS. L. REV. 131.  

117 See Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) (per Posner J.) (“one function of punitive-damages award is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes.”). According to Judge Calabresi, a tort plaintiff seeking punitive damages assumes the role of “private attorney-general.” Guido Calabresi, The Complexity of Torts, in EXPLORING TORT LAW 333, 337 (M. Stuart Madden ed., 2005).  

118 Markel, supra note 109. Another division of labor argument (mentioned above) can be derived from Zipursky, Rights, supra note 57, at 85 (casting the grounds of tort law in terms of a division of labor between the state’s criminal powers and the individual’s right to civil recourse, which may include punitive damages).  


120 Polinsky and Shavell mention two reasons for under-detection and one for under-enforcement: uncertainty on the part of the victim as to whether the harm is the result of nature or misfortune; uncertainty as to the identity of the tortfeasor; and even when all the fact are available, victims may decide not to file a suit against the tortfeasor (e.g., because of the time and effort he would need to invest to win the suit). See id., at 888.  

121 See id. at 889 (“damages that are imposed in those instances in which injurers are found liable should be raised sufficiently so that injurers’ average damages will equal the harm they cause”).  

122 As noted, e.g., in Zipursky, supra note 104, at 122-23.  

123 I say the entire amount in contrast to a fair portion that aims at rewarding the plaintiff for making his contribution to society’s effort to sustain public order. A profit-maximizing plaintiff will not bother asking for punitive damages insofar as they are given to the state. However, it is not clear why the plaintiff should receive the entire amount. After all, by seeking punitive damages he acts on behalf of society (or the social objective of maximizing efficiency). See Polinsky and Shavell, supra note 119, at 878 n.15 (noting that
intent or bad state of mind such as malice,\textsuperscript{124} the latter case (concerning optimal deterrence) seems to recommend awarding punitive damages for any kind of tort, including the most benign form of negligence, insofar as the tortfeasor’s engagement in the tortious conduct in question, malicious or otherwise, is under-detected and – enforced.\textsuperscript{125} It is possible to register some more doctrinal and theoretical reservations.\textsuperscript{126} But these are off the point insofar as the puzzle of punitive damages is concerned.

Dissolving this puzzle, recall, requires an explanation as to why punishment (i.e., punitive damages) takes the unusual form of the private law. As the two explanations sketched above show, the law and economics approach responds to the puzzle of punitive damages by rejecting its imperative character. Maximizing efficiency, either through optimal institutional division of labor or optimal deterrence, trumps concerns for the legitimacy of a private law system of criminal sanctions. The zeal for a private law form of punishment may be a feature of the considerably marginal role of punitive damages in the overall system of punishment, especially the institution of criminal law. But this can hardly make good on the problem of explaining punitive damages since this problem (as I have characterized it) manifests itself with every single private individual asserting a state authority to punish his fellow citizen. It is certainly odd to insist, without more, that efficiency justifies the privatization of the state’s punishment authority.\textsuperscript{127} Thus, the substantive rejoinder to the puzzle of punitive damages fails to overcome the legitimation problem incurred in every instance of delegating punishment authority to private individuals.

The Private wrong/Public Wrong Divide. The third way around the puzzle of punitive damages seems the most promising of all. Rather than conceding to the strength of the objections presented by the puzzle (in particular, to the private exercise of state authority), advocates of this approach emphasize the special kind of wrong involved in tort disputes vis-à-vis criminal ones and the appropriate response to each wrong. Thus, at the core of this approach lies the intuition that the victim of a tort (a private wrong) may acquire a strong desire for revenge against the wrongdoer because the latter committed a particularly insulting wrong against him, not just against another person or against society at large.\textsuperscript{128} The doctrine of punitive damages is a civilized “outlet”\textsuperscript{129} for

