2015

Gatsby and Tort

Robin West
Georgetown University Law Center, west@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1503
http://ssrn.com/abstract=2645934

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Contracts Commons, Criminal Law Commons, Jurisprudence Commons, Social Control, Law, Crime, and Deviance Commons, and the Torts Commons
Gatsby and Tort

Robin West

America’s novel of the 1920s famously depicts an automobile accident in its climactic scene. Daisy Buchanan, a wealthy old-money socialite, is driving a fabulously ornate yellow Rolls Royce well over the speed limit toward Long Island from New York City. She sees a woman dart into the road. She swerves to the left to avoid hitting her, but then realizes that this has put her own car in the path of an oncoming vehicle in the opposite lane. She swerves back, and strikes the victim, Myrtle Wilson, who dies instantly: "when they had torn open her

1 F. SCOTT FITZGERALD, THE GREAT GATSBY (Scribner Press 1995) (1925). The Great Gatsby is frequently referred to both as a distinctive portrait of America, and of the 1920s. For an excellent discussion of both the references in GG to the architects of the American Dream, from Benjamin Franklin to Wild Buffalo Bill, and an insightful reading of the novel as critical of that dream, see Thomas E Boyle, Unreliable Narration in "The Great Gatsby" 23 THE BULLETIN OF THE ROCKY MOUNTAIN MODERN LANGUAGE ASSOC. NO.1, 21, 21-26 (March 1969). See also Gary Scrimgeour, Against the Great Gatsby, for a harsh assessment of both Gatsby and Carraway's character, in an essay that likewise reads the Great Gatsby, perhaps against authorial intent, as harshly critical of the "dangers that confront American sentimentality." Gary J. Scrimgeour, Against the Great Gatsby, CRITICISM, VIII, 75-86, Wayne State University Press (Winter 1966). See also WALTER BENN MICHAELS, OUR AMERICA: NATIVISM, MODERNISM AND PLURALISM 22-60 (Duke University Press, 1995) discussing Gatsby and the themes of American- styled racial insecurity and miscegenation. For a near-classic reading of Gatsby, both the character and the book, as emblematic of the virtues of the American Dream, see Barry Gross, Our Gatsby, Our Nick, 14 THE CENTENNIAL REV., 331-340 (1970) ("Gatsby represents nothing less than wonder itself; the heightened sensitivity to the promises of life, the extraordinary gift for hope, the romantic readiness that makes life something more than an extinction up an alley that makes life a journey. . . Gatsby is the hero we need to acknowledge and affirm, but the hero we dare not be. Nick, who is, like us, within and without, simultaneously repelled and enchanted by the inexhaustible variety of life, is the hero we can and must become."). For a discussion of three different interpretations of the American Dream that are articulable from Gatsby, in the context of a discussion of the novel's focus on ethnicity, see Peter Gregg Slater, Ethnicity in The Great Gatsby, 19 TWENTIETH CENTURY LITERATURE, 53-62 (1973), See also Barbara Will, The Great Gatsby and The Obscene Word, 32 COLLEGE LITERATURE 4, 125-144 (2005) (Gatsby's story is "our' story; his fate and the fate of the nation are intertwined. That Gatsby "turned out all right in the end" is thus essential to the novel's vision of a transcendent and collective Americanism."). For a critique of the tendencies of critics to see Americanism at the heart of Gatsby, see Benjamin Schreier, Desires's Second Act: Race and The Great Gatsby's Cynical Americanism, 53 TWENTIETH CENTURY LITERATURE 2, 153-181 (Summer 2011). For an influential critical reading that centers the novel's temporal location in the middle of the 1920s, see Gross, supra.

2 1. Every person operating a motor vehicle upon a public highway shall drive such a vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person. 2. A rate of speed, by a motor vehicle, . . . in excess of thirty miles an hour for a distance of one-fourth of a mile shall be presumptive evidence of driving a rate of speed which is not careful or prudent." N.Y. Highway Law §287(b) (McKinney 1922) (as amended to January 1, 1918).

Daisy's speed is given by one witness as thirty to forty miles an hour, (GG at 147) and by another, who saw the car a ways past the accident as fifty to sixty. (GG at 147) Gatsby reports that Daisy "stepped on it" after the impact, perhaps accounting for the difference. (GG at 151) Gatsby also tells Nick that Daisy was feeling nervous in New York City, and wanted to drive because she thought it would settle her nerves. (GG at 151)
shirtwaist, still damp with perspiration, they saw that her left breast was swinging loose like a flap, and there was no need to listen for the heart beneath." (GG at 145) The "death car," as it was called in the newspapers, wavers, but then continues on without stopping, according to a witness. A bit further along, the driver stops the car and her passenger, Jay Gatsby, who is also her extra-marital lover and the owner of the car, takes the driver’s seat behind the wheel. He continues on to Long Island.

The next morning, as you may recall, the victim’s distraught, possibly deranged, but unquestionably enraged husband – a car mechanic who is the owner of an auto repair shop and the operator of a gas station – tracks down a sometimes-business acquaintance and customer, whom he has reason to believe can tell him both the identity and the whereabouts of the owner of the car, and therefore, he mistakenly believes, the car’s driver, and hence the man responsible for his wife’s death. He also believes, again wrongly, although not unreasonably, that the car’s owner was his dead wife’s lover. So, on the morning after his wife’s death, Wilson speaks to the fantastically wealthy Tom Buchanan, seeking to identify and locate Gatsby. Unknown to Wilson, of course, it was Tom himself, not Gatsby, who was his wife’s lover, and it was Tom’s wife Daisy, not Gatsby, who was driving Gatsby’s car when it hit and killed Wilson’s wife. Also unknown to Wilson, Gatsby is Daisy’s lover, and much hated by Tom, but Gatsby bears neither any illicit love nor hostility toward Myrtle, Wilson’s wife. Thus, when Wilson asks Tom to identify the owner of the car, he, Wilson, is harboring two false beliefs – that the car’s owner was his wife’s lover and his wife’s killer. He is also brandishing a gun and clearly intends to exact revenge.

When Wilson asks Tom Buchanan who owns the yellow car and where he can find him, Tom tells him. Tom does not correct Wilson’s misapprehension about the identity of Myrtle’s
lover – Tom might not have known his wife was driving the car, but he certainly knew that it was he, not Gatsby, who was having an affair with Wilson’s wife. Nor, more consequentially, does Tom warn Gatsby, after Wilson leaves Tom’s estate for Gatsby’s, that his life is in danger. Wilson spends the morning wandering from the Valley of Ashes into the lush neighborhoods of East and West Egg, onto Gatsby’s estate, finds Gatsby in his backyard pool, and kills him. Wilson then kills himself, and as Nick Carraway, our not very reliable and himself ethically challenged narrator then notes, the “holocaust was complete.” (GG at 170).

Nick then comments on this carnage, and more broadly on the events of the summer that had precipitated it. In so doing he judges his cousin Daisy and her husband Tom harshly, in one of the most haunting sentences in American literature:

They were careless people, Tom and Daisy – they smashed up things and creatures and then retreated back into their money or their vast carelessness, or whatever it was that kept them together, and let other people clean up the mess they had made... (GG at 187-88)

By contrast to this negative appraisal, Nick somewhat inexplicably exonerates Gatsby himself from his otherwise broad denunciation of the moneyed crowd he’d befriended that summer. Although with ambivalence – at various points in the narrative Nick has found Gatsby to be nothing but a roughneck, (GG at 53) a fraud, (GG at 69-70) a bore with an ostentatious roadhouse but nothing interesting to say, (GG at 69) and at one point to represent everything he holds contemptible (GG at 6) – nevertheless, both at the beginning and the end of the novel, Nick basically absolves him. “Gatsby turned out all right at the end,” (GG at 6) Nick tells the reader at the beginning of his narrative, and he tells Gatsby himself, the night before Gatsby dies, that while Tom, Daisy, and Nick’s sometimes girlfriend Jordan are “a rotten crowd,” that he, Gatsby, is “worth the whole damn bunch put together.” (GG at 162)
Nick’s exoneration of Gatsby of virtually all wrongdoing – his judgment that Gatsby is “all right in the end” – has pre-occupied Fitzgerald’s professional readers for generations.\(^3\) Gatsby may be, as both Nick and generations of readers both professional and casual have taken him to be, a quintessentially American romantic,\(^4\) an appealingly self-made and even self-imagined man,\(^5\) an infinitely hopeful innocent corrupted by the dust that swirls around him, a sacrificed lamb on the altar of a rigid class and race-based hierarchy, a Dutch pilgrim who sets foot on virgin land,\(^6\) a trans-raced and oddly disembodied idea of an individual of unaccounted ethnicity or color,\(^7\) or simply a supernaturally handsome fool utterly in love with a rich girl who is out of his class and beyond his reach – all of which Nick clearly believes, and all of which Gatsby’s readers have seemingly wanted to believe. But he is also an adulterer, a criminal with a successful business in illegal bonds trading,\(^8\) a friend of gangsters who themselves talk casually of gangland murders, a bootlegger, possibly himself a murderer, and perhaps most notably – although not much noted in the scholarly literature – an after the fact abettor, at least, of the hit

\(^3\) For a sampling of the poles of the reception of the character of Gatsby himself in the literature, see, e.g., Gross, Our Gatsby, Our Nick, supra note 1 (defending both Gatsby and Nick against criticisms of their character, Gatsby as representative of an ideal, or hope, or dream, and Nick as representative of moral maturity); Scrimgeour, Against the Great Gatsby supra note 1 (“Gatsby is a boor, a roughneck, a fraud, a criminal. His taste is vulgar, his behavior ostentatious, his love adolescent, his business dealings ruthless and dishonest. He is interested in people -- most notably in Carraway himself -- only when he wants to use them. His nice gestures stem from the fact that, as one character comments, "he doesn't want any trouble with anybody." Like other paranoiacs he lives in a childish tissue of lies and is unaware of the existence of an independent reality in which other people have separate existences. What lifts him above ordinary viciousness is the magnitude of his ambition and the glamour of his illusion. . . Grand this defiance of reality may seem; silly it nonetheless is."). See also, Colin Cass, "Pandered in Whispers": Narrative Reliability in The Great Gatsby, 10 COLLEGE LITERATURE 3, 314-326 (1983) (defending Carraway and by implication Gatsby against the charge that Nick is a panderer); Boyle, Unreliable Narration in the Great Gatsby, supra note 1, for critiques of both Gatsby and Nick for their involvement in a "corrupt dream." For readings that focus on Gatsby's ambiguous racial and ethnic identity, see, e.g., Slater, Ethnicity in The Great Gatsby, and Schreier, Desire's Second Act: Race and the Great Gatsby's Cynical Americanism, supra note 1.

\(^4\) See, e.g., Boyle, supra note 1.


\(^6\) See, e.g., Our Gatsby Our Nick, supra note 1 at 336-337 and Boyle, Unreliable Narration, supra note 1 at 24.

\(^7\) See, e.g., Barbara Will, The Great Gatsby and the Obscene Word, supra note 1 at 135 to 140.

\(^8\) For a full discussion of the historical analog of the illegal bonds trading business in which Gatsby was seemingly involved, see Allen Boyer, The Great Gatsby, the Black Sox, High Finance, and American Law, 88 MICH. L. REV., 328-342 (1989).
and run accident that kills Myrtle and that so offends Nick, and for that reason arguably as culpable of it as Daisy is herself. 9 So it is odd that Nick, the book’s narrator and presumptive moral center, finds Gatsby lacking in blame for any of this. Consequently, and perhaps unsurprisingly, a substantial scholarly literature has developed, attempting to account for the considerable distance between Nick’s unabashed adoration of Gatsby – Nick’s love of his romanticism, his “gorgeousness,” his hope, charm, personality, quest, and determination to recreate the past if need be in order to capture the future (GG at 6, 116) – and Nick’s own astute observations of the criminality, vacuity and self-serving character at the heart of this peculiarly large American hero. 10

By contrast, there is not nearly so much attention bestowed, in the scholarly treatments of Gatsby, on Nick’s other central moral judgment of the novel, as quoted above – that Daisy and Tom were “careless people … [who] smashed up things and creatures and then retreated back into their money, . . . [leaving] other people to clean up the mess.” Perhaps one reason for this lack of attentiveness is its accuracy: there is not such a gap between Nick’s assessment of his wealthy cousin Daisy and her husband Tom, and the way those characters appear to the reader. Tom and Daisy are indeed careless people who destroy creatures and leave others to clean up the mess while they retreat into their money – Nick is spot on about that. Tom maims one lover before the commencement of the action of the novel in a separate automobile accident in California. (GG at 82) He strikes his mistress Myrtle at another point in anger, carelessly and

9 Commentators have noted that Nick Carraway's refusal to participate in the inquest by sharing his knowledge of Daisy's involvement in Myrtle's death renders him an accomplice, see Boyle, Unreliable Narration in The Great Gatsby, supra note 1 at 22. I have not found discussion, however, of the fact that the same is basically true of Jay Gatsby himself: of course he was dead by the time of the inquest, but prior to his death and after Myrtle's, failed not only to turn the car around (after he'd taken the wheel) and return to the scene, but he also failed to come forward with his knowledge of the identity of the driver of the car.

