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Torts and Personhood

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INTRODUCTION

Perhaps more so than ever, legal personhood is contested.[1] Lawyers, judges, legislators, and laypeople all jostle to define

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1. This includes considering if a corporation, fetus, or even a robot is a person under the law. *See, e.g.*, 1 U.S.C. § 1 (2012) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . ."). Many state statutes provide for similar definitions. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11022 (2023) ("'Person' means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, or association, or any other legal entity."); 28 U.S.C. § 1332 (2011) ("For the purposes of this section . . . a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ."); H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) ("It shall be the policy of the State of Georgia to recognize unborn children as natural persons."); ARIZ. REV. STAT. ANN. § 1-219 (2021) ("The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state . . . ."); *see generally Votes for Zygotes?*, THE ECONOMIST, July 9, 2022, at 36-37 ("[T]he push for legal recognition of the 'personhood' of fetuses is set to grow. . . . Before *Roe* was overturned dozens of states introduced bills that banned abortion by establishing fetal personhood . . . ."); Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, THE NEW YORKER (June 5, 2019), [https://perma.cc/LME5-UZPU] ("If the right to be free of discrimination on the basis of race, sex, or disability can be made relevant to a fetus, then fetuses are figured as entities with anti-discrimination rights—like people. This move imbues the fetus with rights that the pregnant person—and, by extension, the abortion provider—might violate. What is really at stake is an idea of fetal personhood."); *see, e.g.*, Ryan Calo, *Robots as Legal Metaphors*, 30 HARV. J.L. & TECH. 209, 210 (2016) ("[J]udges hold an increasingly outdated mental model of what a robot is. One hopes that judges will update this mental model as actual robots continue to enter mainstream American life and create new legal conflicts."); *see also* JOHN MARKOFF, MACHINES OF LOVING GRACE xix (2015) ("During the first half of this century, society will be tasked with making hard decisions about the smart machines that have the potential to be our servants, partners, or masters.").

who and what is included in the category of person.[2] But personhood is not an ontological fact; it is a legal construct.[3] This legal inquiry defines the value of human life: the quality of that life and the dignitary interests that attach to individual lives.[4] These are the questions long central to tort law, yet few acknowledge torts' indispensable role in shaping legal personhood.[5]

However, when parties sue in tort, it is, at its core, a legal mechanism that allows those persons to establish and assert the parameters of their personhood and personhood in general. Consider, for example, *Fisher v. Carrousel Motor Hotel, Inc.*, a 1967 case where an African American NASA mathematician attending a work conference at the Brass Ring Club in Houston had his plate forcibly yanked from his hands at the buffet and told, using an extremely charged racial slur, that African Americans were not allowed to be served in the club.[6] Mr. Fisher felt he had suffered injury, so he brought a claim based on a new articulation of the tort doctrine of extended personality.[7] Here, at the height of the civil rights movement, the specific facts and context, the parties and their assertions, and the common law institutional structure of torts created a forum for the court to respond in a societal shift in personhood. The court recognized Fisher's claim to personhood, declared his right to dignified treatment, and defined the parameters of that treatment.[8] The non-legal injury was not new; many people were treated like Mr. Fisher (and

2. Who and what counts as person has changed over time. *See generally* THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY 1-3 (Michael Carrithers et al. eds., 1985) (discussing various conceptions of the person).

3. *See generally* Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563 (1987) ("The edification of the corporation to the status of person is one of the most enduring institutions of the law and one of the most widely accepted legal fictions.").

4. *See infra* discussion Part II.

5. *See infra* discussion Section II.C, Part III.

6. 424 S.W.2d 627, 628-29 (Tex. 1967). The use of this slur is material to the fact of this case, as it makes clear the core dignitary interest being defended. This Article focuses on how human dignity is defined through tort and this particular racial slur has a deep and degrading history that is necessary to acknowledge in order to understand the affront to human dignity at issue here. *See generally*, Jabari Asim, The N Word: Who Can Say it, Who Shouldn't, and Why (2007).

7. *Id.* at 629-30.

8. *Id.*

worse).[9] But declaring that Mr. Fisher suffered a legally recognizable injury acknowledged Mr. Fisher's claim to equal and full personhood unlike law that came before.

The monetary damages in Mr. Fisher's case were trivial.[10] The true stakes in the case were declaring what kind of respect and dignity Mr. Fisher, and indeed any objective "person" deserved; this is a negotiation of what personhood means, and who is a person. Through torts, anyone may challenge what being human means and what the rights of personhood are. These rights are discussed in terms of injury (or wholeness), autonomy, emotions, safety, comfort, and even self-expression. Injuries may be compensated in dollars and cents, but what it all amounts to is a claim to be included as a person.

Through controlling of their claims and articulating their own conceptions of wrongs, plaintiffs and defendants, not a legislature or an agency, negotiate the baseline of human dignity in our society. Tort alone allows for such incremental, fact-specific, and largely ground-up development. Yet tort scholars themselves largely overlook this core function of tort. While they spar over whether tort law is about deterrence, cost allocation, moral justice, or theories of redress and how to optimize the system towards these goals, these theories are inattentive to what tort law *is doing* (rather than what it *should do*).

Neglecting the personhood function of torts is perilous. When American society disregards this function of tort law, it destabilizes foundational principles that provide the bedrock of legal norms. Tort "reform" can therefore skew legal conception of personhood by stifling organic development of law reflecting societal change. Spaces where parties are immune to suit—or where settlement denies the public legal clarity and transparency—become blind spots in the law of personhood and rob our system of needed inputs. Law is denied a plaintiff-driven conceptual development of human dignity.

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9. *Id*. at 629 (stating that "[s]uch holding is not unique to the jurisprudence of this State").

10. *See id.* at 630.

This Article contends that tort suits define personhood and human dignity.[11] Building on other scholarship exploring the expressive function of tort, this Article brings to the fore torts' primacy as an essential facet of the legal development of the law of personhood.[12] It does so in several ways: (1) it pushes back on stayed conventions of tort theory by explaining how tort law provides an essential legal venue to define personhood and the boundaries of human dignity;[13] (2) it delineates how the institutional structure of tort, agency, duty, reasonableness, and injury all doctrinally center around defining what it means to be a person;[14] and finally, (3) it highlights the attendant undertheorized dangers of abrogation of access to bringing tort claims.[15] For these reasons alone, tort law must remain an open and broad access point to the legal system.[16]

Part I of this Article lays out an overview of existing tort theories exposing the limitations of existing paradigms.[17] This positions the reader to consider in Part II the core assertion of this paper: that a fundamental role of torts is to define personhood.[18]

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11. This Article refuses to adopt a distinction between "dignitary torts" and other torts, despite that being the field's convention. Restatement (Second) of Torts § 35 cmt. subsec. 2 (Am. L. Inst. 1965); Elizabeth Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. ONLINE 70, 70 (2019) (listing dignitary torts as battery, false imprisonment, defamation, intentional infliction of emotional distress (IIED), and invasion of privacy). This assertion is a step further that acknowledging the dignity interests in only this subset of torts. Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 69 (2012) ("The behavior underlying these torts does more than inflict property damage or even physical injury that the modern man is expected to rationally commodify. Instead, it invades an individual's sense of worth and dignity, important values in a relational society."); *see infra* text accompanying note 100; *infra* note 114 and accompanying text.

12. *See generally* Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1 (2017).

13. *See infra* discussion Section I.

14. *See infra* discussion Sections II, III.

15. *See infra* discussion Conclusion.

16. While American courts and scholars may overlook torts as a human rights forum, foreign citizens consciously utilize tort law as a primary forum for its vindication, alleging violations of various human rights pursuant to the Alien Torts Statute. 28 U.S.C. § 1350 (1948) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). This statute was originally included in one of the First Congress's most important enactments, the Judiciary Act of 1789. John C.P. Goldberg, *Tort Law at the Founding*, 39 FL. ST. U. L. REV 85, 95 (2011).

17. *See* discussion *infra* Part I.

18. *See* discussion *infra* Part II.

As such, it explores the idea that a principal project that each tort case and litigant is engaged with is not truly about money, property, or even pain per se—it is about determining who is seen. Part III delves into once personhood is recognized, torts take up the next issue: what does being a person entail?[19] Here, plaintiffs articulate what is harm to them, and with it, what human beings have a right to protect, expect, and have respected. Tort cases mete out standards for the most basic expectations of human interaction. Through plaintiffs controlling their own narratives to nudge forward their concepts of what they are due, the law is first put on notice of what is happening at the grassroots level and then encouraged to modify common law legal norms. These cases aggregate to define the floor of human rights in our civil society. The Article concludes with a caution: if torts are about personhood, then limiting access to the tort system not only has monetary and risk implications but broader impacts of disenfranchisement.[20]

I. EXISTING TORT THEORIES

Tort theory is tethered currently to two dominant, and comparably obstinate, theoretical camps: one focuses on efficient allocation of resources and related incentive structures, and the other hones in on torts' function as a form of "corrective justice."[21] This theoretical landscape is often painted in stark brush stroke; the apostles of each side adamant in not only the righteousness of their cause but the total exclusivity of the righteousness of their view. Often scholars of tort theory can barely contain their disdain for one another—economists finding moral justice oriented views to be romanticized and too intangible, and philosophical corrective justice advocates seeing

19. *See* discussion *infra* Part III.

20. *See infra* text accompanying note 256.

21. Christopher H. Schroeder, *Lost in Translation: What Environmental Regulation Does That Tort Cannot Duplicate*, 41 WASHBURN L.J. 583, 587 (2002) ("The objectives of tort are the subject of a long-running debate that shows no signs of resolving itself any time soon.").

efficiency arguments as sterile and bankrupt.[22] While the two lenses vie fiercely for dominance, both adopt certain base assumptions—in particular, that tort is instrumental in nature and used as a means to achieve a certain policy end.[23]

A. Law and Economics: Incentives, Risks, and Efficiency

Tort scholars were early adopters of economic theory in the legal academy and lead the development of the modern law and economics movement.[24] By the 1960s, prominent legal scholars began trading ideas on incentive structures, risks, and remedies with increasing fervor.[25] The 1970s saw law and economics as its own sub-field come of age and firmly entrench itself in the legal academy.[26] Today, law and economics is a fixture in legal academy and the law itself, with the theory widely cited in

22. *See generally* Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423, 1429 (2021) (harshly reviewing from a law and economic standpoint JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020), "While . . . it is certainly true that civil recourse theory has drawn attention (and indeed put GZ on the map as serious tort theorists), a fair share of which is withering criticism directed at the void at the core of civil recourse theory . . . ."); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 134 HARV. L. REV. F. 184, 198-99 (2021) (harshly rebuffing Sharkey's critique, "Contestability is one thing, however. Vacuity is another. And it is something approaching the latter, harsher judgment that Sharkey renders in her Review. . . . [H]er criticism is grounded in a conceptual framework so narrow, and so dogmatically wielded, as to provide no reason for anyone other than fellow true believers to accept her critique.").

23. *See* discussion *infra* Part I.

24. Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 112 (1995) ("[T]he early work in law and economics involved torts . . . ."). William M. Landes and Richard A. Posner assert that tort was always a field of law dominated by economics substantively, but that economic concepts were veiled in legalese. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 1 (1987).

25. *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 549-53 (1961); Walter J. Blum & Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641, 642 (1964).

26. Several seminal works solidified the law and economics field. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 155 (1970) [hereinafter CALABRESI, THE COSTS OF ACCIDENTS] ("It is a search for that degree of alteration or reduction in activities which will bring about primary accident cost reduction most cheaply."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

scholarship,[27] multiple academic publications devoted to its study,[28] its top jurists elevated to prominent federal judgeships,[29] and even international recognition for key figures in the law and economics movement receiving the Noble Prize in Economics.[30] Some scholars have gone so far as to claim that law and economics in not one of the lenses to understand tort law, but *the* exclusive lens to understand torts today.[31]

Applying economics to law requires that one conceptualize law as a system of incentive structures designed to push individuals towards choices that are economically optimal.[32] At its core, economists believe that society is best served in the aggregate if resources are distributed efficiently.[33] In torts, economic efficiency manifests in the concept of the "cheapest cost avoider."[34] The "cheapest cost avoider" incurs legal liability where they,

> have better knowledge of the risks involved and of ways of avoiding them than alternate bearers; he must be in a better position to use that knowledge efficiently to choose the cheaper alternative; and finally he must be better placed to

27. William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385, 385-87, 389 (1993).

28. Amongst these are the *Journal of Law and Economics*, *Research in Law and Economics*, the *International Review of Law and Economics*, the *Journal of Law, Economics, and Organization*, and *Journal of Legal Studies.*

29. These include Judges Guido Calabresi (Second Circuit), Frank Easterbrook, (Seventh Circuit), and Richard Posner (Seventh Circuit), amongst others. *See Hon. Guido Calabresi and the Future of Law and Economics*, THE RECORD: NEWS & STORIES FROM B.U. L., [https://perma.cc/9Z6S-SRU7] (last visited Sept. 24, 2023); *Frank H. Easterbrook*, U. OF CHICAGO: L. SCH., [https://perma.cc/Y6MH-V3LM] (last visited Sept. 24, 2023).

