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JOHN C. P. GOLDBERG, BENJAMIN C. ZIPURSKY

REPLIES TO COMMENTATORS

(Accepted 20 September 2021)

ABSTRACT. With gratitude for our commentators' thoughtful and generous engagement with *Recognizing Wrongs*, we offer in this reply a thumbnail summary of their comments and responses to some of their most important questions and criticisms. In the spirit of friendly amendment, Tom Dougherty and Johann Frick suggest that a more satisfactory version of our theory would cast tort actions as a means of enforcing wrongdoers' moral duties of repair. We provide both legal and moral reasons for declining their invitation. Rebecca Stone draws a particular link between civil recourse in private law theory and the right of self-defense as recognized in criminal law and moral theory. While we share Stone's basic inclination, we argue for a different version of the link than the one that she draws. Veronica Rodriguez-Blanco provides a critique of our model of negligence law based on action theory. In response, we explain – in a way that we hope sheds light on debates over moral luck – how it is possible for the law to define negligence such that its commission depends simultaneously on the character of the defendant's conduct and on the consequences that result from it. Though generally sympathetic to our approach, Stephen Smith faults us for failing satisfactorily to explain important remedial dimensions of tort law. Stubbornly, we insist that we can account for these, and indeed can do so on more satisfactory terms than corrective justice theorists. Finally, Erin Kelly challenges us to consider how our work might inform the analysis of two pressing issues of racial justice: over-criminalization and reparation payments. While we question whether our work to date has as much to offer on these matters as she suggests, we also maintain that the core principle of civil recourse theory – where there is a right there is a remedy – provides grounds for critiquing modern law's failure to provide adequate accountability when police officers use excessive force against persons of color.

Authors fortunate enough to have prominent scholars engage their work can expect to take their lumps. We thus count ourselves especially lucky for receiving in this volume sustained engagement that is generous and largely positive. Each contributor finds much

that's right in *Recognizing Wrongs* and then offers thoughtful suggestions about how to strengthen its arguments or extend its analysis.

This said, theirs can also be cast in a less self-congratulatory light. Roughly, the takeaway would be this: after twenty-five years, we're off to a good start, but there are still a lot of unanswered questions, rough edges, and untaken paths that warrant exploration. While Tom Dougherty and Johann Frick endorse much that we say, they also suggest that we would have done better to defend a version of tort law that identifies as wrongful only conduct that is morally wrongful. By contrast, Rebecca Stone aims to salvage our more positivistic account of tortious wrongdoing, yet contends that we have not articulated a satisfactory foundation for our theory. By way of friendly amendment, she suggests that we might find it in an analogue to the right of self-defense. Veronica Rodriguez-Blanco applauds our capacity to capture in tort law both a Nagel-like view of moral luck as fundamentally inimical to certain responsibility attributions and a Williams-like view of moral luck as an ineliminable aspect of such attributions. Yet she worries that we have not owned up to the fact that one probably must choose between them. Although crediting our notion of civil recourse for capturing why tort law ties the commission of wrongs to rights of action, Stephen Smith says that it falls short – indeed, short of the explanation provided by our corrective justice foils – in accounting for standard tort remedies. And while Erin Kelly finds much that is valuable in *Recognizing Wrongs*, she raises critical questions that theorists of responsibility, justice, and law in contemporary America might have been expected to address that we did not, including questions concerning over-criminalization and reparations for systemic injustice.

In what follows, we aim to address each of these challenges and invitations. As in our book, we are inclined to separate those which relate to our account of the wrongs of tort law from those which relate to the idea of civil recourse for wrongs. We regard Dougherty and Frick, Stone, and Rodriguez-Blanco as primarily engaging our treatment of the nature of wrongs in tort law, morality, and criminal law. Kelly and Smith, by contrast, are more focused on recourse.

Just as there is a choice regarding whether to adopt a more or less self-congratulatory perspective on the comments we have received,

there is also a choice between more open and more defensive replies. Although we would like to claim for ourselves both humility and openness, we realize that, at times at least, we may display the opposite dispositions. Perhaps it is fair to say that they split the difference. As to Rodriguez-Blanco, Stone, and Smith, we risk looking defensive, for we think we have already spoken to the questions they have raised, and we try to use their rigorous analyses to provide a better version of what we have been saying. Our responses to Kelly, as well as Dougherty and Frick, are both more congenial and more contrarian. They are more congenial in conceding that we do not take the positions they suggest we should take, but more contrarian because we insist on sticking to our considered views.

There are two somewhat concessionary themes to this set of replies, but each helps us to develop what we believe is a clearer articulation of the view we have had all along. Each theme comes from something we 'hear' in all of these commentaries. One is that, even if there is comfort to be found in our account of torts as legal wrongs, there is some instability too, and we need more clearly to explain how our account of tortious wrongdoing connects it to (or distinguishes it from) moral wrongdoing and blameworthiness. A second is that the alleged morality of empowerment at the heart of civil recourse theory still needs development in terms of both doctrinal comprehensiveness and theoretical justification. Unsurprisingly, both are themes about the relationship between law and morality in the law of wrongs. One other theme that runs through these comments is worth flagging, namely, the importance of simultaneously articulating what distinguishes the particular type of accountability for wrongdoing that we claim sits at the heart of Anglo-American tort law, while also acknowledging that other types of responses to wrongdoing and injustice – including some aptly captured by the analytical framework of corrective justice theory – are cogent and important to other facets of our legal and political system. Tort law is not a scheme of corrective justice, nor is it a scheme of criminal justice. But corrective justice and criminal justice do indeed have important roles to play in our polity and our legal system.

I. TORTS AS WRONGS

A. *Dougherty and Frick: Corrective Justice v. Civil Recourse Revisited*

In their admirably rigorous and clear analysis, Tom Dougherty and Johann Frick applaud many features of the tort theory put forward in *Recognizing Wrongs*, offer suggestions for strengthening it, and provide a nuanced account of what's at stake in a decision between the tort law we purport to describe and a nearby version of tort law that they argue would be superior.¹ They also offer us a way to finesse the debate between ourselves and our philosophical 'frenemies', corrective justice theorists. Ungenerously, we are disinclined to accept their thoughtful offers of assistance.

Dougherty's and Frick's principal contention is that the best version of tort law, understood as a law of interpersonal wrongs, would be one in which all torts are moral wrongs (though not one in which all moral wrongs are torts).² If moral wrongdoing were a condition of tort liability, then tort law could be understood as law that serves the important functions of encouraging the observance of primary moral duties and of enforcing secondary moral duties of repair. In their view, the three values we highlight in our justification of the principle of civil recourse – equality, fairness, and individual sovereignty – are all strengthened when it is *moral* wrongs and *moral* duties of repair that are being enforced through the law. And, indeed, they worry about whether our equality, fairness, and individual sovereignty justifications work without the 'moral' qualification. This conception, they further suggest, is probably not very far from the tort law as it currently operates throughout the United States. A good deal of conduct that is tortious is also morally wrongful. Thus, it is not difficult to imagine a world in which tort suits are properly understood as efforts by victims to harness the legal system to enforce wrongdoers' moral duties of repair. In this world, tort law would warrant our support in large part because it addresses moral wrongs and enforces moral duties of repair.

As Dougherty and Frick appreciate, their proposed revision to our wrongs-and-redress theory of tort law would bring it much closer to corrective justice theory. Coming to tort theory as outsiders, they

¹ Tom Dougherty & Johann Frick, *Morality and Institutional Detail in the Law of Torts: Reflections on Goldberg's and Zipursky's Recognizing Wrongs*, ___ *Law & Phil.* __ (2021).

² *Id.* at [9–17].

justifiably wonder why that should really bother us, or corrective justice theorists. As they see it, the corrective justice camp ought to accept that we are descriptively correct in claiming that a tortfeasor does not incur a legal duty to repair her wrongs upon the tort's commission. At the same time, we should accept that this feature of the tort system still permits it (or a version of it suitably tied to moral norms) to be aptly described as law governed by a principle of corrective justice.³

In sum, there is a version of tort law that can be understood as law that enforces moral duties of repair *indirectly*, by allocating to tort victims the power to press claims. This allocation of power includes the grant to victims of the power to waive their legal right to insist on the performance of the wrongdoer's moral duty of repair. Once the power to waive is recognized, there is no problem accounting for the fact that, so far as tort law is concerned, the wrongdoer's legal duty of repair does not exist until judgment is entered against the defendant. Anglo-American courts happen to have chosen an 'opt-in' system for the enforcement of wrongdoers' moral duties of repair. Perhaps some type of opt-out system might be preferable. Likewise, having state officials bring suits seeking repair for victims might enhance the capacity of the legal system to do justice and to serve the values we enumerate. Regardless, these are all questions of institutional design, not an indication that tort law, simply because it relies on private rights of action, is something other than an instantiation (or close to an instantiation) of corrective justice. It is a system of corrective justice that incorporates private rights of action.

In the end, Dougherty and Frick's amended version of our account generates a version of corrective justice theory that should be very appealing to Anglo-American lawyers. Like Andrew Gold and Scott Hershovitz, they seem eager to acknowledge and even to endorse the plaintiff-empowerment features of tort law, which

³ *Id.* at [18–23].

plainly figure prominently in tort practice, especially in the United States.⁴ They also seem to embrace a less formal, non-Kantian conception of the wrongs of tort law than do Ernest Weinrib and Arthur Ripstein – one that openly embraces the overlap between the wrongs of positive morality and the wrongs of tort law.