10 For a striking example of an attempt to do just this, see Dan Coleman, A World Complete in Itself: Gatsby's Elegiac Narration, 27 JOURNAL OF NARRATIVE TECHNIQUE, 207-233 (1997).
seemingly casually breaking her nose, and literally leaves others to clean up the considerably quantity of blood that spills onto Myrtle’s furnishings as a consequence. GG at 41) Daisy complains in the opening scene that Tom is a “hulking brute of a man” who has injured and perhaps broken her finger – apparently carelessly, rather than intentionally, but with no hesitation or subsequent regret; when Daisy complains of his brutishness and her broken finger, Tom only protests her description of him as a hulking brute. (GG at 16) Bad driving – not just Daisy's – recurs through the novel as a constant backdrop to the action: Nick’s on again off again girlfriend Jordan is such a careless driver, Nick complains at one point, that on one occasion she narrowly missed injuring a workman standing nearby, and in fact had come so close to doing so that the fender of her car had knocked a button off his jacket. (GG at 63) A drunken driver after one of Gatsby’s parties drives his car into a ditch, although hurting no one, (GG at 58-59) and another drives her car over the hand of another partier who is inexplicably but drunkenly lying in Gatsby’s driveway. (GG at 66) Daisy’s carelessness, of course, is the centerpiece of the novel. Her reckless driving is one cause of Myrtle’s death – Myrtle’s darting out into the street is another – and between the two of them, Daisy and her brutish husband Tom indirectly cause two further deaths – Gatsby and Wilson’s own – by first taking no affirmative action to correct Wilson’s misperceptions regarding the identity of the driver of the car, and second, with respect to Tom, taking no action to correct Wilson’s misperception regarding the identity of his wife’s lover and then failing to warn Gatsby of Wilson’s hunt. Neither Tom nor Daisy have reason to want Myrtle, Gatsby or Wilson dead – they harbor no murderous intent toward any of these three people – but they also feel no need to take due care that those events not occur. At the end of the carnage, they drive out of the jurisdiction – retreating into their money – leaving others – notably, Nick – to clean up the considerable mess they left behind. Careless is as careless does,
and here, careless does two ruined marriages, a damaged car, a near miss, a broken arm, a "run-over" hand, a broken nose, a bruised finger, and three deaths.

So, Nick is famously morally disgusted by all this riotous madcap recklessness; by the end of his summer cavorting with the Long Island crowd, he tells the reader, he’d reached a point where he’d prefer to see citizens behaving like soldiers, "in uniform and at a sort of moral attention forever." (GG at 6) Unlike his varying assessments of Gatsby, furthermore, Nick does not equivocate in his judgment of Daisy and Tom and their rotten crowd, nor does Fitzgerald, nor, ultimately, should the reader. Unlike Gatsby, they have no redeeming charm (other than Daisy's voice that famously was “full of money” (GG at 127)), and their wealth and carelessness pretty much exhaust their shallow characters. There is no mystery to them, they are as they appear: wealthy, thoughtless, shallow, and reckless. Perhaps because of this, there is considerably less puzzlement expressed in the scholarly literature about Tom and Daisy, or the overarching vice – carelessness – which Nick identifies in their moral character. Nick is right to condemn them for it; and the reader concurs. They do wreck lives with their careless disregard of the importance, as well as the rights, of others, and they are never held accountable for any of it; they do retreat into their money, just as Nick complains. Nick’s assessment of Tom and Daisy’s characters does not, then, give the reader reason to wonder about Nick himself, as does his willingness, for the entire summer long duration of his swoon of affection for the book's title character, to overlook Gatsby’s criminality.

But that doesn’t mean that Nick’s haunting judgment of Daisy and Tom and their crowd – that they are careless people who wreck things and creatures and then retreat into their money and let others clean up the mess – should not give us pause. Even conceding the strength of the case for the endless fascination with the mysterious Jay Gatsby, it seems to me this relative lack
of attentiveness to Tom and Daisy Buchanan, and particularly to Nick’s indictment of them, is an unfortunate and unwarranted oversight. First, of course, it is the Buchanans' carelessness, not Gatsby's criminality, that so mightily offends Nick as to drive him back to the wholesome Midwest. That alone should make the Buchanans of more interest than is reflected in the scant attention they have received in scholarship. But second, and more to my purposes here, Nick’s indictment of Tom and Daisy (and their rotten crowd) should be of interest – and to legal scholars as well as literary – because it is an eerily pitch-perfect restatement of the fundamental point of the tort, or wrong, of negligence – a part of the body of law that was then referred to as "the law of wrongs," and a usage I’ll continue here – as it then existed, at the time of both the writing and the action of Fitzgerald's novel. Consequently, Nick’s assessment of Tom and Daisy’s character, and the events that prompted it, provide a glimpse – although perhaps inadvertent, on Fitzgerald's part – on the positive, private law of the era – not just the positive morality – that governed exactly the sorts of wrongs in which Tom and Daisy so routinely and blithely engage.

Thus, the “carelessness” or recklessness Nick finds and condemns in Tom and Daisy’s behavior is loosely synonymous with the more legalistic sounding concept of “negligence” that is and was central to the "cause of action" for negligence that had itself come to be understood, by the time of *Gatsby*, albeit only after a somewhat tortured history and considerable equivocation, as a stand-alone separate tort; as a freestanding part of the "law of wrongs." All three terms – carelessness, negligence, recklessness – refer at their core, in both legal and ordinary usage, to an absence of due care for the rights, safety, interests, or bodies of others. During Gatsby's decade, that carelessness, or negligence, so characteristic not only of Daisy's driving, but of a number of other drivers in this novel as well, was regarded as a “tort,” by which
was meant a legal as well as moral "wrong" for which the wrongdoer, or tortfeasor, should be held accountable, and for which the victim should have legal recourse, against the tortfeasor, for money damages. Thus, whether or not he does so knowingly, Nick condemns Tom and Daisy, in effect, for being tortfeasors – meaning, then, wrongdoers – and of a pretty egregious sort, too, and, more loaded still, wrongdoers who get away with it. It is that careless, reckless, thoughtless, wrongful, and tortious New York and Long Island behavior – not Gatsby's criminality – which so disgusts Nick as to prompt his return to his mid-western roots.

The wrongful torts in *Gatsby* don't, furthermore, begin or end with Myrtle’s wrongful death, or with Jordan’s or the partygoers’ reckless or drunken driving. Tom is a tortfeasor as well, when he breaks Myrtle’s nose, and even Daisy’s finger – these are batteries, for which the wrongdoer should be liable to the injured party. Someone presumably was at fault for the automobile accident in California, in which Tom’s then-lover’s arm was broken. Tom indirectly caused Gatsby’s death when he failed to warn him of Wilson’s intention to kill him. This was an act of carelessness at least, if not deliberate malice, although likely not one for which tort law would provide relief then or now, as I’ll discuss below. Tom’s affair with Myrtle was also a private wrong that would have then been regarded as tortious – a “criminal conversation” – and one which turned out to have particularly disastrous consequences, as was Nick’s pandering,

---

11 “A harmful or offensive contact with a person resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such contact is imminent, is a battery.” Prosser and Keeton, supra note 37 at 39 citing Second Restatement of Torts. *Mohr v. Williams*, 104 N.W. 12, 16 (Minn. 1905) (“Every person has a right to complete immunity of his person from physical interference of others . . . and any unlawful or unauthorized touching of the person, except it be in the spirit of pleasantry, constitutes an assault and battery.”).

12 Adultery with one spouse in a marital relationship is known in tort as criminal conversation. The non-spouse is liable even if the spouse consented or even initiated the extra-marital relationship. Prosser & Keeton, supra note 37 at 917. *Tinker v. Colwell* 193 U.S. 473, 481 (1904) (expressing that because the wife is unable to give lawful consent to engage with another man, even if the wife consents to intercourse with another man, the other man has committed willful and malicious injury to the husband’s rights and privilege over his wife); *See, e.g., Seiber v. Pettitt*, 200 Pa. 48 (Pa. 1901).
which was then a tortious “alienation of affections.”

This list of torts in The Great Gatsby could be considerably extended; there is, for example, also mention of a surgeon's proclivity to malpractice, because of his dts-induced shaky hands. (GG at 113) Wilson falsely imprisons his wife in their home prompting her disastrous attempt at escape, and the main characters in Gatsby libel each other throughout. One could easily base a first year torts course around a close reading of this book. It is a virtual catalogue of actionable private wrongs. The novel is replete with torts.

Yet, and this is the tension I'd like to explore in the remainder of this essay, in this American novel that is so replete with torts, and of both the intentional and unintentional sort, tort law – the law of private wrongs that was meant then and is still meant today to require compensation to victims by tortfeasors for the injuries suffered and the costs imposed by virtue of those injuries – is utterly, profoundly, ineffectual. Nobody sues anybody for anything. More than ineffectual, though, tort law is invisible. Daisy and Tom (and Gatsby, and Jordan, and quite a few partygoers and Nick too for that matter) may be tortfeasors; I think it’s pretty clear that

13 First recognized in New York, anyone who contrives to persuade or assist an individual in alienating a wife’s affections towards her husband is liable. “It consists merely in depriving one spouse of the affections, which is to say the love, society, companionship and comfort, of the other.”. Though the spouse must manifest a change of attitude by some external conduct or words, it is not necessary to show adultery. Gatsby’s efforts to convince Daisy to leave Tom would certainly fall within the category, as would Nick’s assistance in that effort. Prosser, supra note 37 at 918. See, e.g., Heermance v. James, 47 Barb. 120 (1866); Callis v. Merrieweather 57 A. 201 (Md. 1904);

14 As a number of commentators in the sixties, seventies and eighties pointed out, prompting a substantial debate in the literature, the otherwise somewhat priggish Nick is a panderer, who facilitates Gatsby’s affair with Daisy. See Cass, Pandered in Whispers: Narrative Reliability in The Great Gatsby, supra note 12 and Nancy Y. Hoffman, The Great Gatsby: Troilus and Criseyde Revisited: FITZERALD/HEMINGWAY ANNUAL 148-58 (1971). See also Scrimgeour, Against the Great Gatsby, supra note 1 at 81. It is not at all clear what his motives were for doing so, but regardless of motive, and whether or not it was pandering, what Carraway did to facilitate Daisy and Gatsby’s affair was actionable alienation of affection. The gist of the tort is not sexual intimacy but an interference with the marital relation that changes one spouse’s mental attitude toward the other. The defendant’s conduct must have been a cause of the harm to the marital relationship, and have acted for the very purpose of affecting the marital relation. . . [T]o be liable the defendant must have in some way acted affirmatively… but active participation or encouragement by the defendant will be sufficient for liability even if the initiative comes from the plaintiff’s spouse.” Prosser, supra note 37 at 919 to 920. See, e.g., Annarina v. Boland, 111 A. 84 (Md. 1920); Johnson v. Richards 1930 Sullivan v. Valiquette Boland v. Stanley 1909, Vogel. Barlow. v. Barnes, Watkins v. Lord/ “Norris v. Stoenham, Tex. Civ. App. 1932 46 SW2d363
they are. But, there is no mention by either the narrator or the characters of even the theoretical possibility of a lawsuit against Daisy (or Gatsby, or Tom) for the hit and run accident that killed Myrtle, or against Tom for his batteries, or for his various omissions, or against any of the other drivers for their reckless and often drunken and usually injurious driving. There is no mention of the possibility that any of these acts constitute civil, private wrongs, nor is there any mention of the body of private law that is supposed to facilitate recompense for them. Tort law – the law that should govern these relations, that should force at least a partial righting of these wrongs by requiring the tortfeasor to compensate the victim rather than leave others to clean up the mess, is entirely absent, both from the characters' dialogue and from Nick's ruminations. It is absent, in short, from consciousness. To put it melodramatically, torts – again, understood as “private wrongs” – pervade the novel, while tort law – the “law of wrongs” – is as absent from the entirety of this novel as Myrtle herself is dead at the novel’s end.

So, why is there no tort law in Gatsby, a novel filled with torts? My answer to this question will eventually bring me around to a discussion of the role not only of tort law, but of the very idea of tort, and particularly the idea of negligence as an actionable “wrong,” both in the novel itself, albeit indirectly, and more important, in the world Gatsby depicts – the "age of automobility,"15 as it has come to be called, circa 1925. My thesis, in short, is that while the number of accidents was skyrocketing, during the decade in which Gatsby was both set, written, and received, tort law itself – the body of law that should have provided relief for those accidents -- was dysfunctional, and it is that dysfunctionality that explains its absence from the consciousness of Gatsby’s characters, author, and readers all. Because of both problems of access, and doctrinal barriers, very few of the accidents of the sort involved in Gatsby could have

been litigated through to a successful conclusion, and in the sections below, I will detail some of those barriers.

In fact, as I will attempt to show, by the end of the 1920s – Gatsby’s decade – tort law had proven so dysfunctional that the very idea of “tort” as a “wrong,” and the quite specific idea of automobile negligence as a “wrong” demanding recompense, had come under sustained and scathing attack, and from those who had the interests of victims at heart. In the half decade following the publication of the Great Gatsby, tort reformers argued in a range of fora that the very idea of hinging compensation for automobile accidents on any kind of “fault” is misguided and counterproductive. The law should instead, the reformers argued, construct administrative mechanisms by which to compensate the victims of automobile accidents, and leave “fault” or “negligence” – or “carelessness,” as Nick aptly described it – out of it altogether. The idea that tort liability for car accidents should be based on a moral shortcoming – carelessness – and that recovery for them should be guided by principles of corrective justice – the idea, that is, that negligence on the roads is a “wrong” that ought to be compensated precisely because it is a “wrong” – by the end of the decade, had begun to unravel.