30. *All Nobel Prizes*, THE NOBEL PRIZE, [https://perma.cc/Y2YG-9VZC] (last visited Sept. 24, 2023) (recognizing Gary S. Becker (1992) and Ronald H. Coase (1991) with the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel).

31. Sharkey, *supra* note 22, at 1424 ("The law and economics-inspired view of tort law is ascendant, not only in the legal academy but also in the decisions of influential state and federal courts, including the U.S. Supreme Court.").

32. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 9 (6th ed. 2012) ("Economics conceives of laws as incentives for changing behavior (implicit prices) and as instruments for policy objectives (efficiency and distribution).").

33. *See generally* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 18-19 (2004).

34. Guido Calabresi, *Views and Overviews*, 1967 U. ILL. L. F. 600, 608 (coining the phrase "cheapest cost avoider"). For discussion in more detail, *see also* CALABRESI, THE COSTS OF ACCIDENTS, *supra* note 26, at 135-73, 261-63; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

> induce modifications in the behavior of others where such modification is the cheapest way to reduce the sum of accident and safety costs. The party who in practice best combines these not infrequently divergent attributes is the "cheapest cost avoider" of an accident who would be held responsible for the accident costs under the market deterrence standard.[35]

In considering how to encourage socially useful efficient behavior amongst parties, economic legal scholars begin with the premise that people should behave as rational actors who make choices in their own self-interest.[36] Self-interest of a rational person is best served by avoiding greater economic costs to themselves. Playing off of this, law can create structures of risk that are socially valuable.[37] Therefore, tort law should expect that a reasonable (rational) person would select the least expensive choice when weighing the cost of a precaution against the cost of compensating someone for a harm and select the least expensive choice.[38] One of the virtues touted by law and economics proponents is the promise of value neutrality.[39] At its most extreme, economists would argue that efficiency is the only policy that should animate law.[40] Economic analysis in this view is technocratic and data-driven and therefore more insulated from bias, and less subject to manipulations than "moral" analysis.

Law and economics is not without its critics and faces certain formidable limitations.[41] The preoccupation of economists with efficiency and distribution functions best in a legal dispute involving monetary value or "stakes." Even negligence law,

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35. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84 (1975).

36. *See generally* Duncan K. Foley, *Rationality and Ideology in Economics*, 71 SOC. RSCH. 329 (2004).

37. *Id.*

38. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) ("If . . . the benefits in accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted . . . .").

39. Tara Smith, *Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH. U. JUR. REV. 49, 51 (2011).

40. *See id*. at 92-94; Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 966-967 (2001).

41. Michael D. Green, *Negligence = Economic Efficiency: Doubts* >, 75 TEX. L. REV. 1605, 1633-34 (1997) (discussing the challenges of using an economic risk-benefit test as the standard to evaluate tortious design defect cases).

considered the proverbial home base of law and economics theory, has encountered challenges.[42] When considering the reasonable person, some have argued that any positivist account fails when compared to a normative framework.[43] Turns out, people are not "rational" in the way that economists expect, and therefore do not react to shifts in incentive structures as anticipated in model-based deductions.[44] Some point out that courts rarely function in the way that economic theorists describe, therefore law and economics is of little utility.[45] Many point out that the "Hand Formula," which set up the original discursive balancing between probability versus burden and loss, is not only under-utilized by supposed law and economics apostles, it doesn't work in many scenarios.[46] Because law and economics focuses on the connection between the acts and consequences, it also struggles where interactions are less transactional.[47]

Even if one accepts that law and economics may provide a useful tool in the area of negligence, it is a more difficult fit in

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42. *See* Shawn J. Bayern, *The Limits of Formal Economics in Tort Law: The Puzzle of Negligence*, 75 BROOK. L. REV. 707, 731-38 (2010) (breaking down core assumptions of the bilateral-liability threat and assumptions regarding activity levels to expose the inability of law and economics to explain breach in negligence).

43. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 325-35 (2012) (discussing how, as a matter of logic, normative frameworks are analytically more sound in the context of legal analysis).

44. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381-83 (1994) (making a compelling case for the limitations of deterrence as an animating force in tort law).

45. *See* Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQUIRIES L. 145, 151-53 (2003) (noting that judges credited with being at the heart of the law and economics movement, Richard Posner and Learned Hand, did not systematically apply the Hand Formula when adjudicating torts cases).

46. Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2002, 2026 (2007); Wright, *supra* note 45, at 151-153; United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (original case where Judge Learned Hand articulates a formula of weighing the burden on the tortfeasor against the probability of loss and the scale or amount of loss).

47. These critics argue that law and economics is reductionist in understanding human behavior. *See* Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES L. 323, 325 (2001) ("Law and economics celebrates a narrow, reductionist, and technocratic focus on the formalization of means-ends relationships, which, in turn, has spurred the development of genuine expertise about the nature and consequences of legal rules. Law and economics has not been successful, however, with respect to forms of legal purposivism that resist such formal representation.").

other areas of tort law.[48] In particular, it is unclear why law and economics scholarship favors negligence over strict liability, which could be decided with fewer resources, clearer deterrence messaging, and an expeditious analysis.[49] In relation to intentional torts, it is unclear why any meaningful deterrence is not already accomplished by the much more draconian penalties of criminal law, as opposed to tort law.

Finally, some scholars argue value neutrality is not only a ruse but is simply used as a front to cloak desired policy outcomes.[50] These scholars point out that the technocratic nature of economic theory renders it devoid of value.[51] At minimum, law and economics is not value neutral because it states that the paramount moral value is to avoid waste and therefore excess.[52]

B. Corrective Justice in Tort

The corrective justice model of tort has older doctrinal roots than the more utilitarian-focused economic approach to tort law.[53]

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48. Henry E. Smith, *Law and Economics: Realism or Democracy?*, 32 HARV. J.L. & PUB. POL'Y 127, 136-37 (2009) (arguing that property related torts, particularly nuisance, fail to fit easily within economic models).

49. Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7, 44 (1991) (pointing out that Posner has managed to show that negligence is only equal to strict liability not superior); *see generally* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

50. Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 471 (Peter Newman ed., 1998) (arguing that proponent of law and economics "manipulat[e] the apparently value neutral, technocratic discourse of efficiency to support their preferred outcomes").

51. Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671, 672 (1993) ("The simple picture of the economist who provides value-free technical information to the decision maker is at best a useful caricature.").

52. These concepts align squarely with Judeo-Christian moral traditions of virtuosity. Consider the puritanical origins of protestant work ethic in the United States, which place highest regard on frugality and prudence. Michael Shea, *The Protestant Ethic and the Language of Austerity*, DISCOVER SOC'Y (Oct. 6, 2015) [https://perma.cc/P48X-N2QY]; *Seven Deadly Sins*, BRITANNICA, [https://perma.cc/5VHA-URJM] (last updated Sept. 24, 2023) (discussing in the Catholic faith gluttony (excess) as a deadly sin, in contrast to temperance).

53. Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 187-88 (1981).

Corrective justice proponents draw from a deep philosophical well (dating back to Aristotle), to make the case that tort is fundamentally about a binary structure that connects wrongdoer to victim.[54] Oliver Wendell Holmes discussed concepts of corrective justice in his seminal work on the American common law system.[55] Given the time-honored origins of corrective justice, some characterize this approach as "traditional" in juxtaposition to "modern" economic theory.[56]

Corrective justice theory places moral obligations at the center of the normative structure of private law.[57] Corrective justice is fixated on upholding and defending systems of personal moral accountability: who wrongfully injured whom and therefore is morally responsible for repairing that harm?[58] Essentially, "[t]his justification for tort law derives from moral values: when *X* negligently injures *Y*, it is only morally right that *X*, not *Y*, bear the loss."[59] To comport with this theoretical view, moral justice is only achieved if this wrongdoer repairs the losses they created.

The limitations on corrective justice approaches are imbedded in remedial possibilities. Corrective justice is based on "the residual possibility of restoring things, at least in some measure, to where they would have been had one not occasioned their loss."[60] However, even proponents of the corrective justice approach, admit that damages "are not reparative in the strictest

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54. Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 349-50 (1990).

55. O.W. HOLMES JR., THE COMMON LAW 94-97 (1881) (discussing how liability should be tied to wrongdoing).

56. Joshua Ulan Galperin, *Value Hypocrisy and Policy Sincerity: A Food Law Case Study*, 42 VT. L. REV. 345, 368, 380 (2017) ("Restorative justice is the older of these private views of tort, and it was the dominant view prior to the emergence of the utilitarian model. . . . [T]ort facilitates greater deliberative democracy because its touchstone is social reasonableness. Tort provides a forum for civil society to hear arguments. Tort is flexible and open.").

57. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 12-25 (2001); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW § 2.9.1, at 46–48 (2012).

58. *See* Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2355-58 (1990).

59. Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 603 (1985).

60. John Gardner, *What Is Tort Law for? Part 1. The Place of Corrective Justice*, 30 L. & PHIL. 1, 37 (2011).

sense."[61] If a person is blinded by the negligent acts of another, giving them money and medical care does not restore their ability to see.[62] Some argue that this means, at best, that tort, under a corrective justice model, doesn't seek to make someone whole, but render both parties equally damaged.[63] Corrective justice theories struggle to provide remedies that equal relief but also fail to deal well with punitive damages, which clearly exceed the amount of relief that is required.[64]

Substantively, corrective justice as an approach struggles with areas of law, like necessity doctrine and market-share liability cases, which do not evenly match a precise wrongdoing or wrongdoer to the party harmed and suing.[65] A corrective justice rationale does not square well with punitive damages, which are not effectively and proportionally remedying past harm to a specific victim, so much as punitive damages are engaged in deterrence moving forward (not only for the parties in the case, but as signaling to potential additional parties as well). This systemic understanding of the impact of the original case is not well suited to the doggedly individualistic structure of the private law corrective justice archetype.

C. Peacemakers and the Vanguard

The previous Section outlined (in brief) the behemoth poles of tort theory—economic and corrective justice conceptions of tort.[66] This Section turns to discussions outside of this "you're with us or against us" paradigm. Several groups of scholars are attempting to forge paths away from this zero-sum game—some

61. *Id.* at 47.

62. Scott Hershovitz, *What Does Tort Law Do? What Can It Do?*, 47 VAL. U. L. REV. 99, 110 (2012) (arguing that it is impossible to reverse wrongful transactions and think of human interactions in terms "losses" and "gains").

63. *Id.* at 117. ("A tort suit is not an act of revenge. But it aims to do the same thing that people taking revenge aim to do. That is, a tort suit aims to render wrongdoer and victim even in respect of the wrong.").

64. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 710-13 (2003).

65. *See* Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989).

66. *See* discussion *supra* Sections I.A-B.

do so by delineating spheres of influence for each theory (arguing that there is a structural reason implementing one a certain context or another),[67] and others refocus on different themes entirely (such as the role of the state and tort's deliberative democratic role).[68]

Two novel approaches attempt to broker peace between the house of Coase and the house of Aristotle. Each recategorizes torts cases into a new taxonomy—one into variable communities and the other according to the type of benefit sought by the tortfeasor (rather than harm they caused).[69] Both theories do not seek to invalidate moral or economic theories, rather, they explain why one applies in certain contexts and not others.

In her article, *Tort Law Inside Out*, Professor Cristina Carmody Tilley examines tort doctrine and concludes that "tort law is not primarily concerned with efficiency or morality, as instrumentalists have long contended" and invites scholars to "revisit tort on its own terms."[70] In doing so, she concludes that torts serve "as a means of determining community norms, encouraging observance of those norms to enhance private cooperation, and stigmatizing those who deviate."[71] She begins by examining what torts suits are actually doing; and she classifies actions into two parallel communities, a closed community that is intimate and locally based, and an open community that is national.[72] She goes on to argue that the dominant theories of tort—economic theory or corrective

67. Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1325-26 (2017) (advocating that rationales "toggle" between traditional (moral) and modern (efficiency) values depending on whether it is an open or closed community. As such the different theories serve difference goals in the communities to achieve "justice" in local (closed community) cases can "utility" in national (open community) ones); Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. 535 (2017).

68. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 3-6 (2020) [hereinafter GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS] (arguing that the correct conception of tort is as a system of civil recourse for state sanctioned decision-making regarding "wrongs and redress"); Melissa Mortazavi, *Tort as Democracy: Lessons from the Food Wars*, 57 ARIZ. L. REV. 929, 931 (2015) [hereinafter *Tort as Democracy*].

69. *See infra* notes 70-79 and accompanying text.

70. Tilley, *supra* note 67, at 1324.

71. *Id.* at 1325.

72. *Id.* at 1324.

justice—apply selectively, depending on the type of community norm that is at issue in a given case.[73]

Another approach, the benefits theory, classifies tort actions based not on the harms they cause, but the benefits a tortfeasor seeks while committing harms.[74] This allows this Article to allow both theories of torts to coexist in relative harmony.[75] To do so, this Article begins by dividing all human interactions into mutually wanted, coercive, and mutually unwanted acts, with tort law focused on the latter which is comprised of accidents.[76] The concept of considering reciprocal risk is not new. In this iteration, the key inquiry is whether the benefit sought is public or private in its nature?[77] Once the interaction is classified as being public or private, this, in turn, maps onto which theoretical lens is applicable.[78] Stein asserts that this creates domains of influence for each theory respectively, "[t]he case law reveals that our tort system promotes fairness and corrective justice only when it operates in the private mode, but when the system switches to the public mode, it balances victims' safety against the production of public benefits."[79]

Other tort theories focus on the institutional role torts plays in the American political system. John C.P. Goldberg and Benjamin Zipursky's civil recourse theory of "wrongs and redress" charts an alternative course to understanding the thrust of tort law as an either/or between deterrence-based or pure corrective justice driven ideologies.[80] This theory, which they have honed over time and explored piecemeal in various

73. *Id.* at 1385-86.

74. Stein, *supra* note 67, at 551-5967. The concept of considering reciprocal risk is not new but has never been widely adopted. *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); *c.f.* Jules L. Coleman, *Justice and Reciprocity in Tort Theory*, 14 W. ONT. L. REV. 105 (1975) (rejecting the Fletcher theories on reciprocal and non-reciprocal risk).

75. Stein, *supra* note 67, at 540-41.

76. *Id.* at 537.

77. *See* Fletcher, *supra* note 74, at 541-43 (For past considerations of weighing benefits in assessing tort); *c.f.* Coleman, *supra* note 74, at 107 (rejecting the Fletcher theories on reciprocal and non-reciprocal risk).

78. Stein, *supra* note 67, at 543-45.

79. *Id.* at 536.

80. GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS, *supra* note 68.

contexts,[81] is most clearly encapsulated in their recent publication, *Recognizing Wrongs*.[82] Civil recourse theory argues tort functions to provide parties who are wronged a state sanctioned non-violent venue to facilitate redress.[83] Its core concepts are sound political science and the tradition of the social contract theory.[84] Responding in tort under this theory is both a matter of positive law and "political responsibility" that runs between the state to private citizens.[85]

Democratic tort theory asserts that tort plays a structural role in our deliberative democracy by acting in balance with an administrative and code based state.[86] In this model, tort litigation serves several important democratic functions: (1) to tease out and bring forward new information in the form of both fact and opinion and (2) to engage in a dialogue with other forms of law, most directly to inform and galvanize political actors to engage in legislative and regulatory action.[87] This theoretical lens builds on deliberative democratic theory which links legitimacy in governance to articulating and justifying reasoned public policy.[88] As such, proponents argue that tort litigation can increase accountability and legitimacy in final legal and policy outcomes

81. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1643 (2002) ("The reason the court system makes available rights of action in tort cases is that the system is built on the idea that those who have been wronged are entitled to some avenue of recourse against the wrongdoer. But, in a civil society, private violence is not permitted, even where there has been a legal wrong. The state therefore ordinarily must make some avenue of recourse available to the victim. It does this through the courts, via the tort system.").

82. GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS, *supra* note 68.

83. *Id.* at 3.

84. John C.P. Goldberg, *Tort Law at the Founding*, 39 FL. ST. U. L. REV 85, 88-94 (2011) (discussing the early connections of civil recourse theory, natural law and sources like the declaration of independence and Blackstone's commentaries).

85. *Id.* at 87.

86. *Tort as Democracy*, *supra* note 68, at 936-38.

87. *Id.* at 931.

88. Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307, 308 (2003) (discussing accountability as an important component of a "legitimate political order"). Others have linked litigation with accountability in other forums. *See* Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 931 (2017) (discussing enforcement as a form of political representation).

by including better substantive information, more voices, and addressing concerns raised in litigation.[89]

Tort suits can force new arguments, views, and information to the fore, which can turn the tide of public opinion.[90] As a fact gatherer and finder, tort creates more points of input into the legal system and requires responsiveness on the individual and institutional level.[91] Understood with administrative action, tort becomes a player in the policymaking space as a generator of ideas rather than purely a receiver.[92] Understood thus, the regulatory state is not antagonistic to tort, but in symbiosis: "[t]ort and the administrative state have long coexisted in a mutually reinforcing dialectic—where one system moves and the other system often reacts."[93] Tort works in tandem with the administrative state, at once both as a catalyst bringing forward new ideas and arguments, and as a preemptor, stopping discussions in their tracks.[94] Tort understood in this broader lawmaking context enhances the ability of policymakers and citizens to deliberate and supports the ability to make sound policy.

Recent scholarship explores the expressive function of tort beyond this deliberative function.[95] The expressive conception of tort allows a court or jury to signal when an individual is worthy

89. Chambers, *supra* note 88, at 316.

90. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 354 (2021) (discussing interplay between tort and administrative law, and summarizing that tort can spur administrative action "by (1) drawing attention to the problem's existence; (2) uncovering otherwise concealed information to establish accountability and clarify the problem's origin, scope, and character; and, in so doing, (3) affect public opinion in such a way as to spur private activity and also make political action against a powerful industry more palatable").

91. Galperin, *supra* note 56, at 368 ("[T]ort facilitates greater deliberative democracy because its touchstone is social reasonableness. Tort provides a forum for civil society to hear arguments. Tort is flexible and open.").

92. Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2068-70 (2000) (discussing the information forcing function of tort).

93. *Tort as Democracy*, *supra* note 68, at 955.

94. *See* TIMOTHY D. LYTTON, OUTBREAK: FOODBORNE ILLNESS AND THE STRUGGLE FOR FOOD SAFETY 13-15 (2019); Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1838-40 (2008) (discussing regulatory backlash to tort cases).

95. Hershovitz, *supra* note 12, at 1-2 (discussing tort liability's message of a plaintiff's fault).

of dignity or what construes a wrong against their person.[96] Civil recourse theorists respond that tort is not about message-giving—it is about power allocation between private parties, "[t]ort law respects dignity by giving power to those who have been wronged by others, not by expressing the moral truth about them."[97]

This Article asserts that both views are somewhat correct but incomplete. It is not expression alone or the allocation of power alone that make torts essential—it is the combination that lends torts its potency. In bringing a tort action, the litigant expresses their normative view of human dignity as it applies to their factual situation and defends it vehemently. True, tort law recognizes dignity in the person by empowering them to take their own corrective action against those they perceive of as perpetrators—but it also recognizes dignity in other ways such as by validating the significance of a person's ideas and input. It is the expression (and acknowledgment) of a normative view coupled with the power to take that view and put the power of enforcement behind it that gives tort its heft. Thus, civil recourse theory and the expressive function of tort can work in tandem with each other. The expression of the jury or court is only part of what tort law does; tort primarily is about the power of the *person* to express their own articulation of personhood (an individual view of what is worthy of dignity and what it means to be wronged as a person) and to seek social validation of that conception through the backing of the state (the vested power of pluralistic society).

II. NEW PERSPECTIVES ON OLD FOUNDATIONS

The previous Section laid out various theories of tort—that the purpose of tort is to support efficiency, correct injustice, construct community, weigh benefits of action and inaction, provide civil recourse, or aid democratic governance.[98] A reader of torts may decide at this point to be an apostle of any of these theories or even agnostically try to adopt elements of them all.

96. *Id.*

97. Benjamin C. Zipursky, *Expressivism, Corrective Justice, and Civil Recourse*, JOTWELL (Feb. 20, 2018), [https://perma.cc/WXH2-EAXM].

98. *See supra* Part I.

Yet, somewhere in the rigamarole of compensation and risks, justice and deterrence, tort theory has distanced itself from why these concepts matter and what purpose they serve. These bits and bobs are about asserting human dignity and recognizing its value. In our society, monetary value is the most common metric of doing so—but it is only a mode of communicating value, it is not value itself.[99]

This Section makes a simple point: tort may be any or none of these theories, but it is always defining what it means to be a person in the eyes of law.[100] Through torts, any person may declare what being human is and what the rights of personhood are. As such, tort shares the power of the legal state, through law, with the individuals, thereby indicating respect for the person themselves and the knowledge that person has gained from their lived experience.[101] These concepts are discussed in terms of autonomy, safety, comfort, and self-expression. They may be paid out in dollars and cents—but what they amount to is basic humanity.

A. Torts & Personhood

How does tort define the contours of the rights of human beings and the parameters of their dignity? The work of negotiating personhood so permeates torts that it is easy to

99. Hershovitz, *supra* note 62, at 110 ("[M]ost wrongs do not involve a transfer that can be reversed. The most common of these abstractions papers over the particular injuries that victims suffer (broken bones, damaged reputations, frustrated ambitions) by calling them 'losses.'").

100. It is necessary to determine what human rights are in a legal sense because they are not all clear or automatically retained within a system of governance. Hon. Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, *in* CATO SUPREME COURT REVIEW: 2009-2010 13, 15 (Illya Shapiro ed., 2010) ("The essence of the Lockean social compact is that we relinquish certain of our natural rights and we receive, in return, more effectual protection for certain of our rights, plus the enjoyment of positive rights, that is, rights created by the action of political society.") Thus, tort is part of the project of discerning which ideals of dignity are retained and protected, from whom and how.

101. "[H]uman dignity in a commonwealth of mutual deference . . . [w]here the dignity of man is fully taken into account, power is shared, respect is shared, knowledge is shared. A society in which such values are widely shared is a free society." Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 217 (1943).

overlook and can be challenging to disaggregate. Tort law defines personhood when we decide if a person can refuse a massage from a coworker or if a black man has a right not to have his plate snatched from his hands as he tries to get his meal.[102] The very act of bringing a tort is one that recognizes agency and an employment of power—one initially that had to be ceded by a sovereign. Even in our democracy, the basic recognition of one's voice and humanity through tort was denied to many—most notably enslaved people and women.[103] The applied agency of tort is a (if not *the*) cornerstone of personhood, an essential recognition of dignity. It is a power vested and wielded, articulated and brought by parties who assert in their lawsuits that their understanding of human dignity has been violated.

Indeed, long before the U.S. Constitution or Geneva Convention existed, common law tort was meting out protections for basic human rights as it continues to do so to this day.[104] How tort cases are brought and argued provides a unique forum to negotiate the contours of identity, common personhood, and forms of human dignity.[105] The content of these cases signals the unpretentious contours of what individuals have a right to expect of each other and their physical selves. However, modern

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102. *See* Paul v. Holbrook, 696 So. 2d 1311, 1311 (Fla. Dist. Ct. App. 1997); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 628-29 (Tex. 1967).

103. *See, e.g.*, Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814 (1990) (discussing how a "gender-neutral hierarchy of values" has historically "privileged men . . . and . . . burdened women"); Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1212 (2004) (discussing how tort is an inadequate means of addressing claims for damages resulting from slavery).

104. This includes basic rights to legal recognition such as the right to bring a claim on your own behalf or be safe in one's physical person. As late as the 1960s, torts, not constitutional law, was at the reins of defining and protecting concepts like privacy and speech. Tilley, *supra* note 11, at 66 (discussing how tort "created a full-bodied common law of dignitary tort" before the Court applied First Amendment jurisprudence to such actions).

105. This Article rejects a hierarchical conception of human dignity and focuses on torts as a baseline of human dignity that is universalist in character. Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L.J. 1, 2-3 (2008) (There are two broad sets of ideas on human dignity: universalist and hierarchical. The universalist view is that dignity is innate in humans.). Depending on the school of thought, the innate quality of human dignity either be God-given (through natural law) or as a byproduct of rationality (through enlightenment principles). A hierarchical view attaches human dignity to social rank, an entitlement of nobility, and parties attain human dignity by ascending in social status. JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 30-34 (Meir Dan-Cohen ed., 2012) (discussing how social rank and status were the most relevant indicators of a person's place in his or her world).

audiences fail to see or appreciate the existence of torts' protections, perhaps now so fundamental to our basic understandings of self, that they are taken for granted. However, tort law is the oldest and most essential tool in the civil and human rights' toolbox.

