Tort Law Recovered? From Alan Brudner’s Revised Case for Tort Law to the Ethical Underpinnings of Liberal Democracy

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Abstract

Engaging with Alan Brudner’s case for tort law, this article explores how and why tort law is distinctly valuable to the liberal democratic state. It shows that, contrary to first impressions, Brudner’s arguments underplay tort law’s intrinsically relational character, its fundamental connection to the facilitation and stabilization of interpersonal obligations, including the social relations of which these form part. The article outlines an alternative understanding of tort law, foregrounding its specifically relational character. This understanding, it is contended, succeeds in uncovering tort law’s contribution to securing the social foundations of a legitimate political order.

I. Introduction

Tort law is distinctly valuable to the liberal democratic state. A society without tort law would lack one of the essential building blocks of a political system predicated on individual freedom and dignity. Those who favor the social distribution of harms over the tort system are mistaken, as are those who are merely indifferent between these alternatives. The disappearance of tort law would constitute a great loss, and its curtailment can only be justified on the most compelling grounds.

Alan Brudner pressed the case for tort law with great force and ingenuity in The Unity of the Common Law.1 In a chapter originally taking its title from this aim, he insisted that “the state cannot legitimately curtail the right to a tort action for the sake of a gilt-edged compensation scheme. Only the individual can surrender it” (209). This sentence still occupies pride of place at the culmination of his treatment of tort law in the recently published second edition of this work.2 Through careful engagement with the rich theo-

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2 Alan Brudner, The Unity of the Common Law 318 (with Jennifer M. Nadler) (2d rev. ed. 2013). All further page references appearing in parentheses in the main text are to this edition unless they are specifically stated to refer to the first edition.
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Critical literature that has appeared in the intervening years, Brudner continues to argue, as he now puts it, “for a duty on courts to administer a private-law (corrective justice) model of civil liability and a duty on legislatures to retain a private-law regime for rectifying wrongful losses alongside legislative schemes for no-fault social insurance” (272). Such a mixed system is to him “the logical completion of a teleological process of which trespass liability, nuisance liability, negligence liability and social insurance are stages” (272). In his view, social insurance has therefore not arrived to supplant tort law but to complete it, since, as he already put it in the original edition, “a dual system is … the goal of tort law’s development” (1st ed.: 209; 2d ed.: 318). The chapter’s new title, “Recovering Tort Law,” vividly emphasizes the centrality of this duality to Brudner’s vindication of tort law: it is what renders tort law both legitimate and necessary. In this he steers a novel course, away from both those who see tort law as no more than a primitive rival to social insurance and those who stress its divergence therefrom as a system uniquely concerned with correcting private wrongs.

This is a course well worth following—but only, I shall argue, in its general direction, not along Brudner’s precise route. In his chapter on tort law, as in the rest of the book, Brudner charts his way by following an understanding of private law that ultimately fails to identify private law’s distinctive contribution to what he calls “a political life sufficient for dignity” (2). In common with many others, he regards private law as the “law for (actually or hypothetically) dissociated agents” (7). It is this notion that underlies his contention that tort law is simultaneously insufficient and indispensable. Given this, Brudner argues, private law contributes only part of “the progressive embodiment in legal reality of the agent’s claim to be a self-actuating end, master of its body, its acquisitions, and the shape of its life” (2), but a part that provides essential “objective confirmation” of “the agent’s end-status” (315). On this account, legal principles treating individuals as dis-associated agents require supplementation, not abolition. The necessary supplement comes from public law, which “treats the parties’ bilateral relation as having no special salience, viewing it only as an occasion for furthering common ends … that separately link each party to the collective” (5). “Transactional law,” that is, “the law germane to the direct (juridical) interactions between individual agents” (4), must combine elements of both public and private law. This is presented as an instantiation of the general “interdependence of political community and the atomistic person,” which Brudner calls “dialogic community,” and which, he maintains, “delimits the scope of both private rights and political authority” (62). His insistence that “transactional law is a coherent unity of private right and certain … determinations of the public justice ordered to a common good” (31, emphasis added) means that for Brudner, unlike “the new breed of legal formalists,” an

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4 Brudner, supra note 2, at 30 (placing Ernest Weinrib, Peter Benson, Arthur Ripstein, and Martin Stone in this camp).
account of private law cannot stop with working out its character as the law for dissociated agents but must proceed to explore its relationship to public justice as equal parts of a greater whole.

There certainly is much truth in this conception of private law and Brudner employs it in ways that open up significant new pathways of understanding. It is nevertheless, I argue in this paper, ultimately profoundly distorting. Contrary to first impressions, it underplays private law’s intrinsically relational character, its fundamental connection to the facilitation and stabilization of interpersonal obligations, including the social relations of which these form part. Although there certainly is, as Brudner insists, “a solid basis in reality for the distinction (though not the bifurcation) between private and public law” (62), this does not lie in an understanding of private law as the law for dissociated agents. Neither private law’s distinctiveness nor its value can be grasped without greater attention to its inherent associative dimensions. Recovering the relational character of tort law, I intend to show, enables a more robust case to be made for it, one that makes good the claims in my opening paragraph.

II. Supplementing and Supplemented—or Supplanted?

“Social insurance,” Brudner argues, “when absolutized as the exclusive basis of individual rights to care, contradicts itself, or accomplishes the opposite of what it intends” (314). Although it “intends to actualize the end-status of agents by guaranteeing the material conditions of their autonomy,” “social insurance denies the end-status of the human being” (314). This is so because the harmed individual, though insured against his loss of welfare, “is deprived of a public authority’s recognition that the unilateral subordination of his security to another’s end is an infringement of his right” (315). In consequence: “The welfare at which hegemonic social insurance aims is no longer the welfare of free agents; it is the contentment of purely sentient creatures” (315). A successful tort claim, on the other hand, confers precisely such recognition, supplying exactly the “objective confirmation” of “the agent’s end-status” (315) that is lacking from social insurance.