As appealing as their depiction is, we are unwilling to sign on to the proposed theoretical *détente*. The problem is not (merely) our stubborn desire to maintain a distinct ‘brand’. It arises from our understanding of what we are trying to accomplish in offering a wrongs-and-redress theory of tort law. Although we provide a qualified defense of tort law against those who dismiss it as lacking a principled justification,⁵ the first order of business for us has always been to give an accurate interpretive account of what it actually is and how it works. For the reasons set forth below, we regard it as an interpretive mistake to maintain that tort law instantiates or implements a principle of corrective justice.

Many torts are not moral wrongs. Moreover, tort law is prepared to impose liability on those who commit torts that, even if wrongs as a matter of ordinary morality, would probably be deemed fully excused. Nor can morally nonwrongful torts be dismissed as outliers. It has always been a core feature of the tort of trespass to land that it extends to intentional but innocent entries, including necessitous entries. Private nuisance liability likewise is not fault-based, but instead turns on the idea of interfering unduly with another’s enjoyment of her property. Even a shopkeeper who has behaved reasonably can be ordered by a court to make substantial changes to the way in which she does business just because her shop, though otherwise lawfully operated, happens to be located such that it generates more noise than her neighbor is required to bear. Liability for personal injury torts can be similarly unforgiving. A person who

⁴ See ANDREW GOLD, *THE RIGHT OF REDRESS* (2020); Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 Fla. St. L. Rev. 107 (2011). The position Dougherty and Frick sketch also resembles the one articulated by John Gardner in one of his important later works. See JOHN GARDNER, *FROM PERSONAL LIFE TO PRIVATE LAW* (2018). Gardner, like Dougherty and Frick, argues that private law’s rights of action turn out to provide a relatively efficacious means of holding wrongdoers to their moral duties of repair while avoiding various problems that might arise if some other enforcement system were adopted. See John C. P. Goldberg, *Taking Responsibility Personally: On John Gardner’s From Personal Life to Private Law*, 14 J. Tort Law 3 (2021).

⁵ We are open to the possibility that it would be better, all things considered, to address some or all of the behavior that has been addressed through the wrongs-and-redress framework of tort law by law that operates on some other principle. Conversely, if it turns out that there is a stronger justification for tort law than the qualified defense we have offered, so much the better for tort law.

intentionally touches another in a friendly or playful manner commits a battery if that mode of contact runs afoul of prevailing social norms governing touches. That she was not aware of the relevant norms, and perhaps even had no reason to be aware of them, is irrelevant. Likewise, courts have insisted that it is important for the tort of negligence to apply even to a well-meaning person who does her very best to be careful but inadvertently acts carelessly so as to injure another. Basic negligence law also is prepared to impose liability on an accomplished surgeon with a spotless performance record who happens to slip up in one procedure, as well as an elderly person who, merely because of his age, is unsteady on his feet and who falls into and injures another.

As these and other examples demonstrate, the wrongs of tort law are not wrongs by virtue of being moral wrongs. However, this does not mean that the notion of torts-as-wrongs is empty. Like moral wrongs, torts involve a failure to act in conformity with a standard of right conduct. In this respect, they really are breaches of obligations to conduct oneself in a certain manner that correlate with genuine rights not to be mistreated by others. But the relevant standards, duties, and rights are not those of positive or aspirational morality. Instead, they are those that have been legally entrenched through judicial decisions or legislation. The wrongs of torts are breaches of *legal* duties and violations of *legal* rights. Many of these track moral standards. Others don't. Regardless, it is the status of these standards as legal standards that gives them their force.

Of course, one can take the position that tort law's redressable wrongs *should* track moral wrongs, and that the law is an ass for failing to do so. But, again, our primary goal has been to understand how tort law works – to see if we can make sense of the terms on which courts have actually defined the various torts. The claim that torts are wrongs by virtue of being violations of conduct-guiding directives found in judicial rulings and legislation is vastly more plausible, interpretively, than the claim that torts are moral wrongs. Moreover, as we note in *Recognizing Wrongs* and elsewhere, there are good reasons for tort law to define wrongs and to articulate standards of conduct that diverge to some degree from their moral counterparts.⁶ This includes, for example, the relatively 'sharp edges'

⁶ JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 189–198, 205–208 (2020); John C. P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *Cornell L. Rev.* 1123 (2007).

or 'objective features' of tort law's standards, which relate not only to the functionality of such standards in litigation contexts, but more importantly to their capacity to be communicated, to guide conduct, and to operate consistently with expectations people reasonably have of one another. In sum, courts have long fashioned and applied tort law so that it stays in touch with moral norms without strictly requiring moral wrongdoing as a condition of liability. And they have had good reasons for doing so. (We will return to this feature of tort law below, as it figures in Professor Stone's analysis of our work.)

The proposition that tort liability is a means of enforcing moral duties of repair is problematic for another reason – one that becomes clear when one considers the range of cases that result in liability and the magnitude of that liability. Tort law is famously insensitive to the relative circumstances of wrongdoer and victim. Thus, in many cases, legal liability attaches even if it is quite implausible to suppose that the commission of the relevant wrong generates a moral duty of repair. Likewise, even in cases in which it is plausible to posit a moral duty of repair, tort liability often vastly exceeds any plausible conception of the scope of that duty. Imagine that a parent in a well-off family buys sandwiches from the owner of a struggling bodega for consumption on a camping trip. One of the sandwiches turns out to contain meat that is spoiled because the bodega's old refrigerator recently faltered for the first time, resulting in the meat being stored at an unsafe temperature. The parent consumes the sandwich and, because of the spoiled meat, suffers severe gastrointestinal problems that requires hospitalization. Even if the bodega owes a moral duty of repair to the parent, is it really a duty to pay him \$200,000 to cover his medical bills, lost income, and pain and suffering?

Ironically, once one engages in tort theory that seeks to trace the pattern of inferences in the law rather than making the law the best it can be, another advantage of our view leaps out. The legal system draws the inference of liability from the plaintiff's establishment of the elements of the claim without appearing to travel through the intermediary of a duty of repair. Moreover, one can perceive a resemblance between a plaintiff's right to hold a defendant to account for having wronged her and a government prosecutor's power to have a criminal wrongdoer punished once the commission of the

wrong is established. Criminal liability does not presuppose any duty on the part of the offender to appear at the prison gates; it is a kind of vulnerability to the power of the prosecutor to see to it that one face certain treatment from the state. Of course, the question of whether the punishment is indeed justifiable is a different matter. But while it is possible that someone will produce as a theory of punishment that a criminal wrongdoer has a duty to go to jail or give up his life or pay a large fine, that is not how the problem is ordinarily conceived.

Our view of tort liability is in one important respect analogous. The phenomena at issue – judicial decisions applying tort law – bespeak vulnerability to the demand of the victim that the state impose liability on the defendant, grounded in the defendant's having wrongfully injured the plaintiff. Legal systems that predicate such liability on establishment of the elements of a tort are legal systems that empower the victims to exact damages payments or other forms of redress. One account – but only one account – of how the right to have such a power is grounded is that the plaintiff is the beneficiary of the payment the defendant has a duty to provide. For the reasons stated above, we reject that account as an interpretive matter.

The question in normative theory we face is whether there are principles of political morality or morality more generally that could explain why a scheme that routinely allows liability for legal-but-not-moral wrongs, and that imposes liability on terms that often exceed the terms of any applicable moral duty of repair, might be justifiable. Given the gaps in this domain of law between law and morality, the hypothesis that its justification can be found in corrective justice and a moral duty of repair seems dubious, at best. To this extent, our descriptive account of the positive law of torts cannot be adequately vindicated in the way that Dougherty and Frick suggest. The question is whether vindication is possible via some other normative route.

We have shown in *Recognizing Wrongs* that these structures suggest another route. Specifically, what we have found in the law is that the right conferred by the principle of civil recourse is a right to have the state empower victims against their wrongdoers. The core right undergirding tort law concerns what government owes victims in terms of empowering them to respond to wrongdoers. While the

victim's right is a right to a power as against the tortfeasor, insofar as it is a claim right, it is a claim right against government, which bears a correlative duty to provide individuals with a means of redress.

We classify this political-theoretic justification of tort law as contractarian because, like contractarian justifications for other features of a political and legal system, it proceeds by identifying a problem or set of problems that would exist without certain legal and political structures but is solved or substantially ameliorated by their establishment and operation. The problem here is the unacceptability of *the victim's having no recourse* when he or she is legally wronged by others, in a system that does not empower the victim and prohibits private aggression or coercion. Our invocation of equality, fairness, and individual sovereignty as values is not aimed at providing a list of worthwhile values from a political-theoretic point of view. Instead, it aims to illuminate the nature and depth of the problem – no recourse for wrongs – that a political entitlement to a legal power against the wrongdoer solves. We have more to say about these values and how they figure in a qualified defense of tort law as a system of wrongs and redress, but it is time to turn to Professor Stone's comments.

B. Stone: Tort Law, Nonideal Worlds, and Self-Defense

Like Dougherty and Frick, Stone is interested in exploring challenges arising out of the more positivistic aspects of our account of tortious wrongdoing.⁷ In particular, she wonders whether it is justifiable to have a legal system that is not directly aimed at doing justice and does not aim to enforce first-order moral rights and duties. Happily, Stone answers in the affirmative. Indeed, her strikingly original commentary is offered as a potential justification for tort law as we characterize it.