Tort is unique in this regard. It is designed to grow, change, and develop over time, and its driver is not a top-down preset policy goal, but a bottom-up literal pleading vehicle to recognize individual's conceptions of personhood.[106] Unlike our legislative system, which requires a majority to elect a person to office and then a majority of electors to move a new legal concept forward, in torts, a single person's ideas may be heard.[107] That is not to say that this person will win their case; however, that is not the point.[108] The very act of bringing forward the articulation of what an individual believes they are due as a person imbues them with agency, recognizes their value and equality to others, and provides essential inputs for the development of legal personhood.[109]

Personhood is also integrated into torts claims on a granular level. For example, when negligence-based tort considers duty, it is weighing the degree to which personhood is an individualistic or group identity.[110] On one extreme, if duty is only owed to oneself, then personhood is defined purely individualistically. If and when duty extends to a broader ambit, then law is recognizing a human right to expect certain treatment and care to and from others. Duty thus understood finds personhood in understanding rights in relation to other human beings. When tort talks about reasonableness, it is speaking of the essential nature of human dignity—what is behavior we as a society expect a person to

106. *See Tort as Democracy*, *supra* note 68, at 931.

107. "One of the basic manifestations of deference to human beings is to give full weight to the fact that they have minds." Lasswell & McDougal, *supra* note 101, at 225.

108. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969 (2011) (discussing the productive function of litigation loss in social movements).

109. The last thirty years have seen a rise in unrepresented litigants in civil court, particularly at the trial level. *See* Anna E. Carpenter et al., *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 511 (2022) ("Today, most state civil trial courts are lawyerless. . . . [M]ore than three-quarters of cases involve at least one unrepresented party.").

110. John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of Macpherson*, 146 U. PA. L. REV. 1733, 1821-22 (1998) (comparing limited duties and universal duties owed under tort law).

adhere to.[111] This behavior defines us as persons. Tort lays out expectations of how humans behave as rational beings,[112] and certifies parties as worthy of legal recognition. In a pluralistic society, legal recognition signals consensus and respect, and delineates what behavior to engage in or refrain from.[113] Through such determinations, tort declares emphatically: people are those who behave in this way and not in others, basic human rights to your person and place are defined. Through bringing forward perceived wrongs or harms, litigants aggregate their views to express societally what it means to be a complete person. In shaping what counts as broken, tort lays out what it means to be complete.

Thus, torts that are classified outside of "dignitary" in common torts-speak may simply lie at the least contested boundaries of personhood (such as rights to autonomy in one's physical person).[114] When someone's arm gets chopped off in an accident, and they sue to assert their human dignity, their right to safety in their physical person, as much, if not more so, than a person who is suing for defamation. The human right to assert control over one's own body, has been an uncontroversial part of legal personhood for so long that we no longer recognize it is as

111. Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 822 (2001) (discussing the "reasonable person" standard).

112. *Id.*

113. Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1256 (2009) (discussing how the ordinary care standard dictates "what an average person would do, in the normal case").

114. In *The Puzzle of the Dignitary Torts*, Professors Kenneth D. Abraham and Edward White recognize that, "[l]egal protection of individual dignity . . . is not only the province of constitutional law or public law more generally. Private law also plays an important role. In particular, tort law provides a good deal of protection for individual dignity." Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 319 (2019). They argue that common law tort has not been sufficiently active in defining civil and human rights due to impediments from other areas of law as well as built in limitations in tort itself—particularly incoherence in the articulation of specific "dignitary" torts. *Id.* at 319-20. This article aligns generally with the goals and views of Abraham and White; however, this article would contend that the authors need to expand the scope of their vision of dignitary interests and their standard for recognizing tort influence in this area. Abraham and White assert that "[d]octrinal development in American tort law is not simply a function of changing attitudes towards the interests potentially being protected in tort suits." *Id.* at 322. However, it may well be that tort does reflect changing societal values—but it is simply not changing as quickly or as homogenously as the authors might like. Tort is negotiating these changes case by case.

a human right, but there is perhaps no more vital hallmark of personhood.[115] This recognition of agency is what even the most limited forms of common law tort unabashedly endorse. American jurisprudence presupposes the baseline of human dignity vested at the heart of settled tort law rendering that value is invisible. This Section begins to remedy some of that oversight.

B. I Sue, Therefore I Am

American tort law has come to adopt a universalist view of human dignity when it grants each plaintiff, in good faith, an equal opportunity to bring a claim and require response.[116] While personhood begins with agency—who has agency to do what and against whom—this right to demand that another person answer a legal claim is not a given.[117]

Until recently, the human right of agency was sublimated to the sovereignty of the state.[118] The Framers of the U.S. Constitution saw the power of the state and the power of people as mutually exclusive; therefore, the growth of tort liability against the state shows a growth in the conception of personhood as outranking the state.[119] However, most notably, the statutory invention of the Federal Torts Claim Act changed the pecking order between state and individual.[120] Limitations on sovereign immunity not only expose the state to suit but also makes clear

115. The sanctity of physical self is longstanding and finds its roots in natural law. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 265, 305 (Peter Laslett ed., 2d ed. 1967) (1690) (observing as a product of natural law "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself").

116. Zipursky, *supra* note 97, at 3 ("Equality is fundamental to tort law, but not principally because of the *shows* of equality the state enacts through trials that end in victim vindication. Through tort law, the state respects equality by empowering each person to demand redress from someone who wronged her or him should she or he so choose.").

117. *See* Susan D. Carle, *Why the U.S. Founders' Conceptions of Human Agency Matter Today: The Example of Senate Malapportionment*, 9 TEX. A&M L. REV. 533, 572 (2022).

118. KEVIN M. LEWIS & ANDREAS KUERSTEN, CONG. RSCH. SERV., IF11291, INTRODUCTION TO TORT LAW 2 (2023) (stating that "tort law has traditionally been the domain of the states . . . .").

119. Carle, *supra* note 117, at 546.

120. *See generally* 28 U.S.C. §§ 2671-2680.

that the state has a responsibility to answer to litigants.[121] Subrogating the state's power to the individual is a clear departure from the previous norm, where all power was consolidated in the sovereign.[122] While significant pockets of immunity remain, they are being challenged and questioned in favor of recognizing the human rights of individuals as stronger than that of the state. [123] However, when U.S. law granted some individuals rights of private action, and sovereign legal power non-exclusive, tort law could expand to support broader categorizations of personhood. But this is, and always was, contingent on a threshold determination: can you sue, and by extension, are you a person?

Historically, enslaved persons were deprived not only of their liberty, but were dehumanized by being denied the ability to sue for mistreatment.[124] Take the story of Amy, an African American woman who, in 1822, contested her status as "a slave" under a state statute and constitution. She also attempted to bring a common law claim for trespass, battery, assault, and false imprisonment.[125] In reference to her statutory claims to emancipation, the court took an even harder turn, saying that even if emancipated, she was not entitled to citizenship because "[f]ree [African Americans] are, almost everywhere, considered and

121. Sovereign immunity exempts the government from not just liability, but from suit itself. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 766 (2002) ("Sovereign immunity does not merely constitute a defense to . . . liability. Rather, it provides an immunity from suit."); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (noting qualified immunity "is an *immunity from suit* . . . like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial").

122. *See* Ian Bartrum, *The People's Court: On the Intellectual Origins of American Judicial Power*, 125 DICKINSON L. REV. 283, 286-87 (2021).

123. These pockets of immunity have proved to be highly problematic, as insulation from tort has allowed those areas to remain unresponsive to shifting societal norms. Take challenges to police departments and the use of police power. *See* Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS (May 8, 2020, 12:00 PM), [https://perma.cc/ZJ9E-SPKN]. The controversial use of immunities here prevents incremental growth that would or could organically take place within the tort system.

124. An exhaustive search of online databases (such as Hein, Westlaw, Lexis, and Bloomberg) for torts cases brought by persons pre-emancipation reveals no tort cases where enslaved persons were recognized by the legal system as having the ability to bring a claim. Rather, these cases we summarily rejected. *See, e.g.*, Susan v. Wells, 5 S.C.L. (3 Brev.) 11, 12 (1811) (dismissing claim for assault and battery on the basis of plaintiff's status as enslaved).

125. *See* Amy v. Smith, 11 Ky. (1 Litt.) 326, 327 (1822).

treated as a degraded race of people . . . ."[126] The court denied Amy's common law cause action, stating that an enslaved person was barred from bringing suit for such common law claims.[127] The only access that these individuals had to the judicial system was to contest their enslaved status.[128] The terms of enslavement of non-personhood means an inability to bring claims against another. Even once emancipated, courts have denied formerly enslaved people the ability to seek damages for the time where they were enslaved rather,

> we hold that a freedman has no right of action in our Courts, to recover damages for injuries . . . or for wages on account of labor done by him as a slave. As the law then stood, his labor belonged to his owner, and the owner alone had a right of action to recover damages for injuries to his person.[129]

The inability to bring suit reinforced and confirmed the legal construction that enslaved persons were not people, but property.

To a different extent, married women were also rendered legally sub-human under the doctrine of inter-spousal immunity,

> [t]he 'supposed unity' of husband and wife, which serves as the traditional basis of interspousal disability, is not a reference to the common nature or loving oneness achieved in a marriage of two free individuals. Rather, this traditional premise had reference to a situation, coming on from antiquity, in which a woman's marriage for most purposes rendered her a chattel of her husband.[130]

Since "the very legal existence of the wife was regarded as suspended for the duration of the marriage, and merged into that of the husband," a husband suing a wife was viewed legally as being the same as suing himself.[131] She was at best invisible, at

126. *Id.* at 334.

127. *Id.* at 328-29.

128. *See id.* at 327-28.

129. Green v. Anderson, 38 Ga. 655, 663 (1869).

130. Freehe v. Freehe, 500 P.2d 771, 773 (Wash. 1972) (refusing to recognize spousal immunity as valid).

131. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 859-60 (4th ed. 1971).

worst, property.[132] Today, interspousal immunity is no longer generally recognized.[133]

An active example of the renegotiation of personhood lies in the recognition of children as legal actors. This is playing out through challenges to common law torts' parental immunity doctrine.[134] Parents have long escaped tort liability to their children through the doctrine of parental immunity which bars an unemancipated child from suing their own parents in torts for negligent care.[135] The original common law justifications for parental immunity included reticence "to bring discord into the family and disrupt the peace and harmony of the household."[136] Outside of willful and wanton conduct, great weight was placed on the sanctity of familial privacy, and children were not recognized as capable of autonomous legal action against their parents.[137]

Scholars and policymakers have argued compellingly that parental immunity is an antiquated vestige needing to be set aside,

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132. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122 (1996) (critiquing inter-spousal immunity).

133. *See* Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 366 (1989) (outlining how spousal immunity has become obsolete); Bozman v. Bozman, 830 A.2d 450, 464-65 (Md. 2003) (agreeing with the vast majority of courts that inter-spousal immunity is "a vestige of the past, being unsound in the circumstances of modern life, has outlived its usefulness, if ever it had any").

134. William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1030 (1930) ("Here is waged a battle between conflicting conceptions of the family, between individual and relational rights and duties.").

135. "In general, it is still the prevailing rule in most jurisdictions that an unemancipated minor child cannot maintain an action against its parent for negligence." Russell L. Wald, *Parent's Failure to Supervise Children*, *in* 11 AM. JUR. 2D *Proof of Facts* § 1 (1976).

136. Trudell v. Leatherby, 300 P. 7, 8-9 (Cal. 1931) ("[S]uch actions tend to bring discord into the family and to disrupt the peace and harmony which should exist . . . .").

137. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate . . . ."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") However, where acts by parents are willful and wanton, rather than negligent, the parental immunity doctrine has not generally been applied. Grecco v. Univ. of Med. & Dentistry of N.J., 783 A.2d 741, 741 (N.J. Super. Ct. App. Div. 2001) (noting that although the New Jersey Supreme Court has preserved the doctrine of parental immunity in cases involving the negligent exercise of parental authority, the protection did not apply to willful and wanton conduct).

akin to spousal immunity, that is rooted in similarly dated justifications.[138] These norms are shifting as the parental immunity doctrine is limited and disfavored.[139] This movement began in earnest in *Gibson v. Gibson*, where the California Supreme Court led the move in tort away from categorial parental immunity in negligence actions toward applying a general reasonableness standard.[140] Other jurisdictions were initially more zealous insulating parents from a general reasonableness standard, arguing that it is simply too onerous and inapplicable.[141] However, the overall trend points toward extending the legal personhood of children and abolishing the doctrine of parental immunity.[142]

The ability to sue has also been limited in terms of class. For example, the British common law tied the ability to assert many tort claims to contractual privity.[143] In these interactions, the only persons protected were people who had the means and skill to

138. Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 494-98 (1982); *see also* Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161, 1178, 1184 (1991); Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 549 (2013) (stating that "[p]arental immunity and inter-spousal immunity came into being during the same period, and they were based on identical legal justifications"); Rhonda V. Magee Andrews, *The Justice of Parental Accountability: Hypothetical Disinterested Citizens and Real Victims' Voices in the Debate over Expanded Parental Liability*, 75 TEMP. L. REV. 375, 379 (2002) (concluding that both the Rawlsian "Original Position" metaphor and Matsuda's "Victim's Voice" support expanding parental liability beyond traditional torts limitations).

139. *See generally* Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971).

140. *Id.* ("In short, although a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits. The standard to be applied is the traditional one of reasonableness but viewed in light of the parental role. Thus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?").

141. *See* Holodook v. Spencer, 324 N.E.2d 338, 346 (N.Y. 1974) (rejecting "reasonable prudent parent" standard, and instead imposed a no duty to supervise children rule); Wagner v. Smith, 340 N.W.2d 255, 257 (Iowa 1983) (adopting *Goller*-like rule and stating that, "parenting is too subjective and too personal a matter to lend itself to a 'reasonably prudent' tort standard").

142. *See* Porter, *supra* note 138, at 579.

143. *See* Winterbottom v. Wright, 152 Eng. Rep. 402, 403 (Ex. Ch, 1842). Tort law historically has recognized a more unqualified duty of care in cases of action or "feasance" but has been more reticent to expect a duty of care to attach in cases where inaction or "non-feasance" has led to harm. The conception of duty as applying only part of the time is evolving and will be discussed further in Part IV.

contract.[144] However, common law torts grew to acknowledge that while there is a duty of care that attaches to a contractual relationship, that "[i]t is undoubted, however, that there may be the obligation of such a duty from one person to another, although there is no contract between them with regard to such duty."[145] Citing two car drivers meeting or two ships at sea, the court discusses torts as a "reciprocal duty towards each other."[146] The severance of tort relief from contractual privity is apparent in the case *MacPherson v. Buick Motor Co*.[147] In *MacPherson*, Judge Cardozo emphatically pronounced,

> We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[148]

Torts stake human dignity in inherent worth, rather than mutable characteristics like social status and economic transactions.

Finally, the primacy of tort as a baseline recognition of personhood is apparent when considering the reticence of law to deprive people of the right to bring a tort suit. Important legal rights of people convicted of felonies, even after serving their sentences, are often truncated.[149] These include many rights that are important and central to our constitution and general citizenship in a democracy. Amongst these are the loss of the right to vote, serve on a jury, travel, bear arms or own guns, apply

144. *Id.* at 111.

145. *Important Decisions*, 1 MAN. L.J. 10, 10 (1884) (quoting Heaven v. Pender (1883) 11 QBD 503 (Eng.)).

146. *Id.*

147. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916). Tort scholars debate as to the weight and breadth to read into *MacPherson*'s holding: whether *MacPherson* is a broad pronouncement of duties owed to all, or a more modest claim that duties are owed based on relationships and that the relevant relationships can be broadly construed. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1767-70 (1998). For our purposes, either camp will do. Either step moves towards expanding who the law recognizes as people who are deserving of legal care and recognition. With that recognition, the law bestows human dignity that transcends the ability to engage in an economic transaction (here previously gatekept by contractual status).

148. *MacPherson*, 111 N.E. at 1053.

149. Howard E. Hill, *Rights of Convicted Felons on Parole*, 13 U. RICH. L. REV. 367, 367-69 (1979).

for social housing, parental benefits, or certain types of employment.[150] Yet despite a willingness by society to levy these significant incursions on constitutional rights, rights of citizenship, and indeed even familial relations, there is no absolute bar on the right to bring a tort suit.[151] This baseline floor of personhood, to exercise autonomy and assert that another has wronged you, remains intact.[152]

C. What's Tort Got to Do With It?

The revelation of society's consciousness of personhood, acceptable conduct, and harm, happens partially because of the institutional structure of the common law tort system.[153] The institutional structure of a tort claim places agency regarding commencing a legal action, its subject matter and content, not within the power of the court, but vests articulation of the claim with the person (recognizing them as one).[154] This reaffirms a commitment to an ideal of human dignity grounded in rationality. The most powerful actor in torts is the plaintiff, who (through the aid of their lawyer) is the master of the proceeding.[155] It is this

150. *Id*; *What Rights do Convicted Felons Lose?*, THE L. DICTIONARY, [https://perma.cc/KT6D-RDCP] (last visited Sept. 29, 2023).

151. *See How a Criminal Record Can Impact Your Personal Injury Claim*, OLMSTEAD & OLMSTEAD, P.C. (Sept. 20, 2020), [https://perma.cc/W4WA-D6N5].

152. This is not to say that there are not impediments to convicted persons bringing suit. Most notably during the period of incarceration, the Prison Litigation Reform Act requires exhaustion of administrative processes prior to being able to file a claim. 42 U.S.C. § 1997e(a).

153. Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 102 (2010) [hereinafter Hershovitz, *Harry Potter*] ("Tort imposes liability in a particular way: it gives ordinary folks the right to hale virtually anyone into court, where they can seek explanations and evidence, an ascription of responsibility, and, yes, compensation too.").

154. GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS, *supra* note 68, at 208, 123 ("[T]he wrongs recognized by tort law are, in their substance, drawn from everyday life rather than constructed de novo by judges in aid of some sort of social engineering project." In doing so, torts gives a person the "right to respond to or act against others civilly, through the exercise of a private right of action, in light of some predicament or problem one faces because of something another has done or failed to do.").

155. Lasswell & McDougal, *supra* note 107, at 219 ("By 'power' we mean participation in or the ability to participate in the making of important decisions. When such participation or ability is general, there is democracy, in so far as the power variable is

ability to choose "what purposes you pursue[] [t]hat is just what it is for you to be your own person . . . rather than to be another person's slave, serf, or subordinate. You act in your own name, using your means to pursue purposes that you, rather than others, determine."[156] In bringing a tort action, the state recognizes this basic human right and the basis of human equality.

Tort claims are, by design, manifestly pliable and changeable, evolution not revolution.[157] Plaintiffs encompass a broad group of people. It is important to note that plaintiffs are not necessarily victims of wrongs. They are people who, in good faith, believe that they have been wronged and want that view vindicated.[158] That conception of wrong may or may not perfectly align with existing law. This evolution is a mechanism that allows for responsive change based on variable circumstances and inputs.[159]

By incorporating objective standards throughout both intentional and negligence-based torts, from concepts of offensiveness in battery to reasonableness in negligence, there is an elasticity to tort that allows for ample reimagination of concepts of personhood.[160] Tort also functions as a catch-all to provide redress when new situations arise.[161] Judges, navigating

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concerned. The term 'power,' as we use it, is equivalent to 'the function of government,' which is not to be confused with the 'institutions called government.'").

156. ARTHUR RIPSTEIN, PRIVATE WRONGS 33 (2016).

157. Kenneth S. Abraham & Leslie Kendrick, *There's No Such Thing as Affirmative Duty*, 104 IOWA L. REV. 1649, 1698 (2019).

158. *See* Sadie Blanchard, *Nominal Damages as Vindication*, 30 GEO. MASON L. REV. 227, 228 (2022).

159. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 21 (5th ed. 1984) (acknowledging the evolutionary qualities of torts by stating,"[i]n a very vague general way, the law of torts reflects current ideas of morality, and when such ideas have changed, the law has tended to keep pace with them").

160. *See* Richard A. Epstein, *Too Pragmatic by Half*, 109 YALE L.J. 1639, 1643 (2000) (arguing that the common law is shaped by individual party's cases in controversy and it is morally neutral as to social values).

161. This Article is focused on the modern tort system and does not engage closely with the strict writ system which encompassed a more rigid its pleading structure. The common writ system was replaced with general "civil action" to enforce private rights in the United States in the mid-1800s. LAURENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 391-98 (2d ed. 1985); Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 454 (1990) ("The common law forms of action governed the structure and content of tort law from the thirteenth through the mid-nineteenth century. The latter half of the nineteenth century,

"a space or gap between all of the available legal materials that might be brought to bear in the decisional process (rules, principles, policies, and so on) and the decision itself" have interpretive room for the common law to develop and grow.[162] Without granular limitations on applicable facts or plausible pleadings, tort changes are potentially boundless, though unquestionably incremental.

Tort also is substantively advantageous, as compared to other types of law, to negotiate what we consider human dignity and personhood. Tort originates from the person to the state (ground-up), and is non-majoritarian, fluid, and more independent from social class than other forms of law. Other types of law fail to provide these advantages that tort law has built into its institutional structure. Criminal law, for example, is a suboptimal forum for gaging what is truly important to an injured person's concept of human dignity because its subject matter is limited to those charges selected and pursued by an external state agent who is acting theoretically on behalf of "the people."

In tort, it is the party who perceives themselves to be injured who makes this determination. Statutory laws can provide redress to individuals but primarily provides redress to those holding a majority view.[163] Code law is always the product of a hyper majoritarian system—one that elects representatives by majority vote and then approves law by majority vote.[164] Thus, the ability of any law to reflect knowledge or views that are meritorious but not yet adopted by a majority is highly unlikely if not impossible. One might argue that contract law circumnavigates these pitfalls, granting agency and action to individuals and accommodating some minority views. But contract law is still suboptimal to tort

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however, witnessed the abolition of the forms of action, clearing the way for a new conceptualization of the law of torts.").

162. Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335 (1988).

163. These systems can be unsympathetic to those who are currently disenfranchised. Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, DAEDALUS, Winter 2019, at 128, 133 (observing that legislative action can perpetuate growing economic and social inequality rendering state civil courts the last resort government intuition).

164. *See The Legislative Branch*, THE WHITE HOUSE, [https://perma.cc/9C5N-PTTD] (last visited Sept. 29, 2023).

in this regard because it requires an individual to overcome additional hurdles—not only of legal sophistication, but of wealth. A contract, at its heart, is a legal transaction for a good or service. If an individual has no good or service, that individual has no contractual right—they only have a claim in tort. Without tort, there is no claim at all.

Barriers to entry act as a screening mechanism by which the commitment of a plaintiff is tested.[165] Bringing a lawsuit can be expensive both in money and time.[166] It can be difficult to find lawyers interested in a representation.[167] There has never been any appreciable "civil Gideon" right to legal counsel.[168] Many argue that monetary and informational barriers should be minimized.[169] "Access to justice," to the legal system itself, is articulated as a human right in civil society.[170] However, even admitting that many interested people are eliminated because of economic or knowledge-based barriers, it still stands to reason that since bringing a tort suit is onerous, then suits that are brought by parties are, for the most part, of great value to them. Tort reveals not only what parties think they are entitled to, but what they feel is particularly pressing and important.[171] This occurs in a "forum for conversations we might value having in public;" indeed, even if a case settles outside of a public space, the nature of a tort suit allows individuals to obtain information and answers from others, even if that information lead to a particular monetary

165. Sam Bock, *4 Barriers Blocking Access to Justice (and How to Help Break Them)*, RELATIVITY (Mar. 25, 2021), [https://perma.cc/6CAP-7WP7] (describing how costs, inaccessibility, and lack of knowledge prevent individuals from engaging with the legal system).

166. *Id*; Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 721-22 (2015).

167. *See generally* Roger Michalski & Andrew Hammond, *Mapping the Civil Justice Gap in Federal Court*, 57 WAKE FOREST L. REV. 463, 507-09 (2022).

168. *See Civil Right to Counsel*, ABA, [https://perma.cc/K863-38WX] (last visited Sept. 29, 2023*).*

169. *See* Sandefur, *supra* note 166, at 721-23.

170. *See, e.g.*, Justice Jess H. Dickenson, *A Look at Civil* Gideon*: Is There a Constitutional Right to Counsel in Certain Civil Cases?*, 37 U. ARK. LITTLE ROCK L. REV. 543, 545-46 (2015).