In the common law tradition with its complex diversity of torts of different vintages, this is achieved in a complex way. But it is one in which, on Brudner’s telling, the various torts are all tied together as progressively better modes of vindicating “persons as morally self-sufficient ends presiding over inviolable spheres of sovereignty” (308). Even negligence law, which, unlike trespass and nuisance, does not restrict the notion of a wrong to invasions of spheres of sovereignty but “grasps a bond of mutual care between free agents as the ground of their objectively realized worth,” still “enforces rights to care only within limits consistent with” this “atomistic” view of persons (308). It is this feature of tort law that contrasts with social insurance’s “denying private boundaries around private selves” (314), and thus ultimately explains tort law’s necessary presence in a “pluralistic law dealing with human losses” (317). Pluralistic, because though necessary to the individual’s quest for dignity, tort law’s vindication of “atomistic free will” (315) is unable to bring about this end on its own. The reason for this is that “the social basis of individual worth belies the moral self-
sufficiency of the person” (308) to which even negligence law continues to cling. In the end, “the individual’s end-status presupposes a social cooperative in which the right to care is recognized and given effective legal force [i.e., social insurance]; the social cooperative’s end-status presupposes the independent worth of the individual whose end it purports to be [i.e., tort law]” (315). In this ideal pluralistic system “each [component] rules within limits consistent with the preservation of the others—limits made coherent by the primacy of the whole with respect to its constituent parts” (317).

It is not obvious, however, that this makes out a case for tort law. Granted that social insurance pay-outs do not involve recognition by a public authority that someone’s right has been infringed, and granted also that a legal system lacking such “objective confirmation” of the “agent’s end status” is deficient, why is tort law needed to fill this hole? It certainly can do so; Brudner is right in highlighting its character as a system providing a harmed individual with “the institutional means by which to vindicate his self-worth against acts that contradict it” (315). But it does not appear necessary to that end. Brudner describes a world without tort law as one in which “[t]here is only a material loss to be compensated and a breach of a safety regulation to be penalized for deterrence” (314). Yet surely confirmation of the end-status of agents—affirmation of the intrinsic worth of individual persons—is a task also carried out by any adequate system of criminal law. Notwithstanding the rich variety of perspectives evident in contemporary debates on the philosophy of criminal law, there is also widespread agreement that it is in some way or other at least concerned with affirming the intrinsic worth of persons. Indeed, Brudner’s own theory of criminal law (which, in one of the most significant revisions of The Unity of the Common Law, is now no longer part of that work) anchors the criminal law’s justification in “the ethical community sufficient for dignity.” Viewed in this way, criminal law no less than tort law revolves around the mutual accountability and respect that are central to “dialogic community” (176-78). It follows that the displacement of tort liability by a system of social insurance need not result in “the depersonalization of the human individual” (315); all that is needed is an accompanying system of criminal law. True, tort law gives harmed individuals greater control over the official process than criminal procedure typically does, something hinted at by Brudner’s equation of “the right to vindicate self-worth” with the right to sue (317). It thus arguably enhances the scope for asserting one’s individual agency. But this is a difference in degree rather than in kind and is all too easily exaggerated. Disregarding and disempowering the victims of crime is today regarded as a pathological feature of a criminal process, not its defining feature.

So, if a tort system is needed alongside social insurance and criminal law, this must be for a reason other than—or additional to—its role in affirming the intrinsic worth of persons. One way to start looking for this is to consider whether there are other ways in which tort law and criminal law might diverge. A possibility raised by Stephen Darwall is

5 An excellent overview is provided by the essays collected in Liberal Criminal Theory: Essays for Andreas von Hirsch (A.P. Simester et al. eds., 2014).
that they concern different types of obligation. Darwall distinguishes between what he calls “obligation period” and “bipolar obligation”:

Someone is morally obligated to do something period just in case her doing it is something that anyone (including she) justifiably demands of her as a representative person. And someone is obligated to another to do something just in case the obligee has the individual discretionary authority to make demands of the obligor as the obligee and to hold the obligor personally accountable. Moral obligations period conceptually implicate representative authority, whereas bipolar obligations involve the obligee’s individual authority.7

According to Darwall, criminal law is concerned with obligations period and tort law with bipolar obligations. The same actions may be proscribed by criminal law and tort law, “but whereas what is at issue in criminal punishment is … a form of holding responsible that is carried out by duly constituted legal authorities (in the name of the moral community from whom they inherit their authority), what is involved in torts is compensation, that is, something the victim has a distinctive right to claim or not at his discretion.”8 There is plainly much common ground between this description of tort law and its characterization by many tort theorists, including Brudner, as a mode of corrective justice.9 Darwall’s elaboration of the distinction is therefore worth exploring.

Darwall emphasizes tort law’s concern with bipolar obligations as part of a response to Goldberg and Zipursky’s civil recourse theory of tort law.10 Arguing that such obligations involve mutual accountability, Darwall contends that civil recourse theory should be purged of notions of retaliation and vengeance.11 In doing so, Darwall, like Brudner, insists that tort law serves to “enable individuals to hold their victimizers answerable by respectfully demanding respect.”12 Securing respect is, as was pointed out above, a feature that tort law shares with criminal law. But Darwall’s description of tort law also brings to light a difference from criminal law. Being concerned with bipolar obligations, tort law focuses on a distinctive relationship that separates out the relevant relations between the parties from the relations which exist among persons (including these two) by virtue of their common membership of a community. Certainly, tort law, like criminal law, holds a defendant accountable “according to legal standards that have a general application to a community of mutually accountable equals.”13 The difference thus

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8 Id. at 177-78; see also id. at 193.
9 For Brudner’s description, see Brudner, supra note 2, at 274, 303-07. Prominent further examples are Jules Coleman, Risks and Wrongs (1992); Weinrib, supra note 3; Ernest Weinrib, Corrective Justice (2012); Benson, supra note 3; John Gardner, What Is Tort Law For? Part I: The Place of Corrective Justice, 30 Law & Phil. 1 (2011).
11 See Stephen Darwall & Julian Darwall, Civil Recourse as Mutual Accountability, in Darwall, supra note 7, at 179.
12 Id. at 195-96.
13 Id. at 196.
does not lie in the source of the standards; the norms of tort law are no less legal, that is, social, than criminal law norms. Rather, what distinguishes tort law is that its norms feature relationships in which one person is obligated to another in a way that grants the obligee “individual discretionary authority to make demands of the obligor … and to hold the obligor personally accountable” whereas the obligations period that feature in criminal law are ones “that anyone (including she) justifiably demands of her as a representative person.”

