Irresponsible Matter: Sublunar Dreams of Injury and Identity

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Insiders, Outsiders, Injuries, & Law

REVISITING "THE OVEN BIRD’S SONG"

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Irresponsible Matter

Sublunar Dreams of Injury and Identity

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I can't imagine anything
    that I would less like to be
    than a disincarnate Spirit . . .
the sublunar world is such fun,
    where Man is male or female
    and gives Proper Names to all things.

I can, however, conceive
    that the organs Nature gave Me . . .
dream of another existence
    than that they have known so far
yes, it well could be that my Flesh
is praying for "Him" to die,
    so setting Her free to become
irresponsible Matter.

W. H. Auden, No, Plato, No (1973)¹

Like David Engel's "The Oven Bird's Song," the title of this chapter borrows from a poem. Engel's title referred to Robert Frost's poem "The Oven Bird," which, like Engel's essay, describes a response to the perception of a rapidly changing landscape.² In a note beneath the text, Engel explains that, in the poem, the oven bird "sings loudly" in an apparent protest against the changing

environment: “The question that he frames in all but words/Is what to make of a diminished thing.” Engel’s research subjects, whose stories are told in the essay, experienced a similar struggle as they faced the seeming disintegration of their community that accompanied globalization. By referencing Frost’s poem, Engel beautifully conveys both the sadness of his subjects and his compassion for their experience.

The title of my chapter borrows from a line in W. H. Auden’s “No, Plato, No,” which also describes a response to a rapidly changing environment. Auden wrote the poem a few months before he died; the poem is a response to his dying body. Similar to the oven bird, Auden sings a song of resistance: he “can’t imagine anything that [he] would less like to be than a disincarnate Spirit.” But while it is clear that Auden does not want to say goodbye to his body, “No, Plato, No” strikes a more hopeful note than “The Oven Bird,” and so does this chapter. Unlike the oven bird of Frost’s poem – and the subjects of Engel’s essay – Auden does not ask himself what to make of his body’s diminished state. Instead, he dreams of a different bodily existence, one in which his body would be free to become what he called “irresponsible matter.”

Following Engel, I borrow from Auden’s poem in this chapter to signify both the message and the mood of the chapter’s subject: how changing perceptions of bodily identity may be shaping the future of tort law. Like Auden, today’s gender and disability activists seek freedom from bodily categorization, or from what Auden called “giv[ing] Proper Names to all things.” There are also signs of increasing resistance to organizing the body as “responsible matter,” not only among activists but in the culture writ large. These growing demands for bodily freedom echo the dreams of Auden in “No, Plato, No” in both substance and spirit and, as in Auden’s poem, the tone of the resistance is more playful than sad. This chapter is about how these new understandings of the body may shape the future of tort law.

As in “The Oven Bird’s Song,” this is also a story about community “insiders” and “outsiders.” But, again, the tenor of the story strikes a very different note. Here, the “outsiders” are not only “outsiders” in the community (as they were in Engel’s essay) but also outsiders to law. In many instances, their outsider identities effectively preclude them from making a claim at all. Despite this, as compared to the “outsiders” in Engel’s study, it is not uncommon for bodily identity “outsiders” to relish their “outsider” status. They do not seek to become “insiders,” through law or any other means, even as the

3 Ibid, 551.
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communities around them have become more accepting of bodily differences. Instead, today's gender and disability activists seem to be seeking to legitimize "outsider" status, not by becoming "insiders," but through bodily performances that call into question the assumptions upon which "insider"/"outsider" distinctions are made.

The thesis of this chapter is that tort law is currently not well equipped to deal with these developments. Its preoccupation with what I call the "categorical productivity" of bodies—through which "insiders" and insiders to the law are clearly defined—is losing its cultural relevance. More fundamentally, the growing disconnect between tort law's approach to the body and contemporary understandings of bodily identity raises questions about tort law's capacity to deliver on its promise of meaningful justice, especially for the growing number of those who either refuse or are unable to comply with the assumptions about bodies on which tort law currently relies.

My argument proceeds in three steps. The first section considers tort law's reliance on categorical assumptions about bodily productivity as a historical feature of tort law. It considers the different ways in which the body has been categorized in tort law and how these categories have been linked with conclusions about productivity to determine the viability of claims. Drawing on Engel, this section also describes how this emphasis on "categorical productivity" has helped to construct certain categories of individuals as "outsiders," both in and outside of courts.

The second section explores the current cultural challenges—both theoretical and practical—to tort law's demand for categorical productivity. It describes the emerging resistance to identification along categorical lines and the devaluation of productivity as a desirable bodily aim. Instead, many people seem to be seeking a more playful existence for their bodies, where there is less concern with conforming to bodily expectations and the demand for productivity. This section also suggests that these changing attitudes may be representative of a new form of individualism, grounded in a desire for self-expression, that was not identified by Engel in "The Oven Bird's Song."