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\textsuperscript{124} DAN B. DOBBS, THE LAW OF TORTS 1062 (2000).
\textsuperscript{125} See also Markel, supra note 109, at 254 (noting that the “cost internalization approach [of Polinsky and Shavell] … is clearly at odds with the existing doctrine, which … generally requires some finding of malice or recklessness before a court can award punitive damages”).
\textsuperscript{126} See, e.g., Zipursky, supra note 104, at 122-23 (criticizing the economic theory of punitive damages in the light of BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996)).
\textsuperscript{127} This is not to say that there could be no non-economic reasons for investing private individuals with the authority to punish other individuals. The argument is that efficiency cannot deliver the required reasons. Spain can illustrate the point, vesting certain powers of prosecution in private hands on non-economic grounds. For an overview, see Julio Perez Gil, Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain, 25 L. & POL’Y 151 (2003).
\textsuperscript{128} Colby, supra note 105, at 433 (“the desire for revenge burns bright in the human heart – too bright for the law to ignore”). See also id. at 439 (“Punitive damages … are all about private vengeance”); Sebok, supra note 96, at 1022 (“when we see a stranger suffering an injustice we feel indignation; when someone
revenge that seeks the vindication of the victim’s moral worth. Criminal law, by contrast, imposes sanctions that respond to the harm done to society, rather than to any individual in particular. There is nothing personal or private in a harm befalling society as a whole and therefore, the argument goes, criminal punishment and private vengeance “are an entirely different animal.”

Thus, the distinction between the two sorts of wrong, private and public, may alert us to the need for a punitive avenue that addresses the inclination toward revengefulness that is naturally embedded in private individuals, taken severally. Note that this account does not explain the doctrine of punitive damages that figures in contemporary tort law. If the satisfaction of the natural desire for revenge informs the legal recognition of punitive damages, there should be no reason internal to the account under consideration to limit these damages, as tort law actually does, to “serious misconduct with a bad intent or bad state of mind such as malice”. In principle, any faulty conduct, however slight, that causes severe injury may plausibly give rise to a strong impulse to avenge the wrongful loss (consider a merely careless motorist whose faulty conduct results in a devastating injury to the person of another, say, becoming a quadriplegic; would it be that odd to expect a desire for revenge on the part of a typical victim in this case?).

Setting this doctrinal shortcoming to one side, I shall take stock of the core failure of this approach to the question of punitive damages, which is the question arising in connection with the puzzle of punitive damages. Indeed, there is nothing in the argument from private wrong and private revenge that solves the puzzle of punitive damages. More specifically, it cannot explain why satisfying the victim’s desire for revenge, and thus punishing the wrongdoer, takes the unusual form of private law.

To begin with, this argument does not address the puzzle fully. The wrong in question may well be characterized as private, and thus keep a critical distance from the category of public wrongs. However, the response to this wrong—private revenge in the form of punitive damages—still is a punishment and so the puzzle of punitive damages still lurks: how it is that this punishment escapes the monopolistic authority of the state to take the private ordering of tort law. Thus the original source of the problem with punitive damages—that it is a privately-administered punishment—continues plaguing the argument in question.

The private/public separatists may respond to the challenge by insisting that the commission of a private wrong, coupled with its special remedy (i.e., private revenge), requires the private law form of redress. That is to say, vindicating one’s moral worth against the (private) wrong done him is a distinctively private matter—the exclusive matter of the victim and wrongdoer. While I agree that the structure of this argument is

directs an injustice toward us we feel resentment. The former provides a ground for retribution, the latter revenge”); John C.P. Goldberg, Tort Law for Federalists (and The Rest of Us): Private Law in Disguise, 28 HARV. J.L. & PUB. POL’Y 3, 7 (2004) (casting punitive damages in terms of providing victims “satisfaction—a remedy adequate to acknowledge and avenge [defendant’s] predatory conduct towards them”).
129 Colby, supra note 105, at 433.
130 Id. at 439.
key to the challenge posed by the puzzle of punitive damages, the separatists cannot offer this argument because their revenge-based theories lack the normative resources to explain the sense in which the victim and the wrongdoer share a special connection that makes punitive damages a distinctive feature thereof.

Indeed, there is nothing immanent to the logic of vindicating one’s moral worth that specifies a particular form of vengeance; nor does it specify any particular agent of revenge. Feuds used to represent one possible form. Punitive damages, the argument from private wrong asserts, is another. But it is equally possible to satisfy one’s desire for revenge through the state (or God) causing the wrongdoer to suffer for what she has done to him. Perhaps it is even the most powerful form of revenge not only because the state is better equipped than most of us in making the lives of wrongdoers miserable; but, as the proverb reads, because revenge is a dish best served cold. Additionally, by making the wrongdoer suffer for what he has done, the state publicly endorses the victim’s case for vindicating his moral worth (in addition to promoting any other goal of criminal law), and thus renders more gratifying his satisfaction from the suffering of the wrongdoer.