Stone invites readers to consider a polity that is neither irredeemably unjust nor ideally just. In this 'moderately non-ideal' po-

⁷ Rebecca Stone, *The Circumstances of Civil Recourse*, ___ Law & Phil. ___ (2021). In this article, Stone is concerned to determine the conditions under which our theory does a better job than competitors (corrective justice theory and reductive instrumentalism) of explaining why a polity would be justified in adopting a body of tort law that operates on the terms that we claim Anglo-American law operates. While this normative question is appropriate and important, we reiterate here that *Recognizing Wrongs* primarily aims to make sense of tort law (not to establish conclusively its all-things-considered justifiability), and that, on this interpretive dimension our wrongs-and-redress account surpasses its main rivals.

lity, community members aspire to establish just relations but cannot consistently do so because of the difficulty of determining what justice requires.⁸ Such a polity, she maintains, would be warranted in adopting a body of law that ties the commission of putative wrongs to the provision of rights of action to persons claiming to have been wronged. While providing individuals with legally defined entitlements against certain forms of mistreatment and the power to claim on the basis of those entitlements will not consistently vindicate persons' actual moral entitlements, the polity's good-faith pursuit of justice by means of conferring rights and powers on individuals takes individuals seriously as right-holders. In such a polity, its members therefore have reasonable grounds for regarding their legal duties and rights as genuine moral duties and rights.⁹

In short, according to Stone, under a certain set of conditions that may well obtain in the real world, tort law's directives, by linking legal wrongs to liability and rights of action, and by defining legal wrongs positivistically, could generate for members of a community with diverse interests and perspectives a workable framework for coexistence that tends towards justice. Having offered this contention, she then pushes further, asking whether the same result could be reached, perhaps with even greater consistency, through law that calls for the direct official enforcement of individual entitlements (roughly in the manner of criminal prosecutions), instead of arming putative victims with rights of action.¹⁰

Stone's ultimate argument for the superiority of law that incorporates victim enforcement actions starts with an account of the moral right of self-defense. That right (or privilege), she observes, is generally understood to cover not only cases in which an actor is actually threatened with imminent physical harm, but also cases in which the actor reasonably but mistakenly believes she is facing such a threat.¹¹ Cases of mistaken-yet-justified self-defense in turn attest to the idea that the privilege to enforce one's underlying rights against mistreatment can be broader than the rights themselves. Since private rights of action are, like self-defensive actions, efforts to enforce

⁸ *Id.* at [13].

⁹ *Id.* at [15].

¹⁰ *Id.* at [16–23].

¹¹ In this context, to say that the right 'cover[s]' these cases is to say that the use of defensive force based on a reasonable but mistaken belief as to the threat is not merely excused but justified.

or vindicate one's underlying rights (albeit after the violation of those rights), they arguably have this same quality – the privilege to pursue redress for violations of one's rights extends beyond cases in which one has actually suffered a rights-violation.

Thus, in a moderately non-ideal polity, in which justice is generally being pursued but there is uncertainty over the rights we actually have, individuals are morally permitted to use the institutions of private law to vindicate their legal rights even if their legal rights don't actually track their moral rights, and the state is justified in maintaining such institutions. Moreover, precisely because a moderately non-ideal polity is marked by uncertainty as to the rights members enjoy, the grant to individuals of rights of action for putative rights-violations is particularly appropriate. This is because the conferral by the state of rights of action sets the stage for a negotiation between plaintiff and defendant over what justice demands as between them. In this scheme, 'private legal rights ... would represent provisional determinations of the parties' true moral rights against one another that would be entitled to weight in the practical deliberations of potential defendants and potential plaintiffs ...'.¹² These 'provisional determinations' would not have the status of genuine obligation-generating norms but would have some conduct-guiding force.

Stone's effort to bolster the normative aspects of our theory is ingenious and illuminating. And there is a lot in it with which we are inclined to agree, including her doubts about whether tort law would make much sense in a world comprised entirely of relentlessly Holmesian bad persons. We also share her core judgment that an institution such as tort law is best vindicated on political rather than directly moral grounds, in part because – as noted above – it is far from clear that outcomes in tort cases always or even typically ensure that justice is being done. The political justification we offer is less tied to the sorts of epistemic limitations that Stone emphasizes, and more to the idea that a liberal-democratic state that justifiably bars individuals from acting to protect and vindicate rights that the state acknowledges them to have cannot leave them high and dry, but must instead give them a way of responding to violations of those rights. But the basic point stands: tort law is not a scheme for

¹² *Id.* at [23].

the doing of justice and is thus not defensible as such a scheme. It must be justified on the ground that it is a component of a legitimate political and legal regime.

This common ground notwithstanding, at least one point requires us to defend, or at least to clarify, our view. Stone claims that, when all is said and done (i.e., if we accept her reconstruction and defense), we will have to give up on our claim that the duties of tort law are 'genuinely binding relational duties as opposed to relational duties that are merely recognized as such by the positive law'.¹³ We are not persuaded. That is, we continue to insist that the rights and duties of tort law are genuine rights and duties. Of course, whether we can make this claim depends on what 'genuine' means. In contending that the norms of tort law generate obligations, our point is not that these are actual moral obligations. It is instead to register our disagreement with scholars who, following Holmes, have suggested that tort law's putative obligations are only nominally so, and in fact have force only insofar as they go along with the prospect of liability. On this point, we have all along embraced H.L.A. Hart's views that legal obligations so-called have a great deal in common with moral obligations; they are both species of a genus of obligations that has a certain phenomenological character and are appropriately viewed, under a variety of circumstances, as binding. So long as we can help ourselves to 'obligations' in this sense, we do not see any problem.

We also offer a somewhat different account than Stone of the linkage between civil recourse and self-defense – an account that dates back to Zipursky's first article on civil recourse theory and is discussed in our book.¹⁴ These differences are traceable, in part, to our rejection of her contention that, in law, a mistaken belief about a threat justifies self-defense. Our view is that proportionate self-defensive action against another is justified in a narrower set of circumstances. Specifically, it is justified only if another person engages in conduct that has the attribute of being *objectively threatening* – in other words, only if a reasonable person in the position of the would-be victim would perceive the other's conduct as portending an immanent aggressive attack. If, for example, an apparent assailant is wielding a handgun that the assailant (but not the putative victim)

¹³ *Id.* at [17].

¹⁴ Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1, 86 & n. 285 (1998); GOLDBERG & ZIPURSKY, *supra* note 6, at 14–15, 116–120.

knows to be unloaded, but in a manner that indicates an intention to shoot the victim, the relevant threat is present. An aggressive and even a potentially lethal act of self-defense in response to such conduct is justified because the conduct really is threatening, and because there is a right to respond to such conduct with force. By contrast, if a malicious third party named Marlow credibly but falsely tells Harris to be on guard against a middle-aged man carrying a rolled-up newspaper because such a man had recently attacked unsuspecting strangers by hiding a knife in the newspaper, Harris's use of force against a person who happens to walk toward him while harmlessly carrying a rolled-up newspaper would not be justified self-defense (although it might be excused). Even if Harris was reasonable to believe he was facing an imminent attack, nothing in the conduct of the newspaper-carrier amounted to objectively threatening conduct

The distinction we are pressing here is important for understanding tort law, for it is something similar that explains why the wrongs of tort law – as we noted in response to Dougherty and Frick – are carved along ‘objective’ lines. A person injured in a car crash has had her legal rights violated (under tort law) only if the other driver was driving carelessly, but ‘carelessly’ is defined in terms of how a reasonably prudent driver drives, not in terms of whether the driver was doing his or her best. Relatedly, a tort plaintiff has a right to hold the defendant accountable only if the plaintiff's rights (as defined by tort law) were actually violated; a plaintiff's good faith belief is not sufficient. On the other hand, Stone is right that the civil justice system permits individuals to commence litigation against another so long as they have a good faith basis for doing so. And she is right that the legal power to do so is what drives a world of possible settlement, a domain that is indeed part of how we muddle through a world of conflict.

There are three larger points about self-defense and civil recourse. First, both the right to self-defense and the right to recourse against others are anchored in the value that we have called individual sovereignty. Recall that civil recourse theory as we have presented it is a theory of a large branch of the common law with roots tracing back to early modern Anglo-American political and legal thought and practices. As such, we rather unabashedly contend that a certain

kind of Lockean individualism is fundamental in the set of values that undergirds it. Second, and in the spirit of qualification, it is important to see that support for a right to self-defense and a right to recourse should not be taken display enthusiasm for vengeful instincts. Neither we nor Stone advocates a right to revenge. Third, and drawing together the prior two points, while the values anchoring these common law conceptions of Hohfeldian privileges do have a liberal-individualist pedigree and grounding, they rely upon ideas that run deeper than liberal individualism or contractarianism. Both a right to self-defense and a right to civil recourse are critical in a conflict-ridden world where states monopolize coercive force because both recognize that allowance of some leeway for self-protectiveness as against the power and interferences of others is actually a virtue of a liberal polity, not a vice. In both, however, the scope of justifiable self-protective action turns on what putative rights-invaders have actually done.

C. *Rodriguez-Blanco on the Incoherence of Injury-Inclusive Wrongs*

Veronica Rodriguez-Blanco's challenging critique argues that there is an apparent inconsistency in our tort theory as applied to the law of negligence, and that – while it is possible that a philosophical account of action might resolve this inconsistency – we have not provided such an account.¹⁵ More concisely, she says that we face the following dilemma, and that we fail to provide the sort of action theory that might allow us to escape it:

'Premise 1: If the directive-based relationality thesis is at the centre of the tort of negligence, then the defendant's action and conduct should not be part of the core explanation of the tort of negligence'.

