

Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette

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INTRODUCTION

We are grateful to the Executive Committee of the Association of American Law Schools (AALS) Section on Torts and Compensation Systems, and to Michael Rustad in particular, for organizing the event that gave rise to this exchange. We are equally grateful to Christopher Robinette for playing the lead role in converting the event into a publication. And we are grateful most of all to Judges Guido Calabresi and Richard Posner, and to Professors Martha Chamallas, Robinette, and Rustad, for taking the time to comment on our work.

Of course, attention comes with strings attached. Indeed, readers will not fail to notice that the bulk of the comments contained in this volume are quite critical. Several commentators suggest that our attempt to characterize tort as a law of civil recourse is presumptuous and reductionistic. Some argue that, in attempting to explain everything, we have managed to say nothing at all. Others accuse us of having an ivory-tower view that is blind to how tort law really works, and that conceals the degree to which tort law deserves criticism.

Predictably, we believe that our commentators have misunderstood our work. Some of the responsibility lies with us. We have published a slew of articles on topics in tort theory and tort law. Some are long and contain many moving parts. We stand by what we have written and believe that, where our analysis has been complex, the subject matter has demanded it. Still, we owe interested readers a more digestible overall account. We have made one effort in that direction with a

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primer aimed at law students and non-specialist readers.¹ Another effort, directed to academics, is underway.

Taking this as an occasion to assist readers in understanding what we have and have not said, we begin by offering a brief overview of civil recourse theory. We then respond to criticisms. We acknowledge the self-referential nature of the present undertaking. By way of justification, we plead self-defense. Having been accused, among other things, of failing to say anything useful about torts, we are entitled to respond by identifying what we take to be the useful things that we have said.

I. CIVIL RECOURSE THEORY IN A NUTSHELL

Our work on tort law begins with a longstanding and familiar set of social and legal practices and their attendant discourses. Lawyers and lawmakers treat tort law as a separate division of the law; one that stands apart from contract and criminal law. Law students learn “Torts” from materials that tend to include a set of canonical cases, problems, and concepts. In resolving certain kinds of disputes, judges apply what they understand to be tort doctrine. Lawmakers and policymakers debate whether and how to engage in tort reform.

Against this backdrop, our writings have aimed to capture what it means for a person or entity to commit a tort, which in turn requires an analysis of the myriad doctrines that make up tort law. This is why our work is heavily doctrinal. We write about cases—some famous, some unfamiliar, some old, some new—to gain a better understanding of how courts, the primary articulators of tort law, define and deploy particular tort concepts and doctrines. In turn, we hope to locate certain general features that are constant across tort law, while at the same time relying on our understanding of these general features to improve our understanding of particular cases, concepts, and doctrines.

For example, as it has been fashioned by the courts, the tort of fraud includes an actual reliance element. One could imagine a body of law that omitted that element and instead required only proof that the defendant’s misrepresentation caused harm to the plaintiff, whether by reliance or some other means. What does this tell us about the wrong of fraud? What does this tell us about torts? Quite a lot, in fact.²

Our work also has sought to identify connections between tort concepts and the institutions and practices that are characteristic of tort law as it functions day-to-day. In particular, we argue that the concept of a tort fits very naturally with the idea of having a court system that is open to hearing complaints that are filed at the discretion of a putative victim of injurious wrongdoing and that seek relief as against a wrongdoer.

1. JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* (2010).

2. John C. P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001 (2006); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 18–21 (1998). Today, of course, there are statutory claims for consumer fraud that do not include a reliance element. See Goldberg, Sebok & Zipursky, *supra*, at 1017.

Even from this thumbnail description, one can see that the enterprise of civil recourse theory contrasts with other ways of theorizing. Most obviously, it is distinct from the sort of prescriptive or instrumental theory that aims to design rules of conduct and liability in order to achieve a specified goal or set of goals. (For example, a relentlessly prescriptive theory with a redistributive bent might set for itself the task of devising a scheme of liability for injuries that best promises to achieve a just distribution of wealth.) Interpretive theory is also obviously a quite different undertaking from empirical social science. Our task has not been to collect or sift through data on verdicts or settlements to see what it might reveal about the operation of tort law.

In noting these differences, we do not mean to suggest that the different modes of theorizing exist in isolation from one other. Quite the opposite, we have emphasized that the answers to the sort of interpretive questions we pursue have potentially significant implications for prescriptive analysis.³ Likewise, empirical social science findings can inform both interpretive and prescriptive analysis.

Turning from method to substance, we claim that Anglo-American tort law is best understood in terms of three interlocking ideas.⁴ First, torts are *wrongs*, albeit wrongs of a special genus. They are wrongs in that each tort stems from a norm of conduct that enjoins us not to interfere with the well-being of others in certain ways, or to act for their benefit in certain ways. Beyond this, torts are legal wrongs: for a wrong to be a tort it must be recognized as such in the law. Its counting as a moral wrong is neither necessary nor sufficient for it to be a legal wrong. To say the same thing, the norm enjoining conduct is a legally authoritative directive or rule, even if a directive or rule only implicit in precedent.

Within the category of legal wrongs, torts are further distinguished because tort law's directives are defined by law rather than by agreement—a familiar way of dividing tort and contract.⁵ Torts are also distinctive as legal wrongs in that they are *injury-inclusive* and *relational* wrongs. Absent an injury to someone, there is no tort, and even where there is an injury connected to wrongful conduct, there is still no tort unless the conduct was not merely wrongful in a generic sense, but wrongful *as to* the injury victim. Take the tort of negligence, for example. Negligence is a legal, non-agreement-based, injury-inclusive, relational wrong because, at least as applied to physical harms, court decisions have defined the directive contained within it as follows: for any person whom one might expect to injure physically were one to act carelessly toward him or her, one must not physically injure such a person by acting carelessly toward him or her.

Our interpretive claim that torts are a special kind of wrong has left us with several challenges. We have had to establish that the attributes we specify to

3. See, e.g., John C. P. Goldberg, *What Are We Reforming? Tort Theory's Place in Debates over Malpractice Reform*, 59 VAND. L. REV. 1075 (2006).

4. The remainder of this section relies on GOLDBERG & ZIPURSKY, *supra* note 1, at 1–5, and John C. P. Goldberg & Benjamin C. Zipursky, *Rights and Responsibility in the Law of Torts*, in RIGHTS AND PRIVATE LAW 251 (Donal Nolan & Andrew Robertson eds., 2012).

5. The principle of civil recourse, we maintain, is a principle of private law, not just tort law. Thus, contract law also instantiates the principle of civil recourse, though on different terms than tort. John C. P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341, 349 (2011).

capture the distinctiveness of tortious wrongdoing—especially injury-inclusiveness and relationality—really can be found in courts’ definitions of the different torts.⁶ Furthermore, it has been our burden to defend the claim that all torts are cogently described as wrongs, including torts that have “strict liability” aspects, such as trespass to land, products liability, and even negligence (in its use of the objective standard of care).⁷ Much of our writing on tort law has been an effort to meet these burdens.

Second, civil recourse theory identifies as critical to tort law a particular linkage between the wrongs of tort law and the idea of a *right of action*. The commission of a tort confers on the victim a particular legal power; namely, a power to demand and (if certain conditions are met) to obtain responsive action from the tortfeasor.⁸ A legal liability is the Hohfeldian flipside of this kind of legal power. The commission of a tort leaves a tortfeasor vulnerable to a claim initiated by the victim and backed by the power of the state. Because the vulnerability is to the victim, the wrongdoer’s fate is, to a substantial degree, in the victim’s hands. The victim, not a government official, decides whether to press her claim or not, and the victim, in principle, also decides whether to accept a resolution of the claim short of judgment. If the claim is successful, of course, the victim can enlist the state’s aid in her effort to enjoin ongoing wrongful conduct or to demand responsive action from the wrongdoer in recognition of the wrong done to her.

Thus, a core and distinctive feature of our account of tort law is its emphasis on the way in which tort law connects the commission of wrongs to the recognition of rights of action. The courts’ having defined torts as a particular kind of wrong and their having seen fit to confer rights of action on victims of such wrongs is not purely coincidental. The idea of a relational, injurious wrong goes quite naturally with the idea of the victim being entitled to respond to the wrongdoer. Nor is it purely coincidental that courts and legislatures have seen fit to establish this body of law. For the provision of tort law (or other bodies of law similarly recognizing wrongdoer accountability to victims of wrongs) is itself a kind of political duty that the state owes its citizens.⁹

Following Locke and others, we have suggested that this duty is rooted in a natural privilege of individuals to respond to wrongdoing.¹⁰ Insofar as individuals delegate such privileges to governments, and insofar as governments justifiably deny individuals privileges of self-help and self-assertion in the name of civil peace and justice, it becomes government’s duty to provide alternatives. Tort law is, in the first instance, a fulfillment of that duty (though in fulfilling this duty,

6. John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (on the injury requirement); Zipursky, *supra* note 2 (arguing that all torts have a “substantive standing” rule that requires the plaintiff to prove a wrong to her rather than generically wrongful conduct).

7. John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 947–53 (2010).

8. Goldberg & Zipursky, *supra* note 4, at 265–66.

9. *Id.* at 268–69.

10. Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 637–40 (Jules Coleman & Scott Shapiro eds., 2002).

government may also accomplish other things). By granting to individuals who have been injuriously wronged a legal power to exact a remedy from the wrongdoer through the courts, government complies with the *principle of civil recourse*—the principle that a person who is wronged, but deprived by law of the ability to respond directly, is entitled to an avenue of civil recourse against the wrongdoer.¹¹

Tort law's linkage of wrongs to rights of action has been a focal point of our efforts to explain why other theories of tort distort the law that they purport to be faithfully interpreting. Thus, we have argued that recognition of the centrality of rights of action to tort creates insurmountable difficulties for corrective justice theories that treat tort liability as enforcing a moral duty of repair owed by a wrongdoer to his or her victim.¹² More saliently in the present context, we have maintained that attention to wrongs and rights of action exposes as fallacious the overwhelming tendency of modern academics—whether high priests of law and economics or more grounded compensation-and-deterrence scholars—to treat tort law as just another instance of government regulation.¹³ Tort law often does provide some compensation to those who have suffered losses, and the prospect of tort liability can and probably often does discourage actors from engaging in tortious conduct. But it hardly follows that tort law is just regulatory law, or that compensation and deterrence are the central aims of tort law. In providing tort law, government is not interacting with citizens as a regulator. It is providing a forum for hearing and adjudicating complaints about violations of certain norms of conduct that govern interactions between persons and enforcing decisions rendered in those adjudications.

As with respect to our claim that torts are a special kind of wrong, when it comes to rights of action we have faced a number of challenges. It is on us to explain why courts have chosen to recognize immunities and other defenses that deprive certain victims of civil recourse,¹⁴ why the right to obtain responsive action from a tortfeasor is conditioned procedurally in the ways that it is,¹⁵ and why the right has the constitutional status that the Supreme Court has haltingly recognized.¹⁶ Likewise, we are left to explain why persons who have not themselves been wronged—for example, spouses of tort victims—are sometimes permitted rights of action.¹⁷ And we must distinguish instances in which bodies of

11. Zipursky, *supra* note 2, at 82–83.

12. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

13. *See, e.g.*, John C. P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1575–76 (2006) (noting that tort concepts do not fit comfortably with a conception of tort law as regulatory law).

14. *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 1, at 178–83 (briefly suggesting that certain governmental immunities are best defended, if at all, on separation-of-powers grounds).

15. *See id.* at 65–66 (alluding to possible justifications for recognizing procedural hurdles of the sort tort plaintiffs encounter).

16. John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

17. Zipursky, *supra* note 2, at 37–38.

law other than tort law confer rights of action because the government is trying to accomplish something other than providing an avenue of recourse to victims of relational, injurious wrongs.¹⁸

The third level at which our theory operates is at the level of remedies. Civil recourse theory asserts that the question of remedy in a tort case turns on the question of what a person who has proven that she has been wronged is entitled to demand of the person or entity that wronged her. This, we insist, is a question apart from the question of what sort of response the defendant is obligated to make.¹⁹ As noted above, tort law, in our view, is not the recognition in law of the tortfeasor's duty of repair. It is about the victim's right to redress.

To be sure, in modern practice, tort damages are often described as geared to the task of making the plaintiff whole, a fact that has misled scholars of various stripes to suppose that tort law is all about making whole or restoring the status quo ante. We argue instead that "making whole" is but one remedial rule, albeit one that is in many instances a perfectly reasonable one to adopt. It is not part of the very definition of tort. Rather, it reflects a judgment regarding what constitutes fair and reasonable redress to the victim of a tortious wrong. On our account, a successful tort plaintiff is entitled to redress. Redress is a capacious (though not empty) concept that is compatible with judicial provision of remedies ranging from injunctions to nominal damages. This is why the civil recourse account can address pressing contemporary questions about punitive and noneconomic damages more satisfactorily than competitor theories.²⁰

Our writings have principally used civil recourse theory to understand tort law. We wish for better understanding of the law not only for its own sake and not only to enhance our ability to teach the subject. Better understanding allows for better decisions by those applying, evaluating, and revising the law, and for those ascertaining its relationship to other areas of law. And, critically, it anchors in reality those entertaining such proposals from theorists and ideologues across the political spectrum, in academia, in the courts, and in the domain of legislation.