In principle, therefore, the reasonable satisfaction of our passion toward vengeance does not single out punitive damages. More generally, it does not single out the special form of the remedial process in tort law. Once again, a victim may draw reasonable satisfaction from the suffering of the wrongdoer at the hands of the state and, for the same reason, reassert his moral worth in the face of the wrongdoer. Indeed, a leading voice among the separatists concedes this possibility, defending the role of punitive damages (over criminal law) on grounds of effective institutional design—that is, that punitive damages better satisfy victims’ vengeful inclinations than the criminal process usually does.

131 The notion of third-party revenge appears in the Book of Psalms in several different places. For instance, “The righteous man will rejoice because he saw revenge; he will bathe his feet in the blood of the wicked.” Psalms 58:11. Of course, the revenge seen by the righteous man is the doing of God. Furthermore, Christian theology features a third-party revenge. A familiar expression from Romans 12:19 reads:

Dearly beloved, avenge not yourselves, but rather give place unto wrath: for it is written, Vengeance is mine; I will repay, saith the Lord.

132 The proverb is cited, for example, in 2 THE GODFATHER (Paramount Pictures 1974); 1 KILL BILL (Miramax Films 2003).
133 I say reasonable satisfaction (rather than satisfaction) because no proponent of the revenge-based account of punitive damages urges for the full satisfaction of the desire for revenge and vindication. I leave open the (very troubling) question of whether this sort of satisfaction is reasonable for the law to sustain at all.
134 Colby, supra note 105, at 443-44 (“as a functional matter, the criminal law often does not adequately substitute for private revenge”). Colby adds another reason for preferring punitive damages over criminal law:

The law cannot simultaneously defend retributive criminal justice against charges that it is nothing more than glorified on the ground that it in fact serves a very different purpose, while at the same time dismissing the need
punitive damages. For it settles on the proposition that punitive damages take the form of private law, rather than the form of criminal law, because the latter often does a poor job of vindicating the moral worth of victims, but not because the former is required by the nature of the wrong in question. Tort law is, once again, a mere legal technology, only in the case of punitive damages the technology in question might be an illegitimate one.

To complicate matters even more, the insistence of separatists on tort law being the appropriate private avenue of seeking revenge and vindication may reach another, freestanding difficulty. Setting to one side the private character of revenge and vindication, the remedial process in tort law is structured such that the damages are allocated, if at all, in one direction only—from the wrongdoer to the victim only. The satisfaction of the victim’s desire for revenge may (at best) explain why punitive damages are exacted from the wrongdoer. That is, vengeance seeks the suffering of the wrongdoer in the form of diminishing her wealth. Vengeance, however, says absolutely nothing about the additional feature of punitive damages—that of allocating the damages to the victim, and him only. As one commentator wonders, “why should a plaintiff, who has no particular entitlement to [the punitive] damages, receive any—much less all—of them?” Indeed, it is one thing for a victim to gain satisfaction from the suffering of another (and, thus, to cool down his revenge-driven desires); quite another to benefit therefrom as though the damages are a windfall to him.

Hence, not only do the separatists fail to make the necessary connection between satisfying the natural urge for revenge and the private law form of tort law in which this urge is said to lie at the core, but their idea of punitive damages cannot make sense of a defining feature of this form; namely, the entitlement of the victim to seize the damages in their entirety. In the end, the puzzle of punitive damages remains unsettled, urging

for punitive damages on the ground that the criminal law adequately serves the purpose of facilitating revenge.

Id. at 443.

That said, I fail to see why criminal law must choose from either retributive justice or revenge. It seems to me that both can be pursued by criminal law, and that therefore neither of them crowds out the other.

135 See also Helmut Koziol, Punitive Damages—A European Perspective, 68 L.A. L. REV. 741, 756 (2008) (noting that “Colby does not give convincing reasons why punitive damages should be given to the victim”).