Whereas criminal law involves mutual accountability and respect among equal persons generally in a moral community, tort law concerns mutual accountability and respect among persons within particular relationships. We might express this by saying that tort law is specifically relational.

This specifically relational character of tort law seems to me a more promising candidate for grounding the case for tort law’s intrinsic value than its connection with the affirmation of the victim’s separate personhood. It would be absent from a comprehensive socialization of losses even if the latter were to be supplemented by a system of criminal punishment. Admittedly, Brudner does paint tort law with a relational brush. His account of the tort of negligence—which he sees as a more highly evolved tort than trespass and nuisance—describes its origin as involving a breaching of the “privity barrier” (290). Negligence thus achieves what is still merely incipient in contract law, where “a relation of mutual benefaction has come to sight” but, because it is dependent on the parties’ choice, “the relationship is not yet an autonomous norm” (288). Thus he contends that once negligence liability develops, “we now have a notional relationship between agents so situated in relation to each other that they are, as thinking beings, deemed to have the other in mind as likely to be affected by their acts or omissions” (291). And so, what distinguishes negligence as a tort in Brudner’s account is that it grounds legally recognizable rights to another’s care in “a relationship of mutual regard between selves that are conscious of themselves as ends” (292), “a dialogic relationship reconciling selfishness and altruism” (303). This feature of negligence liability is then used to explicate the tests for breach of duty, for when a duty of care is owed, and for remoteness, as well as the treatment of pure economic loss, the requirement of a causal link between the plaintiff’s injury and the defendant’s loss, and the bilateral, corrective, character of the remedy (291-307).

Brudner therefore rejects an approach which “envisages a civil suit for negligence as the private enforcement for reward of a duty owed the collectivity” (297). In a passage that prefigures Darwall’s comparison of tort law and criminal law in all but the precise words used, Brudner writes, that:

> From the fact that one has committed an offense against the public welfare it follows that one must pay the penalty for the offence; it does not follow that one has a duty to compensate an injured person. The latter duty follows only from a civil duty of care correlative to the injured party’s right to the injurer’s solictude for her (297; 1st ed. 193).

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14 Darwall, supra note 7, at xiii (emphasis added); see also Darwall & Darwall, supra note 11.
But here appearances are deceptive. The relationship between injured and injurer that Brudner regards as essential for the existence of a tort duty turns out to be nothing more than the general relationship of mutual accountability and respect among equal persons: he does not require a special or particular relationship. This already comes into view in his description of the right given effect in the tort of negligence as a “right to a stranger’s care” (303, emphasis added), where care requires merely that the obligee avoids “exceeding a threshold of reasonable self-preference” (294). Although this does treat the tort of negligence as turning on a right generated by a relationship of reciprocity, the relationship in question is one that exists among all members of a moral community by virtue of their equal personhood. No relationship beyond equal membership of the moral community is required to render it wrongful to cross the “threshold of reasonable self-preference” in our dealings with others: the quoted phrase is equally apt to describing the duties of social, or distributive, justice. And so in Brudner’s account negligence becomes just one of the many ways in which we breach a duty we owe to all. It is simply a localized breach of a universal duty.

Revealingly, Brudner ends up treating the relationship of injurer and injured required by negligence law as contingent rather than necessary for the existence of the right to care. In his view, “while negligence law affirms a right independent of contract to mutual care, it actualizes this right only in the limited context of transactions between atomistic agents” (307). This indicates that the ultimate foundations of the right to care lie outside the particular relationships negligence law might require and could be realized more effectively if liberated from such requirements. In Brudner’s own words:

If end-status is confirmed in a relationship of mutual concern and respect among agents, why limit the relationship to one among neighbouring solitudes? Why not extend it to include all cooperating members of a society ordered to the common welfare? The right to care would then be held, not against others severally, but against the social cooperative; and this right would be equally a duty to share the collective burden of actualizing positive rights to care (309).

Brudner asks these rhetorical questions as part of his explanation of how negligence comes to appear—also in his eyes—as a stage on the path to the development of social insurance, as occupying a merely “liminal position,” having no more than a “transitional character” (300). As he puts it: “Fully realizing the right to care nascent in negligence entails the overthrow of negligence law by social insurance” (308). And that is the crucial point. For Brudner, negligence law pursues the same ultimate objective as social insurance, plays the same social role, albeit less successfully. His account of the evolution of negligence law into social insurance shows that, for all the talk of relationship, it is not the particularity of the relation between the parties that in his eyes generates the tort duty of care but rather the equal moral status of abstract agents facing each other. In Brudner’s theory of tort, the bi-

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15 There are formulations in Brudner, supra note 2, that appear more demanding, at least at first sight. See id. at 292, 297, 307. But they all dissolve into this attenuated notion. See id. at 298, 305-07.
polarity of the obligation is accidental, contingent, dispensable—indeed a “constraint [that] is illogical” (308)—not, as is suggested by Darwall’s account, foundational.

This is not to overlook that Brudner does identify a service offered by tort law but not by social insurance. As noted above, his case for tort law turns on demonstrating that it involves an affirmation of individual dignity absent from insurance. The point is precisely that this is Brudner’s line of differentiation, for, as we also saw, the affirmation of dignity is a role that can equally well be played by criminal law. His depiction of the tort duty of care as constructed on the same moral foundations as social insurance, his decision not to root it in a bipolar relationship distinct from the multilateral cooperation underlying social insurance, leaves Brudner’s case for tort law dependent on a differentiation that is of limited significance, at least in contemporary legal systems, which invariably contain both criminal and civil liability systems.

III. Negligence and a Gap Between Theory and Practice

In founding tort law on the same “quest for dignity” by human beings he ascribes to social insurance (315), Brudner’s approach also ultimately fails to provide a robust account of central features of tort law. Take the concept of fault, or breach of a duty of care, in negligence law. Starting from the notion that “negligence law protects … a right to another’s affirmative care for the material conditions of one’s autonomy, for one’s health, bodily integrity, and wealth” (292-93)—but only to the extent that “each agent acknowledges the other’s liberty to act self-interestedly within bounds compatible with their equal security against harm” (294)—Brudner concludes that fault is to be “understood as exceeding a threshold of reasonable self-preference” (294), where reasonableness is determined by an objective standard rather than the defendant’s capacities. This is an elegant and illuminating account—but only as far as it goes, and the problem is that it stops short of clarifying the content of the objective standard. This is a large gap, for if we do not know its content, we cannot know which of two clashing parties’ self-preference is unreasonable or even how to determine that.