'Premise 2: if the sound philosophy of action shows that we cannot sever the defendant's conduct from the plaintiff's injury, then the defendant's action might become part of the core explanation of the law of negligence. Therefore, the directive-based relationality thesis in terms of the right-duty pair is secondary to an explanation in terms of the defendant's action'.¹⁶

Here is our understanding of the dilemma. Rodriguez-Blanco rightly takes us to assert that liability for the tort of negligence turns on whether the defendant breached the relational directive at the

¹⁵ Veronica Rodriguez-Blanco, *The Law of Negligence, Blameworthy Action and the Relationality Thesis: A Dilemma for Goldberg and Zipursky's Civil Recourse Theory of Tort Law*, __ Law & Phil. (2021).

¹⁶ *Id.* at [7], [11].

core of negligence law. That directive, in its standard form, enjoins each person from physically injuring others through conduct that is negligent or careless towards them. With this understanding of negligence in mind, we propose to reformulate her Premise 1 – labeled here Proposition A, to avoid confusion – to involve an affirmative rather than negative proposition:

Proposition A: Priority of the Duty of Non-Injury. With respect to the tort of negligence, the defendant's duty to avoid physically injuring the plaintiff is prior to or independent of the duty to avoid negligently risking physical injury to the plaintiff.

This premise follows from the fact that the rights-invasion that triggers the power to sue in negligence is the physical injuring of the plaintiff, not the mere risking of physical injury, and from the fact that the relational directive at the core of negligence law generates duties strictly correlative to rights. The legal right in question is a right not to be injured. As such, it is not properly described by reference to the characteristics or quality of that action as careless.

According to Rodriguez-Blanco, this proposition sits poorly with Premise 2 – here reformulated as Proposition B – precisely because the latter does connect negligence liability to the quality of the defendant's act as careless. She attributes to us the view that in negligence law, the defendant's liability for the plaintiff's injury requires that the defendant acted in breach of the duty to act with care towards the defendant, and the defendant's act is properly described to include not only the defendant's movements but certain results of those movements – in particular, the plaintiff's being injured.

Proposition B: Parallel Status of the Duty to take Care and the Duty of Noninjury. For the tort of negligence, the defendant's carelessly risking physical injury is parallel to the injuring of the plaintiff.

The criticism is that these two propositions are mutually inconsistent: the duty of non-injury in negligence law cannot be both prior to the duty to be careful and parallel with or co-equal to it.

The force of this objection is brought out by Rodriguez-Blanco's discussion of moral luck problems. In advocating for the Priority of the Duty of Noninjury, she says, we seem to be siding with Bernard Williams and acknowledging that a form of responsibility in tort law, as in morality, turns on fortuities outside of the control of the actor. Yet in advocating for the Parallel Status of the Duty to Take Care and the Duty of Noninjury, we seem to be on Thomas Nagel's side

of the moral luck issue, acknowledging that agent-accessible aspects of the action that results in injury must be core to the assignment of responsibility if tort law's linkage of liability to conduct is to instantiate a cogent notion of responsibility. We can't have it both ways, argues Rodriguez-Blanco. And if she is correct about this, we have a problem. For it has been central to our efforts to make sense of tort law to defend the coherence of tort liability against the critiques of those like Jeremy Waldron, who has suggested that the treatment of luck in tort law is fundamentally unfair and incoherent. We have also suggested that our success in overcoming such problems in tort law points moral philosophers in a positive direction on moral luck. If Rodriguez-Blanco is right, the opposite is true.

However, we do not think Rodriguez-Blanco is right. Indeed, we believe we have already identified the problem she frames and have provided a philosophical account of action and an analysis of negligence law that addresses her concerns.

The law of negligence is typically said to require plaintiffs to establish four elements in order to prevail on their claims:

- (a) the defendant owed the plaintiff a duty of care;
- (b) the defendant breached the duty of care owed to the plaintiff;
- (c) the plaintiff suffered an injury (in core cases, physical harm or property damage); and
- (d) the defendant's breach of the duty of care caused the plaintiff's injury, where 'caused' means the breach was an actual and a proximate cause of the injury.

What we have labeled as element (b) is sometimes called the 'breach' or 'negligence' element, and is sometimes articulated by lawyers and courts in terms of the idea of the defendant having acted *negligently*. This usage risks confusion, because the entire tort is also called 'negligence'. Displaying our age, we sometimes amuse (or mystify) our students by saying that the breach or negligence element – element (b) – is the 'title track' of the tort of negligence – elements (a) through (d) taken together. Alternatively, we sometimes refer to the breach element as 'small- "n" negligence' and refer to the whole tort as 'large- "N" Negligence'.

In prior work, we have identified what is in many ways a deeper confusion along these same lines. The problem is not just with

element (b). At a deeper level, it is with element (a): the duty element. The commission of the tort of negligence is a violation of another's right, which is exactly why the other is empowered by tort law to hold the tortfeasor accountable. But if it is a violation of the victim's right, and if rights and duties are correlative (as we claim they are), then it is also a breach of the tortfeasor's duty to the plaintiff. If so, however, that duty is a capital 'D' duty not to injure someone through conduct that constitutes a breach of the duty of care owed to them, much as the law of battery includes a duty to refrain from harmfully or offensively touching someone, or the law of trespass to land includes a duty not to physical intrude upon land in the possession of another. Breaches of the duties in these latter cases are themselves full-fledged torts, correlative to violations of rights.

With these aspects of negligence law in mind, a simpler paraphrase of Rodriguez-Blanco's critique would be as follows:

Goldberg and Zipursky insist that the tort of negligence is the breach of the "big-D duty" not to injure another. But they also insist that careless conduct must be fused with injury in the right way in order for the tort to be committed, and therefore seem to say that the breach of the "small-d duty"—i.e., element (b)—lies at the core of assigning accountability to the defendant for having brought about the injury. They cannot have it both ways. The core duty is either a duty to act non-injuriously or a duty not to injure.

In prior work and in *Recognizing Wrongs* we have tried to explain why we think we *can* have it both ways.¹⁷ Our claim is that a special and potentially confusing feature of the particular tort of negligence is that the right it protects, prototypically, is the *right of a person not to suffer physical injury from another's carelessness towards the person*. The correlative duty is *the duty not to injure others through carelessness towards them*. This is a duty of noninjury – a duty that one breaches only if one in fact causes bodily harm or property damage to another. At the same time, it is a *qualified* duty of noninjury. The duty at issue is not a duty to avoid injuring, full stop. It is a duty to avoid injuring though a certain kind of conduct, namely, careless conduct. Confusingly, negligence law thus nests a duty within a duty – the duty of noninjuriousness (that is, the duty to avoid acting in a manner that unduly risks injury to a person such as the plaintiff) within the duty of noninjury (that is, the duty to avoid proximately

¹⁷ GOLDBERG & ZIPURSKY, *supra* note 6, at 183–188.

causing injury to a person such as the plaintiff through conduct that is careless as to such persons). In sum, the overall duty generated by the tort of negligence is a duty not to injure others through carelessness towards them.

While the ideas of a duty to succeed and a qualified duty of noninjury might seem puzzling, they are hardly esoteric. Indeed, they are staples of everyday life. When a parent says to a child ‘Stay off the neighbor’s lawn’, the parent is articulating, in shorthand, a duty to succeed. The duty in question is not a duty to refrain from intending to go on the lawn. Merely forming the relevant intent without acting on it is not a breach of this duty. Nor would it breach this duty if the child were accidentally to fall off her bike while in the driveway of her home and land on the neighbor’s lawn. The duty articulated by the parent is a duty to refrain from contacting the land in question with the requisite intent.

A similar example displays the quotidian nature of qualified duties of noninjury. Consider another parent who says to a seven-year-old child ‘Slow down!’ Be careful not to knock down your little brother. He’s only two!’ There is contained in this statement a directive to act in a noninjurious manner but the guidance provided by the directive is connected to a norm of noninjury. And the latter is not supplied merely as an illustration of the harms that might flow from not slowing down. Rather, the parent is instructing the child to avoid knocking over the sibling by engaging in a certain kind of careless conduct.

Rodriguez-Blanco is quite right to suppose that her critique connects to important questions of moral and legal luck. Indeed, we believe our account of negligence (and other torts) as involving qualified duties of noninjury captures an important point about the nature of responsibility and moral luck. Carelessness – the breach aspect of negligence; element (b) – is a necessary condition for holding an actor liable for the tort of negligence (elements (a) through (d)). This is why liability for negligence does indeed satisfy an agent-control requirement that many deem fundamental to attributions of responsibility. That negligence liability is qualified – that there must be not merely an injuring but a careless injuring, permits negligence law to live up to at least some of the ‘avoidability’ and ‘choice’ concerns expressed by Waldron and those sympathetic to Nagel’s point of view. An actor can avoid liability altogether by

exercising due care, and there will not be a finding of negligence where no injury was beyond a reasonable agent's capacity to foresee harm.

None of this is to deny the significance of luck, however. That is because if an actor fails to exercise due care and therefore fails to avail herself of the opportunity to avoid liability altogether, the consequences of that failure will vary with contingent facts over which that actor may not have control. Whether a driver's careless running of a red light causes an injury may depend on the fortuity of whether a cyclist happens to be nearby. This feature of tort liability, however, is not one meriting criticism, because tort law is not a scheme for doling out sanctions in accordance with the extent to which an actor has engaged in blameworthy conduct. It is a system for empowering persons whose rights against being injured have been violated by actors committing legal wrongs against them. The rights of tort law are rights against certain actual interferences and injuries. If the driver injures no one and interferes with no one, then there is no rights violation and no occasion for liability. No doubt the discrepancy in outcomes can seem jarring, but the appearance is the result of an overly narrow understanding of what legal liability is and can be.