136 Sharkey, supra note 113, at 391.

137 See Ripstein, supra note 5, at 154 n.42 (observing that “the injured party is not entitled to the benefit received [through punitive damages]”); Weinrib, supra note 23, at 135 n.25 (“under corrective justice damages are compensatory, not punitive”); Weinrib, Punishment and Disgorgement, supra note 100, at 86 (“damages that are the vehicle of punishment are a windfall to the plaintiff because they do not represent anything that the plaintiff has been wrongfully deprived of”).

138 I emphasize that the entire amount of (punitive) damages are, indeed, collected and held by the victim to forestall the following argument possibly made by the instrumental approach to punitive damages. According to this approach (as exemplified by the law and economic argument for an optimal division of enforcement labor between tort and criminal law), the victim should receive a portion of the damages only, representing a premium due to his punitive initiative. The rest of the damages award should then be given to the true beneficiary of the punishment—society as a whole. Again, tort law does not entertain this thought, awarding the entirety of the damages to the victim. Thus, there is no conceptual room for an
for an adequate explanation of the authority vested in private individuals to inflict punishment on their fellow citizens and, moreover, to hold onto the punishment’s economic value.

D. An Outline of a Solution: The Place of Punishment in Reestablishing Respectful Recognition

I shall begin my stylized account where both rejoinders and separatists have failed to make sense of a core doctrinal detail concerning punitive damages, namely, the distinction between torts that allow their victims to seek punitive punishments and those (such as ordinary negligence) that do not. Both economic and revenge-based conceptions of punitive damages, to repeat, lack the normative materials to explain why punitive damages are typically sought and awarded only in cases involving “serious misconduct with a bad intent or bad state of mind such as malice.” This difficulty brings me back to the ideal of respectful recognition with which my account of the remedial process in tort law begins.

As I characterized it above, the reestablishment of respectful recognition is a process picked out by the question of what ‘acknowledging’ requires in the case at hand. Normally, I suggested, the engagement between the wrongdoer and victim involving the making of the victim whole again engenders the required acknowledging. However, committing a tort with a ‘bad intent or bad state of mind’ is importantly different than committing the paradigmatic tort of negligence. This difference, moreover, may render plausible, conceptually speaking, a more extravagant mode of acknowledging, and thus of reestablishing respectful recognition.

Indeed, persons may fail to attend to the demands placed on them by the legitimate intentions and activities of others in a rather unsurprising, though harmful fashion—say, a momentary lapse of care whereby a motorists takes her eyes off the road for just two seconds. This ordinary negligence case, nonetheless, represents a failure on the part of the carer to respect and recognize the point of view of another. Accordingly, it would be apt to cast this sort of shortcoming in the modest terms of a failure to acknowledge the claims of others to be respected and recognized in ways specified by tort law.

But although this shortcoming figures prominently in the contemporary practice of torts, persons can and sometimes do violate respectful recognition in yet another, more instrumental gambit on the part of the separatists in their effort to explain away that which they do not explain (i.e., downplaying the doctrinal importance of the victim’s entitlement to collect and hold the entire damages awarded).

139 DOBBS, supra note 124, at 1062.
140 Of course, there may be extralegal modes of acknowledging appropriate, and perhaps even required, in this case in addition to compensation (such as, in particular, apology).
141 Some (e.g., Jeremy Waldron, Moments of Carelessness and Massive Loss, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 390 (David G. Owen ed., 1995)) may even deny the aptness of attributing a moral failure to ordinary negligence such as a momentary lapse of care. It is beyond the purpose of the present elaboration of my argument to explain why the denial, in my view, is mistaken.
dramatic sense. Persons may deliberately form and execute a course of action that calls for the failure of the intentions formed and actions pursued by others. Thus acting, wrongdoers are not just susceptible to criticism for failing to acknowledge—to respect and recognize—the point of view of others. Their shortcomings, unlike a failure to acknowledge others’ claims simpliciter, reflects the blatant rejection of the claims others placed on them, claims to be respected and recognized as persons possessing their own distinctive subjectivities or points of view with which they negotiate their practical lives.\textsuperscript{142}

In an earlier stage of the argument I have shown that making the victim whole is the mode of acknowledgment required to reestablish respectful recognition through tort law. This mode of acknowledgment, I have argued, is indeed appropriate in cases involving a failure to acknowledge the importance of treating persons with respect and recognition. Now I shall qualify my observation, arguing that it may, nonetheless, fall short of reestablishing respectful recognition insofar as the tort in question expresses the dismissal of the victim being a freestanding constraint on the practical affairs of the wrongdoer.