It was just that soon-to-be discredited moral judgment, though, that Nick’s description of the Buchanans so perfectly captures: the judgment, that is, not simply that it is wrong to carelessly kill people, but the much more complex and more legalistic idea that it is a wrong for Daisy and Tom to do so and then to let others clean up their negligently caused messes, and that therefore – albeit only impliedly "therefore" – it would be unjust for a state to permit this state of affairs. Put the other way around, one way to put Nick's insight is that it would be unjust for a state not to require recompense for careless lethality. That Carraway-ian idea – the idea, that is, that negligence is blameworthy, and a moral wrong, and therefore a tort, and that justice requires
that anyone injured by it have legal recourse to compensation from the wrongfully negligent actor – is precisely the idea that was under sustained attack by the end of the decade of Gatsby – and indeed in disrepute by the end of the twentieth century.

The rest of this Essay has two parts. The first explores tort law and its discontents, during Gatsby’s decade, and presents my explanation, summarized above, for the absence of tort, both in Gatsby itself and the world Gatsby depicts. It then describes briefly the reform movement, led by progressive legal realists, that attempted, albeit unsuccessfully, to replace tort recovery for automobile accidents with a no-fault compensation scheme. Although the specific reform sought was never fully implemented, the idea behind it – that compensation for negligently caused harms should proceed without reference to the fault of the tortfeasor – has taken hold, both in the context of automobile accidents and more broadly. The consequence is that we have lost tort law’s traditional moral center; we have lost, that is, the law of torts as a “law of wrongs.”

The second part reckons the costs of this transformation, both political and conceptual, and briefly defends traditional “wrongs” and “justice-based” tort law against the charge that it reflected overly, and stereotypically, male values. The conclusion looks briefly at traces of the loss of the idea of tort as wrong, in our contemporary legal and political battles.

I. Torts and Tort Law in Gatsby's World

The only explanation I have found in the scholarly literature for the absence of tort law in Gatsby is in a doctoral dissertation by John D. Rockefeller the V, in which he argues that tort law is absent from The Great Gatsby, although torts there are aplenty, basically because that is what Fitzgerald intended: Fitzgerald wanted to assert a moral condemnation of Tom and Daisy’s
reckless conduct, particularly toward strangers, and even more particularly toward strangers of little or no wealth, rather than a legalistic one.\footnote{16 John D. Rockefeller V, Beyond My Eyes Power of Correction: Fitzgerald, Faulkner, and the Past (2008) (PhD dissertation) (on file at Johns Hopkins University, UMI Microform 3311835).} This is not by dint of Rockefeller’s (or, presumably, Fitzgerald’s) unawareness of the contours of the tort law of the time. In fact, in a lengthy and astute legal discussion within a wonderful dissertation that is about much else besides, Rockefeller explains that the tort law of the time in which \textit{Gatsby} is set, rightly condemned exactly the sort of behavior found in \textit{Gatsby} as both tortious and wrong. In fact, he argues, the common law of tort in the 1920s, to its credit, was well ahead of common morality in just that respect. Relying on a handful of progressive decisions from the time period, Rockefeller demonstrates, correctly, that a party could indeed be liable in tort for injuries caused through negligent conduct, even if the injured party was not in any sort of contractual relationship with the injurer. By contrast, he argues, in the common understanding of the time, one’s moral obligations to others stopped at contract’s end, so to speak. Tom’s declaration to Wilson that “I have no obligation to you,” pretty much summed up the positive morality of the era, at least in the minds of the wealthy, and with respect to the obligations they owed the poor.\footnote{17 Id at \textup{___}.}

\textit{Gatsby}, in effect, according to Rockefeller, was in part a brief for Fitzgerald’s view that the moral norms of responsibility and reciprocity, as felt by the wealthy, needed to “catch up” to the more progressive (in every sense) views expressed by the judicial authors of the common law of tort at the time, according to which every individual had well defined legal obligations toward all others, sounding in tort, and regardless of the presence or absence of contract. In contrast to the law’s teaching, the lack of any felt moral obligation on the part of the wealthy, for the consequences of their reckless behavior, Rockefeller argues, just is the moralistic point of
Fitzgerald’s American classic, and focusing on the Buchanans’ legal liability for their recklessness would have only muddied the waters of that moral condemnation. Fitzgerald wanted his novel to condemn the wealthy for their utter disregard of the consequences borne by working class people of their reckless, and often lethally reckless, conduct. That tort law might in fact have held them liable for just that recklessness would have been nothing but a distraction from this central moralistic thesis.

I would like to put forward another possible explanation, not inconsistent with but quite different from Rockefeller’s, for the absence of tort law in this tort-filled novel, which concerns the nature of the tort law of the time period, rather than anything having to do with Fitzgerald’s pedantic ends. I don’t know what Fitzgerald wanted his novel to teach, with respect to the moral obligations of the rich toward the working class. But tort law might be absent in *The Great Gatsby*, even though torts abound aplenty, not because, or not only because, Fitzgerald wanted to direct his readers’ attention to his characters’ moral shortcoming rather than their legal liability, but also because tort law itself was largely absent in the world *The Great Gatsby* depicts – the "age of automobility" – even though torts abounded aplenty. Tort law might be absent from the *Great Gatsby*, in other words, even though the book chronicles so much tortious behavior, in part, because tort law itself was stunted, and compromised, and ineffectual, in the mid-to-late 1920s and early 1930s: the decade in which *The Great Gatsby* was written, set, and first received. The possibility of recovery in tort for the various injuries the characters in Gatsby inflict on each other never occurs to them, and likely never occurred to Fitzgerald or his contemporaneous readers, for the straightforward reason that it didn’t occur to the real victims of very real accidents, many of whom were in exactly the financial straits of Myrtle Wilson and her crazed-with-rage husband. Although tort law would have proclaimed the conduct in Gatsby –
Daisy’s speeding, Tom’s batteries, Gatsby’s adultery, Wilson’s false imprisonment of his wife, Nick’s pandering and Jordan’s careless driving all – as wrongful, it so utterly failed to provide meaningful access to a functional system of law that would remedy those wrongs, that it was simply invisible in the minds of those who deserved and most needed it.

And why would that be? Why would tort law be so absent, even in the public imagination, particularly if its commands were as progressive as Rockefeller depicts them as having been? One reason, no doubt, was the newness of the tort of negligence in particular. Tort law had been around a good long time, but the tort law of negligence and the cause of action for negligence, as an ordinary response to the ordinary occurrence of a negligently caused automobile accident, had not. But newness doesn’t fully explain it: it wasn’t all that new, and however one might want to date it, the legal doctrine by Gatsby’s decade was relatively clear cut: negligent drivers on the road were liable to their victims for the injuries they cause (or to their victims’ survivors, in fatal accidents).

The absence of tort law both in Gatsby and in Gatsby’s decade can be better explained, I believe, by reference to the multiple problems with tort law itself, and not just its immaturity. Tort law during Gatsby’s decade, in short, particularly with respect to torts of negligence, was both moralistic and judgmental – it loudly and anti-positivistically dubbed negligence a wrong, and the tort of negligence a part of the “law of wrongs.” At that time, tort law, unlike today, was squarely grounded in a rough conception of corrective justice: actors who commit wrongs

18 By the end of the decade, however, the automobile accident had become the cause of most civil law filings, and were "flooded the courts," in the minds of some critics and most observers of the tort system. The most significant tort reform effort with respect to automobiles -- the Columbia Compensation Plan authored in the 1930s by a group of Columbia and Yale Law Professors and sociologists, which argued for a no-fault system to deal with automobile accidents, comparable to the no-fault workman's compensation plans -- was based on both the premise that accident victims were woefully undercompensated by the tort system, and that the tort system was being flooded by claims, clogging the system. The reform promised both greater compensation and a reduction in litigation that would ease the burden on courts. See Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences, (1932) at 17-43. (hereinafter, “Columbia Study”).
causing injuries should pay their victims, and the moral “should” in that sentence was the foundational center of the cause of action created by the state to ensure that they would. But the law wasn’t as resolute in practice as that theoretical moral clarity might suggest: in practice, it proved to be conflicted, compromised, and hypocritical. If we can anthropomorphize this for a moment – appropriately enough, in a comment on a novel that anthropomorphizes machines on practically every page – tort law was spineless. It rendered moralistic judgments about who is and who is not blameworthy, but it rarely enforced them. And because it rarely enforced them, it had no presence, and particularly for working class people. Few people knew about it, or instinctively turned to it when injured by a negligent tortfeasor. It’s not surprising that neither Nick nor Wilson would bother to mention the possibility of a lawsuit as a possible reaction to the negligent act that caused Myrtle’s death. It wasn't a part of consciousness.

Nick himself accurately if unintentionally captures both the moral judgment of tort law regarding negligence, as it had developed at the time (and regardless of whether or not Fitzgerald knew it) and the law’s defining ambivalence when it came to actually enforcing that claim against the rich. As explained above, Nick condemns Tom and Daisy’s brutish and indifferent carelessness, in terms that perfectly echoed the tort law’s central moral claim of the young century, as it pertained to negligence. At the end of the novel, though, Nick cannot bring himself to take even a symbolic action against Tom that might communicate the depth of his disgust or make him pay a price for it. Given the opportunity to refuse to shake Tom’s hand on a Manhattan street in a chance encounter, Nick decides against doing so. He swallows his moral “squeamishness,” as he dubs it, and shakes Tom’s hand. When so doing, Nick registers internally the view that Tom’s recklessness, even though calamitous, is best analogized to the recklessness of an infant. There is accordingly, Nick concludes, no reason to be churlish, and
agreeably shakes Tom’s hand, before watching him enter a jewelry store to buy cufflinks. The passage is worth highlighting:

One afternoon late in October I saw Tom Buchanan. He was walking ahead of me along Fifth Avenue in his alert, aggressive way, his hands out a little from his body as if to fight off interference, his head moving sharply here and there, adapting itself to his restless eyes. Just as I slowed up to avoid overtaking him he stopped and began frowning into the windows of a jewelry store. Suddenly he saw me and walked back, holding out his hand.

"What's the matter, Nick? Do you object to shaking hands with me?"

"Yes. You know what I think of you."

...

I couldn't forgive him or like him, but I saw that what he had done was, to him, entirely justified. It was all very careless and confused. . . .

I shook hands with him; it seemed silly not to, for I felt suddenly as though I were talking to a child. Then he went into the jewelry store to buy a pearl necklace – or perhaps only a pair of cuff buttons – rid of my provincial squeamishness forever. (GG at 185-88)

Thus, at least in his own mind, Nick finds Tom morally blameworthy – he can’t forgive him – but then releases Tom from personal accountability. To do otherwise, Nick concludes with a weary shrug of his now-mature shoulders would be pointless, Nick apparently concludes, as Tom seemingly had only the moral compass of a child. One cannot deter or even shame the Tom Buchanans of the world, they're pretty much forces of nature, so there’s not much point in trying. Just let it go. And so, Nick spares Tom even the embarrassment of a refused handshake, watching him wander into a jewelry store, perhaps to buy cufflinks, and then back across jurisdictional boundaries, to carelessly wreck the lives of others.

Just as Nick’s negative appraisal of Tom's character mirrored the law's professed understanding of the tort of negligence, so Nick’s concluding thought – that Tom cannot at the end of the day be held accountable – mirrored tort law’s own ambivalence toward the negligent
tortfeasor of the time, and particularly the negligent tortfeasor who happened to be a person of means. In a nutshell: the tort law of the twenties made the right moral judgment – as Nick himself had made the right moral judgment – but it had no potency with which to act on it. By decade’s end, the law of wrongs, like Nick, had shrugged its collective moral shoulders in weary resignation to the reckless ways of the privileged. If careless rich people ruined lives and things and then retreated into their money, leaving others to clean up the mess, tort law seemed to say, there was little that our private “law of wrongs” could do to stop them. Tort law’s attitude here perfectly mirrored Nick’s – the responsible Midwestern bond dealer’s – own.