171. Hershovitz, *Harry Potter*, *supra* note 153, at 74.

outcome.[172] Explanations obtained through tort have individualized, societal value and assign responsibility.[173]

III. COMMON LAW PERSONHOOD: DUTIES, RIGHTS, & HARMS

A. One Person's Rights Are Another's Duties

Once tort has acknowledged who is a person by affording them the ability to sue in tort, the next question becomes: what does being a person mean? What does that status entail? Here, it is imbedded in torts that personhood is not negotiated in a vacuum—humans, social as we are, define ourselves and associated rights in relation to other persons.[174] The laboratory where we experiment, grow, and develop ideas of this relationality is in torts.[175] Here, tort's obsessive inquiry into duty and attendant reasonableness comes into stark relief. Duty dwells on questions of relationality—are persons connected or not? And if so, how and what does that connection mean?

In considering these questions in the context of duty, tort has incrementally but steadily expanded concepts of relationality by

172. Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2007); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 358-63 (2008) (discussing how parties respond favorably to apologies or expressions of regret in settlement); Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61 (2018) (conducting empirical study of which procedural values were most influential in filing and adjudicating federal claims and finding many issues were important to litigants and jurists).

173. Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1791, 1805-11 (2009) (noting that plaintiffs have the right in a tort suit to hold defendants "answerable").

174. GOLDBERG & ZIPURSKY, RECOGNIZING WRONGS, *supra* note 68, at 93 (observing that tort laws "are all relational—they always enjoin certain actors from doing certain things *to* certain others, or to do certain things *for* certain others"); KEETON ET AL., *supra* note 159, at 6 ("[L]iability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others.").

175. Tilley, *supra* note 11, at 69 ("The behavior underlying these torts does more than inflict property damage or even physical injury that the modern man is expected to rationally commodify. Instead, it invades an individual's sense of worth and dignity, important values in a relational society.").

augmenting the duties parties owe to one another and to whom. These shifts alter relationships between people and concepts of self. More specifically, expanded duties change who each individual is required to acknowledge as relevant in their actions, and modify their actions accordingly.[176] Whether it is expanding duties to entrants to property beyond those limited duties afforded based on status, recognizing duties to third parties in more settings, or duties that attach to parties who were not in privity, tort law has increasingly recognized broader categories of human interconnectedness. This recognition of a general duty of care is profound—it is a legal pronouncement that as human beings we have a right to expect certain respect and care by other humans.[177]

Consider torts' longstanding and tortured struggle with the distinction between misfeasance (conduct) and nonfeasance (non-conduct). Any first year torts' instructor can recount how vague this line between action and inaction can be. Given its limited doctrinal coherence, why is tort law so fixated on this distinction? Looking instrumentally, it is hard to see why the inaction/action debate continues to attract attention and sway. Even recent scholarship which argues for the abolition of affirmative duty and its replacement with a blanket risk-creation analysis does not assert that it would necessarily impact the outcome of cases and may not even clarify doctrine.[178]

So what is at stake in this discussion of conduct and non-conduct? The role of torts in defining the parameters of personhood and attendant rights is exposed. This discussion is

176. Abraham & Kendrick, *supra* note 157, at 1698 ("[T]he existing categories have allowed the law to evolve and to recognize duties in more cases, even if it has continued to call some duties affirmative without much justification.").

177. Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (applying a general negligence balancing test to a property tort, rather than recognizing different duties based on the class of the entrant to the land); Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976) (recognizing a duty of care of a mental health professional to a third party victim on their client's violence); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (recognizing manufacturer's liability for harm caused regardless of fault).

178. Anthony Sebok, *Is Less Really More? Abraham and Kendrick on Getting Rid of Affirmative Duties*, JOTWELL (Jan. 23, 2019), [https://perma.cc/MB7D-KYC9] (critiquing Abraham and Kendrick by noting that even if one adopts the conclusion that action/inaction is not a useful distinction, "I suspect that it will not . . . remov[e] complexity from the Third Restatement. It is just as likely that [it does] nothing more than move[] a difficult problem from one chapter to another").

important because it centers on a feud over what the characteristics of a rational person are. Specifically, misfeasance versus non-feasance unpacks whether a rational person is a person who views themselves strictly individualistically or connected to other persons.[179] If a rational human only takes into account themselves, then actions alone are worthy of legal scrutiny. But if a rational person accounts for the wellbeing of others, if a rational person values human life and limb as a general matter, then non-feasance, the failure to act where another person's life is in danger, is an irrational act.[180] Traditionally, the answer to the question of rationality and interdependence in human interaction was answered in a starkly individualistic way: a rational person is responsible for themselves, and other people are responsible for themselves.[181] This individualist view is associated with the idea that a rational disconnected person was free, and that this insularity was, in fact, freedom. This understanding of personhood, possibly originating from a masculine conception of rights as negative rather than positive, is served well by maintaining a misfeasance versus non-feasance dichotomy.[182]

But society and torts have changed. Whether a correlation or causation, as participation in the formation of common law has shifted so too has its content. It is unmistakable that who makes common law has shifted, in terms of litigants, the judges, and even the jury.[183] Since 2016, women have accounted for more

179. Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219-20 (1908).

180. *See* Peter Benson, *Misfeasance as an Organizing Normative Idea in Private Law*, 60 U. TORONTO L.J. 731, 791 (2010).

181. *See* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 279 (1980).

182. A feminist reading of this duty so circumscribed might argue that this individualistic conception of tort as protecting against harmful acts only, rather than harms arising from failure to care, reflects a masculine version of societal (non)interdependence.

183. Women now make up a sizeable percentage of state judges. *2018 US State Court Women Judges*, NAT'L ASS'N WOMEN JUDGES, [https://perma.cc/5H35-83Z5] (last visited Nov. 2, 2020) (reporting that women hold state court judgeships between thirty-three and thirty-seven percent of the time depending on the court). Today, women can serve on juries throughout the United States, however, in some jurisdictions women did not have the ability to participate as jurors until as late as the 1970's. *History Made when Women Were Allowed to Serve on Jury*, AP (Nov. 16, 2018, 4:38 PM), [https://perma.cc/PFP8-2FAW] (noting that

than half of law school entering classes.[184] While some still argue that tort is about nothing more than a singular commitment to the idea that no one person is in charge of another,[185] this strictly individualist conception of personhood is based on a line between action and inaction that is increasingly blurred and difficult to justify.[186]

The comments of the Restatement (Third) of Torts ("Third Restatement") concur with a weakening of this distinction and probe whether the misfeasance/non feasance divide continues to be meaningful:

> Misfeasance and nonfeasance have a long history as concepts used to explain the distinction between affirmatively creating risk and merely failing to prevent harm. However, this distinction can be misleading. The proper question is not whether an actor's failure to exercise reasonable care entails the commission or omission of a specific act. Instead, it is whether the actor's entire conduct created a risk of harm. For example, a failure to employ an automobile's brakes or a failure to warn about a latent danger in one's product is not a case of nonfeasance governed by the rules in this Chapter, because in these cases the entirety of the actor's conduct (driving an automobile or selling a product) created a risk of harm. This is so even though the specific conduct alleged to be a breach of the duty of reasonable care was itself an omission.[187]

Although the Third Restatement statement concludes it is less and less useful to engage in a conduct/non-conduct inquiry, it falls just short of asserting that persons are not individuals but always responsible for considering others. At its core, the problem with the Third Restatement is that it gestures towards a standard of care that sounds like a general ethics of care, but it

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while the Civil Rights Act of 1957 granted women the right to serve on federal juries, it wasn't until 1973 that all fifty states enacted similar state level rights).

184. Abigail Rowe, *The Parity Paradox*, BEST LAWYERS (June 25, 2018, 1:03 PM), [https://perma.cc/HU3Y-R8AC] (reporting that women made up 50.3% of graduating law school classes and 51.3% of currently enrolled classes in 2017); Elizabeth Olsen, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), [https://perma.cc/E8DD-34GC].

185. RIPSTEIN, *supra* note 156.

186. Abraham & Kendrick, *supra* note 157, at 1698.

187. RESTATEMENT (THIRD) OF TORTS § 37 cmt. c (AM. L. INST. 2010).

fails to make the full leap. Duty is always about a relationship. While some lament that the Third Restatement removes the relational aspect of duty, it does not—it expands the relational aspect duty to conceptualize personhood relationally to a whole.[188] By attempting to assert that more people are owed a duty of care presumptively, the Third Restatement supports the idea that pure individualism will not suffice; instead, the reasonable person should recognize the value of human life and the quality of that life in relation to others. Relatedly, how to meet that duty, and specifically what is reasonable is an inquiry into questions of what the essential expectations of human existence are: how to live and how should others live around or with you. It is also an obsession of tort law.[189] Through this doctrine, tort pronounces what is socially reasonable and rational behavior,

> Ordinary care is what a reasonably prudent person would do under the circumstances. It is more than minimal care and less than extraordinary care. It is geared to what an average person would do, in the normal case, and both its moral significance and its institutional role cannot be understood apart from one another: the jury is supposed to decide what a reasonably prudent person would do under the circumstances.[190]

Every tort theory considered thus far has a take on how to gauge reasonableness, a hallmark expectation of behavior embedded in the law. The breach element of negligence, the expectation of reasonableness, is something uniquely human; we don't expect it to apply to animals or objects (yet).[191] The reasonable person is an everyone and a no one—someone who is predictable in all aspects of their person, consistent in a way we

188. *See* John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 692 (2001).

189. Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 822-23 (2001) ("For as long there has been a tort of negligence, American courts have defined negligence as conduct in which a reasonable man . . . would not have engaged.").

190. Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1255-56 (2009).

191. There is one record of an odd foray by a South African court attempting to discern what constitutes objectively reasonable behavior by a dog. *The Provoking Dogs Problem 1*, J. L. SOC'Y SCOT., March 1993, at 97, 99 (Peter B. Kutner & Cathy Powell trans.). This inquiry unsurprisingly was not widely adopted subsequently.

know no human to be. And yet, here in tort we hold real people up to this theoretical marvelous being and in doing so ask—who should this archetype of human ideal be?

The development of reasonableness is at least partially intertwined with duty: to the extent a duty is not recognized, an inquiry into reasonableness is not triggered. Currently, "no duty to confer a benefit" concepts lead to some counterintuitive conclusions regarding expectations for reasonable human conduct: that one should only expect people to be reasonable selectively—when they "act."[192] This rule, as it stands, indicates that as a matter of positive law it is reasonable human behavior, when there is no risk or potential grievous harm to themselves to fail to help another person even where the consequence would be the loss of human life or serious bodily injury.[193] Thus, under the "no duty to confer a benefit" rule, tort law not only does not expect reasonable behavior on the basis of an increasingly arbitrary action/non-action distinction, it condones behavior that would appear to be objectively unreasonable—and that of a sociopath.[194] General duty and an "ethics of care" would banish such selective reasonableness.[195]

To document the history of the reasonable person standard is a foray into the evolving standards of human behavior.[196] Instrumentalists would likely argue that reasonableness should be

192. RESTATEMENT (SECOND) OF TORTS § 314 (AM. L. INST. 1965) (stating the no-duty-to-rescue rule, "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

193. RESTATEMENT (SECOND) OF TORTS § 314, illus. 1, 4 (AM. L. INST. 1965) (discussing various hypotheticals including a blind man walking into a street in front of an oncoming automobile or a capable swimmer choosing to turn away from saving a drowning person).

194. This "no duty" rule has been challenged by the academy for over a century. *See* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112-13 (1908); Bohlen, *supra* note 180, at 217. Prosser and Keeton noted in their famous treatise that the no duty to rescue decisions were "shocking in the extreme" and "revolting to any moral sense." KEETON ET AL., *supra* note 159, at 375-76.

195. Such an "ethics of care" would focus on, "[a]n ethic of responsibility and care, based on perceptions of human beings as interconnected and mutually dependent, would enrich our legal . . . understanding of responsibility." Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 904 (1990).