18. See Goldberg et al., *supra* note 2, at 1015–18.

19. John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006); Zipursky, *supra* note 2, at 88, 95–96.

20. 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, 4–10 (2004); John C. P. Goldberg & Benjamin C. Zipursky, *Convergence and Contrast in Tort Scholarship: An Essay in Honor of Robert Rabin*, 61 DEPAUL L. REV. 467, 478–96 (2012) [hereinafter Goldberg & Zipursky, *Convergence and Contrast*]; Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) [hereinafter Zipursky, *Theory of Punitive Damages*]; Benjamin C. Zipursky, *Punitive Damages after Philip Morris USA v. Williams*, 44 CT. REV. 134 (2007) [hereinafter Zipursky, *After Philip Morris*]; Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1771–88 (2012) [hereinafter Zipursky, *Punitive Damages and Preemption*].

II. CALABRESI AND POSNER

A. Posner

An academic adage says that it is better to be criticized than ignored. Alas it offers us little solace in dealing with Judge Richard Posner's commentary, for he has somehow managed to criticize our work while ignoring it. The most sustained engagement amounts to a complaint that we once—in a footnote!—mischaracterized a claim in one of his opinions. We had hoped for better, especially given that we have done Posner the courtesy of taking his work seriously.²¹

1. General Criticisms

Posner maintains that we: (1) falsely and presumptuously assume that a single theory can explain “all of tort law”;²² (2) bear the onus of explaining how to determine what counts as a wrong for purposes of tort law, yet have said nothing on this topic, instead relying on the idea that we all know a wrong when we see it;²³ and (3) have nothing to say about doctrines limiting liability for wrongs, and nothing to say about remedies.²⁴ Each of these broad criticisms is off the mark.

It is odd to see the coauthor of *The Economic Structure of Tort Law* criticize us for allegedly maintaining that a single theory can explain all of tort law.²⁵ Pots and kettles aside, we are not guilty of the charged offense. As we have explained above, civil recourse theory offers a particular interpretation or characterization of the main doctrinal and institutional features of tort law. Quite obviously, there are other valuable ways to analyze tort law. Understanding how it has developed over time requires historical analysis, as well as, perhaps, the tools of political science. Understanding how tort doctrine and decisions influence the behavior of individuals and firms requires sociological, psychological, and economic analysis. Deciding which aspects of tort ought to be altered requires a combination of interpretive, empirical, sociological, and normative analysis.

Posner seems inclined to fault us for claiming that civil recourse theory offers a better interpretive account of tort law than rival accounts. If this really is his complaint, he presents it in a highly misleading way when he accuses us of hubristically aspiring to explain all of tort law. We are interested in identifying the

21. See, e.g., John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 544–48, 553–58 (2003) (summarizing Posner's core interpretive claims about tort law and discussing criticisms of them); Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2007–26 (2007) (identifying deficiencies in Posner's Hand Formula conception of fault).

22. Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L.J. 469, 473 (2013).

23. *Id.* at 473–74.

24. *Id.*

25. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (“This book explores the hypothesis that the common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation.”).

distinctive features of tort law. As noted above, we argue that it identifies a special category of wrongs and that it empowers persons who can establish that they are victims of such wrongs to demand, through court proceedings, responsive action from a wrongdoer. We further maintain that the connection between tort's two sides—its particular way of defining wrongs and its provision of an avenue of victim recourse—is organic rather than haphazard: given the kind of wrong that torts are, it is entirely apt for the law that defines those wrongs to authorize victims to obtain redress from wrongdoers. Finally, civil recourse theory emphasizes that tort law's articulation of wrongs and its provision of an avenue of recourse against wrongdoers is the fulfillment of a political obligation owed by government to its citizens.

In developing civil recourse theory, we have, of course, had many things to say about substantive topics in tort law. And other scholars have invoked civil recourse theory in efforts to illuminate various aspects of tort and of private law more generally.²⁶ We have done so because we take the view that an interpretive theory must be true to the law it interprets, and hence one must investigate tort law thoroughly to be satisfied that one's interpretation is faithful to the materials being interpreted. This is a far cry from claiming—and we have never claimed—that the theory explains or entails tort law in all of its particulars. Civil recourse theory is *unifying* in that it treats the various facets of tort law as forming a mostly coherent whole, rather than a mishmash. Yet precisely because the unification takes place at a structural rather than substantive level, the theory is sensitive to the variety among tort law's wrongs and remedies and can embrace a pluralistic approach as to the reasons for having tort law in the first place.²⁷

Having accused us of offering a theory of everything, Posner in the same breath claims that we have managed to say nothing. Specifically, he says that we have no account of how to determine what counts as a “wrong” within tort law.²⁸ It is not enough, he adds, for our theory to proceed on the assumption that we all know a wrong when we see it. This criticism, like its predecessor, reflects a bewildering inattention to our writing. We have—like virtually every torts scholar—noted important linkages between custom, social norms, and the law of torts.²⁹ However, we have never claimed or implied that there is no need for theorists to address the identification, description, or explanation of the wrongs recognized by tort law because one will know them when one sees them.

It is true that we do not purport to deduce the content of tort law from the general idea of civil recourse. To accept that tort law is a law of civil recourse does not entail, for example, that trespass to land must be defined so as to subject innocent trespassers to liability, that negligence law must embrace the objective standard of ordinary care, or that courts must adopt comparative fault over

26. For a useful analytic taxonomy, with citations to works employing civil recourse theory, see Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. 65 (2011).

27. John C. P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1252–53 (2008).

28. Posner, *supra* note 22, at 474.

29. See, e.g., John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1831, 1840 (1998).

contributory negligence.³⁰ Instead, we maintain that the theory illuminates the nature of tortious wrongdoing as well as features of particular torts. Again, we have argued, based on a close examination of case law, that all torts share certain attributes that distinguish tortious wrongdoing from, say, criminal wrongdoing.³¹ For conduct to count as a tort it must be injurious to another, as opposed to merely posing a risk of injury to another. It must also be wrongful to that other, rather than wrongful to the world. And it must be recognized as such in authoritative sources of law. While obviously abstract, there is practical bite in these assertions. Indeed, we have argued that core tort doctrines such as the reliance requirement in fraud and the “of-and-concerning” requirement in libel and slander can only be satisfactorily explained if one recognizes that torts are relational wrongs.³² Likewise, we have shed light on difficult causation questions by examining them against the backdrop of tort’s requirement that wrongs be realized in actual injuries.³³

If Posner is looking for our engagement with particular torts, we have done that too. In our writings we have argued, just to give a few examples, that: (1) the majority of courts have been right to reject “social host” liability claims on the ground that causing injury to another through a careless failure to monitor the alcohol intake of a competent adult should not count as negligence toward that other;³⁴ (2) standard medical monitoring claims are not rightly understood as claims for realized or completed torts, and hence the U.S. Supreme Court was correct to suppose that such claims should not give rise to lump-sum damage payments;³⁵ (3) the Supreme Court erred in concluding that the First Amendment forbids states from treating as actionable intentional infliction of emotional distress (IIED) a defendant’s exploitation of a private funeral to gain attention for his political message;³⁶ (4) “loss of a chance” doctrine probably should not apply to legal malpractice claims;³⁷ (5) attorney carelessness that injures non-clients should rarely count as legal malpractice;³⁸ and (6) *contra* Holmes and Posner, the injuring of

30. We think it is an advantage of civil recourse theory that it can explain these features of tort law. This is quite different from maintaining that these features are logically entailed by the idea of civil recourse, such that their absence would somehow render tort law no longer tort law.

31. See, e.g., Goldberg & Zipursky, *supra* note 4, at 259–63.

32. Zipursky, *supra* note 2, at 17–21.

33. Goldberg & Zipursky, *supra* note 6, at 1636–59 (explaining that the courts’ rejection of tort liability for pure risk-creation is part and parcel of torts being defined as injurious wrongs).

34. John C. P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)’s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1225–29 (2009).

35. Goldberg & Zipursky, *supra* note 6, at 1701–15.

36. Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011).

37. John C. P. Goldberg, *What Clients Are Owed: Cautionary Observations on Lawyers and Loss of a Chance*, 52 EMORY L.J. 1201 (2003).

38. Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649 (1998).

another through the failure to meet negligence law's objective standard is cogently described as a wronging of that other.³⁹

Perhaps, in the end, what frustrates Posner is that we do not provide a foundational account of the nature of tortious wrongdoing. We have not claimed, as he has, that the essence of tortiousness is conduct that wastes scarce resources.⁴⁰ Nor have we claimed that one can derive the list of torts recognized in most U.S. jurisdictions from Rawls's theory of justice, or Nozick's, Kant's, Locke's, or Aristotle's. We have not pursued such an account because we see no reason to think that one is available. We do not doubt that conduct identified as wrongful by plausible moral theories often will also be conduct that is tortious. Other things being equal, it is both immoral and tortious to punch another, to poison another, to trick another out of her savings, to identify falsely another as a pedophile, to botch a patient's surgery or a client's legal representation, and so on. The point is not that we know torts when we see them. The point is that torts have emerged and continue to emerge out of a process in which judges and juries face the practical task of deciding whether to credit complaints of alleged wrongdoing against the backdrop of extant tort doctrine, its animating principles, the complex circumstances of each case, and the institutional place in which decision makers find themselves when deciding these cases. Given that the wrongs of tort have been fashioned in this way, it would be astonishing to discover that the wrongs identified by courts and legislatures as torts track a single, foundational theory of what constitutes a wrong.

One might have thought that an approach of the sort we adopt would appeal to Posner, the self-styled pragmatist. We have not only written about torts from within a pragmatist framework but have expressly connected those writings to a jurisprudential position that we have labeled "pragmatic conceptualism," for which Cardozo serves as the poster child.⁴¹ Given that Posner's patron saint is Holmes, and that Holmes and Cardozo differed fundamentally over the role of legal concepts in legal analysis,⁴² we certainly did not expect Posner to embrace fully our brand of pragmatism. What surprises us is Posner's failure to appreciate that our approach to tort theory, like his, is pragmatic in a way that explains why it does not offer some sort of comprehensive, top-down, and fully complete theory of tort law.

The most obvious display of Posner's failure to take stock of what we have done is in the following passages:

Civil recourse theory has nothing to say about limitations on redress except that since all that the theory requires is "some sort of redress" for wrongful injury, all the traditional limitations are in principle

39. John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1124–25, 1143–63 (2007).

40. See Goldberg, *supra* note 21, at 553 (criticizing this aspect of Posner's interpretation of tort law).

41. Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 474–78 (2000).

42. John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1436–41, 1453–54 (1999) (book review) (criticizing Posner's interpretation of Cardozo's decisions and methods for failing to appreciate that, in contrast to Holmes, Cardozo supposed that legal concepts are not empty labels).

acceptable; whether particular limitations are is a pragmatic issue outside the scope of the theory.⁴³

The list of “limitations” includes:

contributory and comparative negligence, assumption of risk, causation and foreseeability, the economic loss rule, contribution and indemnity, *res ipsa loquitur*, punitive damages, limitations on duties to avoid injuries to trespassers and licensees, general damages, the choice between negligence and strict liability, the distinction between independent-contractor liability and *respondeat superior*, sovereign immunity, official immunity, contractual waivers of liability, loss of a chance (latent or probabilistic injury), mass torts, and constitutional limitations on defamation and on the tort right of privacy.⁴⁴

The assertion that we have had virtually nothing to say about limitations on redress is absurd. Amidst our published works, one can readily find discussions of the following “limitations,” as even a search of article titles would indicate: assumption of risk,⁴⁵ causation,⁴⁶ foreseeability,⁴⁷ economic loss,⁴⁸ contribution and indemnity,⁴⁹ punitive damages,⁵⁰ landowner liability,⁵¹ general damages,⁵² the choice between negligence and strict liability,⁵³ loss of chance,⁵⁴ mass torts,⁵⁵ and

43. Posner, *supra* note 22, at 474.

44. *Id.* at 473.

45. John C. P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 342–51 (2006).

46. John C. P. Goldberg & Benjamin C. Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun Manufacturers*, 32 CONN. L. REV. 1411, 1413–17 (2000); Goldberg & Zipursky, *supra* note 39, at 1132–40; Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in PHILOSOPHY AND THE LAW OF TORTS 214, 221–44 (Gerald J. Postema ed., 2001).

47. Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009).

48. John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 664–73 (2001); Zipursky, *supra* note 2, at 30–32.

49. GOLDBERG & ZIPURSKY, *supra* note 1, at 359–68.

50. *See supra* note 20.

51. Goldberg & Zipursky, *supra* note 45, at 351–59.

52. Goldberg, *supra* note 19; Goldberg & Zipursky, *Convergence and Contrast*, *supra* note 20, at 478–96; John C. P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1934–40 (2010); Benjamin C. Zipursky, *Coming Down to Earth: Why Rights-Based Theories of Tort Can and Must Address Cost-Based Proposals for Damages Reform*, 55 DEPAUL L. REV. 469 (2006).

53. Goldberg & Zipursky, *supra* note 39, at 1149–61.

54. Goldberg & Zipursky, *supra* note 46; Goldberg & Zipursky, *supra* note 6, at 1656–60.

constitutional limits on liability for defamation and privacy.⁵⁶ Indeed, had we included in this accounting the explanatory notes to our coauthored casebook and the book's 500-plus page Teacher's Manual (which we did not—even a voracious reader like Posner cannot be expected to read everything), we could have stated accurately that we have published writings on every one of the topics he listed.⁵⁷

In several of the sources just cited, we expressly discuss why economic theories of tort law are inadequate to explain the relevant aspects of tort law. We also have asserted with respect to most of these topics that instrumental accounts of the limitations offered by more doctrinally oriented scholars are inadequate and that our own approach provides a better account. Perhaps Judge Posner found no value in these writings. Perhaps he concluded in advance that he would find no value in reading them and did not read them. Regardless, his assertion that we have “nothing to say” about topics that we have addressed at length is stunningly off-base.