Take the case of Bolton v. Stone, which Brudner uses to illustrate his argument.16 Is the cricket club’s preference for continuing to play on a ground where balls will inevitably land in neighboring residents’ gardens unreasonable, or is it the neighbors who are unreasonable in preferring to be spared this experience? Brudner’s answer is that “as long as the present cost of the potential accident (that is, risk times seriousness) falls within the range each imposes on the other as an incident of everyday social interaction, each may pursue his ends without giving thought for the safety of others” (296). This indicates that the test for fault is whether a non-reciprocal risk was imposed. But this is not a feasible test, except by chance, at least not if we take “reciprocal” literally. It would be a workable test if people invariably imposed the same risks upon each other.

16 Bolton v. Stone, [1951] A.C. 850. The claimant, while standing outside her house, was struck by a cricket ball hit out of Cheetham Cricket Ground in Manchester; the defendants were members of the committee of the cricket club which had been using the ground since 1864.
so that we might compare the amount each imposes on the other. But they do not. Very often, perhaps typically, the position is as in *Bolton v. Stone*, where the risk imposed by the cricket club on its neighbors (injury and damage caused by cricket balls) is very different from that imposed by the neighbors on the cricket club (to cease using the cricket ground). Given this, it is just not possible to determine whether the cricket club imposed a non-reciprocal risk on the neighbors: which risk is greater than the other? Since neither can get what he wants without the other giving up its demand the risks imposed, in fact, seem fully reciprocal.

This conundrum is a product of Brudner’s attempt to develop the test for fault out of the equality of persons. His notion of fault is that of a violation of equality, more specifically, the entitlement to equal freedom and security. But equality, freedom, and security are abstract notions that fail to differentiate between the demands of the parties in a manner that would enable us to identify one as a wrongdoer and the other as victim. As long as the conflict in *Bolton v. Stone* is thought of (merely) as clashing demands for freedom and security between equals, there is no reason to resolve it in either party’s favor, for each is demanding—and refusing—the same as the other. The only way out of this is to replace Brudner’s breach of reciprocity test with an evaluative notion of reasonableness drawing on a criterion ranking one side’s expectation as more or less acceptable than the other’s. We certainly could ask whether the demand made by the cricket club on its neighbors is more or less acceptable than their demand on the cricket club. Arguably, this is what Lord Reid had in mind when he explained in this case that one had a duty to avoid imposing a “substantial risk” on one’s neighbor. What he actually said was that: “In my judgment, the test to be applied here is whether the risk of damage … was so small that a reasonable man in the position of the appellants … would have thought it right to refrain from taking steps to prevent the danger.”17 But to do so one has to abandon Brudner’s attempt to explain the fault test as turning on the reconciliation of the clashing equal autonomy interests of agents, for the acceptability of behavior can only be determined in a fully fleshed-out social context. That is, it requires one to see fault not as an abstract standard with a single aim which flattens out the differences between the rich variety of settings to which it applies, but as a concrete judgment always made in the context of a particular relationship and always attentive to the diversity of concerns relevant to that specific relationship. That the test for fault has a certain transcending structure, so clearly highlighted by Brudner, then appears to constrain its operation in the interest of individual autonomy, not to direct it towards this single end.

Similarly problematic is Brudner’s discussion of the test for determining to whom a duty of care is owed. Brudner rightly emphasizes the need for such a test in order to justify the injured person’s entitlement to compensation. He also correctly apprehends the relational character of such a test when he remarks that “a right to another’s care is the product of a relationship of mutual concern and respect” (297).

17 Id. at 867 (emphasis added).
However, his elaboration of this relationship again suffers from focusing on the abstract requirement of reciprocity resulting from the equality of persons rather than the concrete relationship arising in a particular setting. For Brudner, “my right to another’s care is mediated through a concept wherein the parties are so linked that one’s duty of care for the other is equally the other’s duty of care for the first” (298). Just such a concept, he claims, is to be found in the standard test, the neighbor principle, according to which a duty of care is owed to someone whom “a reasonably circumspect agent in the actor’s shoes would contemplate as likely to be injured by his activity” (298). For neighbors so defined are “locked in reciprocal embrace”—“an agent of ordinary circumspection cannot contemplate an actor’s neighbour without implicating the actor as the neighbour of the neighbour contemplated” (298).

The problem is that this does not mark out a specifically bilateral relationship (or multitudes of such relationships with many individual “neighbors”). It describes equally well the multilateral relationship that exists by virtue of someone’s membership of a community. Not only “neighbors,” but fellow citizens, too, are locked in such a reciprocal embrace, for the demands one makes on what is communal always affect others. That is, equality and reciprocity, and the notion of mutual concern and respect, are too abstract to distinguish the duties of care negligence law imposes specifically only to “neighbors” from the duties social (distributive) justice imposes among the generality of citizens. This is why Brudner, as pointed out previously, sees social insurance as a continuation of the core concerns of negligence law. To capture the specificity of the tort duty of care it is necessary to explain what distinguishes the relationship among “neighbors” from their relationship (as much with each other as with the rest of society) as citizens. This requires attention, not to abstract reciprocity among agents, but to the manner in which the concrete particularity of their relationship can give rise to a distinct duty owed only to each other.18

Brudner’s inability to account for the specificity of tort liability persists in his discussion of the primary remedy for negligence, the requirement that a tortfeasor pay his victim “a sum of money sufficient to restore the plaintiff (as far as money can) to the level of welfare he or she enjoyed prior to the wrongful transaction” (303). Noting that an adequate explanation thereof “must explain why vindicating the victim’s right to security requires a remedy moving from the harmdoer” (303), he argues that the payment of damages amounts to an “act of deference” (306) by the harmdoer to his victim. This argument turns on the account of negligence we encountered in his discussions of the duty of care and its breach, combined with a very specific understanding of the remedial character of damages. His description of negligence as “an infringement of a right to security against harm through an exercise of liberty that, imposing a nonreciprocal risk, cannot be recognized by the victim consistently with his equal end-status,” leads him to the view that “[t]he loss suffered is a demeaning of self that presupposes the self-elevation of the