Rodriguez-Blanco is also correct to ask what philosophical account of action this account presupposes or requires. Whether it *requires* a particular account of action is unclear; at a minimum, one could say that the need for a philosophical account of action turns on exactly what else we wish to say about the ways in which attributions of tort liability resemble or depend upon attributions of some form of responsibility for acts. In *Recognizing Wrongs* we maintain that tort liability is a form of responsibility for acts. A moral luck problem thus seems to re-insert itself, for one can ask why liability for the act of running a red light should differ depend on the fortuity of whether a cyclist was present at that moment. Our answer is that the liability in the case where someone is injured is not liability for *carelessly running a red light*, but liability for *carelessly injuring the cyclist*. In the case in which the cyclist is not present, the relevant act is not committed: there was no careless injuring of a cyclist (only the careless running of the red light). The philosophical question in action theory is why it is anything other than word play to include

the injuring of the cyclist in the description of the act, rather than saying that the two cases involve the same act but different consequences.

The short answer to this question, developed in greater detail elsewhere, is that the objection rests upon an implicit premise that the 'real' acts of agents are those that would be identified at privileged level of description at which the agent's volition connects unbreakably with objects and events in the world. Like John Gardner, Arthur Ripstein, and many others, we think that this premise is unsustainable, and that, moreover, any nondogmatic understanding of the ways we ascribe acts to agents demonstrates that such a reductive approach to the individuation of actions is unpromising.

II. CIVIL RECOURSE

Tort law defines injurious legal wrongs. It also subjects persons who commit such wrongs to lawsuits that, if deemed meritorious, result in court judgments that impose liability on wrongdoers to demands for payment of damages, cessation of their wrongful conduct, or both. In so connecting wrongs to liability, tort law, we argue, instantiates a legal and political principle: the principle of civil recourse. According to it, one who has been the victim of a certain kind of legal wrong is entitled to look to the state for the ability to obtain recourse from the wrongdoer.

From within sympathetic and careful treatments of our work, Stephen Smith and Erin Kelly raise questions about our account of tort law's remedial aspects. Smith maintains that our theory cannot explain the centrality of the 'make whole' measure of compensatory damages and the availability to certain tort plaintiffs of injunctive relief; he also contends that the importance of civil recourse in other domains of private law undercuts our aspiration to capture what is distinctive about tort law through civil recourse theory. Kelly pushes us to consider how the idea of civil recourse might provide the basis for a sound approach to thinking both about overcriminalization and reparations for historic injustices. In this part of our response, we aim to clarify and defend our understanding of tort remedies, while also explaining why this understanding does not translate neatly into the sphere of reparations.

A. *Smith: Injunctive Relief and Making Whole as Recourse*

Smith's careful critique has three main parts.¹⁸ First, he says that we have not adequately defended the view that tort law is what it appears to be. For, among the things it appears to be is a body of law that stands apart from other areas of private law (such as contracts). Yet the terms on which we characterize it – as a law of civil recourse for the breach of relational duties – are applicable to some of these other areas. Second, Smith maintains that our insistence that tort suits are about providing civil recourse for wrongs is belied by the fact that injunctive relief is often provided in anticipation of a wrong, not as redress for a wrong that has been committed. Finally, while Smith believes that our account does better than corrective justice theories in explaining why tort suits generate various remedies, he also argues that, in one crucial respect, it does worse. Specifically, it fails to provide an adequate account of the centrality of the make-whole measure of compensation as the standard damages remedy.

Our response to Smith's first point will be brief. We have never suggested that tort law is hermetically sealed from other bodies of law. Indeed, we have noted how attributes of tort law figure in other bodies of law, and ways in which the borders between tort law and other bodies of law have fluctuated, historically, and remain today hard to pin down. For example, we have emphasized that the principle of civil recourse figures not only in other areas of private law, but also constitutional law.¹⁹ We have also emphasized that tort suits can sometimes have a regulatory dimension, as for example when punitive damages are awarded on a deterrence rather than a redress rationale.²⁰ And we have acknowledged that there are certain aspects of tort law, both judge-made and statutory, that operate at the edges of the category of tort by imposing liability even when the defendant has not committed a legal wrong against the plaintiff – as for wrongful death claims and actions based on abnormally dangerous activities.²¹ Likewise, courts and commentators, with justification, seem occasionally to place certain wrongs in other legal domains even though they have the attributes of torts. (Think here

¹⁸ Stephen A. Smith, *Are Tort Remedies 'Civil Recourse'?*, _ L & Phil. _ (2021).

¹⁹ Hence our book's discussion of the Declaration of Independence and *Marbury v. Madison*. GOLDBERG & ZIPURSKY, *supra* note 6, at 30–37.

²⁰ *Id.* at 170–174.

²¹ *Id.* at 190–191, 204–205.

of the placement of breach of implied warranty within the law of contracts.) Finally, we have acknowledged that contract law and tort law share important features, including that each involves the identification of wrongs and the provision of an avenue of civil recourse for such wrongs.²²

At the same time, and consistently with the foregoing qualifications, we maintain that lawyers, judges and law professors have good practical reasons to deploy the concept of tort as they do, to refer to a distinct (but not wholly distinct) body of law. As we explain in Chapter 2 of *Recognizing Wrongs*, and further below, notwithstanding their overlaps, tort law systematically differs from contract law along important dimensions, including the source of the relevant rights and duties (agreement-based versus judicially and legislative determined), and the standard form of recourse that is provided (enforcement rights versus redress). Liability for 'equitable wrongs' likewise, in our view, is of a fundamentally different character than liability for torts. For these reasons, we think we have explained why lawyers are warranted in using the concept of tort more or less as they do – to cover redressable wrongs such as battery, conversion, defamation, and negligence – even granted that notions of relational wrongs and recourse appear in other departments of the law.²³

We turn next to the question of our account's ability to explain the availability of injunctive relief in certain tort actions. Smith points out that our insistence that torts are wrongs – violations of conduct-guiding legal rules – at one level sits well with the willingness of courts to enjoin ongoing or even prospective tortious conduct. Because injunctive relief involves courts ordering defendants to heed certain of their legal duties, when granted in tort cases it presupposes that tort duties are, as we claim, genuine obligations. Nonetheless, as noted, he suggests that our account of tort remedies does not capture what courts are doing when they grant injunctions. Injunctive relief, he insists, is forward-looking (preventative) and thus cannot be understood as the provision of recourse, which he construes to be an inherently backward-looking idea. Thus, he concludes that we need a different and more capacious account of remedies: one that allows for remedies that do not involve recourse.

²² *Id.* at 56–58.

²³ *Id.* at 56–61.

Smith's criticism depends on a particular understanding of what counts as 'recourse'. That understanding is too narrow. To see why, it will help to remind readers that, on our account, tort *redress* is but one form of civil recourse in private law.

The idea of civil recourse, as we deploy it, refers to the conferral of private rights of action in multiple legal domains, including tort, contract, fiduciary law, restitution, copyright, and others. In all of these areas, the provision of rights of action is a recognition by government of the entitlement of individuals to an avenue of recourse against others when those individuals are faced with certain kinds of problems because of others' actions or failures to act. Such problems include the inability, without the state's help, to respond to being party to an exchange agreement that has been broken; having been betrayed by a person to whose loyalty one was entitled; having lost to another possession of property that one owns; and having been wrongfully injured by another. Common-law legal systems recognize that individuals enjoy a right against the state to access to courts that are open to enable responses to these sorts of quandaries.

Tort law overwhelmingly deals with a particular kind of quandary – that of having been injuriously wronged and having no means of responding. Accordingly, the government, in providing rights of action to tort victims, is typically providing a particular version of civil recourse, one that consists of the ability to obtain redress from a wrongdoer for an injurious wrong. That private rights of action in tort are ordinarily powers to redress wrongs civilly is a crucially important fact about them. It explains why a claimant cannot prevail unless she has been injured, why it is only one has been injuriously wronged that is entitled to prevail, and so forth. Other bodies of law characteristically support other forms of recourse. Contract law, for example, empowers obligees to enforce contractual obligations owed to them: breach-of-contract claims are thus characteristically not in the first instance about redress, but instead about recourse in the form of an enforcement power.²⁴

Even within the subcategory of redress there is variation. And this is what permits us to explain injunctive relief. An owner of property in a residential area who is subjected to waves of nauseating odors from a nearby sewage plant can sue for the tort of private nuisance

²⁴ Andrew Gold, *The Taxonomy of Civil Recourse*, 39 Fla. St. L. Rev. 65, 68–73 (2011).

and seek redress in the form of compensatory damages. She can also seek redress in the form of injunctive relief. As Smith acknowledges, in this type of case, the entitlement of the successful plaintiff to injunctive relief is an entitlement to an order from the court directing the defendant to cease engaging in the wrongful activity that has already caused injury to the plaintiff. Injunctive relief on these terms thus falls comfortably within a notion of recourse as redress. A property owner otherwise powerless to respond to an invasion of her property rights is empowered to respond by obtaining both compensation for losses and an order ensuring that the still-ongoing rights-violation ceases.