To fix ideas, consider a leading English case, *Cassel & Co. v. Broome.*\textsuperscript{143} The defendant, a publisher, set out to publish a libelous book, intending it to generate tort litigation that would, in turn, boost sales. Knowing the defamatory character of the book in advance, the defendant rejected, rather than just failed to acknowledge, the tort requirement to take the plaintiff as a freestanding source of claims (for respect and recognition) on her (the defendant’s) conduct. Making the plaintiff whole, the ordinary remedial process needed to reestablish respectful recognition, proves flatly inadequate. This is because this mode of acknowledging merely reinforces the disrespect accorded the victim by the initial decision knowingly to publish a libelous book. Indeed, for a rational publisher (i.e., motivated solely by cost-benefit analysis), compensatory damages just are the marketing cost of the forthcoming book. Accordingly, the person to whom these damages are due is no more than a factor of production—more specifically, a resource involuntarily enlisted in the service of making the product.\textsuperscript{144}

\textsuperscript{142} As Jean-Jacques Rousseau has hypothesized in this regard, since an early stage in the natural development of social life, people have incurred a first duty of civility, whose content commended not to engage in the kind of conduct associated with the rejection of others’ legitimate claims to be treated with respect and recognition. See *JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND THE FOUNDATIONS OF INEQUALITY AMONG MEN* 166 (Victor Gourevitch ed. & trans., Cambridge UP 1997) (1754). As he notes, “every intentional wrong became an outrage, because together with the hurt which might result from the injury, the offended party saw an insult to his person which was often more unbearable than the hurt itself.” \textit{Id.}

Certainly, rejecting the legitimate claims of another person for respect and recognition also amounts to a denial of the rightful, public order. See Weinrib, *Punishment and Disgorgement,* supra note 100, at 87 (2003). Weinrib observes that in cases typically meriting punitive damages, the wrongdoer rejects “the very idea that rights govern the interaction of the parties” and he goes on to conclude that thus rejection violates “the regime of rights more generally.” \textit{Id.}


\textsuperscript{144} Another, more familiar though abstract way of putting this point is to say that the publisher has violated the second Categorical Imperative, in Kant’s words, to “[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same
making the victim whole amounts, with Marc Galanter and David Luban, to treating the victim as “a mere cost of doing business.” In the case under consideration, rather than reestablishing respect for the point of view of the plaintiff, stand-alone compensatory damages foster the alienation characteristic of the initial rejection of the plaintiff’s freestanding personality. Punitive damages, therefore, represent a super-compensatory, and thus punitive, response to the problem of reestablishing respectful recognition in the face of this attitude on the part of the wrongdoer. Indeed, insofar as the engagement-based remedial process between victim and wrongdoer aspires to turn the former from a mere factor of production (in the latter’s service) into a free and equal agent meriting, by virtue of being a person, the sort of respectful recognition mandated by tort law, imposing an additional cost on the wrongdoer owed to the victim becomes appropriate. Without which, i.e., without going beyond strict compensatory damages, the initial rejection of the constraints placed on the wrongdoer by the victim (i.e., his course of action) may still remain an obstacle to the elimination of alienation and thus to the reestablishment of respectful recognition. This way of reconstructing the doctrine of punitive damages, while provisional and underdeveloped, can nevertheless point to the right form of the solution to the problem of rendering intelligible tort law’s embrace of punitive damages.

Indeed, against this backdrop, the puzzle as to why punitive damages take the form of private law could be put to rest. The punishment is narrowly tailored to the reestablishment of respectful recognition between victim and wrongdoer, to the exclusion of the rest of the world. As mentioned above, the remedial engagement, because it requires the wrongdoer to take the intentions of the victim (to be treated with respectful recognition) as guide to her conduct, generates an intrinsically valuable relation based on respect for persons as such—that is, as sources of claims independent of faith, social rank, tribe affiliation, or any other contingent fact about them and their well-being. There may be other people than the tort victim (including society at large) holding legitimate claims against the wrongdoer for the same blameworthy conduct and its impermissible consequences. Responding to these claims through the institution of criminal law may well be warranted, at least in some of the cases where punitive damages are awarded as a matter of tort law. But thus responding cannot be grounded in, nor can it supplant, the ideal (of reestablishing respectful recognition) immanent in the remedial interaction time as an end.” IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 429 (H.J. Paton trans., Harper & Row 1964) (1785) (emphasis omitted). See also Weinrib, Punishment and Disgorgement, supra note 100, at 88 (“The wrongdoer [in cases meriting punitive damages] deals with the victim not as a locus of self-determining freedom, but as a thing whose person or property the wrongdoer can treat as his or her own”).