18 To avoid misunderstanding, I should point out that their relationship need not be unique. Identical particular relationships may exist among many pairs of persons (e.g., all drivers and pedestrians) in which case the duty each owes only to the other is duplicated many times.
wrongdoer; and the self-elevation of the wrongdoer entails the demeaning of the victim” (305). Restoring “the reciprocity of respect and concern as between plaintiff and defendant” that the wrong denied, requires “the wrongdoer’s unilateral self-humbling before the plaintiff,” an “act of deference” (306). Payment of damages fits the bill because, “by restoring the victim to the level of welfare he enjoyed prior to the transaction that wrongfully set him back,” the “tortfeasor acknowledges” his “victim’s right to as much concern for his human welfare as is consistent with the equal liberty and security of both” (307). The idea is that the tortfeasor in making up the victim’s loss of welfare caused by his tort also makes up for his earlier tortious failure to display adequate concern for his victim’s welfare—the earlier denial of concern is nullified by now manifesting such concern. Neither an apology nor symbolic damages would suffice to express this concern, Brudner explains, since negligence law “embodies an explicit awareness that the agent’s end-status is real only in a recognized right to security for the material conditions of his freedom” (306). Because only damages reinstates the victim’s material resources, his welfare, it is the only remedy capable of nullifying the wrong.

This discussion certainly succeeds in explaining why negligence gives rise to a remedial bond between the tortfeasor and his victim and why the remedy sounds in money rather than words or symbols. But it cannot account for the remedy actually provided by the law. That remedy is one of compensatory damages, tracking, as Brudner acknowledges, the level of welfare enjoyed by the victim before the wrong—no more, no less. Brudner’s discussion of the wrong, however, points towards a remedy that would track a different index, one insensitive to whether the damages awarded over- or undercompensates the actual loss of welfare. If the wrong indeed consists in the infliction of a “dignitary loss” correlative to a “dignitary gain” (305) through the infringement of a right to security, and negligence law does reflect a “concrete conception of personal dignity” (306) that recognizes a “right to security for the material conditions of his freedom” (306, emphasis added), then negligence law would require a remedy reinstating the material conditions of freedom. Yet this outcome would only accidentally match the actual loss of welfare inflicted. If, for instance, the level of welfare enjoyed by the victim prior to the wrong exceeded what is needed to satisfy the material conditions of freedom, then his loss of welfare would exceed the impact on the material conditions of freedom possessed by him. Thus Brudner’s theory of negligence supports not the (merely) fully compensatory award of damages actually awarded by the law, but rather a remedy that would reinstate to the tort victim the material conditions of freedom enjoyed prior to the wrong.

There are admittedly sentences in the chapter under discussion that are worded broadly enough to leave open the possibility that the right in question is one to security of the existing level of welfare, but this shows at most that Brudner slips from one definition of the right to the other. It is clear that Brudner’s real commitment is to the notion of a right to security for the material conditions of freedom. He characterizes negligence law as instantiating the principle that “human beings are free to act self-interestedly up to a limit consistent with their equal security in the material conditions of autonomy” (290). More-
over, it is only this notion of the right that fits with his insistence that the “general nature of wrong … is the transgression of a boundary that reconciles the end-status of each with the realized end-status of all, the laying claim to more liberty with respect to another’s agency goods than the other can, consistently with his own realized end-status, recognize as valid” (289, emphasis original). For agents conscious of their equal end-status could not consistently with such status recognize a boundary restricting their own liberty with respect to another’s agency goods further than is required for the other’s freedom. To go beyond this, to restrict one’s actions also in respect of agency goods that are surplus to the other’s freedom, would amount to altruistic self-sacrifice rather than respectful reciprocity.19

There is a further, perhaps more fundamental, mismatch between Brudner’s explanation of the grounds of tort remedies and the remedies actually provided by the law. A legal system designed to safeguard persons’ “equal security in the material conditions of autonomy” (290) would not only on occasion award less than full compensation for loss of welfare, it would also sometimes award more than that—and indeed require imbalances in such security to be rectified even in the absence of any welfare deprivation. That is, consistent application of the principle Brudner attributes to negligence law would draw no distinction in principle between misfeasance and nonfeasance, acts and omissions, but would impose affirmative duties to act whenever self-interested failure to act would lessen another’s secure possession of the material conditions of autonomy. Indeed, Brudner writes that “negligence law … affirms a duty of affirmative care for agency goods, and nothing in the idea of this duty limits it to a negative one not to overstep a threshold of permissible risk creation” (309). But this is not the law; negligence law is decidedly and consistently less willing to award remedies for nonfeasance than for misfeasance.

Brudner is of course fully aware both of this implication of his theory and of negligence law’s actual approach. His solution to this apparent discrepancy between theory and practice is to attribute it to an incompleteness in negligence law, to what makes it merely liminal, an intermediate step on the way to a system of social insurance in which such imbalances would indeed be evened out: “Fully realizing the right to care nascent in negligence law entails the overthrow of negligence law by social insurance” (308). In fact, this is also how he responds to the mismatch we uncovered in previous paragraphs, for what is ultimately needed, he argues, is that the negligence measure of compensation be replaced by one in which “compensation now aims to secure the conditions of autonomy for the future, not to remove every trace of a deficit wrongfully suffered in the past” (312). However, it is not clear that this maneuver succeeds in overcoming these incongruities. It appears to resolve matters only in the way a tactical withdrawal avoids defeat. For one could as easily reply that these discrepancies, along with his response, show that his theory is not really a theory of tort law but of something else altogether.