So, what had happened to tort law, in Gatsby's world? How did it become so Nick-like? The lack of tort's potency as a vehicle for accountability, I think, can be attributed in part to its newness, as discussed above. Liability for one’s negligence when driving a car was well established theoretically, but it had not become a normalized feature of daily interaction, including to automobile accidents. Liability insurance, for example, as of 1925, was required in only one state and it wasn’t New York.¹⁹ That’s a part of the story, without doubt. But it’s not the entire story. The impotence of tort was also due to two additional features of tort law itself, and particularly as applied to automobile accidents of the sort depicted in The Great Gatsby, of the 1920s: first, its inaccessibility, and second, its doctrine. Both were themselves a function of the central obsession of Gatsby: class.

i. Access to Justice

First, as contemporaneous critics of tort law at the time repeatedly noted, victims of automobile accidents in the early twentieth century faced formidable obstacles to recovering for

¹⁹ Massachusetts was the only state to require insurance of all automobile owners. See Columbia Report, at 113-27.
their injuries, even given the theoretical availability of the relatively newly minted "tort" or “wrong,” of "negligence." To understand why, though, it’s useful to begin with the role of tort law in the latter part of the "industrial age" immediately preceding Gatsby’s decade – the “age of automobility.” The late nineteenth century industrial era, as virtually every history of tort law amply demonstrates, ushered in a new era of factory-based production, but it also ushered in an explosion, sorry for the pun, in the number and severity of devastating accidents, particularly in the factories that generated all that production, but also on steamships and on the railroads that delivered the factories' wares. Many of those accidents, although certainly not all, were most assuredly the consequence of the negligence, or carelessness, of someone: typically, in the factories, either supervisors who failed to watch for safety violations, or negligent operators of machinery, or the negligent design or manufacture of the machines used to generate those goods. Victims of all of that industrial era negligence, however – and thus would-be plaintiffs in would-be tort actions – were disproportionately poor or middle class, without easy access to legal representation, and they were often pitted against well heeled corporations. Even more importantly for the development – or lack of development – of tort law during the time period,

---

20 For contemporaneous discussions, see the Columbia Report, at 25-44 (listing the obstacles as the liability rules themselves, evidentiary problems related to the suddenness of accidents and the rapidity with which witnesses and evidence scatter, attorney's fees, costs of trial, delays caused by litigation, and second in importance only to the liability rules themselves, the judgment proof defendant, where there is no liability insurance), Young Smith, The Problem and its Solutions, in Compensation for Automobile Accidents: A Symposium,) 32 Columbia Law Review at 788-90, Emma Corstvet, The Uncompensated Accident and Its Consequences, 3 Law and Contemporary Problems, 466 (1936).

those would-be plaintiffs injured or killed by malfunctioning and negligently cared for or negligently supervised or operated machinery were also more often than not laborers in the factories or on the railroads in which those machines were put to use, and therefore the “servants” or employees of the party -- the employer -- logically responsible for the injury, as were the individuals – fellow employees – who might testify at a trial on their behalf. The potential plaintiffs were, therefore, heavily dependent, and they were often totally dependent, upon the continued good will and employment of those who would be the defendants in a lawsuit. The injured factory worker would run the risk of alienating not just an “employer,” but a community to whom they would have to depend for support, if the family had been rendered destitute by virtue of the accident.22 For these reasons and others, injured factory workers were reluctant, during the mid-to-late nineteenth century heyday of industrial accidents, to use the expanded accident law to seek recovery for the injuries they suffered and wrongs that had been done them on factory floors. As a consequence, from what we can glean from the historical record, only a fraction of the accidents that originated in factories, on the rails, or on steamships resulted in lawsuits.23

The automobile accidents of the sort that killed Myrtle and that began to occur in alarmingly high numbers in the 1900s and 1910s were seemingly different from the factory, railroad and steamship accidents that preceded them in one important sense, or at least so a number of legal commentators then argued.24 Whereas the latter pitted the interests, and profits,  

---

22 Thus, as quoted by Witt, one labor leader stated, “when a workman goes to law with his employer, he, as it were, declares war against the person on whom his future probably depends.” Witt supra note 23, at 55 (discussed more generally at 54-57).
23 Witt supra note 23, at 24-42.
of one fairly discrete economic class – consisting of employers, rail companies and steamship companies – against another economic class – employees and passengers – and thus, to a large degree, capitalists against laborers, automobile accidents were at least in theory class-blind. A driver one day could be a pedestrian the next, and a defendant one day might be an injured plaintiff the next. And, in further contrast to industrial accidents, victims of automobile accidents were not typically economically dependent upon the negligent actors that might have injured them. Automobile accidents, and presumably the apparatus of law designed to permit recovery for injuries related to them, should thus – again in theory – have operated in a more egalitarian manner: there was no obvious systematic obstacle to recovery, based upon the gross economic inequality of the plaintiff and defendant classes. Those classes were porous. Anybody could find themselves in either situation, and might even at any time find himself in both simultaneously. There should have been no class-based reason for the courts or anyone else to stack the deck against plaintiffs, or to impose unwarranted obstacles against the act of bringing a lawsuit.

Nevertheless, in practice, by the onset of the age of automobility, the disuse and inaccessibility of the tort system for accidental harms caused by machinery may well have become a feature of daily life. But second, and particularly at the end of the nineteenth and beginning of the twentieth century, in the decades prior to Gatsby’s own, and as alluded to in John Simon’s Foucauldian history of the time period, Driving Governmentality, auto accidents did have a discernible class tilt shared with the industry-era accidents that preceded them, that has simply been lost to us over time.25 When automobiles began to appear at the turn of the

---

25 Commentators on the rise in auto accidents and accident-related court cases routinely note that in the aughts and teens, cars were a luxury item, owned primarily by the wealthy. By the twenties, cars were owned by some working class people as well, or by parties with enough assets to buy a car on a loan, but not enough to either purchase the
century in significant numbers, drivers tended to be wealthier than pedestrians, even if not by
definition or all of the time, and most accidents then, unlike today, involved drivers against
pedestrians, not drivers with other drivers. There weren't that many cars, and there were plenty
of pedestrians, most of whom were not accustomed to obeying rules of the road. Furthermore,
and as commentators in *The Nation, The Atlantic Monthly*, and eventually in law reviews noted,
a high percentage of automobile accidents, particularly in the nineteen-aughts, fit *The Great
Gatsby* mold to a tee: children of the rich in expensive cars out on a lark, striking down working
class pedestrians, while recklessly exceeding safe speeds, and only occasionally stopping, before
crossing jurisdictional lines, thus avoiding all accountability.\(^{26}\) With respect to this sub-class,
then, auto accidents, at least during the nineteen-aughts, were *not* that different, politically, from
the industrial accidents that had immediately preceded them. Victim-pedestrians tended to be
poor or from the lower reaches of the middle class, and both they and their families were often
economically devastated by the direct and indirect costs of a sudden automobile accident.\(^{27}\) A
lawsuit was typically beyond financial reach. Drivers tended to be wealthier than victims, and

car outright or obtain liability insurance. Thus, Simon suggests that car ownership by the time of *Gatsby* blurred
class distinctions, and uses *Gatsby* itself to great effect to illustrate the blurring. He also notes, however, that at least
according to commentators of the time, car owners were inflicting grievous harms on pedestrians, and were reaping
all the profits and pleasures from car ownership while being burdened with none of the costs. See Simon, Driving
Governmentality at 565, quoting Weld Rollins from a letter, entitled *A Proposal to Extend the Compensation
Principle to Accidents in the Streets*, 4 Mass. L. Q. 392 (1919). To similar effect, Simon shows, Herbert Ladd
Towle, in the Atlantic Monthly, decried the "new-rich owner, made arrogant by success, and the spoiled sons and
daughters of rich parents... have property, but without responsibility... the greatest need of the owner today is for
the social feeling that accords courtesy and fair play to one's neighbors on the road... Simon, Driving
\(^{26}\) See commentators id, and contemporaneous commentators cited and quoted by Simon, including Edward Weeks,
A Criminal in Every Family, 140 Atlantic Monthly 445 (1927), Robert Marx, Compulsory Compensation Insurance,
25 Columbia Law Review 164, 167 (1925) and Russell Holt Peters, Death on the Highway, 93 Forum 179(1935),
Editorial: The Automobile's Death Toll, 114 The Nation, March 1922 at 279 and A J Bracken, The Aftermath of
Sudden Death, 27 Readers Digest 53 (1935).
\(^{27}\) Emma Corstvet, who worked as a social scientist on the Columbia Plan, details the devastation on financially
strapped families caused by automobile accidents in her short but powerful defense of the Plan, in *The
Uncompensated Accident and Its Consequences*, 3 LAW AND CONTEM. PROBS. 465 (1936).
found it relatively easy to retreat into their money, and walk away from the mess they had made of the lives or bodies of others.

By the time of *Gatsby*, however, this class tilt had shifted considerably: in part because of the spread of loan agreements, working class people such as Tom and Myrtle Wilson increasingly owned cars themselves. Nevertheless, class continued to play an outsized role in the accessibility of the law, and hence justice, to those injured by cars. Then as now, the plaintiff in any tort action, including automobile accidents, bore various burdens of proof: first a burden of going forward, and eventually a burden of proving his allegations by a preponderance of the evidence. In the context of a car accident a la 1925, the logistical and financial costs of these burdens could be, and typically were, prohibitive. The plaintiff was required to show by a preponderance that both the defendant bore some fault, *and that* the plaintiff him or herself was free of fault. This was usually simply not possible, even if it was true and no matter how egregious the negligence. The aftermath of an accident was chaotic, with no sophisticated science of accident-recreation. Witnesses faded, without having given eye-witness accounts. Nobody exchanged licenses and insurance information on the spot. The evidence that could be gleaned from the damage to a car or a human body yielded very little. Plaintiff pedestrians such as Myrtle did not typically have insurance that would have borne these litigation costs. And finally, if somehow the plaintiff did prevail, the chances of actually enforcing a judgment were negligible. At the time of *Gatsby*, only Massachusetts had a mandatory insurance law. Drivers who had borrowed money to buy the car, even if proven negligent in court and found liable by a jury, might have no assets to which a resulting judgment could attach. If so, again, there would be little reason to go forward.

---

In other words, no matter how blameworthy the driver, no matter how blatant the negligence, and no matter how serious or fatal the injury, there often wasn’t much point in bothering to sue. As a consequence, while tort actions for recovery for the injuries and fatalities caused by accidents were seemingly “flooding the court system” and “clogging the dockets,”\(^\text{29}\) when compared with the total number of civil actions, nevertheless, when compared to the total number of accidents, they were relatively rare events, and enforceable judgments even rarer, and for reasons that would have directly limited the ability of people like George Wilson to even contemplate bringing an action on his own or his wife’s behalf. Like many victims of industrial era accidents, Wilson was financially dependent upon the business of the husband of the party most responsible for the accident, and also like many of those victims, that dependency was not reciprocated with a feeling of mutual responsibility. Tom felt no moral sense of obligation to Wilson, in fact he felt nothing but snobbish contempt for him. As Rockefeller insists in his dissertation (although for another reason),\(^\text{30}\) Tom Buchanan tells Wilson midway through the novel that “I don’t have to sell you my car . . . I have no obligation to you whatsoever.” (\textit{GG} at 338) But more fundamentally, even had Tom and Daisy, on the one hand, and Wilson on the other been strangers, without the possibility of the sale of the car binding them in at least partial privity, it's hard to imagine the lawsuit by a real analogue of Wilson; he lived in the Valley of Ashes in impoverished conditions on a shoe string, with no cash on hand for hiring a lawyer or financing a lawsuit. He was awaiting the proceeds of the resale of a car that he had not yet even purchased, but which had been promised to him by the husband of the woman that killed his wife. The witnesses to the accident faded away, and the police reconstruction of the accident at the scene was wildly inaccurate. (\textit{GG} at 126) Even had Wilson known all the facts, not been


\(^{30}\) See note 28 supra.
deranged, and had a willing and competent lawyer, he would not have had sufficient independence to dare a lawsuit. The Buchanans were hardly pressed to even consider providing compensation to Wilson or his estate, either before or after Wilson’s own suicide. They were spared even the annoyance of offering to pay for the funeral; there would be no funeral for this wife of a working class man who was himself dead by his own hand. Daisy drove off, in the immediate aftermath of the accident. After the dust had cleared in the Valley of Ashes, Daisy and Tom too drove out of the jurisdiction, and as Nick tells us, leaving no forwarding address. (GG at 127).

ii. Doctrinal Compromises

The second reason tort law lacked presence in Gatsby’s world stemmed from the compromised doctrine itself. Most consequential, the then well-entrenched rule of “contributory negligence” led to the dismissal of unknown numbers of actions for recovery for auto accident losses. Plaintiffs in auto cases were (and of course still are) oftentimes also careless, and that carelessness often contributed, causally, to either the occurrence of the accident or the severity of the harm, or both. Under the traditional "contributory negligence rule," where there was even a sliver of negligence on the part of the plaintiff, or “contributory negligence,” the action would be dismissed, even in the face of much greater negligence, and with a much more direct causal impact, on the other side. Plaintiffs in automobile accidents in the age of automobility would lose, then, if the “law” was faithfully applied, in cases in which they were only slightly at fault, even where defendant's fault was far more egregious. This state of affairs continued well into

31 Which it often times was not, if the case was before a judge and jury sympathetic to the plaintiff’s plight. This was noted both by the supporters and critics of the existing law. See e.g., Richard Nixon, Changing Rules of Liability in Automobile Accident Litigation, 476-77 (1936).
32 As noted by virtually every author on the topic in any way connected to the Compensation Plan. See, e.g., P French, The Automobile Compensation Plan, note 96 supra at 38, Corstvet, Uncompensated Accident and its
the 1970s, when state legislatures began the laborious process of supplanting the common law’s rule of contributory negligence with various, and varying, comparative negligence regimes, which tied plaintiff’s fault to a reduction in recovery rather than a bar, depending upon the degree of plaintiff’s negligence, bringing the basic law of tort recovery closer to the dictates of moral and common sense.