196. *See* Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131, 2160 (2015).

held to a normative standard seeking certain policy goals, while others would take a positivist approach and monitor growth of law from the standpoint of individual cases.[197] However, what constitutes reasonable behavior is constant only in its fluidity. An example of the renegotiation of reasonableness is happening in the space of parental negligent supervision, where courts have expanded the scope of parental liability over time.[198] Here, societal shifts in parenting norms have redefined what it means to be a reasonable parent. Tort cases from the late 1800s to early 1900s present a societal sense of proper parental supervision that runs counter to the high level of supervision that is a societal norm for many today.[199] For example, in a case involving a four-and-a-half-year-old child being run over by a horsecar as he crossed the street without parental supervision, the court instructed the jury that it is only prima facie negligent supervision to let a two-year-old child cross the public street unattended.[200] Times have changed, and today, in the context of cyberbullying, parties seek to have parents be legally responsible not only for the in-person action of children but for supervising children's potentially twenty-four hour digital and virtual activity.[201]

B. Injury Defines Wholeness

Since antiquity, the question of what it means to harm another person has always laid at the heart of conceptualizing what it means to be a person. Aristotle wrote about defining personhood in relation to what expectations humans should have normatively about their right to live free from harm.[202] It is in juxtaposition to this "wrong" or "harm" that a society can discern

197. Miller & Perry, *supra* note 43, at 323 (arguing that all reasonableness is either normative or positive).

198. Porter, *supra* note 138, at 563.

199. *See id.* at 555.

200. *See* Lynch v. Smith, 104 Mass. 52, 54-55 (1870).

201. Denis Binder, *A Tort Perspective on Cyberbulling*, 19 CHAP. L. REV. 359, 360 (2016) ("Traditional bullying was limited in time and space. Today's cyberbullying can occur at any time on a global basis through the World Wide Web.").

202. *See* Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 410-11 (1989) (discussing Aristotle).

what it means to have "rights" or to be "whole." One of the primary questions tort law negotiates is harm.[203] If one accepts the logical conclusion that that harm is always relative to unharmed, the relationship between torts and norms of the human condition is apparent.

Some argue that conduct can be "wrongful and tortiously actionable" but "need not express anything about the victim."[204] If tort is understood in terms of compensation, rather than identity, that might be the case. However, even in engagements where no wrongful act occurs, there is still the ability of the victim to assert what is a "wrong," and therefore what is, in their estimation, the correct treatment due to a human being, by articulating a harm. By recognizing this person as a litigant in the pursuit of their tort claim, American pluralistic society has also recognized the relevance of this victims' view on the subject of human dignity and personhood. All tort cases require a harm,[205] and so long as we are engaged in the projects of determining what is a harm, we are engaged with the question of what a basic determination of a non-wrongful state is. Said otherwise, the determination by the perceived "victim" that wrongful action has occurred, is itself both expressive and active. It imposes the need for action upon another—the defendant, to respond to the plaintiff's articulated concept of harm.

Some of today's harms likely would be inconceivable to people three hundred years ago, who lived and worked in day-to-day conditions that were physically more difficult, uncomfortable, and dangerous than today. In the past, children worked rather than attending school.[206] Compared to today, lifespans were short, jobs dangerous, and the population was subject to harsh conditions and limited medical intervention.[207] Harms when considered relative to this base condition would need to be fairly egregious to be recognized. It is no wonder then

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203. Jean Thomas, *Which Interests Should Tort Protect?*, 61 BUFF. L. REV. 1, 4 (2013).

204. Zipursky, *supra* note 97.

205. *See* LEWIS & KUERSTEN, *supra* note 118.

206. Michael Schuman, *History of Child Labor in the United States—Part 1: Little Children Working*, U.S. BUREAU OF LABOR STAT. (Jan. 2017), [https://perma.cc/7SSX-645T].

207. *See* Sharon Basaraba, *Life Expectancy from Prehistory to 1800 and Beyond*, VERYWELLHEALTH (June 23, 2023), [https://perma.cc/J68P-SDWU].

that cognizable legal harms in torts historically focused on the basic physical safety of the person and their property as paramount.

While the commitment to the physical harms endures to this day, torts conceptualization of harm has developed significantly to include broader conceptions of physical space, broader emotional harms, and economic ones.[208] This incremental expansion of what constitutes harms recognizes a different base expectation for a dignified human life and clarifies what it means to be "whole."

Harms in torts have long been recognized as sacrosanct to the human right to control access to one's physical person.[209] One of the oldest common law torts is battery.[210] According to the Restatement (Second) of Torts, battery requires an act intending to cause a harmful or offensive contact with another person, or an imminent apprehension of such a contact, and that such an offensive or harmful contact directly or indirectly results.[211] Battery recognizes not only the right of people to be free from physically harmful touches by others, but also has long recognized an offensive touching as wrongful.[212] This doctrine persists and continues to extend the concept of harm beyond the purely corporal—an offensive unwanted touch, is a harm.[213] In acknowledging such, torts establishes a human right to be free not

208. Traditionally, torts did not recognize pure economic loss. *See* DAN B. DOBBS, THE LAW OF TORTS § 452, at 1283 (2000). Here, "[t]he term 'economic loss' refers to damages that are solely monetary, as opposed to damages involving physical harm to person or property." Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 873 (9th Cir. 2007).

209. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless **by** clear and unquestionable authority of law.") (emphasis added); Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) (Judge Cardozo notes, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .").

210. Melissa Mortazavi, *Tainted: Food, Identity, and the Search for Dignitary Redress*, 81 BROOK. L. REV. 1463, 1488 (2016) [hereinafter *Food, Identity, and the Search for Dignitary Redress*].

211. RESTATEMENT (SECOND) OF TORTS § 18 (AM. L. INST. 1965).

212. Crosswhite v. Barnes, 124 S.E. 242, 244 (Va. 1924) ("[T]he slightest touching of another . . . if done in a rude, insolent, or angry manner, constitutes a battery for which the law affords redress.").

213. Johnson v. United States, 559 U.S. 133, 139 (2010) (affirming that force, an element of battery, is, "satisfied by even the slightest offensive touching.").

only from physically deleterious or painful touches, but the right to choose what touches to allow, and a societal ability to weigh in on non-physically harmful touches all people should be free from.

The parameters of the right to the sanctity of the physical person have changed and grown over time. The incremental institutional structure of tort allows for gradual development and captures changes in emerging societal consciousness of human rights, particularly as they pertain to our physical person. The doctrine of extended personality is an example of such an extension of this physical personhood.[214] The doctrine of extended personality protects parties from unwanted harmful or offensive touching of clothing or other objects closely identified with the body.[215] Harm so defined by this doctrine is focused on recognizing human dignity.[216]

Consider the case of *Fisher v. Carrousel Motor Hotel, Inc.*, where an African American NASA mathematician attending a work conference at a hotel club in Houston had his plate forcibly yanked from his hands at the buffet and told, using a highly charged racial slur, that African Americans were not allowed to be served in the club.[217] No tort is devoid of context—this case took place in 1967, at the height of a nationwide reckoning with systemic legal disenfranchisement of African Americans.[218] Desegregation of places of common social interaction, particularly lunch counters and restaurants, charged this interaction with specific meaning and offense.[219] The court's clear and strident application of the doctrine of extended

214. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 9, at 33 (3d ed. 1964) (The interest protects "the integrity of [a plaintiff's] person and includes all those things which are in contact or connected with it.")

215. RESTATEMENT (SECOND) OF TORTS § 18 cmt. c (AM. L. INST. 1965).

216. *Id.* ("Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed.").

217. 424 S.W.2d 627, 628-29 (Tex. 1967). The use of this slur is material to the fact of this case, as it makes clear the core dignitary interest being defended.

218. *See* Farrell Evans, *The 1967 Riots: When Outrage Over Racial Injustice Boiled Over*, HISTORY (June 21, 2021), [https://perma.cc/FM2A-VSYJ].

219. *See* Heart of Atlanta Hotel, Inc. v. United States, 379 U.S. 241, 250 (1964); Hamm v. City of Rock Hill, 379 U.S. 306, 306 (1964); Katzenbach v. McClung, 379 U.S. 294, 294 (1964).

personality—extending beyond clothes or a cane—was a clear declaration of Mr. Fisher's human right to dignified treatment, and what the parameters of that treatment were.

Courts have also extended harms beyond person to person or extended-person contact. Persons and their extended personality can also be wrongfully touched by objects in the control of the defendant—so it is not only that a person has a human right not to have their body touched by another person's body, but by another person by an object under their control.[220] Court have applied the concept to recognize wrongful impact to the person of another by substances as ephemeral as a gas, like second hand smoke, or even light, in the form a purposefully directed laser pointer.[221]

What is wrongful, and therefore what is rightful treatment, is an ongoing project and continues to be negotiated in the context of tort cases today. Domestic violence, once marginalized as a tort action and sublimated under the doctrine of spousal immunity, now actively articulates harm in tort.[222] Sexual harassment is another area of live development in project of defining harm, and with it, the parameters of personhood. Recent years have seen significant public condemnation of sexual harassment through the #metoo and #timesup movements.[223] Such public discussion is markedly different from the sensibilities reflected in tort cases from as little as thirty years ago. Consider the case of *Paul v. Holbrook*, where a male office worker (Holbrook) repeatedly made sexually charged comments to a female co-worker (Paul) and then approached her from behind

220. *See* Leichtman v. WLW Jacor Commc'ns, Inc., 634 N.E.2d 697, 699 (Ohio Ct. App. 1994) (stating that the contact between the plaintiff and cigar smoke was sufficient to state a claim for battery).

221. Shaw v. Brown & Williamson Tobacco Corp., 973 F. Supp. 539, 542 (D. Md. 1997) (regarding a cigarette company sued for battery by a person exposed to secondhand smoke); Adams v. Commonwealth, 534 S.E.2d 347, 351 (Va. Ct. App. 2000) (affirming trial court's decision finding battery where a laser beam was deliberately pointed at the plaintiff's eye and no physical harm occurred).

222. Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 134 n.64 (2001) (noting that claims brought under the Violence Against Women Act usually included concurrent intentional tort claims).

223. For further discussion, *see* Melissa Mortazavi, *Incivility as Identity*, 2020 MICH. ST. L. REV. 939, 945 n.20 (2020) (discussing the origins, purpose, and distinctions between the #metoo and the #timesup movements).

and massaged her shoulders twice, stopping when asked.[224] In the 1990s, when this case was originally heard, the trial court dismissed on summary judgement Paul's claims of battery, finding the shoulder massages to be non-offensive as a matter of law.[225] In this closely contested case, the appellate court reversed and remanded on battery charges alone, conceding that a trier of fact could find the massages objectively offensive, and that sufficient intent could be inferred from the alleged facts.[226]

Today, courts are much more consistent about "uphold[ing] offensive-battery liability based on a nonconsensual sexual contact."[227] This includes when parties claim this is a "joke" or that they did meant no harm.[228] Tort law has developed to where courts recognize consistently that a reasonable trier of fact may find such touching offensive and refuse to dispense of such cases summarily against the plaintiff.[229] Some jurisdictions now categorically find nonconsensual touching of certain body parts (like the buttocks) constitutes battery.[230] The right of a person to be free from unwanted offensive touching is made clearer by the development of such case law. Some tort claims against individual defendants, rather than institutional ones, are not always pursued, allowing cases to be dismissed on the basis of a lack of vicarious liability, before reaching the torts merits issues.[231] Including individual battery claims would allow further

224. 696 So.2d 1311, 1311 (Fla. Dist. Ct. App. 1997).

225. *Id*. at 1312.

226. *Id.* (stating that "the act of approaching a co-worker from behind while on the job and attempting to massage her shoulders is, in the circumstances of this case, not capable of such summary treatment. On these facts, offensiveness is a question for the trier of fact to decide").

227. RESTATEMENT (THIRD) OF TORTS § 101 DD cmt. g (2014).

228. Kelly v. Cnty. of Monmouth, 883 A.2d 411, 415-416 (N.J. Super. Ct. App. Div. 2005) (finding a live battery claim when defendant claimed he had engaged in "horseplay" when he grabbed plaintiff's genitals); Burns v. Mayer, 175 F. Supp. 2d 1259, 1269-70 (D. Nev. 2001) (upholding battery where plaintiff's bra strap was snapped and her buttocks hit with a clip board).

229. Harper v. Winston Cnty., 892 So.2d 346, 354 (Ala. 2004) (denying summary judgement in a case of wrongful workplace touching finding it to be an issue for the trier of fact).

230. *Kelly*, 883 A.2d at 415-16 (observing that "we have held that a non-consensual touching of a woman's breast or buttocks constitutes a battery").