Here it is vital to note that Brudner works with a very specific understanding of the theoretical enterprise. His work is expressly presented as Hegelian, “a way of studying

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19 Brudner rightly rejects such extreme altruism in his refutation of a regime of strict liability for harm. See Brudner, supra note 2, at 293-94.
Hegel as well as law” (62), and the development of an idea through thesis, antithesis and synthesis is central to Hegel’s dialectical method. As Brudner puts it, “the justification of Hegel’s thematic idea consists in depicting the logical movement of the normative ends by which jurists organize the legal system from within” (64). From this perspective, the dissolution of an idea (negligence law) in an overarching one (securing the conditions of autonomy) is not a weakness in a theory but an expected part of its unfolding. Moreover, his discussion of negligence law as part of a movement which “leads by logical steps to the idea of dialogic community” (64), finally realized in a dual system combining tort law and social insurance, does account for the central features of tort law highlighted in the preceding two paragraphs. In his explanation they are what enables tort to supplement social insurance, albeit as transitional aspects of an evolving practice.

This is not enough, however. As Brudner acknowledges, “[T]he criterion for the validity of our interpretation of Hegel is … whether it succeeds in rendering intelligible a sphere of life without doing violence to the independent point of view of its participants” (63). As he seeks to shed light on the practice of law rather than on its practitioners, Brudner must be taken to refer not to views actually held by lawyers and judges, individually or collectively, but rather to an objective point of view, the point of view implicit in the practices of the law. That means that the test is not whether some or even the majority of tort practitioners regard tort law as an incomplete expression of the ideals of social insurance, merely supplementing the latter by providing “institutional means by which to vindicate … [one’s] self-worth against acts that contradict it” (315), but whether such an understanding of tort law is reflected in its structures and concepts. In light of the continued centrality of both the full compensation of lost welfare to the measure of damages in negligence law and the distinction between misfeasance and nonfeasance, Brudner’s understanding is plainly not the only point of view implicit in the law. To the contrary, the prominence of these features in negligence law suggests that it has no truck with “a duty of affirmative care for the conditions of another’s autonomy” (307).

So, even someone who accepts Brudner’s Hegelian method need not follow him all the way to his conclusions regarding tort law generally and negligence law specifically. It remains open to demonstrate that there is a better understanding of their normative ends. This is of course just another way of saying that Brudner challenges theorists to formulate an understanding of the normative end of tort law that does not culminate in tort law’s dissolution. The next section takes up this challenge, and seeks to develop such an understanding on the basis of the sort of relational theory of tort law hinted at earlier. If this succeeds, we will have reason to react to the discrepancies between tort law and Brudner’s theory by discarding the theory rather than the features of tort law he treats as expendable.

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20 Brudner provides evidence of the existence of such views. See id. at 307-12.
IV. Towards a Relational Theory of Tort Law

Two deficiencies in Brudner’s account of tort law were highlighted thus far: it fails to take seriously the distinction between tort law and criminal law, and it fails to distinguish the duties individuals owe each other under tort law, as a matter of corrective justice, from those they owe each other as fellow citizens, as a matter of distributive social justice. These can be traced to a single cause already averted to. Despite his references to relationships, Brudner actually treats tort law as concerned not with Darwall’s “bipolar obligations” but with “obligations period.” Both of the functions Brudner attributes to tort law—officially recognizing individual persons as final ends and providing a certain level of security for welfare interests—spring from the duty to show “as much concern for … [another’s] welfare as is consistent with the equal liberty and security of both” (307). And this duty, which is simply the duty to display equal concern and respect for others, is a universal one. It is not subject to the obligee’s discretionary authority but can justifiably be demanded of the obligor by anyone, as a representative person. This is why the mapping out of these functions does not succeed in marking out tort law from areas of law concerned with public matters such as enabling duly constituted legal authorities to hold persons responsible in the name of the moral community from whom they obtain their authority and to ensure that all members of society are guaranteed “the material conditions of their autonomy” (314). Brudner’s elaboration of dialogic community shows convincingly why a legal system must pursue both functions, but it fails, for this reason, to make out a case for doing so by means of tort law. He ultimately fails to explain why we need a single body of law that unites the institutional affirmation of individual worth with the recognition of a relation of mutual care when these purposes can also be accomplished by the co-existence of distinct legal fields (criminal law and social insurance).

This is a productive failure, however, for it directs attention to a promising alternative. Brudner anchors tort liability in a single overarchingly ground of wrongfulness, writing that: “Trespass, nuisance, and negligence all instantiate this idea of wrong as a breach of mutual recognition” (289). It is the very generality of his wrongfulness criterion that disables him, as we saw in the previous section, from providing a robust support for negligence liability. And this provides a signpost to the alternative—a theory which anchors wrongfulness, “the common ground … of all liability in tort” (289), not—or at least not only—in a single, general, notion of wrongfulness, but in a mosaic of situation-specific rights/duties which arise from the particular concrete relationship of the relevant persons rather than a general over-arching principle.21

The general structure of the alternative I can here offer only in outline grows out of the distinction we encountered above between what Darwall calls “obligation period” and “bipolar obligation” and the light this sheds on the differentiation between criminal law and tort law. As we saw, Darwall suggests that what distinguishes tort law from crimi-

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21 “Not only” because the challenge to be met exists primarily in respect of negligence liability, so that we may leave open the possibility that Brudner’s approach might deal adequately with trespass and nuisance.
nal law, the other legal means for affirming the worth of individual persons, is that only tort law is concerned with enforcing bipolar obligations, i.e., with obligations which are correlative to a right by the obligee to “demand solicitude for her” so that “the obligee has the individual discretionary authority to make demands of the obligor as the obligee and to hold the obligor personally accountable.”22 The same can be said, I venture, of the relationship between tort law and such alternative mechanisms for securing the resources for autonomy as social insurance, or some other scheme of distributive justice.

If the criminal law is (understood as) a system in which designated institutions impose punishment in the name of all members of a moral community, and thus, as Darwall suggests, an institutionalization of “representative authority,” then a single overarching notion of wrongfulness may well be necessary. So understood, the criminal law’s concern, as Darwall points out, is with “obligations period,” the duties owed by all to all as representative persons or members of the moral community. From this it follows that the criminal law’s notion of wrongfulness—which is simply the criterion for identifying those obligations—must be capable of identifying duties that can be owed by anyone to anyone. As the existence of these obligations is independent of individual identities, it must be impersonal, neutral both among obligors and among obligees. This requires a single and overarching notion of wrongfulness that does not take account of the concrete differences between specific individuals and the circumstances in which they might find themselves.

