

How to Get Away with Negligence

Author : John C.P. Goldberg

Date : October 20, 2015

Robin L. West, *Gatsby and Tort, in American Guy: Masculinity In American Law And Literature* 86 (Saul Levmore & Martha C. Nussbaum ed., 2014), available at [SSRN](#).

In *Gatsby and Tort*, [Robin West](#) engagingly argues that Fitzgerald's famous novel highlights serious shortcomings of tort law as it has been traditionally understood, and of modern efforts to supplant or reconceptualize it.

West begins by observing that *Gatsby* would make for a good torts exam. In its 'fact-pattern' one can find bases for claims of battery, fraud, and criminal conversation. There is also a paradigmatic example of negligence—Daisy Buchanan, speeding in *Gatsby's* Rolls Royce, runs down Myrtle Wilson. (Myrtle, Tom Buchanan's mistress, had darted out into the street while escaping her husband George's efforts to cloister her.) As West further notes, the novel ends with narrator Nick Carraway condemning the despicable Buchanans on terms that sound in tort: "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 is that kept them together, and let other people clean up the mess they had made." (P. 3.)

So how can it be—asks West—that, in a novel lousy with torts, there is nary a word about civil litigation? (Criminal law, meanwhile, gets several mentions.)

A flatfooted reading of West would perhaps engender a scornful retort: "There's no civil litigation in *Gatsby* because it's a novel, and Fitzgerald didn't fancy the idea of having Nick give a disquisition on the doctrine of last clear chance, or of *Gatsby* vacillating on whether to join Daisy as a third-party defendant in George's wrongful death action." (A dyspeptic critic might go further and claim that there is textual evidence of Fitzgerald's familiarity not only with tort law but tort theory: amidst yet another episode of bad driving, he has the character of Jordan Baker offer the Calabresian-Coasean observation that "it takes two to make an accident.")

But these imagined bits of snark take West—here writing in a literary vein—too literally. Putting aside the all-too-obvious answer to her puzzle, she instead plays out an intriguing alternative hypothesis. There is no mention of tort law in *Gatsby*, she claims, because tort law would have been, and was, entirely absent from the consciousness of *Gatsby's* characters, author, and audience. To them, tort law was "invisible." The novel thus provides a dramatic illustration of just how ineffectual tort law was in the 1920s.

To be sure, judges back then were busy marking off various forms of conduct as tortious, and were insistent that victims of such conduct were entitled to compensation from tortfeasors. But all this talk amounted to mere finger-wagging. For they were at the same time equally busy preventing victims from obtaining compensation by fashioning rules of contributory negligence, limited duty, and proximate cause. And even if the rules had been more plaintiff-friendly, the sheer cost of litigation put legal remedies out of the reach of ordinary folk. It's thus hardly surprising that the same era that gave us *Gatsby* saw the rise of progressive efforts to supplant tort law's ineffectual moralisms with workers' compensation and automobile no-fault schemes.

Though hard on tort law, West concludes by registering some dissatisfaction with modern responses to its 'failure.' Here, she astutely points out a way in which the progressive attraction to no-fault is of a piece with the subsequent rise to dominance (in the legal academy) of economic analyses of tort law. As a law of wrongs, tort law was such a miserable failure that both camps eventually gave up on the idea of liability as a form of redress: either it had to be

replaced with no-fault schemes, or recast as an amoral scheme of privately enforced safety regulation.

In sum, according to West, one can find in *Gatsby* not only a demonstration of tort law's inability to right wrongs, but also a foreshadowing of the eventual extinction of any appetite for law that holds wrongdoers accountable to victims. Nick's concluding description of Daisy and Tom as people who get away with negligence turns out to be an apt description of how our legal system actually operates, and how it got that way.

As the foregoing description I hope suggests, West has imaginatively fashioned a complex, rich, and provocative argument that cuts across literature, theory, and history. There is a lot to chew on here, and readers will have fun doing so. Of course one will also find some points of contention. I will mention two.

First, even as speculative reconstruction, West's 'invisibility thesis' is implausible. Civil litigation over car accidents was enough of a problem in the 1920s that it generated the now-famous 1932 Columbia Study on compensation for car accident victims. Although West mentions the Study as an example of progressive dissatisfaction with tort law, she fails to mention that it was prompted in significant part by a concern that car-accident litigation was clogging the courts. Relatedly, in her discussion of the prohibitive costs of litigation, West gives little if any attention to our system's longstanding reliance on contingent fees (and the American Rule against fee-shifting) to reduce some of the costs facing plaintiffs. Whatever its problems, the tort law of the 1920s seems often to have allowed persons of ordinary means to pursue negligence claims. In turn, it is unlikely that civil litigation and liability were entirely out of sight and out of mind.

Second, West's complaint that, as a law of private wrongs, tort law was all bark and no bite is predicated on a theoretical mistake. (In fairness, it is a mistake that many others make.) *Gatsby*, she says, vividly demonstrates tort law's failings because, in it, bad behavior goes unaddressed and injuries go uncompensated. This criticism, however, presupposes that tort law's efficacy is properly judged by whether people who behave badly get their comeuppance and whether victims get compensation. Just as *Gatsby* is not that sort of novel, tort law is not that sort of law.

Tort law aims to empower victims to obtain recourse for having been wronged. Accordingly, it grants victims discretion to sue (or not sue) and to settle their suits regardless of the effects of their decisions on overall deterrence or compensation. Of course we might want a world without torts, or with fair compensation for tort victims. But it hardly follows that tort law is or ought to be designed to maximize deterrence or compensation. Doing so, after all, would almost certainly call for the law to constrain or override victims' choices about how to respond to wrongful injuries. (Put it this way: Is it really a "failing" of the tort system that it allowed Tom to decline to pursue a criminal conversation claim in response to *Gatsby's* affair with Daisy?) West unfairly stacks the deck against the private law of tort by measuring its "bite" using public-law metrics.

Relatedly, although tort law is indeed a law of wrongs, it is famously not concerned with wrongs 'in the air.' Rather, it aims to enable victims of injurious wrongs to respond to having been wrongfully injured. Negligence law, for example, does not take notice of carelessness in and of itself, but of carelessly caused injuries. One can readily condemn Daisy for her irresponsible driving. But before we can reach the conclusion that she was "negligent"—in the tort sense—we need to know, among other things, whether her speeding was a cause of Myrtle's death, and whether Myrtle was herself careless in running out into the street. To treat these aspects of negligence law as 'arbitrary' limits that undermine tort law's 'efficacy' in policing irresponsible behavior is to proceed from the mistaken premise that tort law exists to police irresponsible behavior.

These complaints aside, I share West's concluding lament over the tendency among moderns to downplay notions of individual responsibility and accountability. The path forward, however, is not to dismiss tort law, in general, as too judgmental, too ineffectual, and too undemocratic, though it certainly has at times and in certain applications been vulnerable to these charges. We must instead see tort law for what it is (a law of private wrongs and victim redress), recognize its importance as one longstanding component of our legal system, and reform it as necessary to ensure that it can properly play its part. So must we beat on, boats against the current, borne back ceaselessly into the past.

Torts

The Journal of Things We Like (Lots)
<http://torts.jotwell.com>

Cite as: John C.P. Goldberg, *How to Get Away with Negligence*, JOTWELL (October 20, 2015) (reviewing Robin L. West, *Gatsby and Tort, in American Guy: Masculinity In American Law And Literature* 86 (Saul Levmore & Martha C. Nussbaum ed., 2014), available at SSRN), <http://torts.jotwell.com/how-to-get-away-with-negligence/>.