In the 1920s, however, the contributory negligence rule was the major doctrinal means, although not the only means, by which otherwise meritorious automobile accidents could be dismissed. Pedestrians such as Myrtle who ventured into the road were contributorily negligent, and could not recover for that reason alone, unless a jury or judge was willing to “nullify” – as in ignore – that relevant law (and at least some juries and judges, and perhaps many, were willing to do just that). It was not, however, the only rule limiting recovery. Of course, the plaintiff had to prove both defendant’s negligence and his own lack of negligence, and proof might be extremely difficult or expensive to come by: in a case arising from negligence on a highway, as noted above, the aftermath of accidents was chaotic at best. But additionally, if a plaintiff rather than a defendant had the “last clear chance” to avoid an accident, and didn’t make use of it, that would bar recovery, even in the face of defendant’s negligence. In some states, if the plaintiff was a passenger of the negligent defendant, that fact alone, because

33 Nixon, note 33 supra at 482-83.
34 Nixon, id.
35 During the twenties, states were split on who had the burden of proving the plaintiff’s contributory negligence, or its lack. Rabin supra note 23, at 942 & 947.
36 The reverse was also true: if the plaintiff had been contributorily negligent, but the defendant had the last clear chance to avoid the accident, the defendant would be liable. Last clear chance in other words trumped the negligence rules. LCC proved impossible to define with any precision (unless it is simply a type of negligence) and common law courts eventually abandoned it, although in some states more rapidly than in others. See generally Nixon, supra at 33.
of worry over fraudulent claims between spouses, would bar recovery.\textsuperscript{37} If the injury suffered by the plaintiff was the result of fright occasioned by a close brush – such as a heart attack or miscarriage prompted by a near miss – but with no physical contact the lack of physical contact would be a bar to recovery.\textsuperscript{38} If the defendant's negligence was a cause of the accident but not the most "proximate cause" – the definition of which has never, after 150 years of debate, been made clear – even a clearly negligent defendant would be shielded from liability.\textsuperscript{39} And if the plaintiff were him or herself in violation of a state law – such as crossing not at a crosswalk or walking on the wrong side of a street or highway – that fact as well could sometimes bar recovery under the so-called "per se" doctrine, even if it could be shown that the statutory violation might not have been itself unreasonable given the circumstances.\textsuperscript{40} And finally, no one was ever liable for so-called "omissions" rather than commissions, even if those omissions were negligent – because of the force of a more general and idiosyncratically American principle of private law, to wit, that no one is ever required to take any action to actually help someone. Therefore, there cannot be liability for failing to help someone else avert harm, even if not doing so looks literally care-less, in the automobile context or in any other.

Given this doctrinal background, look again at the torts in Gatsby. Although I stated above that the novel is replete with torts, it is more correct to say that the novel is replete with tortious behavior – on closer look, there may not be a single apparently tort-like act, either

\textsuperscript{37} Nixon has a good discussion, at 489-90.
\textsuperscript{39} See, e.g., Silver v. Silver, 50 S.Ct. 57 (1929) (ruling that a Connecticut statute barring recovery from automobile owners and drivers for gratuitous passengers is not unconstitutional). Higgins v. Mason 174 N.E. 77 (N.Y. 1930) (ruling that an automobile driver is not liable unless he knows of a dangerous condition, realizes that it involves an unreasonable risk, believes that guests would not be able to realize the risk, and fails to warn them).
\textsuperscript{40} See, e.g., Martin v. Herzog, 228 N.Y. 164 (N.Y. 1920) (holding that plaintiff killed in an accident where he did not turn on his headlights and defendant was driving on the wrong side of the road could not recover due to the decedent’s contributory negligence).
intentional or unintentional, in *Gatsby*, whether or not it led to physical injury, that would have actually been recoverable even in well-funded lawsuits. Daisy’s possible negligence in the hit and run accident that killed Myrtle would have been trumped by Myrtle’s contributory negligence in darting out into the road, no matter how fast Daisy was driving or how slight or inadvertent Myrtle's infraction. George Wilson, then, would not have recovered a dime for Daisy’s wrong against Myrtle even had he hired a lawyer and brought suit. Nor could there have been an action against Gatsby, the owner of the car, for allowing Daisy to drive, even though she was visibly distraught when she took the wheel, because of proximate cause limitations. The other accidents recorded or mentioned in the novel would also likely not yield any recovery. The accident in Gatsby’s driveway, in which one drunken partygoer ran over the hand of a second drunken partygoer, would have been equally barred by the contributory negligence of the latter. Jordan’s near accident that led Nick to accuse her of being a bad driver, in which a worker’s button was nicked off but there was no other physical contact, would have been barred, even if it led to fright-induced physical harm, because of the lack of physical contact.41 Tom's West Coast girlfriend might have been barred by the "guest doctrine" that prohibited passengers from suing drivers.42 Tom's failure to correct Wilson's misapprehension regarding the extent of Gatsby's moral turpitude, and his possibly more consequential failure to warn Gatsby that he was in danger, could not have been torts of any sort: they were omissions rather than commissions, for which tort law has steadfastly refused recovery, and were not proximate causes in any event.43

---

43 See, the Restatement of the Law second (torts 2d) § 314 : the fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.” See also Prosser & Keaton (1984) (early common law was resistant to acknowledging ‘nonfeasance’ as opposed to ‘misfeasance’ difference between active misconduct and passive inaction or a failure to take steps to
The causal chain between Tom's omission and Gatsby's death, any court would have held, was "cut off" by the intervening act of Wilson himself.\textsuperscript{44} Tom’s breaking or bruising of Daisy’s finger would have been barred by spousal immunity doctrines.\textsuperscript{45} Tom and Daisy and their rotten crowd might have been careless people, in Nick's judgment and the law's judgment both. Both the devil is in the details, and in this case, what the devil shows is that Tom and Daisy would have gotten off scot free, not only in Nick's private mental calculation but in the law's quite public one as well.

Thus – \textit{perhaps} a well functioning legal system, with a highly regarded and democratically generated law of wrongs grounded in principles of corrective justice, could have prevented some of the carnage of this holocaust, as Nick dubbed it: I believe it could have. If Wilson had had meaningful legal recourse against either Daisy and her husband or Gatsby, and knew it, he might have been reconciled to that avenue of relief, rather than moved to take personal revenge. If Myrtle could have gotten a restraining order against her abusive husband because of her wrongful imprisonment perhaps she wouldn’t have darted out into the road. If Jordan and her reckless friends faced real threats of lawsuits rather than only fanciful ones, perhaps they wouldn't have been so cavalier regarding their own negligent and drunken driving.

\textsuperscript{44} See, e.g., Derdiarian v. Felix Contracting Corp. 51 N.Y.2d 308 (1980) (“Where the acts of a third person intervene between the defendant’s conduct and the plaintiff’s injury. . . liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant’s negligence. If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant’s conduct, it may well be a superseding act which breaks the causal nexus.”) \textit{Suagerties Bank v. Delaware & Hudson Co.}, 141 N.E. 904 (N.Y. 1923) “A wrongful act is not a proximate cause unless it is in clear sequence with the result and unless it could have been reasonably anticipated that the consequences complained of would result from such act, and such sequential relation does not exist if its consequences were only made possible by the intervening act of a third party, which could not have reasonably been anticipated.”) \textit{Scheffer v. Washington City V.M. & G.S.R. Co.}, 105 U.S. 249 (U.S. Va. 1881)

But this was not a well functioning legal system, and the law of wrongs was so thoroughly compromised as to be dysfunctional. Wilson had no law-based recourse against either Daisy or Tom or Gatsby for his wife's death, regardless of whose hand was on the wheel. His ability to finance a lawsuit would have been nil. His ability to prove Daisy’s speed would have been zero, and would have been trumped by Myrtle’s contributory negligence in any event. Even assuming he could marshal the resources to do so, his chances of recovery would have been zero as well, had he been able and inclined to file.

To sum this up: the attitude of the law of torts of the 1920s toward the by-this-time paradigmatic unintentional tort – negligence on the roads leading to injury or death – turns out to be like nothing so much as Nick Carraway’s stance, ultimately, toward Tom and Daisy: a sharp moral judgment, followed by a resigned shrug of the shoulders, when the question turned to actual accountability. Accidents were extraordinarily common and extraordinarily lethal in the age of automobility: there were about three fourths as many fatal car accidents in the nineteen-teens as there were in the 1990s, with a half of the population. Recklessness and negligence, tort law proclaimed, are wrongs – not unlike assault, battery, and so on – for which recompense should be due, and had done so for seventy years. Tort law – the law of private wrongs – included within its scope injuries caused by reckless disregard of the safety of others, or by a lack of due care with respect to their rights and interests. Tort law, then, were we to take it at its word, should have been able to both provide relief to victims, hold wrongdoers accountable, and not just incidentally also stem, by deterring, the rising tide of accidents. But – it didn't.

Lawsuits, both for industrial accidents and the automobile accidents that followed, compared to

---

46 According to Jonathan Simon, about 30,000 Americans died in automobile accidents in 1930. In 1995, the number of people killed in car accidents was 41,800. The population in 1930, according to the United States census, was about 122,775,000, and in 1990, about 248,709,000. Jonathan Simon, Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941, 4 CONN. INS. L.J. 521, 525 (1997–98).
the number of accidents, were rare, and recovery was even rarer. A panoply of rules and practical constraints made recompense next to impossible.

The wealthy and careless American tortfeasor – the Tom or Daisy Buchanans of the early part of the century – was judged blameworthy by the tort law on the books of the era, as engaging in wrongful and reprehensible conduct by virtue of his negligence. He was then almost never held accountable. There was no significant likelihood of a lawsuit, or, if a lawsuit was filed, no real danger of liability. The law shrugged its collective shoulders as the negligent tortfeasor, more often than not, retreated into the privacy of his money. The wealthy tortfeasor, as Nick said, was more like a will-less force of nature, or an infant, than an adult responsible for choices who should be held accountable. The sorry state of tort law, no less than Nick Carraway, facilitated the retreat.

Tort law, then, is absent in *Gatsby*, and in the minds of its narrator, characters, and contemporaneous readers, at least in part, because tort law was absent in *Gatsby’s* world – the age of automobility. From 1850 to the date of the novel, accidents there were in abundance, but they were accidents without accountability. It is not surprising, then, that it simply didn’t occur to many of the people involved – victims, tortfeasors, most likely Scott Fitzgerald himself, his readers – to think about holding these people accountable for their wrongs through the mechanisms of law. Why? *Not* because of law's basic norms: tort law had a century earlier proclaimed negligence an actionable wrong. Rather, I would venture it was because of tort law's dysfunctionality. That dysfunctionality became acute when the number of wrongful accidents skyrocketed – and therefore, when the effect of its bite, had it had one, would have actually been felt, first in the profits of industrialists, and a bit later, during the age of automobility, as an
interruption to the enjoyment of luxury – including the luxury of an automobile – by the
privileged class.

c.  The Death of the Law of Wrongs

The contrast between the ideological core of tort law – what we can call, following
Ronald Dworkin’s suggestion, tort law’s “point” – during the age of automobility – *Gatsby’s*
decade – and our own, is stark.  At the beginning of the twentieth century, as John Goldberg and
Benjamin Zipursky histories have recently reminded us, tort law was called a “law of private
wrongs” and it was called that for a reason: the word “tort” after all means “wrong.” The point
of the “law of tort,” is to facilitate compensation to a victim of a wrong by the wrongdoer.  For
the state to fail to right that state of affairs, and demand payment by the wrongdoer to the victim,
would be an injustice.  Tort law – the law of wrongs – is thus a requirement of justice. Contrast
that with the understanding of the point of tort law that prevails today, and has since the
beginning of the last quarter of the twentieth century.  The phrase alone – “law of wrongs” –
today sounds like a curio.  That the word “tort” means “wrong” is better known by crossword
puzzle mavens than tort students or lawyers.  Tort law is no longer understood as a means by
which a victim achieves private recompense against a wrongdoer that has injured him. In a tort
action today, certainly in theory and more often than not in practice, the question is not whether a
private individual wronged another through carelessness, and if so, how much he should pay.
Rather, the question is quite different: the question is whether the cost of preventing whatever
accident that occurred, viewed *ex ante*, would have been lower or higher than the cost of injury

times the likelihood of the accident’s occurrence. Liability is placed accordingly, but placing liability is hardly the point of the enterprise. Rather, the point of the body of law in its entirety, with respect to unintentional torts, is to articulate accident-cost minimizing rules that will guide strangers – meaning actors who can’t settle these matters efficiently by contract – toward an optimal allocation of the costs of the risk of accidents *before* they occur: if the cost of preventing an accident is lower than the likelihood of the accident times its likely cost, then the actor should absorb the cost and prevent the accident. If the cost of the accident itself is lower than the cost of preventing it, however, the victim should bear that cost him or herself.