Tort law, however, does not sanction transgressors in the name of the moral community but enables individuals to claim and to obtain compensation specifically from those who wronged them. In Darwall’s terms it institutionalizes “personal authority,” giving legal support to the vindication of “bipolar obligations” owed by one particular individual to another. Such obligations can be impersonal in the sense of being capable of being owed by anyone to anyone—e.g., the obligation to respect another’s property—but, in contrast to “obligations period,” they need not be. As it is owed by one specific individual to another, a bipolar obligation can be unique to the persons concerned, excluding all others as possible obligors and obligees.23 Promising illustrates this, as does the inducement of reliance. For this reason tort law’s criterion for identifying the obligations it is concerned with, its notion of wrongfulness, cannot consist of a single overarching test but must incorporate attention to the varying concrete relationship-specific factors that can give rise to bipolar obligations.24

22 Darwall, supra note 7.
23 Darwall & Darwall, supra note 11, at 184, write that “violations of bipolar obligations not only wrong the obligee; they are also wrong period” (emphasis in original). It seems to me that, if true, this would not be so for the reason that bipolar obligations are in any sense a subspecies of obligations period, but rather because bipolar obligations give rise to obligations period. It may be necessary to distinguish these obligations period from those that are “pure,” as it is doubtful that they will always be suitable for enforcement through criminal sanctions.
24 The “pockets” approach to liability for pure economic loss criticized by Jane Stapleton, Duty of Care and Economic Loss: A Wider Agenda, 107 Law Q. Rev. 249 (1991), is therefore not problematic as such. What actually matters is whether the appropriate considerations are deployed in each pocket. For discussions relevant to the latter point, see Paula Gilliker, Revisiting Pure Economic Loss: Lessons to Be Learnt from
Precisely this can be seen in the cases. It is, as Bru dner rightly insists, essential to the justification of liability for negligence that a duty of care is not, as Justice Andrews claimed in *Palsgraf v. Long Island Railroad Co.*, 25 owed “to the public at large,” but only to someone who, in Justice Cardozo’s words in this case, is “within the range of apprehension” as likely to be injured by the defendant’s act (297-98). Cardozo’s requirement locks injurer and injured “in reciprocal embrace”: “whatever burden of duty it lays on one neighbour it also lays on another” (298). This ensures that the “right to another’s care is the product of a relationship of mutual concern and respect” (297). But the subsequent history of the tort of negligence makes it clear that reasonable foreseeability of harm is not enough for the existence of a duty of care. In no jurisdiction is all reasonably foreseeable harm recoverable; everywhere one finds restrictions on the recovery of compensation for some undoubtedly foreseeable harms, especially when it consists of pure economic loss or psychiatric injury. English law is perhaps most transparent in this regard: the so-called three-stage test, announced in *Caparo v. Dickman* as a refinement of Lord Atkin’s classic neighborhood test, makes explicit that foreseeability must be accompanied by further considerations pointing to a relationship of “proximity” between victim and injurer as well as to the fairness, justice, and reasonableness of holding the latter liable. 26 There is significant variation among common law jurisdictions here, both in the articulation of the law and in its application, but it is evident everywhere that the courts look for more than the reciprocity of foreseeability and the abstract relationship of mutual concern and respect identified by Bru dner. They also look at the concrete relationship between the parties, fastening onto the presence or absence of facts capable of generating bipolar obligations: assumption of responsibility and reliance, 27 even the claimant’s vulnerability. 28 And what these facts are varies greatly. One of the most notable features of cases in this area is that it has proven impossible to capture the courts’ approach to the existence of a duty of care in a single formulation that is both more informative than the three-stage test and capable of transcending the specifics of a given case. Indeed, not even the three-stage test appears to apply across the board. 29 All of this shows that the existence of a duty of care turns on a fact-sensitive inquiry into the varying concrete relationship-specific factors that can give rise to bipolar obligations. Negligence liability encompasses a mosaic of situation-specific rights/duties which arise from the particular relationship of the parties rather than from a general over-arching principle.

Not only the incidence of the duty of care, but also its content, is specifically relational in this way. Like the test for the existence of a duty of care, the test for breach of the duty is often formulated in abstract, general terms, but it is again situation-specific considerations that are decisive in practice. Thus more extensive precautions must be taken when potential victims are unusually susceptible to injury or are at risk of suffering greater injury than others, while their social or financial costs in a given case may argue against the need for precautions. Moreover, account is taken of the fact that an injurer had to act in “the agony of the moment” or in circumstances leaving no time for calm reflection but demanding split-second judgments. Context is decisive: children playing together must accept that their playmates may not be as responsible as adults, just like the clients of jewelers’ ear-piercing services or traditional healers cannot expect the degree of care and skill that a doctor should provide. Indeed, under the principle of common practice, it is of vital importance whether an injury occurred in a particular industry rather than another, or at the hands of a member of a specific profession, for it is the practice and standards applied in that branch that are the primary considerations when courts come to decide whether a duty of care has been breached. The picture is again that of a mosaic of rights and duties that are generated by the concrete relationship of injured and injured.

Whereas Brudner grounds the moral appeal of the tort of negligence in recognition of the other as an equal agent, this situation-specific dimension of negligence law points us in the direction of relational moral theories. This approach, prominent especially in feminist writings, highlights the limitations of moralities of justice, with their exclusive focus on abstract and impersonal obligations, and urges their supplementation or even replacement by an “ethics of care.” A rich variety of views appear under this banner, but they are united

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33 Roe v. Minister of Health, [1954] 2 Q.B. 66; Wooldridge v. Sumner, [1963] 2 Q.B. 43; Condon v. Basi, [1985] 1 W.L.R. 866. As Sir John Donaldson explained in the latter case, one can say either that you “take a more generalised duty of care and … modify it” or “that there is a general standard of care … taking account of the circumstances in which you are placed.” Condon, [1985] 1 W.L.R. at 866. Richard Kidner, The Variable Standard of Care, Contributory Negligence and Volenti, 11 Legal Stud. 1 (1991), has argued that the second approach is preferable. The argument in the text does not express a preference for either approach; however one chooses to describe what happens, the point is that the care required varies with the circumstances.
37 Antje du Bois-Pedain helped me understand the relevance hereof. See her chapter The Duty to Preserve Life and Its Limits in English Criminal Law, in The Sanctity of Life and the Criminal Law 296 (Dennis Baker & Jeremy Horder eds., 2013).
by an insistence on the moral salience of the concrete and immediate relations among persons in all their particularity. What is demanded is always a response to a specific other, and so a question of what is needed by that other: it is not reducible to any generalized formula, and focuses on how to respond to needs and expectations rather than on rights and duties. James Kellenberger has emphasized the importance of relationships to this way of thinking, stating that they “determine the individual form of the obligation appropriate to the relationship in question … and … are the very source of the obligation that obtains.” Behind the façade of general “tests” for the existence of a duty of care and for breach of such a duty, this is exactly what the courts seek to accomplish—to the extent that the blunt instruments of the law and the forensic process allows.