2. Micro-Criticisms

One of Posner's criticisms differs from those already canvassed because it is quite specific and because it has some textual support in our writings.

After citing the work of other critics of civil recourse theory, Posner announces that he will add his “two cents' worth” by noting, “as one example of erroneous analysis,”⁵⁸ our mention in a law review article of his 2003 opinion for the Seventh Circuit in *Mathias v. Accor Economy Lodging, Inc.*⁵⁹ *Mathias* is a well-known decision among tort scholars. A motel knowingly rented a bed-bug infested room to the plaintiffs. The plaintiffs suffered bites and sued. A jury awarded each plaintiff \$5000 in compensatory damages and \$186,000 in punitive damages.⁶⁰ Judge Posner's opinion for the court upheld the punitive damages awards, along the way emphasizing the value of punitive damages in making up for the deterrence deficit that, in his view, attaches to wrongdoing of a sort that tends to escape detection and that tends to cause relatively minor harms to individual victims.⁶¹

Here is what we said about *Mathias* in a 2010 article:

55. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011); John C. P. Goldberg, Comment, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034 (1997); Ripstein & Zipursky, *supra* note 46.

56. See GOLDBERG & ZIPURSKY, *supra* note 1, at 307–41; John C. P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471 (2003).

57. JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS (3d ed. 2012); JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TEACHER'S MANUAL FOR TORT LAW: RESPONSIBILITIES AND REDRESS (3d ed. 2012), available to adopters at http://www.aspenlawschool.com/books/goldberg_tort/profMaterials.asp (copy on file with authors).

58. Posner, *supra* note 22, at 470.

59. 347 F.3d 672 (7th Cir. 2003).

60. *Id.* at 674.

61. *Id.* at 676–77.

The standard “under-deterrence” explanation provided by deterrence theorists fails entirely to explain the rules for when punitive damages will be awarded²²⁰

220. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (suggesting that punitive damages are awarded to induce plaintiffs with modest compensatory damages claims to sue, and to encourage litigants to uncover hidden wrongs, thereby promoting the private prosecution of conduct that would otherwise go unsanctioned). On this theory, one should never see an award of punitive damages in cases of tortious conduct causing substantial harms, nor should courts permit punitive damages in cases of open and obvious misconduct. The law allows punitive awards in both kinds of cases. . . .⁶²

Posner is unhappy with this footnote. After providing a lengthy excerpt from *Mathias*, he responds to it as follows:

[C]ontrary to Goldberg and Zipursky’s summary, the opinion does not say or imply that punitive damages are awarded *only* in order to induce suits to enforce modest claims or to encourage plaintiffs “to uncover hidden wrongs,” and therefore that punitive damages should never be awarded in cases of tortious conduct that cause substantial harm or in cases of “open and obvious misconduct.” The summary is not only inaccurate, but internally inconsistent. If it were true that awards of punitive damages had only two possible aims, that of inducing suits to enforce modest claims and that of encouraging plaintiffs to uncover hidden wrongs, then such awards would be proper in cases of substantial harm caused by hidden wrongs and of modest claims even if they were the result of open and obvious misconduct.⁶³

We are grateful to at last encounter something in Posner’s attack that engages a claim we have actually made. True, it is an engagement with a single sentence contained in one footnote to a seventy-page article, but we’ll take what we can get. Moreover, we concede that the offending sentence, which follows the parenthetical description of *Mathias*’ reasoning, is deserving of criticism for its capsule summary of a claim about shortcomings in standard economic accounts of punitive damages. The summary suggests, incorrectly, that difficulty of detection and modest victim losses are both necessary conditions for the award of punitive damages on the economic account. We erred in constructing the offending sentence around the use of the “nor” conjunction—a small but not inconsequential mistake that we should have caught.

In mitigation, we note that the parenthetical preceding the problematic sentence is both circumspect (commencing with the word “suggesting”) and avoids the mistake contained in the sentence that follows it. More to the point, Judge Posner never actually responds to the argument that is raised in the text—and that is

62. Goldberg & Zipursky, *supra* note 7, at 961 & n.220.

63. Posner, *supra* note 22, at 472–73 (emphasis in original).

discussed at length in our writings on punitive damages⁶⁴—as to the descriptive weaknesses of economic accounts of punitive damages. We return to this issue below.⁶⁵

3. Impact-Based Critique

Posner seems to take some delight in pointing out that, whereas his tort decisions have been cited many times by other courts, our scholarly writings have been judicially cited infrequently.⁶⁶ We are unsure what to make of this observation. Apparently the point is that legal scholarship needs to be assessed in part by its ability to assist lawyers and judges in doing their jobs, and that citation counts indicate that our work fails on this dimension.

Obviously the citation of judicial decisions is a very different matter from the citation of scholarship, though we do not doubt that Posner's tort scholarship has been more frequently cited by courts than ours. And many factors bear on citation counts that have nothing to do with the quality of cited scholarship or its potential value for legal actors. Posner insinuates that he has an explanation for our count: our work is unhelpful because it fails to explain the nature of tortious wrongdoing and the limitations on tort liability. The insinuated explanation is unpersuasive in light of the falsity of its premise.

We have our own thoughts about possible explanations. We take an anti-reductionistic approach to scholarship and adjudication. Thus, we tend to offer extended analyses and qualified conclusions. Likewise, we present our work as primarily helpful in framing, shaping, or directing analysis rather than in generating prefabricated results. In substance, our views do not map neatly onto to defense-side or plaintiff-side positions in the modern tort wars. No doubt there are other reasons, but canvassing them here will not be a fruitful exercise. In any event, we are the wrong people to do it.

Abstracting from our own case, we have long taken the view that Legal Realism and the "law-and-..." movements have had a regrettable influence on the interactions of judges and law professors. As legal theorists have tried to display with ever-greater sophistication that legal concepts are just empty labels, and that sound reasoning about legal problems turns instead on the application of cognitive psychology, economics, empirical social science, or philosophy, many judges have lost interest in reading what legal scholars have to say. We have endeavored to take the law on its own terms and to provide illumination from within it. But we can hardly expect the lawyers who brief cases and the judges who decide them to overcome their now understandable suspicion that academic analysis has nothing to offer them. In this climate, the fact that some judges might still find value in sprinkling their opinions with citations to academic "rock stars" would not be particularly persuasive evidence on the issue of which sort of scholarship has greater potential to be genuinely helpful to courts struggling to decide difficult legal issues.

64. *See supra* note 20.

65. *See infra* text accompanying notes 71–74.

66. Posner, *supra* note 22, at 475–519.

In further support of his claim that the citations to our work demonstrate the deficiencies of the civil recourse account of tort, Posner takes advantage of his dual citizenship on the bench and in the academy by attesting that he finds nothing in the account that would help him decide cases. In a sporting gesture, however, he concludes his critique by inviting us to demonstrate how our work might have aided him in analyzing the tort cases that have come before him.⁶⁷

The challenge is probably rigged—as if Posner had said to us: “I’ll bet you \$20 that you can’t convince me to like *Moby Dick*.” It is also rigged in a second way. For whatever our misgivings about Posner’s efforts to reduce tort law to a scheme of efficient deterrence, we happily concede that he is a first-rate lawyer who, in spite of his larger theoretical commitments, tends to write very strong tort opinions. Posner reports that he loves tort law.⁶⁸ We believe him. Indeed, as we have previously noted, and as Zipursky emphasized in his Prosser Award presentation at the 2012 AALS Tort Section Meeting, Posner stands out among his cohort of torts scholars for his attention to, and command of, the procedural, substantive, and remedial aspects of tort doctrine. Because, when writing theory, he is so keen to remake tort law into something that it is not, one might question whether he really can count as a “lover” of tort law, as opposed to a lover of a certain theoretical model projected onto tort law.⁶⁹ But there is no doubt that, in tort, Posner “gets it.” To this sort of judge our work probably will not add a huge amount in terms of guidance on decision making in particular cases.

Enough, though, with the qualifications. Where might our work have made a difference? We stand by our claim that Posner’s musings in *Mathias* on punitive damages are off base. Punitive damages are available even for highly visible wrongs that cause substantial losses, and, as noted above, they are unavailable in many instances in which they probably could promote the cause of efficient deterrence. The economic conception of punitive damages as making up for under-deterrence simply does not work as a positive account of doctrine.⁷⁰

To be sure, courts have since the 1970s increasingly emphasized the value of punitive damages as a tool for punishing and deterring antisocial conduct.⁷¹ However, there is a profound difference between punitive damages understood as victim redress and punitive damages understood as a regulatory device. Appreciating this difference is of vital importance not just to tort theory but to legal practice. As we have argued elsewhere, the U.S. Supreme Court’s wobbly but persistent efforts to impose due process limits on punitive damages make sense, if

67. *Id.* at 525.

68. *Id.* at 486.

69. See John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1509–13 (2002) (offering this suggestion).

70. This point is accepted by leading scholars who take a more openly normative approach to the application of economic analysis to tort law. See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 897–900 (1998) (arguing that the law of punitive damages does not reflect a rational application of deterrence principles).

71. See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 603–06 (2003) (describing “public wrongs” conceptions of punitive damages).

at all, as an implicit recognition of the need for added safeguards when punitive damages are functioning as a form of regulation rather than as tort redress.⁷² In other words, when punitive damages are being awarded on terms that have little to do with an individual victim's claim, and everything to do with the state's interest in punishing and deterring antisocial conduct, there needs to be closer scrutiny of the system of civil litigation to ensure that it operates on terms that befit a regulatory scheme. To give jurors carte blanche to set an award that will serve the public interest—as opposed to allowing them to set an award that is fitting redress for the plaintiff given the defendant's mistreatment of the plaintiff—is to engage in a form of regulation that is so haphazard as to deny defendants due process.⁷³

Because Judge Posner cannot conceive of punitive damages as anything other than a regulatory instrument, he cannot appreciate what underlies the Court's due process decisions. Hence, in *Mathias* he essentially ignored the Court's stated concerns about punitive damages awards vastly disproportionate to compensatory damage awards.⁷⁴ For Posner, the existence in *Mathias* of an economic rationale for a large punitive award *bolstered* the case for deeming the jury's disproportionate award to comport with due process. This gets the constitutional dimension of punitive damages law backwards. It is precisely when punitive damages are awarded on such an avowedly instrumental rationale that they must be subjected to more exacting scrutiny and tighter substantive limits. Had Posner attended to our writings on punitive damages, he might have recognized that his stated reasons for upholding the jury's punitive award in *Mathias* in fact cut against his conclusion that the award comported with due process.

Our casebook includes several Posner opinions as principal cases or cases highlighted prominently in notes.⁷⁵ One of them is *Beul v. ASSE International, Inc.*⁷⁶ It concerned the failure of a non-profit that places foreign exchange students with U.S. host families to check properly on the placement of a sixteen-year-old girl named Kristin Beul. Kristin was physically coerced and emotionally manipulated by Richard Bruce, the father of the host family, into an ongoing sexual relationship that eventually left her shattered.⁷⁷

72. See, e.g., Zipursky, *Punitive Damages and Preemption*, *supra* note 20, at 1777–84.

73. *Id.* at 1785.

74. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676–78 (7th Cir. 2003) (upholding the jury's punitive award on the ground that doing so would be consistent with the deterrent purpose of punitive damages).

75. GOLDBERG ET AL., *supra* note 57, at 137, 208–10, 524–27, 761–66.

76. 233 F.3d 441 (7th Cir. 2000).

77. *Id.* at 445–46. The host father committed statutory rape, and perhaps other crimes as well. However, probably for reasons having to do with the difficulty of proving that proper care by the placement agency could have prevented the father's initial criminal acts, which occurred relatively soon after the victim was placed with the family, the plaintiff's civil action did not emphasize the agency's failure to protect Kristin from Bruce's attacks, and instead focused on its failure to prevent the plaintiff's trauma at having been coerced into a disastrous "relationship" that ended with the host father's suicide. See *Beul v. ASSE Int'l, Inc.*, 55 F. Supp. 2d 942, 945–46 (E.D. Wis. 1999) (so characterizing plaintiff's claim), *aff'd*, 233 F.3d 441 (7th Cir. 2000).

We include *Beul* in our casebook in part because of the methodical way in which Judge Posner proceeds through the legal issues raised by the case, which range from the applicability of *respondeat superior* to non-employee volunteers, to the ways in which federal regulations should figure in assessing the placement agency's carelessness, to the leeway factfinders enjoy to make findings on causation, to the propriety of instructions bearing on the victim's alleged comparative fault.⁷⁸ On the core issue of liability, moreover, Posner in our view gets things right by affirming a judgment that the agency was liable to the student for carelessly failing to protect her against the grave emotional trauma she suffered. And yet, the opinion in *Beul* is unsatisfying in one important respect. In trying to stave off liability, the placement service argued that the criminally abusive actions of Richard Bruce, the host father, should cut off ASSE's liability notwithstanding the careless failure of its volunteer (Breber) to monitor the placement in a way that could have prevented the harms inflicted on Kristin. Posner's opinion rightly rejects this argument, but the grounds on which it does so are unpersuasive. Had he paid more attention to our work, he could have written a better-reasoned opinion.