Marc Galanter and David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 AMER. U. L. REV. 1393, 1430 (1993). See also RIPSTEIN, supra note 5, at 152 (noting that “without [punitive damages], the wrongdoer would have succeeded in treating the other party’s rights as part of the cost of pursuing his or her own ends”).

It is important to note that the punitive remedy discussed in the main text is not reducible to the remedy (grounded in unjust enrichment law) often called disgorgement of wrong-based gains. This is because the wrong warranting punitive damages, as I argue in the main text, lies at the rejection of the legitimate claims to be respected and recognized as a free and equal agent. Whether or not this wrong happens to be economically beneficial for the tortfeasor is not a defining feature of the wrong in question, but rather a contingent upshot thereof. Accordingly, punitive damages can be awarded (for reasons I develop in the main text), regardless of whether the defendant gained (or sought to gain) from the tort.
characteristic of tort law. Thus vesting the legal authority to exact super-compensatory measure of damages—“a right to be punitive”—in the tort victim may not only serve either individualistic or collective masters (such as satisfying the victim’s desire for revenge or the optimal division of institutional labor, respectively), but can also be seen as a distinctive aspect of engendering the solidaristic ideal that underlies tort remedy and law, more generally.

The account I have outlined in these pages has set out to establish the connection between, on the one hand, the special morality of the remedial duty and process in tort law and, on the other, punitive damages. The puzzle of punitive damages has naturally and justly earned most of my attention. However, in addition to dissolving the puzzle plaguing punitive damages, this account can illuminate concrete doctrinal questions pertaining to tort law’s punitive damages. I shall only mention two such illustrations, reserving the complete elaboration of my account for another occasion.

The first doctrinal question has already been introduced from the outset: why does the law of torts restrict awards of punitive damages to certain, ‘serious’ torts only? As the United States Supreme Court has recently observed, “[t]he prevailing rule in American courts… limits punitive damages to cases of … enormity, where a defendant’s conduct is outrageous, … owing to gross negligence, willful wanton, and reckless indifference for the rights of others, or behavior even more deplorable.”

Mentioned above, accounts of punitive damages that emphasize efficiency (in criminal law enforcement and in promoting deterrence) or revenge must incorporate foreign normative materials into their theories in order to explain the doctrinal confinement of punitive damages. By contrast, I repeat, the ideal of reestablishing respectful recognition through the remedial interaction in tort law underwrites the distinction between simple failure to acknowledge the claims others placed on the wrongdoer and an outright rejection of such claims. This distinction, and the ideal of respectful recognition from which it originates, provides principled foundations, internal to the proposed account, for the doctrinal distinction between torts (such as ordinary negligence) that do not qualify for punitive damages award and torts (such as a deliberate trespass to the property of another) that do.

A second doctrinal question relates to the distinction between the plaintiff-victim and other people who may have been injured or offended by the tortious conduct of the defendant-wrongdoer. May punitive damages be awarded so as to punish the defendant for harms caused to victims other than the plaintiff or, alternatively, must they be awarded by reference to the plaintiff’s harm only? The historical development of