It might be thought that moral matters of this kind are not the law’s business, that its character as an instrument of public governance restricts its role to the pursuit of justice along the lines captured by Brudner. But this would be mistaken. A legal order capable of securing justice in an enduring way does not arise out of nothing; it requires social underpinning in the form of what Margaret Urban Walker has described as “a recognizably moral relationship,” “a certain disposition of people towards each other and the standards they trust, or at least hope, are shared.” Fostering such moral/ethical social relations is thus part of the law’s pursuit of its general social role of securing a just order. It does so in part by facilitating “moral repair,” “restoring or stabilizing—and in some cases creating—the basic elements that sustain human beings in a recognizably moral relationship.” This is a task that, as Walker reminds us, “falls upon us as individual parties who have done wrong, or caused or failed to prevent wrongful harm, and as members of a community intended to be defensibly just.” And it is precisely this that is accomplished by tort law’s “ethics of care.” In enabling obligations that arise out of concrete relations among specific persons in all their particularity to be vindicated at the demand of those who have been wronged, tort law helps to sustain the direct moral relationships that create and support the social foundations of justice.


41 Id.

42 Id.

43 Arthur Ripstein, The Division of Responsibility and the Law of Tort, 72 Fordham L. Rev. 1811 (2004); Arthur Ripstein, Private Order and Public Justice: Kant and Rawls, 92 Va. L. Rev. 1391 (2006) [hereinafter Private Order], develops a broadly comparable line of argument, contending that private law helps to foster the “moral powers” Rawls considers central to a just social order. But whereas I emphasize the relationship-building dimensions of private law, Ripstein values private law for what he sees as its reinforcement of “the idea that you have a special responsibility for your own life” (Private Order, supra, at 1397)—i.e., the separateness of persons.
V. Conclusion: From Dialogic Community to Civil Society

Tort law’s contribution to securing the social foundations of a legitimate political order is but a specific instantiation of the distinctive social service provided by all of private law. By supporting direct bipolar obligations in a rich variety of ways, the various branches of private law facilitate and support a society made up of relationships that are not merely expedient and instrumental, but, to use Walker’s phrase, “recognizably moral.” This is as true of property law, which not only enables the creation and enforcement of boundaries but also constrains and defines those boundaries, as it is of those fields, such as contract law and family law, which revolve more directly around the creation and maintenance of bipolar obligations. Together, they create a network of norms and institutions that support and help to shape the dense pattern of relationships that characterize human life and transcend the individual transactions out of which they grow.\(^{44}\) There is no space to argue the point here, but I hope that what I have written about tort law is enough to show that it is mistaken to claim, as Brudner does, that “[p]rivate law is the law for individuals conceived as dissociated except for their transaction” (4-5). Private law, at least as we know it today, is only conceivable where bonds count at least as much as boundaries and relationships shape transactions. Although it certainly needs to be “part of a larger public world embracing criminal, administrative, and constitutional law” (40), private law possesses greater internal resources for contributing to “the ultimate goal” of a “public life sufficient for dignity” (4) than Brudner allows.

It is these resources, its intrinsic relationship-nurturing and relationship-supporting facets, which ultimately render private law indispensable. For while the state can wield public measures to vindicate the objective worth of individuals, a social life of moral relations can only exist as the lived experience of persons. The most that the state can do is to contribute to its flourishing by deploying the institutional means at its disposal so as to nurture direct, bilateral relations. Crucially, such a social life is essential for the “political life sufficient for dignity” (2) demanded by Brudner and thus for the very legitimacy of the state and public law. This, too, is a lesson taught by Hegel, whose thought Brudner has so fruitfully drawn on to provide fresh insights into large swaths of law. Without “a well-constituted ethical life, which integrates the rights of persons and subjects into an organic system of customs and institutions providing individuals with concretely fulfilling lives,” there can be no freedom and dignity, Hegel insisted.\(^{45}\) There is a communal life of relationships that are

\(^{44}\) One way in which private law does so is brilliantly captured by Hanoch Dagan’s explanation of its contribution to autonomy as self-authorship—see his contribution to this book symposium as well as his Property: Values and Institutions (2013). It seems to me that the moral service provided by private law extends well beyond this, however. See François du Bois, Social Purposes, Fundamental Rights and the Judicial Development of Private Law, in Rights and Private Law 89, 98-101 (Donal Nolan & Andrew Robertson eds., 2011), for an attempt to start exploring the social construction role of private law.

neither political nor atomistic. Our associational life cannot, and should not, be shrunken to our relations as citizens. Nowhere is this explained better than in Brudner’s own work on constitutional law.\footnote{Alan Brudner, Constitutional Goods 297-423 (2004).} As he points out, “[A] particular family, a particular culture, a particular trade union, professional association, or university … are clear reflections of ethical life in the private lives of individuals, and so they are nurtured and given legal recognition by a political community ordered to the cultivation of ethical life in all its forms.”\footnote{Id. at 391.} But private ethical relations stretch far beyond this list, encompassing also much of what The Unity of the Common Law assigns to the realm of mutual cold respect among atomistic individuals. It is here that private law does its distinctive, irreplaceable work—so well-described by Brudner as “reconciling good-centered and right-based normative frameworks” (2)—through nurturing and supporting the common ethical life in which this reconciliation is brought about by complex cultural processes.