Here is an excerpt from Judge Posner's analysis of the agency's attempt to avoid liability based on the nature of Richard Bruce's intervening wrongdoing:

As for the argument that Bruce's misconduct was so egregious as to let ASSE off the hook, it is true that the doctrine of "superseding cause" can excuse a negligent defendant. Suicide by a sane person, unless clearly foreseeable by the tortfeasor, for example a psychiatrist treating a depressed person, is a traditional example of the operation of the doctrine. So if Bruce's boss had refused him a raise and Bruce had responded by killing himself, the boss even if somehow negligent in failing to give him the raise would not be considered the legal cause of the death. Or if through the carelessness of the driver a truck spilled a toxic substance and a passerby scraped it up and poisoned his mother-in-law with it, the driver would not be liable to the mother-in-law's estate; the son-in-law's criminal act would be deemed a superseding cause.

Animating the doctrine is the idea that it is unreasonable to make a person liable for such improbable consequences of negligent activity as could hardly figure in his deciding how careful he should be. The doctrine is not applied, therefore, when the duty of care claimed to have been violated is precisely a duty to protect against ordinarily unforeseeable conduct, as in our earlier example of a psychiatrist treating depression. The existence of the duty presupposes a probable, therefore a foreseeable, consequence of its breach. (*All that "foreseeable" means in tort law is probable ex ante*, that is, before the injury that is the basis of the tort suit.) Thus a hospital that fails to maintain a careful watch over patients known to be suicidal is not excused by the doctrine of superseding cause from liability for a suicide, any more than a zoo can escape liability for allowing a tiger to

78. *Beul*, 233 F.3d at 444–45. At the same time, we acknowledge that there is also in *Beul* a regrettable passage, quoted below, in which Judge Posner's pithy writing betrays him. *Id.* at 448 (describing the host father's mistreatment of the plaintiff as "sexual hanky-panky").

escape and maul people on the ground that the tiger is the superseding cause of the mauling.

So Kristin's high school would not have been liable for the consequences of Bruce's sexual activity with Kristin even if the school should have reported her frequent absences to Breber; [Bruce's] criminal activities with their bizarre suicide sequel were not foreseeable by the school. But part of ASSE's duty and Breber's function was to protect foreign girls and boys from sexual hanky-panky initiated by members of host families. Especially when a teenage girl is brought to live with strangers in a foreign country, the risk of inappropriate sexual activity is not so slight that the organization charged by the girl's parents with the safety of their daughter can be excused as a matter of law from making a responsible effort to minimize the risk. Sexual abuse by stepfathers is not uncommon, and the husband in a host family has an analogous relationship to a teenage visitor living with the family.⁷⁹

It is appropriate to hold the agency responsible, Posner says, because the agency—like a hospital dealing with a suicidal patient or a zoo that keeps a dangerous animal—had access to information that alerted it to the presence of a significant risk of harm that could otherwise be presumed to be quite small and therefore ignored. If he meant by this that the agency incurred a duty to Kristin because it had *actual knowledge* of the danger to her posed by Richard Bruce—which is what he would have needed to say to render the hospital and zoo examples analogous⁸⁰—then his analysis was factually unsupported. The agency had no such knowledge.⁸¹ If he meant instead that the agency incurred a duty because its volunteer had better access to information about the danger to Kristin posed by Bruce, then his attempt to distinguish the agency from the school fails. As his opinion acknowledges, Kristin missed a lot of school, and Bruce was the one who would call the school to report that she was “sick” and would be absent. The school was probably as well situated as the agency, if not better situated, to detect the danger to Kristin posed by Bruce.⁸² Finally, if Posner meant to say that the agency owed Kristin a duty to take steps to protect her from Bruce because, as a general matter, agencies have better access to information than do schools about the risks posed to foreign exchange students by host fathers, his analysis rests on a set of speculative and not particularly plausible empirical assertions. At a minimum, we

79. *Id.* at 447–48 (emphasis added) (citations omitted).

80. Even with actual knowledge, there would still be a salient difference given that the agency lacked the physical control over Bruce that a hospital has over an incompetent patient or a zoo has over an animal.

81. In fact, the agency had no reason to know of Bruce's dangerousness. *See Beul*, 55 F. Supp. 2d at 949–50, (noting that a background check would have revealed nothing to suggest that the Bruces were unfit to serve as host parents), *aff'd*, 233 F.3d 441 (7th Cir. 2000).

82. Posner misleadingly asserts that “[Bruce's] criminal activities with their bizarre suicide sequel were not foreseeable by the school.” *Beul*, 233 F.3d at 448. The issue is whether the agency or the school was in a position to foresee that Kristin was at risk of trauma through host parent mistreatment, not whether those entities could foresee that she would be traumatized in the precise way in which she was traumatized.

do not see why schools are less capable of appreciating the risk of host-parent abuse than exchange agencies.

The problem Posner faces in this aspect of *Beul* resides in his determination to rid normative concepts such as duty of their normativity: to boil duty down to known or knowable probabilities.⁸³ *Contra* Posner, “foreseeable” in negligence law does not reduce down to probabilities. And in any event, in a case like this, the duty inquiry turns not just on foreseeability but on a judgment about which sort of actor or entity (if any) is appropriately regarded as having a duty to look after a foreign student’s emotional well-being.

There are two particularly important aspects to this inquiry. First, one must attend more carefully than does Posner to the nature of the wrongdoing alleged by the victim. Kristin’s claim against the agency was for nonfeasance rather than misfeasance. The allegation was not that the agency had traumatized Kristin, but that it had failed to protect her against trauma at the hands of a third-party wrongdoer. Courts, of course, have long maintained (though not without controversy) a reluctance to recognize liability for nonfeasance. Yet they have not flat out refused to recognize such liability. Instead, they have looked for particular grounds supporting recognition of an affirmative duty, especially the presence or absence of a certain kind of relationship between defendant and plaintiff.⁸⁴

This leads to the second point: ASSE (unlike Kristin’s school) stood out as a candidate for bearing an affirmative duty to protect Kristin precisely because of the kind of relationship that existed between them. As Posner’s opinion eventually recognizes:

ASSE . . . was standing in the shoes of the parents of a young girl living in a stranger’s home far from her homeland and could reasonably be expected to exercise the kind of care that the parents themselves would exercise if they could to protect their 16-year-old daughter from the sexual pitfalls that lie about a girl of that age in those circumstances. ASSE assumed a primary role in the protection of the girl.⁸⁵

In sum, *Beul*’s reliance on mere probabilities, an artifact of Posner’s academic commitment to replace what he takes to be “legal mumbo-jumbo”⁸⁶ with supposedly more determinate concepts drawn from outside law, weakens his opinion. Had Posner attended to our writings on duty in negligence law,⁸⁷ and

83. Posner tries to shore up the “scientific” basis for his analysis by citing to a study on rates of sexual abuse by stepfathers, arguing that host fathers can be analogized for these purposes to stepfathers, and that ASSE as a placement agency that regularly deals with host fathers could be charged with knowledge of the risk of abuse posed by host fathers as quasi-stepfathers. *Id.* As noted in the text, he does not bother to explain why professional educators who deal with children on a regular basis, such as school administrators, would have lesser access to the same knowledge.

84. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 37, 40 (2010) (articulating the default no-duty rule and exceptions based on special relationships).

85. *Beul*, 233 F.3d at 448.

86. *Shadday v. Omni Hotels Mgmt. Corp.*, 477 F.3d 511, 513 (7th Cir. 2007).

87. Goldberg & Zipursky, *supra* note 29, at 1807–11, 1825–42 (criticizing duty-

particularly our writings about the intersection of affirmative duty doctrine and superseding cause,⁸⁸ he could have done better.

We turn next to *Shadday v. Omni Hotels Management Corp.*,⁸⁹ another negligence case with upsetting facts involving a sexual assault. The plaintiff was a guest at the defendant's large, upscale Washington, D.C. hotel. She had drinks in the hotel bar with a "seemingly very respectable Guatemalan lawyer."⁹⁰ When the bar closed and the guest was in the lobby awaiting an elevator, the man accosted her. She ran into a waiting elevator, but the man followed her into it and there raped her.⁹¹ The rapist was later arrested and convicted. The guest sued the hotel, arguing that it breached a duty to take care to protect her from the attack.

Posner's opinion for the Seventh Circuit affirmed the trial court's grant of summary judgment to the hotel. Adopting reasoning similar to that on display in *Beul*, he purported to focus exclusively on ex ante probabilities, opining that guest-on-guest violence is such a remote possibility that a hotel of this sort is under no duty to take steps to prevent that sort of violence.⁹² He granted that the hotel was obligated to take security measures against intruder-on-guest violence but argued that the plaintiff was not entitled to point to *that* duty as a basis for liability. Here Posner invoked the "scope of the risk" idea famously illustrated by the old English case of *Gorris v. Scott*⁹³—because this was the "wrong sort" of attack, the hotel could not be held liable for it even assuming that it could have been prevented had the hotel exercised due care with respect to the risk of the right kind of attack.⁹⁴ This limitation on liability, he concluded, is necessary to protect hotels from unpredictable liability. Such liability, he further reasoned, should not be allowed because it is of no social value: it is likely to have little deterrent effect and will sometimes result in erroneous judgments against actors who acted with due care.⁹⁵

Once again Posner's concern to avoid the normative dimensions of duty, and also his determination to treat tort law entirely in terms of deterrence, overrides his lawyerly judgment. The idea that a hotel owes no duty to its guests to take steps to protect them from other guests is quite untenable. Imagine that a hotel installed low-grade electronic locks that enabled guests easily to use their own room keys to open other guest's rooms. If a guest were to take advantage of this inadequate security system to break into the room of another guest and attack the other, the victim's claim that the hotel failed in a basic responsibility to provide security would be quite compelling. This would be a failure to provide the security that a

skepticism and explaining why special relationships figure prominently in courts' duty analysis).

88. Goldberg & Zipursky, *supra* note 34, at 1238–44 (discussing the interaction of duty and superseding cause doctrine).

89. 477 F.3d 511 (7th Cir. 2007).

90. *Id.* at 512.

91. *Id.*

92. *See id.* at 514 (maintaining that, since the major risk of crime against hotel guests is from intruders rather than staff or guests, the hotel's obligation to its guests is that of "maintaining a reasonable perimeter defense . . . and also an inner, back-up defense in case [an] intruder manages to get inside the hotel").

93. [1874] 9 L.R. Exch. 125.

94. *Shadday*, 477 F.3d at 517–18.

95. *Id.* at 518.

guest reasonably expects from a hotel and that a hotel implicitly promises to its guests. The duty Shadday was owed was a duty to take ordinary care against her being attacked on the premises. Parsing that risk into the risk of attack by intruders versus guests is arbitrary and unmotivated.

To be sure, the evidence described in the Seventh Circuit's opinion suggests that the plaintiff in *Shadday* faced an uphill battle on breach and actual causation. Yet the evidence does not appear to have been so one-sided as to warrant taking those issues away from the jury. And even if a plunge into court records were to reveal that summary judgment was appropriate on one or both of those issues, it matters for future cases, for primary actors (e.g., hotels), and for insurers that *Shadday* mistakenly asserts that the defendant had no duty to take care to protect its guest against another guest's attack. Here, again, Posner might have learned something from our work.

Like many people who are good at what they do, Posner the judge fails to grasp how easily things come to him. This is in part why he sees little value in our work. "I knew that already," seems to be his predominant reaction. Yet in today's intellectual climate—one that Posner has helped to create—it is all too easy for courts and commentators to lose sight of basic features of tort law that our work tends to emphasize, but that he takes for granted. Illustrative is a case that we discussed in our AALS talk: *Comer v. Murphy Oil USA*.⁹⁶

Comer involved a lawsuit brought by victims of Hurricane Katrina against large energy companies. The theory of liability was that the defendants' emission of greenhouse gasses had contributed to Katrina's ferocity and hence the damage it caused. The lawsuit asserted claims for trespass, negligence, and public and private nuisance, among others. The district court granted defendants' motions to dismiss the plaintiffs' tort claims on standing and political question grounds, but a Fifth Circuit panel reversed.⁹⁷ Rehearing en banc was subsequently granted,⁹⁸ as a result of which the panel's reversal of the district court's dismissal was vacated.⁹⁹ However, prior to the actual rehearing, several of the appellate court's judges recused themselves—so many that the court lacked the quorum necessary to rule en banc. The appeal was therefore dismissed.¹⁰⁰ The effect of this dismissal was to leave intact the district court's initial decision to dismiss the lawsuit entirely.¹⁰¹

It is arguable that the *Comer* litigation would today fail on the merits given the Supreme Court's decision in *American Electric Power*, although as the latter attests, standing and political question doctrines are complex.¹⁰² What is truly remarkable is that the litigation in *Comer* got as far as it did. The plaintiffs' negligence claims quite clearly failed on causation, and the trespass and private nuisance claims were even weaker, as a doctrinal matter. Simply put, the plaintiffs offered no evidence to suggest that the conduct of the defendants was an actual or

96. 607 F.3d 1049 (5th Cir. 2010) (en banc), *mandamus denied. sub nom In re Comer*, 131 S. Ct. 902 (2011).

97. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009).

98. *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010).

99. *Comer*, 607 F.3d at 1056 (Dennis, J., dissenting).

100. *Id.* at 1054–55.

101. *Id.* at 1055.