The purpose of the lawsuit, then, is not to compensate victims of private wrings, or to hold wrongdoers accountable, but rather, to provide an opportunity for a court to articulate less general versions of the principles of allocation cited above: it’s cheaper, for example, for motorcyclists to wear helmets than for the rest of us to take all precautions to avoid hitting them, therefore failure to wear a helmet is contributorily negligent, but it’s cheaper for motorcycle manufacturers to place side guards around the footrests than for riders to . . . and so on. The plaintiff himself in such an action is basically the mechanism by which these rules can be articulated. The actual compensation to the plaintiff, however, is hardly “the point;” rather, the plaintiff’s compensation is entirely incidental, and the plaintiff himself is simply a convenient vehicle for the achievement of other social ends. The idea that causing a harm to another through carelessness is a *wrong*, for which justice demands recompense to the victim by the wrongdoer, and for which, therefore, the law should require compensation, is just not a part of the calculation. Tort law, in effect, has been morally neutered. Tort law seeks efficient allocation of accident costs, not recourse for victims of wrongs they’ve suffered at the hands of private parties. Another way to put it is simply that the idea of a "wrong" has been dropped from
the idea of a "tort" and the idea that the point of the enterprise is to demand, in accord with
justice, that wrongdoers pay those they wrong, has disappeared entirely. We don’t care, so much
anymore, whether the wrongdoer retreats into his wealth and lets others clean up the mess. Thus,
the transformation of the tort law from a law of wrongs mandating compensation and
accountability for those wrongs, to a body of law, the point of which is to seek an efficient
allocation of resources toward the minimization of the costs of accidents and their risks.

In the past decade a handful of torts scholars – and most notably Professors Goldberg and
Zipursky from Harvard and Fordham Law Schools respectively – have begun to unearth the
multiple reasons – jurisprudential, political and philosophical – for this extraordinary
transformation, over the course of the twentieth century, of the point of tort law, and more
specifically, the transformation of negligence law as a part of the “law of wrongs,” into a body of
law the point of which is not to hold the negligent party accountable, but to allocate efficiently,
and *ex ante*, the costs and risks of accidents.49 One reason for that transformation which
Goldberg and Zipursky *don’t* explore, however, but which is directly pertinent here, is the
profound *inadequacy* of the law of wrongs, at least the inadequacy of that body of law as a
vehicle for compensating accident victims, first in the industrial age, and eventually in the age of
automobility as well. Just when a “law of wrongs”, or tort law understood as a law of wrongs,
might have most mattered – when it could have and should have become the body of law that
would guarantee the compensation of victims of accidents caused by the negligent conduct of
industrialists and automobile drivers, and, by so doing, cut into first the profits of industrialists
and then the wealth and luxury of the privileged class – it didn’t. It drew back. Again, only a
minority of negligently harmed accident victims in those decades were compensated through tort

49 *Id.* at 928-37.
law, both in the nineteenth century with respect to factory, steamship and railroad accidents, and
in the early twentieth century with respect to automobile accidents. The compensation provided
through tort law for negligently caused accident injuries was a drop in the bucket compared to the
costs of the accidents themselves. The result was not surprising, at least in retrospect: as more and more factory and auto accident victims went uncompensated or undercompensated, tort
law in its entirety – the law of wrongs – came under attack, and it came under attack, not only or even primarily from capitalists unhappy with the prospect of liability, or from court mavens worried about the “clogging of the courts,” but from progressive-era advocates for the wronged, both in the legal academy and in the political realm. The inadequacies of tort law as a vehicle for compensating accident victims eventually became a staple of progressive criticism of early twentieth century law and capitalism. And it became a staple of progressive criticism, basically, because it had failed.

As is well known, the most visible, lasting and important fruit of the progressive era dissatisfaction with tort law, were the workman’s compensation laws, eventually passed in all states, guaranteeing some measure of recovery to workers injured on the job, and without the need of proving negligence, traded off for a schedule of benefits lower than what would theoretically be available in a successful tort based lawsuit.50 In a less familiar history, but as ably told by torts scholar John Simon in his Foucauldian history of the era, Driving Governmentality,51 a similar effort was made two decades later, with respect to automobile accidents, culminating in the publication in 1932 of “The Columbia Study on the Compensation

---

50 Witt supra note 23, at 195.
51 Simon, Driving Governmentality, at 569-585.
of Automobile Accident Victims.” Authored primarily by Shippen Lewis, a member of the Philadelphia Bar, and a number of Columbia and Yale law professors, and supported with the work of a number of contributors from the then nascent social science of the study of accidents, the Columbia Report urged policy makers and state legislators to adopt a compensation scheme for automobile accidents comparable to that already embraced in the workman’s compensation laws, and with basically the same underlying bargain: drop the tort system entirely, the Columbia Report authors urged, and substitute in its stead the “Columbia Plan.” The Columbia Plan the authors detailed, explicitly mimicking the workers compensation plans, would establish an administrative compensation system in place of tort law, under which recovery for the costs of automobile accidents would be guaranteed, although the amount would be capped at stated levels. Compensation would come from mandatory privately held insurance. Most important to the authors of the report, though, the need to show negligence and the absence of contributory negligence would be abolished. The authors vigorously and repeatedly eschewed the principles underlying the common law negligence regime; disclaiming all reliance on moral principles of "right." Rather, compensation should be premised upon the "reality" that automobile accidents

52 Hereinafter, Columbia Report (1932). My edition states that a copy of the report can be had for 1.00 by Addressing the Committee to Study Compensation for Automobile Accidents, Commercial Trust Building, Phil. Pa. 53 The director of the project was Shippen Lewis. Advisers included Dean Charles Clark of Yale Law School, who gave advice on the Connecticut case studies in particular, Elwyn King and Charles Samenow of Yale who presented analyses of court record studies, Walter Dodd of Yale contributed his expertise on workmen's compensation law, Professor Ralph Banchard of Columbia contributed expertise on insurance, Prof. Noel Dowling of Columbia Law School gave the constitutional analysis, and Dr. Francis Deak of Columbia Law School presented material on foreign law, and Dorothy Thomas of Yale, Frank Ross of Columbia on the analysis of statistics. 54 Columbia Report, at 199-216 (Conclusions). 55 Columbia Report at 160 ("The Committee believes that the principle of negligence is a principle of social expediency, and that it is not founded on any immutable basis of right.") and at 212 ("The Committee believes that the principle of liability for fault only is a principle of social expediency, and that it is not founded on any immutable basis of right. The Committee has therefore tried to learn what actually happens when this principle of fault is utilized, and to estimate, so far as possible, what would happen if the principle of liability without fault were applied. The value of either principle is to be tested by its results rather than by a priori moral considerations.") See also Shippen Lewis, The Merits of the Automobile Accident Compensation Plan, 3, Law and Contemporary Problems, at 588 ("the compensation theory springs from a more realistic view of the problem than does the liability theory.") Patterson French, The Automobile Compensation Plan, at 45-47; Young Smith,
are ubiquitous and unavoidable in a complex post industrial society. All accident victims would thus receive some compensation: those injured by defendant’s negligence, those injured by a combination of defendant’s negligence and their own contributory negligence, those injured by a non-negligent defendant in which the victim was the only negligent party, and those injured in accidents for which no negligence on either side existed or could be proved. The “point,” of the compensation plan, as was true of the workers compensation plan that was its model, would be to compensate accident victims. It would not be to mandate that wrongdoers compensate victims for the wrongs they caused.

For various reasons, the Columbia Plan never enjoyed the success of the workers’ compensation statutes. No-fault did not become the norm and still is not the norm, in the automobile context, as it did, and is, in the context of workers’ injuries. Why did it fail? According to later historians, there were multiple reasons. First, by the time of publication of the Columbia Plan in 1932 automobile accidents lacked the clear class tilt of factory accidents, so there was not as sharp a political movement pushing for the reform.56 Automobile ownership had become somewhat democratized, thanks in large part to sophisticated loan agreements, and were increasingly becoming a necessity.57 The project also ran out of money, and was plagued by various forms of "researcher bias" from the start: the researchers tended to focus on the


56 The authors and supporters of the report wrote at length on the point that unlike workers' compensation statutes, on which the automobile compensation plan was analogized, there were not two discrete classes involved in automobile accidents. They did so basically to refute the suggestion that the existence of two discrete classes in a precondition of no fault regimes. See generally Symposium, Compensation for Automobile Accidents, 32 Columbia Law Review, at 805-7. They did not seem to foresee that the lack of a discrete class of automobile injury victims might, though, present political obstacles to the plan's success in the legislatures. According to a number of historians, however, this is what happened. See Jonathan Simon, Driving Governmentality, 4 Connecticut Insurance law Review 521 (1998) at 585-86.

57 Simon, id at 578-88.
inadequacies of tort law in dealing with calamitous injuries, which skewed their findings.\textsuperscript{58} Most influential though, were the bar associations, which included both the plaintiffs' bar, and the lawyers for the fledgling insurance industry, all of whom were already making a serviceable living off of accident law cases.\textsuperscript{59} There was nothing comparable with respect to workers' injuries, which had never constituted a decent living for any slice of the bar, either plaintiff or defense based. "Vested interests in the status quo" with respect to car accidents, as one of the authors put it, prevented the Columbia Plan from being enacted into law.\textsuperscript{60}

In spite of the Columbia Plan’s failure, though, the substantial seed of doubt to which it gave voice regarding the tort system, elaborately argued in the Columbia Report itself\textsuperscript{61} as well as the literature it spawned,\textsuperscript{62} had been planted. Central to the critique on which both workers compensation plans and the Columbia Plan was based, was the basic idea, given a full treatment in the Columbia Study, that “liability based on fault,” in both the automobile context and workplace contexts, ill-served accident victims, and for essentially the same set of reasons. A "law of wrongs" that viewed liability as triggered by a finding of fault as determined by a court of law was inadequate to meet the needs of those injured in accidents that were either caused by negligence that was improvable, caused by negligence but which was nevertheless non-compensable because of contributory negligence or other doctrinal bars, caused by provable

\textsuperscript{58} For a history, within the context of a discussion of the tensions on the Committee between the social scientists, who were interested in the development of methodology promised by the Report, and the lawyers, who were interested in law reform, see John Schlegel, American Legal Realism and Empirical Social Science, at 105-09 (1995). I thank Dan Ernst for the reference.

\textsuperscript{59} Jonathan Simon, at 586.

\textsuperscript{60} See, e.g., James Fleming, Compensation for Automobile Accidents, 59 Columbia Law Review 408 at 423. ("The human tragedy indicated by the dry statistics of the Columbia Study . . . escapes the popular mind. No political pressure group is interested in playing it up, and there are many vested interests in the status quo. Publicity and drama exist, but only for the spectacular verdict or settlement. This makes the present system appeal to the gambling spirit so strong in American culture..... And there is great and highly motivated opposition to compensation from the ranks of plaintiffs' lawyers. . . ")

\textsuperscript{61} See Columbia Report, note 56.

\textsuperscript{62} See authorities in note 57, 60 and 62 supra.
negligence and not barred by defenses but for which either the plaintiff lacked the resources to bring suit or the defendant lacked resources or insurance making a judgment meaningless. Most damning of all, however, in the minds of critics, tort law as a “law of wrongs” is simply and utterly irrelevant for the victims of accidents that were “blameless” – not caused by negligence at all. The bargain proposed in both the workplace and the automobile context as an alternative to tort – in both workman’s compensation schemes and in the Columbia Plan – was, then, to dispense with the very idea of wrong, and blameworthiness, and the idea of a “tortfeasor,” and instead guarantee some measure of recovery tied not to a "wrong" at all, but instead, more simply, to an administrative showing of the fact of the accident leading to injury. The premise of both plans, in other words, was that compensation should be tied not to fault, or the commission of a wrong, at all, but rather, to need: the need of the injured workman or auto accident victim to sustain himself and his family over the duration of the disability.

The idea of recompense-for-a-wrong was basically jettisoned by the progressive reform movements in favor of compensation-for-accidents. According to the workman’s compensation laws that set the template, and the failed Columbia Plan that used it as a model, it should not be the commission of a “wrong” that should prompt liability, whether or not justice requires that wrongs be righted. The Columbia Report was very explicit about this. Moral factors, such as a defendant’s wrong, or a plaintiff’s right, should not, the authors declared, be salient factors in determining who gets compensated for automobile accidents, they should not even be relevant factors. Rather, it should be the fact of an “accident” that leads to an “injury” that causes demonstrable need, which should prompt not liability, but compensation, as administered by an

63 See Columbia Report, supra note. 54.
64 Id.
administrative body, not a court of law. And it should do so, finally, in the interest of sound public policy, not justice.

The adoption of workmen's compensation schemes was a clean, if limited, victory for workers injured on the job, and the partial adoption decades later of some of the key principles of the Columbia Plan in some states was similarly a victory, albeit more limited, for drivers, passengers and pedestrians injured by automobiles. Both have their points of origin in progressive era and legal realist generated critiques of the idea at the heart of the law of wrongs: that liability for accidental injury should pivot on personal wrong, and be grounded in norms of corrective justice. Both were motivated, largely, by a sense of the corrosive social injustice as well as the broad based suffering occasioned by a system that could cavalierly turn its back on those injured in ways not captured by those norms. Both, eventually, prompted schemes of recovery for accident victims more responsive to need, more streamlined, less dependent on courts, and more broad-based, than the highly individualistic systems they replaced.