231. Evans v. Wash. Ctr. for Internships & Acad. Seminars, 587 F. Supp. 2d 148, 151-52 (D.D.C. 2008) (finding that a battery claim could remain live as a matter of factual dispute, however plaintiff did not meet the requirements to establish contributory negligence

development of tortious harassment, which could include increased consideration of imbedded heteronormative assumptions.[232]

Tort plaintiffs continue to push forward new ideas of what constitutes a wrong or harm in the context of food litigation, expanding what we consider to be a whole person in the process.[233] There, parties assert new conceptions of harm in lawsuits where plaintiffs argue not that food was poisoned in a physiological sense, but tainted in a way that undermined their identity as human beings.[234] This identity might manifest in the form of the connection between food and an individual's faith in terms of kosher or halal laws, or in terms of their political and social consciousness (i.e., vegetarianism, fair trade, or animal husbandry).[235] Here, plaintiffs have relied on the malleability of tort as a legal medium to bring claims to articulate their conception of personhood—that they were not whole when subject to ingesting foods that undermined their identities, and that they were harmed by the actions of food producers and suppliers.[236]

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on the part of the institutional defendants sued, and therefore the claim was dismissed); Corbitt v. Home Depot U.S.A., Inc., 589 F.3d 1136, 1167 (11th Cir. 2009) (holding that summary judgement was appropriate when the employer did not have actual knowledge of the tortious conduct underlying the battery claim); Corbitt v. Home Depot U.S.A., Inc., 598 F.3d 1259 (11th Cir. 2010) (ordering the cause to be reheard by the court en banc); Corbitt v. Home Depot U.S.A., Inc., 611 F.3d 1379 (11th Cir. 2010).

232. Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 532 (2013).

233. *Tort at Democracy*, *supra* note 68, at 938-951 (discussing at length how food cases articulate the idea of ongoing physical harm to health over time, seek to conceptualize harms as being about how products are made rather than what the final product is, and how some food cases seek to assert expressive harms to identity, free choice, and ethics).

234. *Food, Identity, and the Search for Dignitary Redress*, *supra* note 210, at 1487-92 (discussing battery as a cause of action in cases where parties allege harms from offensive food related touching that is not recognized in a regulatory context).

235. *See* Lateef v. Pharmavite LLC, No. 12 C 5611, 2013 WL 1499029, at *1-3 (N.D. Ill. Apr. 10, 2013) (in which a Muslim plaintiff bought "vegetarian" vitamins and ingested them only to learn later that they were case in pork. The plaintiff sued in tort, despite the fact that there is no regulatory requirement to disclose such trace uses on the label); Gupta v. Asha Enters., L.L.C., 27 A.3d 953, 953 (N.J. Super. Ct. App. Div. 2011) (in which observant Hindus who were vegetarian attempted to sue to assert a harm to them when served food that has animal products in them); Popovitch v. Denny's Rest., No. B177296, 2005 WL 1926550, at *1 (Cal. Ct. App. Aug. 12, 2005) (in which a vegetarian woman sued after being served a meal with meat after being assured that the meal did not contain meat).

236. *See* cases cited *supra* note 235.

But even when claims do not succeed, in the act of bringing them, the plaintiffs put forward their conception of harm and it must be considered (even if ultimately rejected). This process of challenging and changing what it means to be harmed is how concepts of being a whole person are legally constructed. In incremental terms, the impact of these cases has yet to be fully realized; however, that doesn't negate that this is a function of tort and how it is being used.

In addition to physical harms, traditional torts have always recognized some form of limited emotional component to underlying claims. In the intentional torts space, it was incorporated into standards for torts like assault which requires apprehension, and battery to the extent touching was offensive but not otherwise harmful.[237] Although gradual, the ambit of emotional harms has grown. It was only relatively recently, that emotional harms were recognized as freestanding and actionable separate from physical harms or the threat thereof.[238] Intentional infliction of emotional distress is a free-standing area where the duty to care for the emotional state of another has been successfully articulated.[239] In May 2021, the American Law Institute adopted the Third Restatement as it pertains to intentional torts.[240] The Third Restatement discusses intentional infliction of emotional distress as imposing a duty to avoid intentional or reckless severe emotional harm to another, stating that "[a]n actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm."[241] Cyber bullying is another space where plaintiffs are arguing to redefine wrongful conduct in ways that defy a strict physical tort

237. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (1768) (discussing assault and that threat and fear of bodily injury).

238. Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1524 (1985).

239. *See id.* at 1522.

240. *Restatement Third of Torts: Intentional Torts to Persons Is Approved*, AM. L. INST. (May 18, 2021), [https://perma.cc/H7Z4-9JHA].

241. RESTATEMENT (THIRD) OF TORTS § 46 (AM. L. INST. 2012) (discussing intentional infliction of emotional distress as imposing a duty to avoid intentional or reckless severe emotional harm in another).

requirement and fuse with significant emotional harm components since "[t]raditional bullying was physical, often with psychological complications."[242] In contrast, "[t]oday's cyberbullying is psychological, often with physical complications."[243]

CONCLUSION: IMPLICATIONS FOR ACCESS

Placing a price on the human life did not end with slavery—tort law does this every day.[244] Tort disputes decide, on a granular level, whether human life carries with it value—and if so, how much.[245] Torts also define the quality of human life, and with it, what it means to be a person. It is within tort's institutional structure—based on person by person, incremental growth—that a pluralistic society reveals what is society's true bottom line: who counts, what treatment can a person expect and hold another to, and finally, what does it even mean to harm another person? What does it mean to be safe and whole? Despite the growth of overlapping regulatory and statutory law, the scope of who may bring a claim, what torts are recognized, and attendant obligations have often grown. Here, in the development of common law torts, where plaintiffs can control their own articulation of self, plaintiffs assert their view of what is a common person.

The structure of tort law itself is vitally linked to dignitary interests and the manifestation of human dignity through law. Various existing tort theories provide meaningful insight into understanding the unique function of tort but are incomplete on their own. This Article not only provides a meaningful alternative

242. Binder, *supra* note 201, at 360.

243. *Id.*

244. Popular entertainment remains understandably fascinated with this function of tort. *See, e.g.*, WORTH (Higher Ground Productions 2020) (dramatizing the administration of the 9/11 victim's compensation fund which included charging the special master with the tasks of valuing the lives of the different decedents).

245. The most common metric for this value continues to be money. Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL into Tort Damages*, 96 NOTRE DAME L. REV. 1479, 1479 (2021) (advocating for adopting a unform "value of statistical life" for all people) ("The substitution of a uniform VSL for race- and gender-based statistics addresses the racialized and gendered deterrence gap that has led to skewed incentives for actors to take precautions against harms to blacks and women.").

to the morals versus efficiency dichotomy,[246] but it provides a context for understanding the field of torts and its contours as well as why tort, as an area of law, is worth preserving and broad access to bringing tort suits is vital.[247] Tort law creates a unique institutional venue where individuals manifest their perception of what is means to be a whole person, have value, and live with human dignity. When unimpeded, tort law may be the truest and clearest expression of society's real-time sensibilities regarding basic human rights. It reflects understandings of personhood that have grown over time; there are more duties to each other, those duties run deeper, there are less fora of exclusion and less people excluded from those, and there are more harms tort law recognizes as real. Tort law is a progression towards a world where people must consider impacts on other people broadly and may expect others to take notice and care of various harms they experience.

Tort exists within an ecosystem of laws and social norms, some of which are likely more effective at efficiently allocating resources, providing deterrence, or supporting corrective justice goals. Economists have long argued that differences in individual motivation to bring lawsuits is in tension with long-term social goals because individuals inefficiently create negative externalities (in the form of legal costs to others) while undervaluing broader benefits (such as deterrence).[248] If the primary function of tort is understood as efficiency, then tension may be fatal. However, if aggregating individual exercises of autonomy to define what personhood is and human value is the goal, then this "tension" is a strength.

Viewing tort law as being significantly involved in the project of constructing legal personhood has important implications. With growing bodies of statutory and regulatory law, a robust insurance industry, and a criminal legal system that punishes malicious action, tort can appear redundant or

246. *See* discussion *supra* Part II.

247. *See* discussion *supra* Part III.

248. Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 582 (1997).

outmoded, a vestige of a pre-code legal landscape.[249] If tort is about imposing liability, it can be unclear how commonly stated goals of torts—whether efficient allocation of cost or enforcing moral justice—are best served by the tort system, as opposed to other legal vehicles.[250] Concurrent systems like criminal, regulatory, and statutory law increasingly provide other avenues for parties to address many of these needs. Tort skeptics have long pushed to limit the ambit of tort law—going so far as to argue it is all together unnecessary.[251] Some of these efforts limit access through alternative dispute resolution or the creation of alternative compensation systems.[252] Others use statutory law to change substantive criteria, set aside common law doctrine, or truncate available redress.[253]

Such "reform" presents torts as an antiquated vehicle to individual compensation, a misused clunky tool for policy change. Such views are unsurprising, given the criteria tort scholars have set forth for justifying and evaluating the torts system. Dominant tort theories of economic efficiency and corrective justice do little to quelch such middling assessments. Tort law often fails on these theorists' own terms—it is simply not efficient. Litigation is not the efficient way to allocate any resource.[254] As for brokering justice between a wrongdoer and a

249. Sugarman, *supra* note 59, at 611 (dismissing tort's peacekeeping function) ("[A] more powerful peacekeeping force is that most people realize that they would risk criminal liability if they deliberately inflicted harm on a tortfeasor.").

250. Engstrom & Rabin, *supra* note 90, at 353 n.346 ("If one were to tally comparative advantages, tort law is inferior to regulatory activity in certain respects.").

251. Sugarman, *supra* note 59, at 558.

252. Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 39-44 (1988); Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CAL. L. REV. 898, 898 (1985).

253. Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1503 (2009) ("[S]tate legislative 'tort reform' efforts have continued unabated for over two decades as states enact increasing numbers of statutes to place limits on compensatory and punitive damages, create regulatory compliance defenses for consumer claims against drug manufacturers, impose new statutes of limitation and statutes of repose for products liability and other tort claims, place additional limits on claims for medical malpractice, and otherwise supplant historic common law tort developments in these areas.").

254. Sugarman, *supra* note 59, at 611 (noting that there is "a general awareness by those who know anything about the tort system that the road to legal victory is often long and treacherous").

suffering receiver of wrongdoing, tort is haphazard—at once over and underinclusive.

But when tort law is understood as a unique driving force in the development of the law of personhood, limiting access to torts take on a wider and more sinister dimension. Then, disparate access to tort suits by different populations with the United States leaves necessary persons, facts, and perspectives underrepresented.[255] Each of these cases are lost opportunities, of which there are few (if any) redundancies in our legal system.[256] As a lab for developing societally current legal norms, it is particularly important that a broad swath of people have access to bring tort claims and that those claims are brought effectively.[257] Some argue civil Gideon, providing a right to counsel in civil claims, is the answer.[258] Others push back against civil Gideon in favor of examining and reforming pro se litigation rights.[259] Thought needs to be put into why these cases are not being brought. Some of this has to do with how lawyers take cases: lawyers choose cases not on the basis of their merits alone, but also on the basis of potential monetary recovery (unless the plaintiff can pay their fees out of pocket). When confronted with a workplace sexual harassment claim, it may well be that lawyers

255. Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2260-63 (2013) (discussing Gideon as a human right to "civic participation" including the right to counsel, rather than a "need" based inquiry).

256. There is an undeniable trend towards fewer trials (which eliminate the collective public aspect of personhood formation), shorter trials, and more civil litigation where clients are unrepresented by a legal professional. Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2131-32 (2018). Engstrom asserts that civil trials are vanishing and, in 2000, made up less than three percent of the overall federal court docket. *Id*. at 2131. Of those that remain, they are shorter than ever before and that this is alarming in its own right because remaining trails are hampered in their ability to be effective. *Id.* at 2133. "As the number of trials dwindles, the few that are left have an outsized and ever-larger effect—when it comes to enforcing laws, setting precedent, establishing settlement rates, promoting accountability and transparency, and, more broadly, shaping Americans' interactions with, and conception of, the civil justice system." *Id.*

257. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 968-72 (2012); *cf.* Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175, 175-76 (2019).

258. *See* Hon. Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 503 (1998).

259. Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1227-28 (2010).

look that the employment law contours and decide that the necessary employer knowledge elements aren't there, and leave it at that, not bothering to sue the potentially judgment proof coworker for battery.

Regardless, for those who seek to limit access to courts, this Article cautions: the stakes of "reform" that truncates the ability to bring a tort action are higher than previously assessed.[260] When we create pockets outside of tort law, through sovereign immunity or behind the quick doors of settlement, the impacts can be far-flung. Moreover, as courts and lawmakers contemplate incursions, common law torts, preemption by constitutional law, and regulatory or legislative action, we must consider the personhood interest lost when we cut out torts. This incursion on our most fundamental of rights, is a loss unmitigated elsewhere in our legal system.

260. Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 876 (2009) (citing as "a general problem of institutional design" the need to "best [] prevent undesirable lawsuits from entering the court system"); Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. F. 109, 109-10, 121-23 (2010) (discussing how shifting pleading standard may limit access to courts).