To be sure, there are, as Smith notes, cases in which a plaintiff can obtain an injunction to respond to a *threatened* rather than a completed tort. We readily concede that, in such cases, the relief obtained by the plaintiff cannot be described as redress for an injurious wrong. However – to repair to the distinction between recourse and redress – this merely tells us that the historical fusion of law and equity has expanded the forms of recourse available to tort plaintiffs to include recourse that does not consist of redress for a completed injurious wrong. The quandary facing the claimants in these cases is the imminent prospect of being wrongfully injured. Where such a prospect is present, and the equities of the case otherwise support a claim to relief, the claimant is empowered to protect herself against the impending interference with her rights. Of course, it has long been understood that granting potential victims this sort of recourse is potentially fraught, particularly when there are bodies of law that enable redress after the fact. This is why courts are cautious about granting this special form of recourse, even for plaintiffs who can provide evidence of being at risk of wrongful injury.

In sum, once ‘civil recourse’ is understood as broader than ‘tort redress’ – as it has always been, on our account – there is no difficulty accommodating injunctive remedies in tort. As a convenient shorthand or slogan, we have said that tort law is a law of redress for injurious wrongs. But it is other things as well, including law that sometimes provides recourse against imminent wrongful injury. Perhaps it would be more elegant to insist that tort law exclusively is law for the redress of legally recognized, injurious wrongs. Likewise – to return to Smith’s first criticism of our account – it would be

more elegant if all the injurious legal wrongs that generate claims for redress were housed in tort law, such that none could be found in (for example) the law of contracts. Our account of tort law is not so tidy, for the simple reason that such tidiness can only be achieved at the cost of artificiality. In the U.S. and other jurisdictions, the category of tort is certainly intelligible and workable, but not nearly so neat.

We turn, lastly, to damages and the idea of 'making whole'. To understand our account of the place of making whole in the law of tort damages, it will help first to explain why we reject the positive account offered by corrective justice theories.

In our estimation, it is weakness of corrective justice theory that, despite being built upon a rejection of Holmesian skepticism about duties and rights, it shares Holmes' tendency to overemphasize the degree to which tort law is about shifting losses. To be sure, sophisticated versions of corrective justice theory are wrongs-based in the first instance, rather than loss-based. However, a basic analytical move in each of these is to understand the defendant's liability as a duty to make the plaintiff whole so as to absorb the plaintiff's loss, and then to understand the state's enforcement of that duty as the rectification or righting of the wrong.

The problem with this way of thinking is not merely jurisprudential. It is also interpretive. For tort law, at least in the U.S., clearly allows for remedies other than make-whole compensation, including injunctions and punitive damages. And even when it comes to compensatory damages, the relevant legal rule states that the fact-finder in tort cases is to award an amount that constitutes fair and reasonable compensation to the victim. For these reasons, among others, we have insisted that it is a mistake to think of making whole as the foundational principle of tort law or tort damages.

While our rejection of making whole as a foundational principle enables us to explain important aspects of tort remedies that corrective justice theory renders mysterious, it also creates for us an explanatory burden. For the make-whole idea does figure prominently in legal practice, education, and scholarship. This is one of the main points that Smith presses against us in his response. How can a putatively interpretive and practice-based theory of tort law purport to be compelling if it cannot explain this familiar feature of tort law?

As he puts it: if, on our account, liability in tort is accountability of wrongdoer to victim for the wrong done, what can explain why it is ‘assessed at exactly the amount of [the victim’s] losses’.²⁵

In some of our writings, including Chapter 5 of *Recognizing Wrongs*, we have attempted to draw a theoretical lesson from the historical evolution of judicial approaches to tort damages. We see now that this approach is prone to generating the misimpression that we regard the make-whole measure as a purely contingent development of nineteenth-century law that was implemented by judges for instrumental reasons (e.g., to better control jury awards). More generally, we have sometimes unduly downplayed the significance of the make-whole metaphor in modern tort law and tort theory. In both these respects, we have done ourselves a disservice, for we have understated the capacity of our account to explain the place of make-whole damages (and, indeed, the superiority of our account in doing so). At the same time – and in a concededly contrastive spirit – we have also understated the reasons to be critical of the corrective justice theory approach to this question. While Smith is correct to underscore the pervasiveness of doctrine supporting the make-whole notion and correct to criticize us for some level of dismissiveness, he has overlooked the pervasiveness and depth of the ‘fair and reasonable’ concept that we claim is more fundamental.

A tort victim’s right to redress is a right to hold the tortfeasor accountable for having wronged the victim. A consistent theme of our critique of corrective justice theory is that the principles underlying the recognition of this right do not fully specify the form and content of the victim’s remedy. Yet it hardly follows from this critique that the opposite is true – that there is no connection at all between the idea of redress as holding accountable and the remedies through which accountability occurs. Because the notions of accountability and responsibility for a wrong are integral to why there is a right of action at all and because tortious wrongs are injury-inclusive, there is spillover as between the analysis at the level of rights of action and the analysis at the level of remedies. If a negligent driver destroys my fence and garden, his accountability to me for that wrong is, unsurprisingly, keyed to the injurious consequences of his wrong. Indeed, tort law entitles me to be made whole

²⁵ Smith, *supra* note 18, at [19].

– to compensation measured by reference to the damage done. We stand by the claim that this measure of damages is an interpretation of the concept of fair and reasonable compensation. But we also must emphasize (more so than we have in the past) that making whole is an interpretation or application of the fair-and-reasonable idea that is particularly appropriate in this context. In sum, both ‘fair and reasonable’ and ‘make-whole’ are principles at the level of tort remedies (not at the level of why there is a right of action at all): the former - ‘fair and reasonable’ - is the more general principle; the latter - ‘make whole’ - is a specific articulation of it.

Thus, while Smith supposes (as do many tort theorists) that corrective justice theory best explains the centrality of make-whole damages to tort law, we believe that our civil recourse account does at least as good a job, and perhaps even does better. In Chapter 4 of *Recognizing Wrongs* we identify three values underlying the principle of civil recourse – equality, fairness, and sovereignty. All of these, we suggest, illuminate the importance of repair and, with it, of making whole. Concern for differences in the ability of individuals to see to it that their rights are respected (and therefore differences in the extent to which their rights are respected) is central to our claim that *equality* requires a right to recourse. Equality in the enjoyment of rights in one’s possessions, for example, is furthered if one is able to obtain compensation equivalent to their value from those who wrongfully damage or destroy them. Likewise, we argue that it is fundamentally *unfair* to leave a tort victim to bear the losses wrought by the tortfeasor’s mistreatment of her – without a make-whole or reparative measure, some of those consequences may unfairly remain with her. Finally, and in our view most importantly, the idea of *sovereignty* connotes an individual as having control over, and a power to maintain, her possessions, and other integrally important aspects of well-being (such as bodily integrity, privacy, reputation, decisional autonomy, and the like). In articulating the value of sovereignty, we analogize the right to recourse to the right of self-defense and the right to use proportionate force to defend one’s property. Owning my fence and my garden gives me a right to security in their existence and intactness as against wrongful interferences by others. The security in them provides me with a right against the primary conduct interfering with them – others are

subject to directives not to interfere with them intentionally or negligently – and empowers me to use the courts to call to the carpet someone who does so interfere. It relatedly permits me to maintain a fence and garden without having to suffer a financial loss by requiring the tortfeasor to pay for their repair. A thing being mine, in our legal system, means in part that, when someone wrongfully damages or destroys it, I will ordinarily have the ability to demand that he or she restore it.

Tort redress thus often and appropriately takes the form of make-whole compensation. And not only in property damage cases, even though the latter tend to be particularly well-suited to the application of the make-whole principle.²⁶ In many personal injury cases, too, it is apt for the plaintiff to recover the value of what she has lost. A cyclist who is negligently knocked over by a driver, and who suffers a broken leg that will fully heal, is entitled to compensation that will pay her bills and cover her lost wages (among other things). In this sense, we agree that making whole is basic across tort cases. Still, we remain steadfast in insisting that cases of make-whole compensation are not the model or prototype for what is happening in all of tort law, or even in all of negligence law.

Our book sets forth an example of an equally typical case – a real one – involving medical malpractice.²⁷ In *Ditto v. McCurdy* the plaintiff was a woman who had suffered disfigurement from a plastic surgeon who had negligently performed breast implant surgery and had followed up with subsequent negligent surgeries, causing infections and further disfigurement. While the language of ‘make-whole’ and ‘repair’ could be used in such cases, it is plainly metaphorical and Ditto was plainly suing for more than a return to her prior condition (which was not possible). ‘Fair and reasonable’ compensation lies behind both cases, but in *Ditto* and innumerable other scenarios, the make-whole metaphor sheds little light. Insofar as it offers any guidance, it is not because a plaintiff such as Ditto seamlessly reestablishes the good condition of something she owns; it is because an appropriate damages award vindicates the notion of sovereignty – that it is her body and her life and that negligent

²⁶ Which is not to say that all tort cases involving harm to property fit comfortably with the make-whole remedy. One who offers to board my cat while I am on vacation and then deliberately kills it would face damages beyond the market value or replacement value of the cat.

²⁷ GOLDBERG & ZIPURSKY, *supra* note 6, at 160–163.

interference with it was therefore a wrong to her. To the extent that making whole is understood in connection with the idea of vindicating sovereignty rather than in a manner that envisions a return to the status quo, we might be content to recognize a more substantial place for it (subject to the qualifications below). But, of course, as it is used by lawyers, judges and scholars, the phrase is instead associated with restoration of the plaintiff to her pre-tort condition.

Standard-fare personal injury cases like *Ditto* pose a huge problem for those who think of tort damages in terms of a notion of restoration. So too – as Smith notes – do cases that allow for punitive damages. Even beyond these, however, it is evidence that appeal to the more general idea of fair and reasonable compensation is necessary to make sense of tort remedies. Indeed, there is a wide range of cases in which plaintiffs are permitted a damages remedy, but because of reasons sounding in fairness and reasonableness, compensation does not rise to the level of making whole.