102. *See Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

proximate cause of the injuries of which they were complaining. Remarkably, the *Comer* plaintiffs re-filed their claim in the same district court after their petition for a writ of mandamus from the United States Supreme Court was denied.¹⁰³ In an opinion published in March 2012, a district court judge finally stated the obvious:

The assertion that the defendants' emissions combined over a period of decades or centuries with other natural and man-made gases to cause or strengthen a hurricane and damage personal property is precisely the type of remote, improbable, and extraordinary occurrence that is excluded from liability. Therefore, the Court finds that the plaintiffs have not asserted a plausible claim for relief under state law.¹⁰⁴

What is going on? The answer in the first instance is that the plaintiffs and their lawyers saw in tort law an opportunity to achieve regulatory goals that had not been achieved, and were unlikely to be achieved, through legislation or regulation. In other words, this was but another instance—albeit a dramatic one—of the “private attorney general” model of tort litigation in action. Our principal problem, though, is not with the motivation of the plaintiffs, but with the lack of seriousness about the content of tort law displayed by the Fifth Circuit. Judges are not supposed to treat tort law as some sort of game whereby liability can attach so long as one can tack together an allegation of antisocial conduct (even antisocial conduct with potentially severe consequences) with an allegation of a setback (even a serious setback). A tort plaintiff must be prepared to put forward evidence that the defendant wrongfully injured her, not merely that the defendant acted wrongfully in some general sense and that the plaintiff suffered an injury that has no particular connection to that conduct.

Again, we do not suggest that tort law is incapable of accomplishing public goals (such as improved safety). Nor do we suggest that tort law should be understood as a rigid pleading system with no room for the recognition of new wrongs and new injuries. Our point is more modest, but still important. A tort claimant must establish that she has suffered an injury that can plausibly be enveloped within the notion of a relational wrong. In this instance—unlike many others in which defendants are merely crying wolf—the defendants were right to maintain that the plaintiffs were attempting to use tort law as a means of sidestepping the political institutions through which climate change, understood as a political and social problem, must be addressed. This same defense argument would be entirely hollow if made against claimants who could plausibly claim that a political problem was also, as to them, a relational wrong. Nuisance plaintiffs in a

103. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 854 (S.D. Miss. 2012) (citing *In re Comer*, 131 S. Ct. 902 (2011)).

104. *Id.* at 868. The district court also dismissed the case on collateral estoppel, justiciability, and other grounds, in part relying upon the Supreme Court's *American Electric Power* decision. *Id.* at 857, 865 (citing *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011)).

case like *Boomer*¹⁰⁵ are entitled to redress even if an environmentalist agenda is part of what motivates their suit. But they are not granted redress because doing so will help combat the systemic problem of air pollution. Instead it is because, in these instances, the defendant's polluting activities also constitute an unreasonable interference with their use and enjoyment of their property. *Comer* is an indication that courts are losing their ability to distinguish conduct that is antisocial from conduct that is not only antisocial but also tortious. Our work is in part an effort to reverse this trend.

It is not particularly surprising that the Fifth Circuit in *Comer* ultimately handed the defendants a victory. What is stunning is that two out of three members of the panel seem not to have recognized that this outcome was dictated by basic rules of Mississippi tort law.¹⁰⁶ As a result, the plaintiffs were denied relief only because of a bizarre procedural sequence that no doubt left them dissatisfied, perhaps justifiably so, with the process they received. *Comer* is an instance of policy-sensitive quivering by judges at the precipice of a very easy tort case. Neither Holmes nor Cardozo would have handled the case in the way it was handled by the appellate judges, and our guess is that Posner would not have either. But not every judge is Holmes, Cardozo, or Posner. While by no means an effort to squeeze tort law into a rigid, formal box, or to deny its potential salutary effects for the public, civil recourse theory aims to restore in students, in lawyers, and in judges the healthy and accurate sense that there is a body of tort law to be deployed and that it is not to be ignored or bent out of shape merely because some good might come from imposing or denying liability.

B. Calabresi

Judge Calabresi faults us for being “reductionist” in assigning to tort a single function or purpose.¹⁰⁷ He also criticizes us, as does Posner, for having nothing to say about what renders conduct wrongful within tort law.¹⁰⁸ Calabresi is demonstrably incorrect in attributing “reductionism” to our work and, again like Posner, seemingly indifferent to our published writings on the nature of tortious

105. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (recognizing a private nuisance claim by landowners against a factory that emitted pollutants so as to unreasonably interfere with their use of their lands).

106. In a concurring opinion, Circuit Judge W. Eugene Davis wrote:

The defendants argued an alternative basis for dismissal to the district court—that the plaintiffs failed to state a claim under common law. Specifically, the defendants argued to the district court that the plaintiffs failed to allege facts that could establish that the defendant's actions were a proximate cause of the plaintiffs' alleged injuries. If it were up to me, I would affirm the district court on this alternative ground.

I recognize however that the panel has discretion whether to decide this case on a ground other than one relied on by the district court and I defer to the panel's discretion not to address that argument. With this reservation, I concur.

Comer, 585 F.3d at 880 (Davis, J., concurring specially).

107. Guido Calabresi, *Civil Recourse Theory's Reductionism*, 88 IND. L.J. 449, 468 (2013).

108. *Id.* at 451.

wrongs. However, in contrast to Posner, Calabresi offers his criticisms with characteristic good humor. In doing so, he allows us a somewhat better grasp of why our work seems to drive these two great judges and scholars crazy and why they have so misunderstood our theoretical and practical aspirations.

Calabresi claims that we fail to recognize that tort law, and particular doctrines within it, serve many different purposes. Yet he knows that this is not the case. In a symposium honoring his classic work, *The Costs of Accidents*, we (in his presence) criticized that book precisely on the ground that its exclusive focus on tort as a potential mechanism for the reduction of accident costs (subject to justice-based side constraints) adopted far too narrow an account of the many goods that might come from having tort law.¹⁰⁹ These include: (1) tort law's articulation and clarification of norms of responsibility that attend different forms of human interaction; (2) its empowerment of individuals vis-à-vis each other and the state; (3) its recognition and reaffirmation that individuals are entitled to equal concern and respect; (4) its contribution to the maintenance of civil order and civil society; (5) its functioning as a "bottom-up" and relatively nonbureaucratic form of governance; and (6) its context sensitivity and hence its potential to achieve a kind of equity in resolving particular disputes. (At the same time, we have acknowledged that the law in action will often fail to achieve these goods, and that the achievement of these goods can also generate significant costs.)¹¹⁰

This was hardly the only occasion on which we have explicitly recognized the plurality of goods associated with tort law.¹¹¹ So how is it that Calabresi can find his way to accusing us of reductionism? The answer may lie in his being captive to a false assumption about tort theory. According to that assumption, the only cogent definitions of tort law are those that define it exclusively in terms of some purpose(s) that it serves. For example, on one familiar functional definition, tort law is just courts deciding when to harness the threat of liability to incentivize actors to take precautions against harming others. Calabresi, it seems, misconstrues us to be offering a monolithic functionalist account of tort as law that exists for the exclusive purpose of providing civil recourse to victims of wrongs.

We approach tort theory differently. We maintain that, in order to see what goods tort law stands to achieve (as well as its limitations), one must first have a sense of what tort law *is*, apart from the functions it might serve. Our further claim is that the principle of civil recourse has a special place in the explanation of what tort law is. Tort law's being a law of civil recourse is, on our view, exactly what enables it to achieve goods such as those identified above. In a tort case, the question is whether the defendant acted upon the plaintiff in a manner that a legislature or courts have identified as a relational, injurious wrong, or that can be regarded as such under a good-faith application of the principles implicit in the wrongs that have already been recognized. This is so because tort plaintiffs (like certain other kinds of civil plaintiffs) really are asserting a right to make a judicially

109. John C. P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 366 (2005).

110. *See id.* at 398–407.

111. *See, e.g.*, Goldberg, *supra* note 16, at 606–11 (discussing various goods that come from having tort law); Goldberg & Zipursky, *supra* note 52, at 1945–47 (discussing values served by products liability law).

enforceable demand of another person, and our system regards each of us as entitled to be free of such demands unless we have committed certain kinds of wrongs against the person making the demand. We have carefully made the case that, overwhelmingly, courts do frame the question of whether a plaintiff has a right of action in roughly these terms. And they do so because the principle of civil recourse—the principle that those who have been injured by conduct that is wrongful and injurious as to them are entitled to recourse against the wrongdoer—is entrenched in our legal system. For us, the functional question is the question of what goods can come from having *this sort of law*: that is, law that instantiates the principle of civil recourse. To this question we have unequivocally answered: “many things!”

Of course any account of tort law maintaining that it is a law of recourse for wrongs must address the question of why the law counts only certain ways of interacting with other persons as wrongs. Calabresi claims that we have failed to say anything on this question: that we have not given an account of what Holmes called the “life of the law”—the considerations that drive judges to decide tort cases the way that they do. Here he echoes Judge Posner in emphasizing that we have supposedly said nothing about when and why courts recognize *limitations* on tort liability (such as no-duty and proximate cause rules in negligence law) and *why* courts have decided in some cases to impose liability on manufacturers whose products injure consumers, whereas in other cases they do not.¹¹²

We confess to being flabbergasted by these complaints. We have written *ad nauseam* on duty in negligence, parsing the different senses in which courts invoke it, and identifying different types of reasons for limiting liability that attend those different senses.¹¹³ We have also had more than a little to say in our published writings about topics such as proximate cause and products liability. Even beyond this, we presented in our remarks at the AALS meeting an analysis of the New York Court of Appeals’ no-duty decision in the *Lauer* case,¹¹⁴ as Calabresi acknowledges.¹¹⁵

In August of 1993, Andrew Lauer, the three-year-old son of plaintiff Edward Lauer and his wife Lisa, fell ill.¹¹⁶ The Lauers took Andrew to a hospital, but tests did not reveal any underlying medical condition, so Andrew was sent home with his parents. That night, Andrew died. After the Lauers discovered their son dead, Dr. Eddy Lilavois, a medical examiner in New York City’s medical examiner’s office, conducted an autopsy. Finding massive hemorrhaging at the base of Andrew’s brain, Dr. Lilavois ruled the death a homicide by blunt trauma. Mr. Lauer immediately became the prime suspect and was that day subjected to a twelve-hour police interrogation. Afterwards police continued aggressively to investigate him. Because of these developments, Mrs. Lauer came to believe that Mr. Lauer had

112. Calabresi, *supra* note 107, at 456–60.

113. *See, e.g.*, Goldberg & Zipursky, *supra* note 48, at 698–720 (distinguishing four different senses in which courts use the concept of duty in negligence cases).

114. *Lauer v. City of New York*, 733 N.E.2d 184 (N.Y. 2000).

115. Calabresi, *supra* note 107, at 454.

116. The facts stated in this and the next paragraph are drawn from the intermediate appellate court’s opinion. *Lauer v. City of New York*, 258 A.D.2d 92, 94–96 (N.Y. App. Div. 1999), *rev’d*, 733 N.E.2d 184 (N.Y. 2000).

killed their son and divorced him. Edward Lauer's friends and neighbors likewise turned on him to the point that he was required to sell his home and move to another neighborhood. Charges were never brought because of a lack of evidence corroborating Dr. Lilavois's initial finding.

In March of 1995, seventeen months after the child's death, a local newspaper undertook to write an article on the stalled criminal investigation. The newspaper then learned that staff in the medical examiner's office, including Dr. Lilavois and a neuropathologist, had performed a follow-up autopsy three weeks after the boy's death through which they determined that the original autopsy was mistaken: the boy had died of natural causes. Yet neither Dr. Lilavois nor anyone else in the medical examiner's office altered the death certificate, issued a correction of their original findings, or revealed the error to the police or to the parents. The error came to light only because of the newspaper's investigation. Mr. Lauer was exonerated, but his life by then had been destroyed.

Lauer sued Dr. Lilavois and the medical examiner's office, pleading negligent infliction of emotional distress, among other torts.¹¹⁷ Although New York's lower courts were willing to entertain the claim, the New York Court of Appeals in a 5-2 decision held that it failed as a matter of law because the defendants owed no duty to take care in relation to the risk of the plaintiff's life falling apart.¹¹⁸ Treating the duty element as an invitation to look for systemic reasons why negligence liability ought to be blocked, the majority cast itself as the adult in the room: the one strong enough to make a hard decision for the greater good. "It is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and, concomitantly, liabilities, regardless of the economic and social burden."¹¹⁹ Resisting the pull of "symmetry and sympathy," the court reasoned that "allowing emotional distress claims against a municipality for an official's negligent failure to transmit correct information to law enforcement authorities conducting criminal investigations in this case will have far-reaching effects in future cases."¹²⁰

When we read this opinion—authored by a moderate, open-minded and compassionate judge—we are convinced that something has gone very wrong in standard ways of thinking about tort law. The problem is not just that *Lauer's* floodgates argument is hopelessly vague as to the "far-reaching effects" that supposedly required its ruling. It is equally the court's deafness to the plaintiff's argument that the defendants owed a duty of care to the plaintiff. The medical examiner's office had conducted an autopsy and prepared and delivered a report that placed a particular person's well-being in peril. The office knew that its actions would have this effect: it was a willing and knowing participant in the process of

117. Included in his complaint was a claim for defamation that was eventually dismissed. *Lauer*, 733 N.E.2d at 186. Were we analyzing Lauer's claims on a clean slate, we might conclude that defamation captures better than negligent infliction of emotional distress the nature of the wrong done to him. For present purposes it is enough to show defects in the court of appeals' analysis of the plaintiff's negligence claim.