II. Tort Law Then and Now

Let me turn now to a comparative assessment of tort law – and the idea of tort law – in Gatsby’s era, and tort law – and the idea of tort law – now. The tort law of Gatsby’s era, according to a wave of critical, left wing, and third wave feminist legal criticism from the 1970s through the 90s, was, at the time, like Tom, a bit of a brute.65 During that time, the judicial authors of the common law of tort imposed restrictive rules of causation and duty, narrow definitions of negligence and expansive definitions of contributory negligence, all of which jointly shrunk the communitarian and other-regarding duties of tort law to a bare minimum,

---

while the scope and potency of the self-serving and individualistic – more Tom-like – law of contract, in which no one owes anyone anything if they’re not contractually obligated, grew.66 Strikingly, tort law refused (and still refuses) to impose a duty to help or rescue others, even when the cost of doing so was (or is) miniscule.67 Acts of omission, rather than commission, then and now, cannot be the basis of liability. Liability was limited to those who had most “directly” or “proximately” caused harm, without ever giving content to that limitation, and refused to unequivocably universalize the obligation of due care beyond the borders of contract and narrowly defined “duties” until well into the twentieth century. Most important, the negligence rule itself obviously restricted tort liability to those accidents provably caused by negligence. Those caused by non-provable negligence, as well as those not caused by negligence at all were simply not subject of law’s concerns. A shrunken tort law combined with an expansive law of contract to fuel a private civil law that trumpeted the social utility of entrepreneurship, that celebrated industry, hyper-individualism, and capital, while aggressively neglecting the communitarian or feminine values of caregiving, of reciprocated responsibility, and the relational needs of vulnerable people, of dependents, and victims.68 Tort law itself, although fundamentally imposing a feminine-sounding communitarian duty of other regarding care, nevertheless imposed constraints on its reach that exhibited an over-regard for masculine values. It was uncaring in the extreme. It was brutish.

67 See, e.g., Hurley v Eddingfield, 156 Ind. 416, 59 N.E. 1058 (Ind. 1901).
Although the 1970s-90s feminist or critical language for this judgment was not available, the tort reformers of the 1930s who authored the Columbia Report, would very likely have concurred in its large outline. Tort law was inadequate to meet the needs of victims of the age of automobility. By requiring cause, fault, acts of commission, and the right sorts of injuries, thus limiting recovery to those cases, it deprived victims in extreme distress of needed assistance. Most restrictive, of course, was the fault requirement itself: it did indeed hold negligent parties liable for the consequences of their actions, but precisely because of its fastidiousness on that point, it let off the hook all who caused accidents but who could not be found negligent, either because they weren’t negligent, or their negligence could not be proven, or because even their provable negligence was trumped by their victim’s negligence. As a consequence it made paupers of a large class of victims. It was, in a word, heartless; it cared greatly for compensatory justice, although perhaps more in theory than practice, but it cared not one whit for the survivors of accidents such as that which killed Myrtle, where both actionable negligence and a lack of contributory negligence could not possibly have been proven, even in a well-funded lawsuit. It cared even less for victims of those accidents that had their genesis in events that were indeed caused by human acts but were entirely free of negligence. Those victims, in Justice Holmes’s famous or infamous dismissal, were no more deserving of recompense than victims of random lightening strikes, and should be treated the same, meaning, of course, that like victims of lightening they should be left to fend for themselves; the loss of non-negligently caused harm should stay where it initially fell. Tort law was, then, to this degree, itself “uncaring,” even though it was premised on a duty of care: by requiring a breach of that duty of care as a condition of liability, the Columbia Report argued, it showed itself uncaring toward the much larger class of victims that were injured not through a provable breach, but injured, or killed, nevertheless. It

69 Oliver Wendell Holmes, Jr., The Common Law, 96, (1881).
cared too much, we might say today, for an “ethic of justice,” with its focus on compensation for wrongs, and not enough for an “ethic of care.” The compensation system for which it argued would, then, dispense with the ideal of justice, and the ethic of individualized responsibility it entailed, and embrace the ideal of care instead, with its focus on communitarian bonds. Individuals should take due care, but the law should care for victims, rather than dole out justice to those lacking requisite character. Thus – the need for compensation schemes, rather than tort law itself, as a morally superior way to deal with accident costs.

The Report thus urged that we displace a moralistic tort law that premises recovery on individual acts provable negligence, with a compensation scheme that provides for some measure of recovery regardless of fault, and thereby expand the number of victims who will receive some measure of compensation for devastating accident costs hugely. Replace the moralistic tort system with a compensation system that responds to the needs of victims, and does so regardless of outmoded conceptions of “fault.” This would be a move toward a more caring society. A more caring society, after all, should not abandon those in extreme distress, and should not do so regardless of whether that distress is the result of another person’s fault.

Nevertheless, to the degree we’ve acted on this impulse – to the degree we have displaced a moralistic, justice-based, idea of tort law, in favor of a care-based, communitarian, and needs-focused compensation schemes – that displacement comes with a high price, and to both sexes. Let me end with just a brief listing of what some of those costs of this century-long ongoing reform movement might be. What is the price of abandoning the law of wrongs, moralistic though it might be, and replacing it with compensation schemes, either with respect to automobile accidents alone, or across the board?
One part of the price of this reform movement is conceptual and cultural: by jettisoning the moralistic understandings of tort law, and of the moralistic, tort based duty of reasonableness at its core, we lose the content, and hence the teaching, of an elastic legal norm of minimal, required, civil conduct toward each other. Again, in terms of the novel, Daisy’s indifference and Tom’s brutishness were both aspects of the carelessness that Nick and tort law both condemned. Tom and Daisy are both, and more or less equally, culpable. Nick, the novel, and the law of wrongs all, managed to get at least that much exactly right. Likewise, when we trade a moral reckoning of conduct, backed by law, for greater compensation for victims, we lose not only a conception of the character flaws behind negligent conduct, but also a robust conception of the virtue of reasonableness it requires: non-brutish carefulness in one’s conduct, with a due regard for the consequences one’s conduct might visit upon others. By jettisoning the traditional conception of the law of wrongs, we may have rid ourselves of an overly gendered and overly moralistic set of norms that came replete with unjust limitations. But to whatever extent the teaching of that body of law loses rhetorical and cultural force, we inherit in its stead a legal world that teaches, to some measure, the acceptability of an androgynous indifferent brutality.

That is no small loss. When we give up on the law of wrongs, in essence, we lose the moral force of an articulated body of law which, however badly it did so, sought to hold people accountable for their careless acts that wreck lives and create messes, rather than permit them to retreat into their money. Nick Carraway’s initial judgment, in brief, about the wrongness of Daisy and Tom’s carelessness, was right, and a cost of the reform movement that followed its utterance was that it obscured that judgment, no less than it obscured the hypocrisy of the law that tried to put it in effect. Carelessly wrecking lives is a private wrong that deserves recompense, and corrective justice does demand that a state not permit a wrongdoer to retreat
into his or her private money, and let others clean up the mess. By conflating the "problem" of uncompensated victims of wrongful negligence with uncompensated victims of all accidents, and then defining the mess that's left behind as a social problem, the solution of which is to provide compensation for victims of accidents regardless of fault, both the fault of the individual who exhibits that carelessness, and the injustice of a system that fails to hold him accountable, is in effect whitewashed. The wrong of negligence is swallowed by the costs of accidents, and the injustice of the state's failure to address fault is swallowed in the larger "social problem" of the uncompensated costs of accidents that occur regardless of cause. There may, then, be more compensation all around: victims of automobile accidents and industrial accidents, no less than victims of lightning strikes and hurricanes all need health care and economic support. If the negligently caused accident, however, is indeed a wrong, then it is a compounded wrong – an injustice – for the state not to treat it as such.

The second cost is political. The manifest inadequacy of the law of wrongs for automobile accident victims had two root causes, not just one, which the Columbia Report repeatedly blurred; sometimes explicitly, sometimes not. It would have been a gain, at least in terms of the clarity of the century long reform movement that followed it, to have separated them out. First, the law of private wrongs failed some accident victims on its own terms: accident victims who were victims of someone else's negligence, but who for various practical and doctrinal reasons, could not recover.70 Plenty of victims of clearly negligent action received no compensation whatsoever, because of practical, procedural, or doctrinal barriers to recovery. But second, the tort regime of the time did not even purport to address the problems of victims of non-negligently caused accidents. It was the sheer size of this latter group, with their utterly

70 See Columbia Report, supra note 128 at 199 to 211; See also, Shippen Lewis, The Merits of the Automobile Accident Compensation Plan, 3 LAW AND CONTEM. PROBS. at 584-87 (1936).
noncompensable-even-in-theory injuries, that was at the heart of the critics’ case for the inadequacy of tort-law-as-a-law-of-wrongs.71 Faultless victims of non-negligent accidents were entitled to no recovery at all, *even in theory*, because they had not been the victim of a “wrong.” And there were many such accidents. Mark Twain had observed seventy years earlier that victims of steamboat accidents as often as not had “no one to blame,” when a machine, rather than a human, had caused the injury.72 The same was true, seemingly, of the victims of factory machines and automobiles. A tort regime focused on the commission of *wrongs* did not even address – whether or not fairly – the injuries of those hurt through some chain of events in which there was "no one to blame."73 The ratio of the tiny numbers of plaintiffs who successfully recovered in tort law for a “wrong” done them in a negligently caused accident, compared to the number of maimed or killed workers in factories, and workers and passengers on the rails, and eventually pedestrians killed by cars, who were not recognized at all by a system that was myopically focused on "wrongs," was wildly disproportionate. It was also, eventually, politically unsustainable.

Blurring these two problems however – the inadequacy of the law, with respect to victims of negligence, and the law’s failure to compensate at all victims of non-negligence – as both the workers compensation reports that preceded it and the Columbia Report repeatedly and explicitly did, blurred two hugely different forms of injustice. The first – the failures of the law of wrongs to compensate clear and deserving victims of wrongful negligence, because of the cost of justice

71 WITT *supra* note 23, at 47, 63.
72 MARK TWAIN AND CHARLES DUDLEY WARNER THE GILDED AGE: A TALE OF TODAY 48 (New York: New American Library, 1980). "A jury of inquest was impaneled . . . and after due deliberation and inquiry they returned the inevitable American verdict which has been so familiar to our ears all the days of our lives -- NOBODY TO BLAME." *as quoted in GOODMAN*, SHIFTING THE BLAME, *supra* note 66 at 66. Goodman devotes a chapter to Twain's complaint, generally toward the end of showing that "the finding of blamelessness in the context of accidents was at once both a cause and a symptom of a widespread erosion of responsibility. Id. See also WITT, *supra* note 23, at 239-40 (discussing the quote); and see FRIEDMAN *supra* note 23, at 470.
73 WITT *supra* note 23, at 63–65.
or the effect of unduly restrictive rules – is a failure of legal justice. If someone has wronged you in a way the law recognizes, there should be recompense. A legal system that fails to do so or that is so tilted towards the interests of defendants as to make the promise that it will do so illusory, is an unjust system. The second, though, – the failure of the legal system to provide any relief for victims of non-negligently caused harms, whether on the roads or in the factories – is a failure of social justice. If the law should provide you with compensation for these harms – whether the harms are caused by disease, or accidents, or the natural catastrophe, or poverty – and doesn’t, that is a social injustice, and should be rectified politically, by the enactment of law that does so. Conflating these two different forms of injustice into one overarching social problem, as the Columbia Report did with respect to negligently and non-negligently caused accident costs, was politically (and morally) problematic, in part simply because it understates the magnitude of the social injustice of which non-negligently caused accidental injury is simply a part. Non-negligently created accidents became a problem for tort law, because of the close resemblance of non-negligently created accidental injury and negligently created accidental injury. It looks, simply, odd to compensate the latter but not the former, if one is focused on the fact of the injury – a victim injured through a non-negligently caused chain of events is, after all, just as injured, just as in need, as a victim injured through negligence. Myrtle is just as dead as she would have been had the accident been entirely Daisy’s fault. But if this is a problem that must be rectified because of concerns of horizontal justice, then other injustices loom: what is even more unjust, if horizontal equity is our concern, is compensating injuries caused by workplace or automobile accidents, but not compensating sicknesses caused by unhealthy conditions in the workplace. More unjust still, once we expand a compensation scheme to pick up workplace disease as well as injury, is compensating injuries and sicknesses caused in
workplaces as well as compensating for all automobile accidents regardless of fault, but not compensating for non-negligently caused injuries caused in other locales, such as schools, homes, or public sidewalks. If that is compensated, then other horizontal inequities emerge: why not compensate, simply, for illness, as measured by the extent of the disability? And, if we compensate for illness, or disability, then why don’t we compensate for equally crushing poverty?

But this is just a bizarre way to approach problems of social, rather than legal injustice. Getting to an acknowledgement that we need a more robust safety net for people in distress through an ever expanding compensation scheme, itself originating in an insight about an apparently failure of horizontal justice – that negligently caused but not non-negligently caused accidents are compensated by a fault system – is just torturous, and at any rate, it is not a path we managed to traverse: compensation schemes stalled with workman's compensation, and limited no-fault for automobile accidents prevailed in only a handful of states. The idea has hardly spread like wildfire, and even where it did it’s a mixed blessing: compensating for accidents in the workplace and to a lesser degree on the highways with no need to show fault, might have legitimated, rather than highlighted, the complete privatization of health costs on the ill and their families (as left wing and Marxist critics of the workers’ compensation schemes predicted it would). We continue to believe Holmes' teaching about the undeservedness of victims of random harms to any law-based relief, albeit with some narrowly carved exceptions: victims of some sorts of accidents caused in some places by non-negligent events, are deserving of help from the rest of us, but victims of misfortune otherwise – whether of lightning strikes or cancers or household accidents or crushing poverty – must be left to their own devices. Solving the problem of some non-negligently caused accidental injury costs through a re-jiggering of the tort
system thus might have obscured, and certainly did not cure, the injustice of a system of public law that fails to provide a right to health care for disease or injuries regardless of their cause. Thus, one result of blaming the tort system for not providing a means by which the victims of non-negligently caused injuries can be compensated, is that the social injustice of not granting a right to health care is further obscured, and political efforts to correct that injustice might well have been frustrated.