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147 Zipursky, supra note 104, at 151.
148 Exxon Shipping Co, 128 S.Ct. at 2621 (internal citations and quotations omitted).
149 See supra texts accompanying notes 123-24, 129, respectively.
150 “Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence.” Restatement (Second) of Torts §908 cmt. b (1979).
151 See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (awarding punitive damages for trespass against the plaintiffs’ land after repeating warnings not to do so).
152 There is another question that I shall set aside in the present analysis: attributing evidentiary role to harms befallen nonparties. Showing harms to others (i.e., nonparties) as a result of the conduct for which a particular victim sues the defendant is permissible insofar as it helps to expose the reprehensibility of the
punitive damages is subject to disagreement among scholars of punitive damages, featuring cases that prefer one alternative over the other, and vice versa. The Supreme Court of the United States, however, has recently made clear that harm to nonparties must be excluded from the punitive damages awarded to the plaintiff-victim. This ruling is grounded in the constitutional Due Process Clause of the Fourteenth Amendment. Accordingly, punishing the defendant for harms caused to nonparties violates the constitutional norm against the taking of property (of the defendant) without due process of law. The Williams court reasons that punishing the defendant for harms caused to nonparties raises obvious and serious risks (among other things) of “arbitrariness” and “unfairness.” This is because the defendant cannot present her defense against nonparties to the legal proceedings against her, the extent of these victims are uncertain, and so is the nature of their injuries.

Since nonparties remain outside the scope of punitive damages as a matter of constitutional law, it is important to figure out whether tort law itself can map onto this supreme law. For if it cannot, if it does not cohere with such elementary and universal legal principles against arbitrariness and unfairness, the doctrine of punitive damages becomes unattractive and, indeed, unwarranted. That is to say, the notion of a doctrine that, due to its arbitrary and unfair nature, must be tamed by constitutional provisions in order to occupy a legitimate place in the legal order renders suspicious the place of this doctrine within a liberal and democratic society. Indeed, the worry of punitive damages being arbitrary and unfair may surely be accounted for by norms of constitutional law, but the very worry and the shadow it casts over this doctrine is as broad and deep as the legal commitment to distinguish itself from the rule of brute force. For this reason, a reconstruction of punitive damages must aspire to show why the constitutional limitation on the punitive award is also required by the immanent logic of tort law, in general, and punitive damages in particular. Thus the doctrinal burden is to show that restricting the defendant’s conduct (rather than fixing the punitive award itself). See Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007) (allowing for evidence of actual harm to nonparties to be considered for the purpose of determining the reprehensibility of the wrongdoer’s conduct). But see Philip Morris USA, 549 U.S. at 360-62, 363-64 (Stevens J. and Ginsburg J., separately, dissenting) (casting doubts over the plausibility of the distinction between the impermissibility of fixing the punitive award by reference to nonparties and the permissibility of determining the reprehensibility of the defendant’s conduct partly against the backdrop of injuries to nonparties).

Cases favoring the consideration of nonparties’ injuries are documented in Sebok, What did Punitive Damages Do?, supra note 112, 185-90. The opposing view is represented in cases cited in Thomas B. Colby, Beyond the Multiple Punishment Problem: Punitive Punishment for Individual, Private Wrongs, 87 MINN. L. REV. 583, 614-29 (2003).
application of punitive damages to the punishment of the plaintiff-victim (to the exclusion of nonparties victims) is no mere limitation on the otherwise intolerably arbitrary doctrine of punitive damages, but rather a feature of the doctrine itself. In other words, to overcome the charges of arbitrariness and unfairness, a successful account of punitive damages must explain the line drawn between plaintiff and other, nonparties-victims of the same tort, and provide this explanation based on the normative underpinnings of tort law and remedy (rather than on external norms such as constitutional law alone).

The articulation of this line has proved difficult for both the economic analysis of punitive damages and revenge-based accounts. The former, because it seeks the promotion of maximal cost-internalization on the part of wrongdoers, has a reason to resist this line. After all, limiting the class of victims distorts the structure of incentives toward cost-internalization because it renders irrelevant substantial portions of the actual costs imposed by the wrongdoer on society (nonparties included).

Revenge-based accounts would prefer to draw the line between the two classes of victim in question according to the law’s interest in satisfying the victim’s desire for revenge. As I have argued above, it is an open question (and one that plagues the account of punitive damages as a form of civilized revenge) whether thus satisfying vengeful desires must take the form of private law. Indeed, there is no a-priori reason to dismiss the possibility that nonparties might draw satisfaction from the punishment imposed, partly on their own behalf, on the defendant-wrongdoer at the hands of the plaintiff-victim.