First, and most strikingly, negligence law across the common law world today includes the doctrine of comparative fault. A plaintiff otherwise entitled to make-whole compensation loses that entitlement if his own fault contributes to his injuries, and instead recovers partial compensation (and in some cases, nothing at all). Although comparative fault, particularly in its ‘pure’ form, was a substantial innovation of modern tort law, it shares with its doctrinal predecessor contributory negligence a grounding in the thought that victims of negligence whose carelessness is a cause of their injuries are not entitled to be made whole. The same judgment has long figured an important body of law immediately adjacent to negligence. Indeed, admiralty law governing collisions on the high seas has long included reduced damages for at-fault plaintiffs.²⁸ Plainly, the legal system has deemed such rules appropriate because of the belief that it is only *fair and reasonable* that the remedy should be diminished if the plaintiff is partly at fault. Relatedly, there is the doctrine of avoidable consequences (failure to mitigate).²⁹ Under it, even if a tort plaintiff’s injury could be rectified by the payment of

²⁸ *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401–402 (1975) (discussing the history of admiralty law’s divided damages rule, which applied to a ship collision caused by carelessness on the part of both ships).

²⁹ See generally DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *DOBBS’ LAW OF TORTS* §§ 230–231 (2021 update) (describing the operation of the rule).

\$100,000, the defendant will not be required to pay that amount if the plaintiff failed to take reasonable steps to limit the scope or severity of the injury, thereby increasing the cost to the defendant of repairing it. Here, again, the law does not select make-whole as the measure of recovery even when losses are easily measured and monetized, and here again the reasons for its doing so sound in fairness and reasonableness.

Second, and relatedly, one must take into account the common law's collateral source rule, under which many tort plaintiffs are made more than whole because no offset is provided for compensation received from other sources, such as first-party insurance policies.³⁰ Our point is not to express skepticism about the rule, which may well be justified, at least as applied to a range of cases. Instead, it is that the rule, at the level of principle, sits very awkwardly with the thought that making whole serves as the regulatory ideal for tort compensatory damages. After all, by virtue of it, a significant swath of plaintiffs is entitled to more than is needed to make them whole. And a standard justification for their receiving super-compensatory awards again involves an appeal to fairness – specifically, the unfairness of allowing the tortfeasor to be the beneficiary of the plaintiff's having access to other resources to help her cope with having been wrongfully injured.

Third, as Smith notes, the make-whole measure, when applied to particular cases, requires further specification, and that specification will often involve invocations of notions of fairness and reasonableness. Return to the simple case of the negligently damaged fence and garden. Suppose that the defendant happens to have destroyed a rare and unusually expensive shrub, for which the owner paid \$15,000 five years earlier, and that would currently cost \$30,000 to replace. Will the defendant be required to pay \$15,000, \$30,000 or something in between? What if the replacement value were \$300,000? Does it make a difference whether the defendant was an inveterate drunk driver with a suspended license, or a sober, newly licensed teenage driver who accidentally pressed the car's accelerator when meaning to apply its brakes? A judge or jury will be asked to decide what compensation is owed, and they will surely bring to bear notions of fairness and reasonableness when doing so. It seems

³⁰ *Id.* § 482 (describing the operation of the rule).

unlikely, for example, that, even with proof of a \$300,000 replacement cost, a jury verdict in the case of the well-meaning, inexperienced teen driver awarding that amount in damages would withstand a new trial motion or appeal. Instead, the trial judge or appellate court would probably deem it shocking to the conscience – that is, wildly unfair and unreasonable.

In the end, Smith is right to push us on whether we have found the sweet spot when it comes to explaining tort damages. Hitting that spot requires an account that both explains why making whole has an important role to play but is not the be-all or end-all. We believe this is the account that we offer.

B. Kelly: Criminal and Civil Wrongs; Recourse and Reparations

Erin Kelly's comments fall into two parts: one pertains to a critique of familiar understandings of criminal justice. The other pertains to debates over reparations for slavery and structural discrimination.³¹ Each sees in civil recourse theory a source of insight for problems pertaining to race relations in America today. We will respond briefly to each, while also taking the opportunity to mention briefly a distinct connection that we perceive between racial justice and civil recourse.

1. Criminal Justice

Kelly rightly notes that the wrongs of tort law, on our account, do not necessarily warrant moral blame. The point holds at several different levels. First, and in some ways most obviously, there is the 'positivistic' dimension of our account: we think that if it is settled legal doctrine that a certain way of treating another is a tort in a certain jurisdiction then, all else equal, it is a tort. This could be so even if, from a moral point of view, it ought not be a tort. (Imagine, for example, it were a tort to publicly identify another person as a domestic abuser, and that the truth of the statement provided no defense to liability to that person.) Second, as discussed above, even where tort law is as it ought to be, the legal directive according to which the defendant's conduct is adjudged wrongful may not be structured in such a way as to be sensitive to considerations that ordinarily bear on blameworthiness. Third (as also discussed above),

³¹ Erin I. Kelly, *Redress and Reparations for Injurious Wrongs*, __Law & Phil. __ (2021).

even where a tort in substance tracks a counterpart moral wrong, considerations as to the agent's capacities or circumstances that would normally undercut an attribution of blameworthiness tend not to defeat tort liability. A driver who is understandably distracted for a few moments after receiving an unexpected, panicked call informing him that his child has been gravely injured swipes a parked luxury car, causing \$10,000 worth of damage but no personal injury. That the driver's lapse should be largely or wholly excused is irrelevant to the question of whether the damaged car's owner has a valid tort claim against the driver.

In prior work (and to a lesser extent in *Recognizing Wrongs*) we contrast torts with crimes precisely on the dimension of blameworthiness. Our point, of course, is not that all crimes are mala in se. Instead, it is that the criminal justice system, in imposing liability in the form of punishment, typically does so in part on the supposition that punishment is merited by the defendant's conduct: that the offender *deserves* the punishment, or at least that the commission of the crime is sufficiently blameworthy to permit punishment. While we regard tort liability itself as having certain kinds of rule-of-law preconditions, blameworthiness is not one of them.

Kelly asks readers to consider whether this contrast is mistaken, or at least drawn too starkly, because it overstates the extent to which extant criminal law really is about blameworthy acts. Crimes, like torts, are violations of legally recognized norms of conduct, and, she argues, the reality is that governments have been willing to specify those norms in a way that authorizes punishment for non-blameworthy conduct. Likewise, while allowing for certain excuses, criminal law defines these narrowly, so as to exclude various grounds – such as severe economic deprivation or drug addiction – that probably should suffice to undercut moral blameworthiness for some crimes. Appreciation of the gulf between criminality and blameworthiness, Kelly suggests, undercuts the plausibility of supposing that those who violate criminal law deserve harsh treatment, in turn demonstrating the manifest unacceptability of locking up huge numbers of convicted offenders for long periods of time. In this way, she suggests, civil recourse theory indirectly sheds light on the fundamental moral pathology of mass incarceration. Appreciation of the category of nonblameworthy wrongs allows us not only to

understand tort law but to appreciate that a cruel game is being played in contemporary criminal law in the United States: it purports to be (and to be justified as) a scheme for punishing blameworthy acts and actors, yet it defines many crimes on terms that authorize harsh punishment for acts and actors that are not blameworthy.

There is much we find compelling about Kelly's analysis, but we come at it from a different and in some ways even more critical angle. It may be that modern criminal law has problematically or even disastrously divorced liability from blameworthiness and that, as such, it is to be broadly and roundly condemned. Nonetheless – unlike Kelly, whose argument seems to push in favor of the abolition of criminal law organized around the principle of punishing blameworthy wrongdoers in favor of criminal law that imposes sanctions only as necessary to promote the security of basic individual rights – our inclination would be to favor reforms that enable criminal law actually to operate in conformance with the principle that conduct must be blameworthy to be punishable (as well as the principle that punishment must be proportionate and humane). A nonblameworthy actor at most should face regulatory sanctions or consequences, not criminal punishment.

In sum, we agree with Kelly that our work on legal wrongs in tort law helps open up space for the identification of nonblameworthy wrongs in other areas of law. We further agree that, when these wrongs are recognized as such, the character and harshness of certain forms of liability will be exposed as unjustifiable. And we agree that core aspects of American criminal law – especially those responsible for mass incarceration – would benefit from such reconceptualization. More precisely, those who have faced or may face unjust criminal liability could benefit from such reconceptualization, if it were put into practice. We would not, however, favor saying that blameworthiness is optional for officials who wish to criminalize conduct. Rather, we would say that there are many ways that a legal system might wish to set out and enforce standards of conduct and categories of wrong, and our system has narrowly-mindedly assumed that it may use criminalization wherever it believes it would be efficacious to do so. Full-fledged criminalization should be reserved for a carefully qualified subset of wrongs, for which blameworthiness is indeed necessary (though not sufficient).

2. *Reparations*

Like Dougherty and Frick, Kelly would tie civil recourse theory to a notion of moral injury. Whenever a person wrongfully injures another, she argues, that wrongdoer not only invades a particular right of the victim's (for example, the right not to be physically injured by another's carelessness), but also implicitly calls into question the victim's status as a rights-bearer. Appreciating this aspect of interpersonal wrongdoing helps make the case, in Kelly's mind, for the civil recourse principle. One important value served by a system of civil recourse is that of enabling victims to take steps to restore relationships of moral equality with wrongdoers.