The last problem, though, or cost of the scuttling of the law of wrongs, returns us to *Gatsby*. Conflating the problem of under-enforcement of tort law even where there is demonstrated negligence, and the lack even in theory of any mechanism for compensating injuries which occur in the absence of any wrongdoing, obscured for Gatsby’s decade and that which followed it, the legal injustice of the restrictive tort rules that so badly compromised the law in the first place. The progressive reform movement's response to tort law’s inadequacy was basically to urge a compensation scheme that swallowed the harm of negligently caused harms with other harms, thus leaving completely unacknowledged, rather than only badly half acknowledged, the injustice of the law's cribbed accounting of the contour of the private wrong in the first place. The result was a reform movement, no less than the law it criticized, that embraced, rather than was at least a bit embarrassed by Nick Carraway's attitude toward Tom at the end of *The Great Gatsby*: reformers argued for limited compensation of victims, but not from *wrongdoers*, and not for *wrongs* but rather, for a compensation scheme that explicitly subsumed the moral wrong of carelessness and the injustice of not enforcing norms against it within the larger “social problem” of accident costs, and explicitly collapsed the injustice of accidents caused through legal wrongs for which the law fails to guarantee compensation, with those caused innocently. The wished for reform would clearly serve, albeit in a limited way, the need
for compensation: Obviously if drivers are unaccountable for the harms they cause, and if those harms involve injury and death of such a magnitude as to dwarf the injury and death of two wars, then yes, those uncompensated injuries will eventually become a social and political problem. There must be at least some limited compensation for the victims of drivers’ carelessness, lest there be intolerable unrest – and thus the need for "compensation schemes" – after the law of wrongs’ demise. Limited compensation of victims from the public purse, however, does not address the injustice that is the subject of *The Great Gatsby* and of Nick's insight, and that is the injustice of leaving the reckless and often wealthy tortfeasor unaccountable – the injustice, that is, of permitting the Buchanans to retreat into their wealth, leaving others to clean up the messes they leave behind. If anything, it exacerbates it, by erasing even the idea that that unaccountability is a wrong requiring a state response.

**Conclusion**

In 1883, Mark Twain, commenting on the steamship accidents that caused thousands of deaths, including that of his brother, remarked that there was seemingly "Nobody to Blame."\(^{74}\) He might have meant that literally: that the steamships' machinery caused accidents without human will, such that no one was blameworthy for this class of accidents. Or he might have meant it figuratively: that the legal and political framework of the era left no one accountable for their blameworthy conduct. The context of his remark doesn't help resolve the ambiguity, and it has been interpreted by subsequent Twain scholars both ways.\(^{75}\) In 1925, Scott Fitzgerald, through Nick Carraway, clarified, somewhat, the ambiguity in Twain's remark. Nick found plenty of blame to go around for the accidental wreckage by machines of creatures' lives, which

\(^{74}\) *TWAIN & WARNER, THE GILDLED AGE* supra note ___ (need full cite), contained in note 136 of Witt at 239.

the Great Gatsby chronicles. Machines don't cause accidents, Nick can be read as reporting in his one and only moment of moral clarity in the entire novel, people do: the people who drive them, or operate them, or make them, or design them, or put them on factory floors, or on the seas, the rails and the highways, and who profit from them accordingly. Neither Nick nor the law, however, could fashion a way to hold the Buchanans and their crowd accountable. Nick allows Tom to retreat into his money, leaving others to clean up the considerable mess, not even imposing the sanction of a moment of embarrassment on a public street. The law forgave the Buchanans of Gatsby's world for much more.

The depressing cyclical dynamic of Nick's relationship to the Buchanans – his chronicling of their carelessness that wrecked creatures' lives, followed by their retreat into their private money, his judgment of their blameworthiness, and then ultimately his failure to hold them accountable - should feel dreadfully familiar to American readers: it portrays a slice of America that wound up being at least as pervasive as the hypnotically compelling dynamic of Nick's relationship to Gatsby, with its own cycle of admiration and contempt for Gatsby’s transgressive criminality. Nick, the responsible Mid-western bonds dealer, gave the Buchanans, with their inherited wealth, a pass, basically, on liability for the injuries and deaths that were the consequence of their madcap riotous summer. Plenty of other responsible community leaders, both bonds dealers and otherwise, have done likewise, over the decades that followed the publication of Gatsby. In fact, the tortfeasor that gets away with it, leaving others – notably, taxpayers, if not victims themselves – to clean up the mess, and who then retreating into his money and drives off out of the jurisdiction, evading both liability and accountability to the bloody end, has become as much an American fixture of the hundred years since Gatsby's time, as the criminal who charmingly flouts the law but winds up dead in the last act.
The moneyed class has carelessly or recklessly imposed harms and injuries on the rest of us likely from the dawn of time, but in our own history it has done so most dramatically, most publicly, and most egregiously in the two Gilded Ages that framed the twentieth century. In the first, from the industrial revolution through the beginnings of the age of automobility, it was the carelessness of those who profited from steamships, railroads and factories, and those who enjoyed the luxury of wealth that wrecked lives without accountability; In the Gilded Age we're now enjoying or suffering, depending on our class, it is the carelessness of financiers, that have recklessly endangered millions of people's financial lives while enriching that of a few.76 Banks and financial institutions are "too big to fail,"77 we're told, in a phrase whose ambiguity directly echoes that in Twain's complaint from the 1880s: does "too big to fail" mean that there's truly no one who should or could be held to account for the crisis, because of mechanisms beyond human will, or does it mean that our legal and political institutions are just not willing to take on the task of holding those that are that big, accountable? Is the machinery of finance, like the machinery of steamships, now beyond human agency? Or rather, is it perfectly clear today, as it was to Nick in *Gatsby's* world even if it wasn't to Twain in his, to whom and how to assign blame for this catastrophe – indeed, journalists and historians seem to be doing a fairly good job of it – but, rather, our mechanisms of legal accountability that are lacking? If the latter, then it seems to me that those responsible for the law – that would be us – are basically in Nick's shoes; shaking Tom's hand, and declining to testify at the inquest into the deaths that his cousin, her lover, and her noxious husband all jointly caused. Perhaps also like Nick, we are as quiet as we are so as not to jeopardize the value of our own legitimately acquired bonds. Nick Carraway, the

76 GRETCHEN MORGENSON & JOSHUA ROSNER, RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON (Times Books 2011).
77 ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (Viking Penguin 2009).
moralistically squeamish but ultimately accommodating responsible bonds dealer, might be an apt representative, not only of the ambivalent tort law of the nineteen twenties, but of our own tort law, and of our own attitudes, today. And if so then that Nick Carraway-like tendency to blame the rich for their recklessness but then hold them harmless, may by now be as much a part of our American character, as is our much more remarked upon love for criminals – although with respect to the latter, we do then subject them to the most inhumane and punitive set of rules and institutions ever created on earth.

As countless commentators have argued, *Gatsby* is indeed, partly, about that weird sadomasochistic love affair we Americans have with our criminals, so long as they wind up dead in the end, and whether or not for the wrong crime, and regardless of who pulls the trigger. Gatsby had to wind up dead, and if the blameless, non-culpable, out-of-his-mind-with-rage Wilson pulled the trigger, in revenge for a crime and a wrong Gatsby did not commit, well then all the better; because of it, Gatsby got his, Wilson got his, the Buchanans got out of the way, and Nick went back home. We would do well to reflect on the tidiness of all that. But by the same token, *Gatsby* is also about our tolerance, which we share with Nick, of the non-accountability of the Buchanans for the vast numbers of private wrongs, many of them lethal, they inflict on others. Tom is blameworthy, Nick famously decides at the end – he couldn't forgive him, he tells the reader – but he can hardly be held accountable. There's no point in refusing to shake the man's hand, Nick concludes, Tom exhibits a kind of infantilism in his self-justification that defies accountability. So why bother. It would be fruitless. The tortfeasor – the wrongdoer – retreats into his money, away from accountability for the harms, injuries, and wrongs inflicted on others.
The tort law of private wrongs of that era reflected the same attitude toward the tortfeasor of means as Nick exhibits toward Tom. *Blame* there was a-plenty: tort law – the "law of wrongs" – loudly proclaimed negligence to be a wrong, for which recompense should follow. Accountability, though, was almost completely absent. The progressive reformers, for the noblest of reasons, did likewise. The tort of negligence, they correctly saw, was unjustly hampered by its restrictive rules. But that problem was swamped by the utter inapposite inadequacy of the idea of tort as a law of wrongs to address accidental injuries across the board: a wrong-based or fault-based system of justice after all could not even address, much less do so well, the problems of those injured in factories, on railroads, and in cars or by cars through no provable fault. The reform proposals that followed – to dispense with fault altogether, and move toward an administrative system of compensation for injury – were and still are today a limited victory for those who are injured. They also, however, discredited for the century that followed the idea – Nick’s idea – that carelessness that wrecks creatures and things is a wrong, and that justice requires its recompense.

That idea, which for a few decades was central to the law of tort, is no longer. It has been displaced. To a considerable degree, tort-law-as-a-law-of-wrongs has been literally displaced by compensation schemes. Even to the degree it hasn't, though, the “point” of tort law has been redefined: Tort law is now conceived as a body of law that regulates the costs of accidents, or the allocation of risk, aiming, under either formulation, for an efficient distribution of resources rather than a righting of individual wrongs. It is no longer really about fault, or wrongs, at all. Talk of fault has largely dropped out of the law of "accidents" while Twain's dark complaint – that no one is to blame – has become official dogma. We don’t have, any longer, a “law of wrongs” that recognizably assigns blame and accountability for wrongful negligence.
That absence matters. The law of wrongs, with its anything-but-crass notion of money damages as the appropriate response to the infliction of a private wrong, was a bulwark, albeit an inadequate one, against the human tendency to acquiesce in the non-accountability of powerful people for the wrecks they make of the lives of others. We entered the twentieth century with that law almost still-born by virtue of the restrictive rules surrounding common law negligence inherited from the industrial era. We ended the century with the very idea of fault-based tort-as-wrong discredited, in the minds of advocates for victims no less than in the minds and actions of advocates for industry. Who’s to blame for that? Ronald Coase, his famous theorem, the law and economics movement of mid and late twentieth century, and the effort by those theorists and jurists and others to reformulate tort law as a body of rules designed to fill in gaps where information costs prevent parties from contracting, is no doubt a big part of the large reason why. Tort has been redefined by that movement as a body of default contract rules, in which the idea of “wrong” obviously has no place, displaced by the idea of hypothetical contractual intent. That is not, however, the exclusive reason, nor is it the origin of the transformation of tort. The progressive realist reformers of the twenties and thirties, disgusted with the inadequacies of tort law for accident victims, also had a role; it was these progressive minded victim friendly reformers, after all, that set this transformation in motion. They did so with the entirely laudable and arguably feminist aim of providing more humane and more certain compensation to injured workers in the factories, passengers on the seas and on the rails, and eventually drivers and pedestrians injured or killed in automobile accidents. Some of those injuries were the consequence of negligence, but of the non-provable or non-compensable kind. Others were not the consequence of negligence at all. They were not caused by cognizable “wrongs,” there was “no one to blame.” But they all caused unsustainable hardship. They all, then, were reconceived
as a social problem, requiring some measure of administered support from state coffers. In the progressive reformers vision, the idea of fault then had no place, it was overshadowed by the imperative to help those in need “regardless of fault.”

The particular reform for which the progressive reformers argued – replacing the tort system with a compensation system, for all automobile accidents – did not succeed. But the idea took root, indeed, it transformed the way we think of tort law in toto. One relatively unremarked upon consequence of this transformative idea, by century's end, is simply that both the general idea of tort law as a “law of wrongs,” and the more specific idea of negligence as a wrong for which justice demands compensation, have died. Contract law did not die during the century behind us – announcements of its death proved premature, to say the least.\textsuperscript{78} Contract law is enjoying quite a robust comeback from whatever minor threat was arguably posed to its dominance at midcentury by the consumer movement. We've privatized everything from prisons and schools to civil procedure, using the law and mechanisms of contract law to do so. It's the law of wrongs that died, and more specifically, the idea that animated it: the idea that negligence – a lack of care for the safety of others – is a private wrong, for which justice demands a private remedy. That idea, so well expressed by Nick at the novel’s end, died. It died in the 1920s or thereabouts – a casualty of a hit and run accident for which there was plenty of blame but no accountability, on a highway that cut through the Valley of Ashes, midway between Long Island's mansions and New York City's plush hotels.