118. *Id.* at 189.

119. *Id.* (quoting *De Angelis v. Lutheran Med. Ctr.*, 449 N.E.2d 406, 407–08 (N.Y. 1983)).

120. *Id.* at 191.

criminal justice. The office then discovered that the entire premise of the peril it created for that person was based on its own prior mistake. At that point, the relevant office personnel surely owed a moral duty to the person whom it knew to have been wrongly imperiled by its mistake to correct the mistake. And while moral duties do not always translate into legal duties, *this* moral duty—given the context in which it arose—surely is one that had a powerful claim to recognition in law.

What, then, does civil recourse theory contribute to the analysis of a decision like *Lauer*? To understand tort law as a law of wrongs and recourse is to understand that tort liability hinges on the breach of a relational duty. In negligence, the duty question is whether there is a duty owed to another (or others) to be vigilant of an aspect of his well-being, and to take ordinary care not to interfere with that aspect of his well-being. *Contra* the New York Court of Appeals, the question of duty, in the first instance, is *not* the question of floodgates or aggregate consequences. As dissenting Judge Smith explained, quoting from New York Court of Appeals precedent and the canonical English case of *Heaven v. Pender*, duty in negligence, as in morality, turns primarily on how an actor is positioned relative to another¹²¹:

whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.¹²²

The fact that Dr. Lilavois was responsible in the first instance for creating the risk that the plaintiff's life would be ruined, that he (and others in his office) had the power to eliminate that risk, and that he (and others in his office) actually knew these things and could easily have fixed his mistake, all strongly support the conclusion that Dr. Lilavois, among others, really was *obligated* to Lauer to correct the mistake and thereby spare Lauer from the ruination he was experiencing. A cruel irony of *Lauer* is that here, as in many other cases, legal "realism" causes the law completely to lose touch with reality. Civil recourse theory aims to reground our thinking about tort law; to remind lawyers that torts really are breaches of duties owed to others not to injure them.

We repeat here our conference remarks about *Lauer* to help to convey the depth of our puzzlement over Calabresi's assertion that we have nothing to say on the scope of tortious wrongdoing, and particularly on no-duty doctrines in negligence. What can he mean by this? As we have quite obviously addressed these topics, including in remarks made in his presence, we suppose he must instead be accusing us of having nothing *useful* to say. This conclusion, however, follows only because he adopts parochial criteria for what counts as saying something "useful."

The tip-off is in Calabresi's own account of *Lauer*, which he describes as a "great decision." It is a great decision, he says, because it recognized that:

121. [1883] 11 Q.B. 503 at 509.

122. *Lauer*, 733 N.E.2d at 193 (Smith, J., dissenting) (quoting *Havas v. Victory Paper Stock Co.*, 402 N.E.2d 1136, 1138 (N.Y. 1980)) (internal quotation marks omitted).

the question of duty is a question that . . . must be decided based on a series of factors that have little to do with a *particular* person's right to civil recourse. The factors the court speaks of are deterrence, spreading, and economic effects. I have my students read *Lauer* and then kind of laugh when they say: "It looks like Calabresi's *Costs of Accidents*; it looks like the things that *you* wrote should be looked at." In other words, the court in *Lauer* seemingly held that the question of duty must be decided based on factors that have little—perhaps too little—to do with civil recourse.¹²³

We would not be so keen to claim credit for this particular decision, and indeed are surprised to see it endorsed by a jurist who has shown a deftness in deciding tort cases that is missing from *Lauer*.¹²⁴ In any event, the passage reveals basic mistakes about civil recourse theory and about judicial reasoning in tort cases. In particular, it rests on the false supposition that reasons of "deterrence, spreading and economic effects" are the sorts of reasons one must look for if one is going to provide a meaningful account of why courts define tortious wrongs the way that they do. To be sure, these are sometimes relevant reasons, and courts sometimes properly invoke them in determining, for example, when a legal duty is owed, as we have acknowledged.¹²⁵ But they are not the only relevant reasons and in many contexts they are not, and should not be, particularly important.

To state the obvious, courts typically find reasons for their decisions in rules and principles already contained in the precedents that courts are *prima facie* bound to follow. Likewise, the recognition of duties in everyday morality routinely serves as grounds for the recognition of parallel legal duties (though, again, tort duties do not simply track moral duties). It is understandable why the individual defendants in *Lauer* were reluctant to correct their mistake. Nobody likes to admit to a serious error, particularly if doing so will likely entail adverse employment actions. Still, as a matter of ordinary morality, it is ludicrous to suppose that Dr. Lilavois, at least, was entitled to allow a man's life to be destroyed merely to avoid the consequences that awaited him upon disclosure of his mistake. These sorts of considerations support the recognition of a tort duty, owed to Lauer by Dr. Lilavois and perhaps others in the examiner's office, to correct the mistake and liability for injury caused by failing in that duty. This sort of reasoning about duty, and about the wrong of negligence, is cogent, not vacuous. Much of what we have written about duty, negligence, and civil recourse theory aims to validate it as against the longstanding but impoverished view, here reiterated by Calabresi, that "real" reasoning in law must involve reasoning about aggregate social consequences.

Again, we are not advocating that open questions of duty in negligence are to be resolved by judicial reliance on raw, unstructured, we-know-it-when-we-see-it

123. Calabresi, *supra* note 107, at 454 (emphasis in original).

124. *See, e.g.,* Desiano v. Warner-Lambert & Co., 467 F.3d 85 (2d Cir. 2006), *aff'd by an equally divided Court sub nom.* Warner-Lambert Co. v. Kent, 552 U.S. 440 (2008) (per curiam); Zipursky, *Punitive Damages and Preemption*, *supra* note 20, at 1790–96 (discussing Judge Calabresi's *Desiano* opinion).

125. *See, e.g.,* Goldberg, *supra* note 27, at 1253–54 (explaining how instrumental considerations might figure in judicial reasoning about whether to recognize a duty of care owed by a class of actors to a class of potential victims).

moral intuitions. They should not be, and they need not be, because negligence law, like tort law more generally, has moral concepts already built into it, and structures them in ways that help to guide their further deployment. There is nothing particularly subjective or esoteric about legal reasoning of this sort. It has long been the stock-in-trade of common law courts and was very much on display in the dissenting opinions in *Lauer*. As they emphasized, it was not simply the *foreseeability of harm* to Lauer from nondisclosure that generated a *duty to disclose* the error. It was also the fact that Dr. Lilavois's own erroneous report was a *source of the peril*, and that he was under an *affirmative duty* to correct his error as a matter of his *statutorily defined* job responsibilities. It was not simply his failure to report, but the fact that the police and the district attorney's office *were expected to rely and did rely* on his report. It is not simply Dr. Lilavois's self-serving behavior, but his flouting of standards of behavior beyond what New York Court of Appeals' precedents had already designated as an outer boundary of *immunity for public officials*. Finally, the litany of harmful consequences suffered by the plaintiff—his divorce, his being made into a pariah, his trauma's *attendant physical manifestations*—not only went toward establishing the seriousness of the injury as a moral matter, but to its *cognizability as emotional harm* under New York law.

Each of the words and phrases italicized in the preceding paragraph references moral considerations that are contained in legal concepts that had been previously deployed by New York courts faced with duty issues. As such, they could have readily been invoked in *Lauer* to fashion a rule that simultaneously acknowledged the power of the plaintiff's claim and set appropriate limits on public officials' responsibilities and liabilities. For example, the court could have ruled that an official owes others a duty to take steps to prevent injury to them whenever the official (or someone with whom the official has a relationship of responsibility) has committed a ministerial mistake, of which the official is actually aware, and the circumstances are such that a reasonable person would recognize that failure to correct the mistake would pose to an identifiable person or persons an immediate and substantial risk of injury. Other limited duty rules might similarly have been fashioned out of the available legal materials. The point is not to nail down the best rule. Rather, we aim to demonstrate that our complaint about *Lauer* is not that the judges in the majority failed to consult their consciences. It is that they could have done a better job of legal reasoning.

At the end of the day, Calabresi, like Posner, seems to doubt the possibility that a certain kind of putative explanation can genuinely explain anything. Both are skeptical that one can really illuminate the wrongs of tort law by reflecting on social norms concerning how persons are required to avoid mistreating others, or concerning entitlements not to be so mistreated, or concerning the extent to which individuals enjoy a liberty to conduct themselves in a manner not constrained by any such duties. Such skepticism would be understandable in the face of a foundationalist effort to identify at a theoretical level the true account of individuals' rights and duties, and then to impose that account onto the law. However, that is not what we are up to. Rather, we are trying to interpret legal notions of right and duty in light of concepts found in ordinary morality that legal concepts rather obviously track. In this context, we think it likelier that it is Calabresi and Posner who are the dogmatists, not us.

That we find ourselves fighting with our opponents on this particular terrain is more than a little frustrating. For decades, scholars have clung to a uniquely American form of pragmatic instrumentalism, typically rooted in a mélange of legal realism, utilitarianism, and emotivism. Yet in the second half of the twentieth century, a diverse collection of scholars, including Hart, Rawls, Dworkin, and Raz, offered powerful arguments against the notion that utilitarianism, moral skepticism, and legal realism are the only positions available to “sophisticated” or “hard-headed” theorists or to those who reject strong versions of natural law or formalism.¹²⁶ If anything, they argued, sophistication and clear philosophical thinking would lead to openness about the general viability of many forms of legal and moral discourse.

Later, in the 1980s and 90s, Jules Coleman and Ernest Weinrib developed some of these insights into powerful and sophisticated attacks against reflexive and reductive instrumentalism in tort law.¹²⁷ However, Coleman has quite openly recognized his own account as schematic and deliberately adopted a kind of agnosticism as to what might count as a wrong.¹²⁸ Similarly, Weinrib has self-consciously characterized his view as anti-pragmatic and as dependent on acceptance of a general framework of Kantian right.¹²⁹ These particular features of their arguments have left them vulnerable to at least some of the criticisms that Calabresi and Posner now inappropriately raise against us.

For the past fifteen years, our project has been double-barreled. On the one hand, while readily acknowledging that our work builds on that of Coleman and Weinrib, we have criticized their work and have developed civil recourse theory as an alternative in part because we think it avoids important criticisms that can fairly be leveled against their work.¹³⁰ On the other hand, we have maintained that anyone who hopes to offer a compelling account of tort law must get his or her hands dirty by immersion in the law. This is why we have devoted so much time and effort to making sense of canonical tort decisions and modern classics,¹³¹ and why we have written about doctrines ranging from duty in negligence to punitive damages.¹³² This is why we have extensively engaged the Restatement (Third) of Torts.¹³³ This is why we have published a primer and a casebook that, we hope,

126. See Goldberg & Zipursky, *supra* note 29, at 1799–1806.

127. For important early contributions, see Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233 (1988) (book review); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

128. JULES L. COLEMAN, RISKS AND WRONGS 329–60 (1992).

129. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 22–55, 84–113 (1995).

130. See Goldberg & Zipursky, *supra* note 5, at 358–71 (offering criticisms of various strands of corrective justice theory, including Weinrib’s).

131. See, e.g., Goldberg & Zipursky, *supra* note 29 (*MacPherson*); Goldberg & Zipursky, *supra* note 6 (*Metro North R.R. v. Buckley*); Zipursky, *supra* note 2 (*Palsgraf*); Zipursky, *supra* note 21 (*Carroll Towing*).

132. See, e.g., Goldberg & Zipursky, *supra* note 29 (duty); Goldberg & Zipursky, *supra* note 48 (duty); *supra* note 20 (writings on punitive damages).

133. Goldberg & Zipursky, *supra* note 34; Goldberg & Zipursky, *supra* note 48; Zipursky, *supra* note 47.

fairly and accessibly present the subject while doing so in a way that demonstrates the power of the wrongs-and-recourse framework to make sense of tort law.¹³⁴

In sum, we have approached tort law as both lawyers and legal theorists, and we have offered an account of torts that, though theoretical, is grounded in case law and appreciative of the complexity and diversity of tort doctrine, as well as the different values instantiated in, and served by, tort law. Moreover, we have patiently engaged and defused certain broad objections to our project—objections that for the most part are grounded in outmoded and underdeveloped ways of thinking about law. That Calabresi and Posner feel entitled to issue wholesale dismissals of our work, rather than seriously engaging it, ultimately attests to the fact that even the most accomplished scholars can sometimes be imprisoned by their intellectual prejudices.

III. CHAMALLAS AND RUSTAD

Professor Chamallas argues that our way of doing torts scholarship has false pretensions to neutrality, is inherently masculine and atomistic, and fails to address adequately the ways in which tort law reflects and contributes to domination and discrimination on the basis of race, gender, and socioeconomic status.¹³⁵ Professor Rustad, meanwhile, assigns to civil recourse theory a colorful litany of sins, including that it “does not permit empirical studies of the law in action,”¹³⁶ “lacks the ‘smell of the streets,’”¹³⁷ is “ethereal,”¹³⁸ aims merely to “retell long-standing tort stories . . . rather than addressing modern problems,”¹³⁹ prides itself, like “pure mathematics,” on being useless,¹⁴⁰ is “barnacle-ridden,”¹⁴¹ treats tort law as a “stagnant pond” rather than a “moving stream,”¹⁴² has no account of “where the doctrine came from and where it is likely to go,”¹⁴³ and has nothing to say about the implications for tort law of new technological and sociological developments.¹⁴⁴

A. Rustad

It was Rustad’s idea to call for an “audit” of civil recourse theory. We were only too happy to open our books for careful review. His own audit, unfortunately, is anything but careful. We will offer only a brief response to his scattershot critique.