From this understanding of interpersonal wrongdoing, Kelly turns to consider historical injustices, and particularly the appalling history of race discrimination in the United States. Quite obviously and overtly, invidious race discrimination threatens the equal moral standing to its victims. If one supposes that government does right by empowering victims of interpersonal wrongs to take steps to re-establish relations of moral equality, then it seems plausible to suppose that government also does right in similarly empowering those burdened by historical injustices. Kelly argues that reparations can deliver this form of empowerment, using as an example proposed legislation that would permit persons who identify as Black and have at least one ancestor who was enslaved to claim monetary compensation from the federal government.³² Such legislation, she maintains, would furnish Black Americans with an opportunity to obtain redress on terms that affirm their equal moral standing and allow for a public reckoning with grave historical injustices.

As we explain in Chapter 1 of *Recognizing Wrongs*, injurious wrongs that involve oppressive or discriminatory acts by individuals – whether in the form of a firm that discriminates against employees – or a racist police officer who uses excessive force against a minority-group member – fall squarely within a wrongs-and-redress conception of tort law. And indeed, this is why, as a matter of positive law, wrongs such as these are often civilly actionable, at least in principle. Kelly's focus is not on these straightforward applications of the civil recourse principle to individual acts of discrimination. Instead, she is concerned with the responsibility of governments to respond to, or

³² *Id.* at [21] (discussing the proposal of William A. Darity and A. Kirsten Mullen).

enable responses to, systemic injustices. In the type of scheme she envisions, a claimant need not prove that she herself has been the victim of mistreatment at the hands of another person in order to be eligible to recover. Rather, the claimant seeks a monetary payment from government as compensation for a loss of wealth that the claimant – along with all other members of the oppressed group – is presumed to have suffered as a result of wrongs previously committed by private actors and by federal, state and local governments, against the victim's progenitors.

Mindful that the topic of reparations is more than a little removed from our areas of focus and expertise, we are inclined to think that compensation on these terms does not fit easily within a civil recourse framework. Recourse and redress are constituted and governed by norms that seem in some ways ill-suited to measures that aim to address historical and systemic injustices. Again, our point is not to counsel against such efforts, but instead to suggest that such injustices should be addressed on other terms.

As we explain in our book, there are embedded in this picture fairly specific notions of wrongdoing and redress. The wrongs for which government ought to make redress available are legal wrongs – violations of wrongs explicitly or implicitly recognized by institutions with lawmaking authority. Moreover, they are relational – that is, wrongs to particular persons or classes of persons. And they are injury-inclusive. Even the most adventurous forms of tort liability – such as market-share liability – require proof that the defendants have committed particular legal, relational, injury-inclusive wrongs as against the plaintiffs who are suing them. Whether this model can be extended to allow claims by descendants of enslaved persons for economic and other injuries alleged to arise out of the horrific mistreatment of their forebearers is, as Kelly acknowledges, an open and difficult question.³³

Even when the principle of civil recourse is properly triggered, the idea of recourse arguably is ill-suited to the reparations context. Recourse, in tort law, takes the form of court-ordered relief that, in principle, is sufficient to settle accounts as between wrongdoer and victim. Once the defendant complies with a court order to pay damages to the plaintiff, or once a settlement agreement is signed,

³³ *Id.* at [12–13].

the matter is considered resolved. In this respect, the form of civil recourse made available through tort law – redress consisting of injunctive relief and or damages – is *not* understood to be a step toward some sort of reconciliation between the parties. Quite the opposite, courts generally are anxious to resolve the matter finally in part so that the parties no longer will have any need to interact with one another, unless they want to. Reparation, in tort, is not about restoration of the parties' pre-tort relationship.³⁴ Indeed, under modern conditions, torts often occur among strangers who have no meaningful relationship to restore. There is, so to speak, a business-like, arms-length aspect to redress in tort. The regulative ideal is: 'let's get this matter appropriately resolved and be done with it'.

It is difficult to fathom how the payment of reparations can be understood as redress in the tort sense of finally resolving a dispute arising out of the wronging of one person by another. Is it plausible to suppose that the payment by the U.S. government of even significant sums of money to descendants of past victims of race discrimination will or should be understood as settling accounts? Would it be cogent to argue that, once such a program is properly implemented, there is no obligation on the part of governments in the U.S. to take further steps to address the legacies of race-based slavery and de jure and de facto race discrimination? The fact that these are rhetorical questions suggests, again, that something quite different from the tort notion of redress would be at work in a reparations program.

The translation of civil recourse theory to the reparations context is also rendered awkward by the distinct roles that government plays in the two contexts. As instantiated in tort law, the principle of civil recourse envisions a triangular relation between tortfeasor, victim, and government. The government, through its laws, identifies various duty-right correlates that define injurious wrongs (such as the duty to refrain from intentionally touching another in a harmful or offensive manner and the right not to be so touched). Having specified these duties and rights, government is then bound to provide those who suffer violations of the relevant rights with the ability to respond, civilly, to the person who committed the rights-violation. Government is bound to do so, we claim, because it would

³⁴ GARDNER, *SUPRA* note 4, at 91–100.

be asking too much of individuals to leave them powerless to respond (outside or within the law) to having been treated by another in a way that the law itself deems to be mistreatment.

In the reparations context, the government's role is in important respects quite different. First, and most obviously, the actions and inactions of past iterations of our federal and state governments are deeply implicated in the wrongs at issue. Thus, the question of reparations is inevitably bound up with the issue of the reparative obligations owed by government itself to the descendants of those who suffered as the result of official enforcement of racially discriminatory laws and policies. Given governmental complicity, the demand for justice that underlies the calls for reparations seem to fit more comfortably within a corrective justice than a civil recourse framework. Indeed, arguably at the core of Kelly's argument is the plausible idea that continuously operating governmental entities that, for generations, presided over a legal and political system rife with *de jure* and *de facto* race discrimination, incur a duty to take certain steps to repair this shameful history. Such a duty bears little resemblance to the sort of vulnerability to a claim that is generated by operation of the principle of civil recourse. Rather, it is a genuine duty to take steps to right wrongs in which these governments were at least complicit, whether by means of payments, in-kind benefits, benign forms of 'reverse' discrimination, the establishment of truth and reconciliation commissions, or the like.

Second, a program that involves payments to descendants of enslaved persons funded by general tax revenues is not, in any straightforward way, a means of holding wrongdoers accountable for their wrongs. Thus, probably the most apt private law analogue in this context is not tort, but actions that allow for restitution or disgorgement of ill-gotten gains.³⁵ Because of historical injustices, some members of society hold more wealth than they otherwise would have, others less. A program of reparations can be understood as a rough-cut effort to adjust holdings to account for such distortions. Such an effort seems quite distant for the core tort idea of a victim being empowered to use the civil justice system to hold accountable to her a person who wrongfully injured her.

³⁵ Compare Anthony J. Sebok, *Two Concepts of Injustice in Restitution for Slavery*, 84 Boston U. L. Rev. 1405 (2004) (questioning this analogy) with Dennis Klimchuk, *Unjust Enrichment and Reparations for Slavery*, 84 Boston U. L. Rev. 1257 (2004) (defending the analogy).

Again, our point is not to question whether a case can be made for a reparations program. It is to question whether tort law, understood as law for the redress of wrongs, provides a helpful model for such a program. We do not regard it as weakness or failing of our account that other bodies of law (such as restitution) and other theories of civil liability (such as corrective justice) seem more promising in this regard. Rather, it serves to remind us, yet again, that tort law and its animating idea of recourse-for-wrongs has a distinct role to play within a system that features many other bodies of law that instantiate different principles. In our efforts to explain why tort law is not properly understood as a law of corrective or distributive justice, we have criticized applications of those theories. But we have never suggested that they lack cogency, or that they have no place in Anglo-American law. What Kelly helps to demonstrate is that the subject of reparations for historic injustices is one in which corrective justice theory may prove more relevant and illuminating than the idea of civil recourse for wrongs.

3. *Police Violence*

We conclude our substantive responses by pointing out very briefly a connection between the two themes Kelly raises in relation to civil recourse theory – a connection beyond the fact that criminal justice and reparations are pressing contemporary issues that relate to justice. Both are also, of course, longstanding issues relating to the oppression of Black Americans. And race-based oppression is equally obviously tied to police violence. The American public (and the world) has been shocked by what some legal scholars have pointed out for more than a century: the lack of adequate legal accountability for police officers who violate the rights of individuals – especially people of color – in their daily lives. A central goal of *Recognizing Wrongs* is to deepen and defend the importance of accountability for legal wrongs, and to explain its centrality to the conception of equality for which our constitutional system putatively stands. Civil recourse theory sheds light upon the reasons why expansive police immunities cannot be reconciled with these commitments, and why these commitments merit our fidelity.

III. CONCLUSION

We again wish to express our gratitude to Professors Dougherty and Frick, Stone, Rodriguez-Blanco, Smith and Kelly for engaging our book on its own terms and for doing so in such a thoughtful and careful manner. The questions and challenges they raise are, to our minds, some of the most basic and difficult we have faced in trying to theorize tort law and its distinctive notion of accountability for wrongs. To return to a contrast drawn in our opening paragraphs, we would like to think – in self-congratulatory mode – that we have here strengthened the case made in the pages of our recent book. Alternatively – and in a more modest register – we hope that our responses clarify for *Law and Philosophy* readers why the domain of questions we address in *Recognizing Wrongs* cuts deeply into moral theory, jurisprudence, and political philosophy, well beyond the domain of tort theory.

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