In contrast, by emphasizing the intrinsic value of engaging one another qua plaintiff-victim and defendant-wrongdoer in the remedial process characteristic of tort law, the account that I prefer offers a precise demarcation of the line drawn between parties and nonparties. Indeed, nonparties by definition remain disengaged from the wrongdoer; the only intentions the defendant-wrongdoer is required to respect and recognize through the remedial process are those of the plaintiff-victim whose legal power to exact punitive damages from the former is a necessary condition for the possibility of reestablishing respectful recognition. Accordingly, nonparties are alien to the relations between tortfeasors and tortvictims. There is nothing in the actual remedial process in tort law that could connect between the wrongdoer and the absolute passivity of nonparties, let alone give rise to relations susceptible to reestablishing respectful recognition —neither a remedial interaction nor even the award of punitive damages itself is available for them. In short, respectful recognition originates only insofar as the wrongdoer engages the victim as in the remedial process in tort law, in ways that embrace the intentions of the latter to be put in the position he should have been occupying post the wrong, save for the wrong, which is the solidaristic position characteristic of what I have called a relation of care.

Against this backdrop, the doctrine of punitive damages properly reconstructed tracks precisely the constitutional requirement never to impose punishments on the wrongdoer

\[160\]  See supra text accompanying notes 130-35.
for the harms caused victims other than the plaintiff. This requirement is not merely an external constraint imposed on the law of torts from above, as it were. It is, more importantly, a feature of the inner morality of the remedial process in tort law itself. The threat of arbitrariness and unfairness involved in punishing the wrongdoer for harms to nonparties is not, therefore, the upshot of the supposedly unrestrained doctrine of punitive damages, only of misunderstanding it.

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The doctrine of punitive damages is perhaps the best proving ground for the main theses of the present paper. To begin with, the doctrine stands in stark opposition to the conventional view, according to which the tort remedy seeks the restoration of the *status quo ante*. Moreover, the doctrine suffers its greatest threat from the consequences of the conventional view—the commitment to viewing tort law and remedy as a mere legal technology. This is because explaining the doctrine in technological terms (as a contingent instrument in the service of its master, whatever it is) cannot even begin to dissolve the puzzle of this doctrine; namely, how a legitimate punitive practice that takes the form of private law is possible. Out-sourcing the state’s distinctive authority associated with criminal law—bringing charges against suspects, proving their guilt before a court of law, imposing a punishment on them, and taking exclusive hold over the punishment’s monetary value (the damages themselves)—becomes suspiciously difficult to justify. Emphasizing the technological grounds upon which this doctrine of punitive damages lies only exacerbates matters, for there is no compelling reason to believe the desired technology attributed to punitive damages cannot be provided, even if less effectively so, by the state acting through its traditional punitive avenue.

In line with my arguments against the conventional view of the tort remedy and its impulse toward reducing torts into a mere legal technology, I have outlined an account of punitive damages that emphasizes the freestanding value underlying the remedial interaction in tort law. This value of respectful recognition, because it is generated exclusively and intrinsically by virtue of the engagement between plaintiff-victim and defendant-wrongdoer, explains why the supercompensatory measure of (punitive) damages is an extension of the ‘acknowledging’ appropriate for reestablishing respect and recognition between the parties in certain tort cases. Thus, the explanation of punitive damages—including, most importantly, the explanation of the peculiar, private law form it takes—reclaims the place of this doctrine within the greater normative architecture of tort law, properly (and sympathetically) reconstructed.
CONCLUSION

A tort remedy might serve any number of masters (ranging from justice to economic efficiency) by vindicating the status quo ante the tort. In these pages, I have developed a novel account of this remedy, maintaining that, apart from the contingent services it may render whatever masters, the remedial process in tort law is in itself a source of value. The connection that this process establishes between tortfeasors and victims generates a special form of attending to other persons as such—that is, as free and equal agents. The tort remedy, on this account, expresses the intrinsically social character of a legal practice (of torts) grounded in a liberal vision of coexisting with others in the world.

The account that I have sketched does not only provide a more sympathetic interpretation of the essential core of tort law than the one implicit in the conventional view and in the various approaches that dominate contemporary theoretical discourse. Rather, it also aspires to illuminate important questions in positive tort law and remedy. Pursuing this task piecemeal, I have deployed the ideal of re-establishing respectful recognition through the tort remedy in the service of explaining the mysterious category of punitive damages. Accordingly, I have shown that, in taking the form of private law, this category can make sense insofar as it is viewed as a conceptually plausible extension of the proposed ideal.