134. GOLDBERG ET AL., *supra* note 57; GOLDBERG & ZIPURSKY, *supra* note 1.

135. Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 530–32 (2013).

136. Michael L. Rustad, *Twenty-First Century Tort Theories: The Internalist/Externalist Debate*, 88 IND. L.J. 419, 427 (2013).

137. *Id.* (apparently quoting Professor Marshall Shapo, who used the phrase in a different context).

138. *Id.* at 428.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 429.

143. *Id.*

144. *Id.* at 429–30.

It is true that civil recourse theory is not sociology or empirical social science. This is hardly a defect, unless one has an argument as to why interpretive analysis is unsound and why sound legal analysis must take the form of sociological or empirical analysis. Rustad offers no such argument, and we are not aware of anyone else who has made a cogent argument to this effect. His further claim that civil recourse theory does not permit empirical analysis is facially bizarre. Our writing carries no such injunctive force. Indeed, it can both aid empirical analysis (by helping to frame cogent hypotheses) and benefit from it.

Whatever it takes to render a theory of tort law “ethereal,” or “pure,” these terms have no bearing on our work. There is a tired—indeed utterly exhausted—trope in legal, academic discourse that contrasts “formalist” with “pragmatic” analysis. This is a false dichotomy; legal analysis can and should be both conceptual and pragmatic.¹⁴⁵ The point is so obvious that, but for U.S. law professors’ seemingly infinite appetite for superficial skepticism, it probably would not be worth making. Alas, Rustad’s accusations remind us that we must continue to hammer away on this issue. Getting straight on the content of tort concepts, and how they relate to one another, is necessary for lawyers to make sound legal arguments in tort cases, for judges to apply tort law properly, and for legislatures to undertake sensible tort reforms.

Most peculiar is Rustad’s claim that civil recourse theory is innately backward-looking, and therefore unable to say anything about topics of contemporary interest such as multiple causation, lost chance, and the like.¹⁴⁶ It is true that a good deal of our writing has devoted attention to the history of tort and to tort chestnuts, largely in an effort to undo longstanding academic misconceptions that have led modern tort scholarship astray. (Shame on us!) But we have hardly done so to the exclusion of attention to current developments. Here, Rustad the realist has managed to untether himself completely from the reality of our work: the fact that we have written on many of these topics does not dissuade him from criticizing us for failing to address them.¹⁴⁷

B. Chamallas

Chamallas’s criticisms are much more sympathetically rendered than Rustad’s feverish indictment, and for that we are grateful. Still, there are times when she too seems keen to tar us with stock charges that do not fit our work. Thus, she offers that civil recourse theory is “built around a model of an abstract, disembodied individual who acts and responds apart from social context.”¹⁴⁸ Later, we read that the “central character” of civil recourse theory is the “masculine subject of liberal theory, now depicted as ‘empowered’ rather than simply ‘autonomous.’”¹⁴⁹

145. Goldberg, *supra* note 42; Zipursky, *supra* note 41.

146. Rustad, *supra* note 136, at 428.

147. Goldberg, *supra* note 37 (loss of chance); Goldberg & Zipursky, *supra* note 46 (loss of chance); Goldberg & Zipursky, *supra* note 6 (loss of chance); Ripstein & Zipursky, *supra* note 46 (market share liability).

148. Chamallas, *supra* note 135, at 527.

149. *Id.* at 530 (citation omitted).

The quoted language demonstrates that Chamallas is at times determined to cram our work into a framework that divides political and legal theorists into “liberals,” on the one hand, and “communitarians,” “progressives,” and/or “feminists,” on the other. Liberals, on this depiction, start from the premise that the social world is made up of autonomous actors, each rationally pursuing his self-interest, unfettered by any ties other than those he voluntarily makes.¹⁵⁰ The coin of this realm is acquisition and individual achievement. Other putative values, particularly of community and relationships are ignored or rejected. Worse, liberals are said to present this picture as if it were a neutral description of the world as it “really” is, rather than a contestable political construct, and indeed one that has many highly undesirable features.

Chamallas is hardly alone among academics in relying on this framework, which is a shame because it is a caricature.¹⁵¹ In any event, there is nothing in our writings in tort that commits us to any of the core tenets of “liberalism” so depicted and indeed plenty demonstrating that we reject them. In particular, we have argued in a decidedly non-atomistic vein that: (1) tort law’s conferral on individual victims of a legal power to obtain the state’s assistance in redressing wrongs is partly constitutive of the individual as a rights-bearer; (2) when courts entertain tort cases they are not merely serving as a locus in which private actors hash out their private disputes but instead fulfill an *affirmative* governmental duty to provide citizens with law for the redress of wrongs; and that (3) torts recognize genuine, non-contractual duties that people owe one another and that track (but also refine and at times push against) thick social norms of conduct, many of which are grounded in particular relationships.¹⁵² None of this is the stuff of “classical legal thought,” “classical liberalism,” or “masculine jurisprudence,” or, if it is, then those terms are approaching vacuousness.

Chamallas reports that her “main concern” with civil recourse theory is that it offers “too rosy” a picture of tort law because “[i]t does not speak to or say much about the disempowerment out there in the real world of injured persons who find themselves unable to recover for many of the most serious recurring injuries in their lives.”¹⁵³ In particular, the allegation is that we have nothing to say about sexual and racial harassment and exploitation, reproductive injuries, domestic violence, or harm to relationships. Chamallas goes still further in suggesting that civil recourse theory lends itself to a defense of the unjust status quo by presenting tort law as “even-handed, as neutrally selecting which harms to recognize as legal wrongs based on consensus norms.”¹⁵⁴

In assessing the force of these criticisms, it will help to keep in mind the context in which we have written about tort. Our writings have primarily aimed to challenge one of two dominant views held by U.S. torts scholars: namely, that tort

150. See C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962) for a classic statement of this indictment.

151. See, e.g., Don Herzog, *As Many As Six Impossible Things Before Breakfast*, 75 CALIF. L. REV. 609 (1987).

152. See, e.g., Goldberg, *supra* note 16, at 590–96, 606–11 (articulating each of these points).

153. Chamallas, *supra* note 135, at 531.

154. *Id.* at 532.

law is a mess (either glorious or hopeless) or that it is not a mess only because one can impose order on it by replacing its concepts with concepts taken from another realm, such as economics. At bottom, our claim is that tort law, though complex, is not a mess—that many features of tort law that have been identified as incoherent or unintelligible are neither—and that one does not need to impose an external conceptual framework in order to grasp its coherence.

As we noted earlier, this kind of project is distinct from relentlessly prescriptive theorizing that attempts to construct an ideal liability regime for the achievement of certain goals, and also fundamentally differs from reductionistic efforts to make sense of tort by reference to non-tort concepts.¹⁵⁵ At the same time, we have been reluctant to describe our work as “descriptive” theory, in part because that word is often understood to carry with it implicit claims to neutrality (in the sense of being uncontestable or value-free). Rather, we have seized on the adjective “interpretive” to describe our theory in part because, as both a philosophical matter and a pragmatic matter, we reject stark versions of the dichotomy sometimes drawn between description and prescription. Tort law admits of competing interpretations. We claim that ours is a better interpretation. But we do so on the understanding that the evaluation of competing interpretations requires judgments that cannot be resolved by appeal to brute data.

Nor have we claimed “neutrality” for our theory. In fact, we have described it as “weakly normative.”¹⁵⁶ In doing so, we have explicitly claimed for our theory a dimension that Chamallas criticizes us for allegedly suppressing. To make sense of a body of law that many have assumed to be incoherent is already to recognize a reason for supposing that it is a body of law worth having. Likewise, to see how that body of law fits with other parts of our law and with some of the most basic principles built into our law and polity—such as principle of equal concern and respect—is to identify additional reasons supporting the retention of that body of law.

Still, there is nothing in our approach that amounts to quietism, much less a blanket endorsement of the status quo. It is true that our understanding of tort law, and law more generally, points toward a more constrained view of judicial authority than the sort of maximally unconstrained conception of adjudication that sometimes goes under the unhelpful heading of “activist” judicial decision making. But we are fans of Cardozo, who quite appropriately rendered important decisions that moved tort law forward. Judges, on our view, have ample authority to reform tort law in a progressive direction. And legislatures, on our view, enjoy still broader leeway to recognize new torts or to make up for the limits of, or deficiencies in, tort law by deploying or creating new forms of law. When we claim that Title VII has rendered certain forms of workplace discrimination tortious, we do not do so (as Chamallas implies¹⁵⁷) in aid of a cramped reading of that statute as necessarily limited by common law tort principles nor to endorse that statute’s particular limitations on liability. Instead, we invoke it to emphasize that there are, as there

155. See *supra* text accompanying notes 2–3.

156. Goldberg & Zipursky, *supra* note 5, at 346. In this respect, as in many others, we have maintained a consistent position from the start of our efforts to analyze tort law. See, e.g., Goldberg & Zipursky, *supra* note 29, at 1827–28.

157. Chamallas, *supra* note 135, at 538–41.

often should be, genuine statutory torts that both build on common law torts yet expand the reach of tort law.¹⁵⁸

Chamallas complains that our approach “treats gender, race, and class bias largely as if they were things of the past, equating formal equality with gender and race equity.”¹⁵⁹ The basis for this complaint is apparently that we have in our writing observed that prior historical iterations of tort law contained overtly sexist and racist elements, the most blatant of which have been removed from modern doctrine. Because we have done so, but then not decried loudly enough remaining problematic features of tort law, we are deemed to embrace those features. Would we have done better never to mention and criticize past injustices? Is it Chamallas’s view that if one discusses some forms of injustice and not others, one must be understood as endorsing or tolerating the latter?

Many of Chamallas’s other criticisms proceed in this same manner. For example, she finds fault with our work for “provid[ing] no critique of tort law’s dismal record on domestic violence.”¹⁶⁰ That we have not discussed this particular failing of tort law does not amount to an endorsement or acceptance of it: that is, unless scholars who write on tort law can only avoid being deemed to embrace its failings by routinely mentioning them. If we had somewhere offered an evaluation of the tort system and given it, say, an A– grade for its overall performance in terms of recognizing wrongs and actually providing recourse, one could fairly criticize us for having offered too rosy a picture of tort law. But we have never said any such thing. We have depicted, at a general level, what tort law aims to do, and we have acknowledged that it may well fall short, sometimes far short, of that ideal, and that when it does there are grounds for law reform. In this respect, civil recourse theory does not *inhibit* criticism of tort law for failing to provide recourse for wrongs. Quite the opposite, it provides a basis for such criticism.

Finally, let us briefly address the allegation that our work devalues injuries such as emotional distress, a longstanding concern of Chamallas’s.¹⁶¹ We are befuddled by this criticism. To begin with, we have applied civil recourse theory to defend the propriety of emotional distress claims or claims for enhanced damages in light of substantial emotional distress.¹⁶² And, as noted above, in our remarks at the AALS conference, we specifically chose as one of three examples for discussion the New York Court of Appeals’ decision in the *Lauer* case.¹⁶³ We did so because we think civil recourse theory offers powerful grounds for criticizing that decision, which *denied* a claim for negligent infliction of emotional distress. The denigration of an emotional distress claim by the court, we argued, was symptomatic of a failure of the court to take seriously the plaintiff’s claim that a wrong had been done to him—

158. GOLDBERG & ZIPURSKY, *supra* note 1, at 225–26.

159. Chamallas, *supra* note 135, at 534.

160. *Id.* at 537.

161. *Id.* at 537–38.

162. Goldberg & Zipursky, *Convergence and Contrast*, *supra* note 20, at 493–95 (defending jury discretion to provide compensation for emotional distress as part of fair compensation); Goldberg & Zipursky, *supra* note 52, at 1934–40 (same); Goldberg & Zipursky, *supra* note 6, at 1685–88 (offering an account of the grounds on which courts tend to allow recovery for negligent infliction of emotional distress).

163. *See supra* text accompanying notes 114–126.

that the defendant owed the plaintiff a duty to take simple steps to prevent the plaintiff from having to suffer a very serious ordeal. It would have been helpful to hear from Chamallas how this aspect of our presentation jibes with our alleged denigration of emotional distress injuries.

Moreover, we have provided an extended argument as to why, even if emotional distress in many contexts is a very significant form of injury warranting the recognition of causes of action in tort, courts might nonetheless be justified in thinking about emotional distress claims in a different manner than certain kinds of claims based on physical harms.¹⁶⁴ It may be that there are problems with our argument, and indeed we continue to wrestle with the topic of negligent infliction of emotional distress, as do many torts scholars of all political and methodological persuasions. The point for now is that Chamallas is content to issue her indictment without engaging our arguments. This is another example of criticism by generalization. Our work is tarred with a position that we have explicitly disavowed, and treated as problematic, just by virtue of being tagged as “liberal,” “masculine,” or “formalist.”

The notion of relational duties and the clear rejection of Holmesian atomism is as fundamental to the work we have done as any—arguably more fundamental than the notion of civil recourse itself. And we stand second to none in our commitment to the proposition that wrongs involving dignitary and emotional injury are no less central to tort than other kinds of wrongs. (This is in part the point of our use of the metaphor of the “gallery of wrongs” to describe tort law.¹⁶⁵) Furthermore, to recognize that tort law is a law of civil recourse is to recognize that it gives expression—albeit highly imperfect expression—to a notion of equality: the idea that each of us has rights not to be mistreated by others and standing to call them to account when those rights are violated.

Why, then, all of the criticism? Chamallas is a self-identified critical legal scholar. Tort law, for her, is a lens through which to focus on the regressive aspects of our society and a canvas on which to paint a vision of a more just world. For her, the crusade to do justice is the whole thing; so much so that it should guide the enterprise of saying what the law is and how it is best interpreted. Chamallas is not merely suspicious of the neutrality of any self-styled “interpretive” enterprise, she takes such suspicions to warrant a crusader’s approach at every level of legal analysis. By contrast, we maintain that bodies of law are amenable to interpretations that do not collapse completely into evaluations. We also maintain that a serious effort to understand law need not be tied to complacency or regressiveness and can indeed provide motivation and guidance for reforms, both incremental and radical.

164. Goldberg & Zipursky, *supra* note 6, at 1668, 1672 (arguing that, even granted the moral equivalence of physical harm and emotional harm, there may be reasons for a court to impose greater limits on liability for negligence causing emotional distress).

165. GOLDBERG & ZIPURSKY, *supra* note 1, at 43.

IV. ROBINETTE

Professor Robinette's scholarly critique of our work raises three interrelated criticisms.¹⁶⁶ First, he, too, criticizes us for offering a non-pluralistic view that identifies the provision of civil recourse as *the* purpose of tort law and for failing to acknowledge that tort law has many purposes, including compensation and deterrence.¹⁶⁷ Second, he contends that our descriptive assertion that tort law is a law of recourse for wrongs is false because many if not most tort cases are handled through routinized processes.¹⁶⁸ Third, he faults us for failing to offer a theoretical framework within which legal thinkers can address "[t]he most critical normative question," which he takes to be the question of when to treat tort claims "as wrongs and when to treat them as routinized, compensable events."¹⁶⁹

We appreciate not only Robinette's level of care in trying to capture our work, but also his clear and concise synthesis of scholarly work (including his own) on the ways in which tort claims are, and have been, processed in a routinized manner that often less resembles adjudication as traditionally conceived and instead takes the form of bureaucratic claims processing.¹⁷⁰ In part because, as scholars and lawyers, each of us has had experience with mass litigation and routinized claiming,¹⁷¹ we regard it as a real contribution for Robinette to pose the challenge of figuring out how to determine when a tort claim is resolved on terms such that it no longer can be treated as involving recourse for a wrong.

As Robinette notes, we resist standard professorial usage, according to which compensation and deterrence are identified as two of tort law's main "purposes" or "functions." We do so not because we deny that injured persons stand to receive compensation through filing tort claims or that companies and persons are deterred from incautious activity by the prospect of tort liability. Nor do we deny that the prospect of tort's achieving such worthwhile consequences provides a reason for courts to keep their doors open to tort claimants and for legislatures to refrain from engaging in defendant-friendly tort reform. Instead, we resist in part because the identification of compensation and deterrence as "purposes" of tort law goes hand-in-hand with a general approach to understanding tort law—instrumentalism—that we find woefully deficient.

Overwhelmingly, instrumentalism, whether practiced by progressives or conservatives, is reductive. Its practitioners work backward from function to concepts, treating the latter as meaning only what they need to mean in order for tort to serve its assigned purposes. Yet even if non-reductive forms of instrumentalism are tenable, there is a larger problem in the instrumentalist's

166. Christopher J. Robinette, *Two Roads Diverge for Civil Recourse Theory*, 88 IND. L.J. 543 (2013).

167. *Id.* at 543.

168. *Id.* at 549–50.

169. *Id.* at 566.

170. *Id.* at 550–63 (discussing the scholarship of, among others, Professors Engstrom, Green, Issacharoff and Witt, and Keeton and O'Connell).

171. See, e.g., Erichson & Zipursky, *supra* note 55 (discussing and critiquing the Vioxx settlement); John C. P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill*, 30 MISS. C. L. REV. 335 (2011).

identification of compensation and deterrence as purposes of tort. According to the instrumentalist, the question of whether a plaintiff has a right to recover in tort from a defendant is necessarily a matter of whether the provision of such a right will advance the goals of compensation and deterrence to a sufficient degree in light of the costs of imposing liability. A plaintiff's right to recover, and a defendant's liability, are understood to be justified as means to reaching social goods. This is presumably why, as we noted above, Judge Calabresi can bring himself to describe *Lauer v. City of New York* as a "great" decision notwithstanding the court's denial of the victim's compelling claim to have been injuriously wronged.¹⁷² Its "greatness" (as he sees it) resides in the court's having focused on the correct issue—the issue of whether liability would really deter and whether it would do so in a cost-effective manner. While there are areas of law that are perhaps best understood on such a model—antitrust law might be one—we have argued that tort law is not. Tort is a law of civil recourse, not a scheme for achieving compensation and deterrence.

Robinette contends that, in light of the extent to which the processing of tort claims is routinized, we cannot claim that civil recourse theory provides anything close to an accurate depiction of tort law. If claims arising out of car accidents caused by carelessness are processed by and between insurers, with barely any involvement by injurer and victim, and typically result in the issuance of a check paid by the injurer's insurer directly to, say, the providers of the victim's medical care, or the repairer of the victim's vehicle, then we are not entitled to count these cases as instances of wrongs and recourse. They are instead instances of compensation.

This contention overreaches. If a restaurant patron were to describe some of the items on a particular restaurant's menu, or the type of cuisine on offer, the patron might be providing a highly incomplete description of the restaurant. One might also want to know, for example, about prices, ambience, and location, and about how well-established it is, how well-rated it is, and so on. Though incomplete in all of these respects, the patron's description of the restaurant is not "false." As the endless parade of footnotes contained in this response attests, we have probably done far better with respect to tort than our fictional restaurant patron. Still, our scholarship has left some significant aspects of tort law largely untouched. One of them is the world of routinized claims. This by itself does not render false anything in the account of tort law we have offered.

One might, however, put a somewhat different spin on Robinette's critique. Like Issacharoff and Witt before him,¹⁷³ he seems puzzled how scholars who spend so much time on torts could fail so spectacularly to see where the action really is. To stick with food metaphors, it is as if one encountered a writer of a food column who devotes all of his professional time to writing about truffles when he should be writing about the obesity epidemic currently plaguing American society.

For any number of reasons, this imagined critique (our own, of course) is also wrongheaded. Put aside the fact that our work has not focused on exotic or arcane

172. See *supra* text accompanying note 123.

173. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

features of tort: we write about burgers and fries, not truffles. The larger point is that the world of routinized tort claims—unlike, for example, the world of disaster relief programs in areas ravaged by storms—is legally connected to the aspects of tort law about which we have written. When we say, as we do, that routinized claims occur in the shadow of tort law, we are not only making a claim about the impact of tort doctrine on the conduct of insurance adjusters, but also an analytical claim about the legal relation between them. Robinette is entirely right that there is a complex world of practices to be understood that analysis of tort doctrine will not yield. But there is also a complex world of tort doctrine that empirical scholarship on the resolution of claims will not yield. It may be that many disputes governed by a negligence standard are resolved without a judgment as to who was at fault, or even without much overt attention to the issue of fault. But the settlement process itself obviously presupposes a law in which one who wrongfully injures another is potentially liable to that other.

The “shadow” cast by tort law on routinized claim resolution is in some respects even more pronounced than the foregoing comments suggest. Robinette argues that lawyers and insurers have left tort law behind by relying on presumptions and procedures that enable them, in the name of efficiency, to sidestep nuanced, fact-intensive judgments about fault and damages in resolving disputes.¹⁷⁴ Yet he magnifies the distance between these practices and tort law by drawing a pair of overstated contrasts: (1) liability based on fault (associated with tort) versus strict liability (associated with compensation systems), and (2) individualized damages (associated with tort) versus scheduled damages (associated with compensation systems).¹⁷⁵ We have emphasized that torts are legal wrongs rather than moral wrongs in part to demonstrate that it is a mistake to think of negligence liability as resting on a notion of full-blooded culpability and equally a mistake to suppose that there is no notion of wrongdoing at work in many forms of “strict” tort liability.¹⁷⁶ And, unlike many other tort theorists, we do not treat “making whole” as an essential feature of tort.¹⁷⁷ Routinized payments made in reliance on presumptions of fault (for example, a presumption that any driver who strikes another driver’s car from the rear is the one who is “at fault”) are thus in our view not so far removed from the imposition of tort liability imposed in *P v. D* litigation. The same can be said of payments that do not track the full value of the victim’s losses and instead more closely hew to insurance coverage limits, particularly when made in response to accidents that involve less culpable wrongdoing and minor damage. Modern claims-resolution processes are not entirely different beasts from tort law. Indeed, they are in many respects but a shadow of tort law’s traditional self. One, therefore, needs a nuanced understanding of tort law to grasp why these systems operate in the way that they do.

174. See, e.g., Robinette, *supra* note 166, at 550–52.

175. *Id.* at 552 (arguing that auto accident claims are often resolved in a manner inconsistent with the idea of civil recourse because “little or no regard” is given to “the fault of the parties”); see also *id.* at 555–58 (describing H. Laurence Ross’s findings that auto accident claims are often resolved without meaningful consideration of fault and through the application of “mechanical” damages formulae).

176. See *supra* text accompanying notes 4–7.

177. See *supra* text accompanying notes 19–20.

Ultimately, we perceive a major point of consensus between ourselves and Robinette. Civil recourse theory is sometimes viewed as romanticizing tort law as a domain in which a victim can come to court and, through the state, hold the injurer accountable. This picture has an egalitarian appeal and also sounds in the idea of dynamic justice. We ourselves have sometimes evoked this image and will probably continue to do so. Robinette is concerned that the picture is misleading in light of what happens with the overwhelming majority of tort claims. He is right to be concerned. Moreover, he is right to recognize that our legal system, whether deliberately or through acquiescence, has permitted the overwhelming numerical majority of tort claims to be processed in a more bureaucratic manner. Finally, he is right to raise the following normative and analytical question: When, and for which sorts of claims, should our legal system encourage or embrace a drift toward the more bureaucratic mode, and when should it make an effort to preserve the ethos of tort claim as recourse for having been wronged?

Yet Robinette's framing of this key question counts in favor of civil recourse theory, not against it. We do not have an answer to the question, but we do bring to the table a basic tool for answering it. One cannot even perceive or accurately describe the bureaucratization of tort unless one has a complex and detailed account of what the character and structure of a tort claim is. Moreover, it is precisely when one recognizes a tort claim as a private legal power to demand redress from one who has wrongfully injured another—a characterization derived from civil recourse theory—that the question of when and why individuals choose to exercise this power comes to the fore. A principal point of emphasis in civil recourse theory is that tort law, like other branches of private law, connects wrongdoing to the conferral on victims of a responsive power that is exercised at the discretion of the victim. In doing so, it raises rather than avoids or obscures the following basic question: Are there recurring instances in which victims of wrongs knowingly favor a scheme that affords them speedier, less fulsome compensation at the loss of some of the satisfaction that might come from a more elaborate inquiry into responsibility and a more substantial damages award? Just by inviting this distinction, civil recourse theory may help point toward an answer to the normative question that Robinette has powerfully articulated.

CONCLUSION

Calabresi, Chamallas, Posner, Robinette, and Rustad come at our work from different perspectives, and emphasize different perceived deficiencies in it. But they share a common complaint. All claim that our approach suffers from being academic and moralistic in the pejorative senses of those terms. Ours, they say, is an effort to isolate tort as a pure moral form divorced from and blind to hard realities, including the reality that law is an instrument for the attainment of certain goals, the reality that law changes in response to changing conditions, the reality that law can be an agent of injustice, and the reality of how civil justice actually works. These complaints in turn rely on a set of dogmas that tend to fall under the heading of "legal realism" and that, unfortunately, pervade the modern legal academy.

Our work in tort law is self-consciously premised on a rejection of realist dogma, and indeed it is offered as evidence against it. It maintains that one can take

seriously tort law's morally rich language of duty and right without embracing the notion that practical and consequentialist considerations have no relevance to determinations of legal liability. It takes the view that tort law's doctrines are capacious enough to accommodate social, economic, political, and intellectual change without thereby being rendered vacuous, and that judges have the power and responsibility to develop common law in light of these changes. It recognizes that, while tort law's scheme of powers and liabilities can promote justice, it can also promote injustice, and that often there is simply nothing worth saying about whether a tort judgment has effected justice or injustice. It acknowledges that tort law is operationalized in part through other bodies of law, including the law of civil procedure, and other institutions, including insurance, yet denies that tort law somehow dissolves into these other laws and institutions, leaving only them as worthy objects of study.

We do not suppose that our work is any more immune from serious criticism than other legal scholarship. As grateful as we are to have this occasion to engage our critics, we find few such criticisms leveled against us here. We do not need to be told that our work departs from realist orthodoxies. We have not only argued against these orthodoxies at a philosophical level, we have engaged in concrete, ground-level legal analysis that demonstrates their falsity. We will continue to develop our view that torts are a special class of wrongs, that tort law is a law of civil recourse, that common law adjudication can and should be conceptual and pragmatic, and that law can and should be approached in the first instance through the lens of a jurisprudence of pragmatic conceptualism. We hope that we will continue to be rewarded by the attention of critics at every turn.