The third section assesses the implications of these developments for the future of tort law. It argues that emerging, more complex conceptions of bodily identity will require tort law to move away from its current reliance on category-driven assessments of injuries. What replaces it is less clear. One possibility is a return to a more individualized approach to injuries that places more emphasis on suffering and pleasure than on productivity. Another possibility, perhaps related to the first, is the development of new legal rules that protect and foster what appears to be a growing interest in bodily self-expression.
Tort Law's Reliance on Categorical Assumptions About Productivity

For many years now, tort law has been preoccupied with the categorization and productivity of bodies, so much so that, in most instances, the possession of what we might call a “categorically productive” body is a condition precedent to recovery. As evidence of this, the two most dominant approaches to tort law - corrective justice theory and law and economics - both assume that the body should be restored to productivity after injury or compensated for any loss in productivity that cannot be restored. While in recent years there has been some progress toward recognizing non-bodily harm as a basis for claims, the productivity of the body remains the focal point of analysis in most tort cases. Perhaps as a result, it is not usually possible to make a viable claim unless some injury to the productivity of the body is alleged. Notably, this emphasis on the productivity of the body marks a departure from early tort law, where injuries were primarily understood in terms of damage to honor and reputation. Foucault blamed the increasing emphasis on the body on the rise of capitalism, which demanded increasingly productive bodies to maintain and increase profits. But we know that as early as the thirteenth century, English courts began to place more emphasis on the physical aspects of the injury and its impact on productivity. This important shift in the concept of injury, during what Marx would have called the pre-capitalist era, survives to this day.

As the law developed, jurisdictions utilized different criteria in their assessments of bodies. For example, some jurisdictions treated all fingers the same, while others focused on injuries to particular fingers. Similarly, some jurisdictions considered the loss of smell or speech to be injurious while others did not. That differential treatment exposes the cultural biases at play in assessing bodies for purposes of injury law which continue to this day.

There are generally two steps in contemporary analyses of the body's productivity in tort cases. The first step is the categorization of the body. During this phase, bodies are categorized according to race, gender, age,
disability, etc. The second step is the linking of the categorizations with expected levels of productivity, based on assumptions about the categories. For example, aging bodies and the bodies of women are generally assumed to be less productive. Similarly, certain categorizations are linked with a pre-existing failure of productivity, such that the body is deemed incapable of experiencing a legally cognizable injury. A body that is categorized as "disabled" before injury, for example, might find it difficult to obtain compensation for any losses associated with new injuries. A body that is re-categorized as "disabled" after an injury, in contrast, typically has a very strong claim. This is because the plaintiff's injuries will be deemed to have led to a failure of bodily productivity, which tort law has historically considered a compensable loss.

We can see the two steps of the analysis operating in a 1909 case involving the alleged false imprisonment of an African-American man. 11 After first categorizing the plaintiff's body according to race, the court then linked the categorization to assumptions about expected levels of productivity associated with the plaintiff's designated racial category. These assumptions led the court to conclude that it was appropriate to award a smaller amount of damages to the plaintiff because the amount of injury experienced by an African-American man for false imprisonment was not as great as that of a white man in the same position. 12 There were two categorical assumptions at play in the court's analysis. The first had to do with the assumed relatively lower baseline of economic productivity of the plaintiff's body before injury. The second involved an assumption about the plaintiff's capacity to experience injury. In both instances, the assumptions flowed directly from the court's initial categorization of the plaintiff's body, according to race.

A very similar practice is followed in contemporary tort cases, where categorical conclusions about the productivity of would-be plaintiffs enter into the legal analyses of tort claims under the guise of actuarial analyses, which rely on prior economic performance data as a marker of current and future productivity. It remains fairly common, for example, for courts and parties to use race-based and gender-based methods of damage computation in tort litigation. 13 These practices effectively make it more difficult for individuals categorized as women or non-white to state a financially viable claim. The same is true for older plaintiffs, whose productive years are largely assumed to be behind them.

11 The case is described in Chamallas and Wriggins, The Measure of Injury, 52-3.  
13 Ibid, 155-82.
In recent years, the movement toward capping non-economic damages has placed even greater emphasis on productivity. As a result, those with bodies associated with relatively less productivity before injury can find it especially difficult to succeed with their claims. Generally, young white men will find it much easier to retain a lawyer and pursue successful injury claims than old white men; whites will find it easier than non-whites; and men will usually find it easier than women. In each instance, the categorization of the body predicts the result, rather than the degree of pain and suffering that the injured individuals experienced.

While legal analyses in contemporary tort cases generally focus on the economic productivity of bodies, some conclusions are reached on the basis of the presumed failure of bodies to be productive in other aspects of cultural life. For example, in jurisdictions where hedonic damages are recognized, courts typically permit a jury to award hedonic damages on the basis of a disability diagnosis alone. In a similar way, courts also presume injury in so-called wrongful birth cases where the child is categorized as “disabled” at birth. The operational presumption in both instances is that a life with a disability is inherently less pleasurable than a life without one, even when there is no evidence offered to support this conclusion.

A similar type of categorical discrimination is at play in the treatment of plaintiffs whose pre-injury bodies do not fit clearly into a binary (male/female) sex categorization. Intersex infants and other children who undergo sex-assignment surgery, for example, find it difficult to state a claim for the often very serious injuries that result. The categorical assumption is that a body that cannot be clearly classified as male or female cannot be injured by actions that attempt to make the body conform, even when those actions lead to the loss of sexual function.

Because bodies classified as disabled and intersex are clearly able to lead economically productive lives, the failure of productivity in these examples relates to the presumed failure of the bodies to be productive in other aspects of life, such as experiencing pleasure or having physical attributes that the law associates with binary sex identification. By making this presumption, tort law assumes that to be classified as “intersex” or “disabled” is inherently undesirable, without any consideration of how the individuals involved might

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experience the attributes that prompted the classifications of their bodies in these ways. Thus, here the demand for categorical productivity presents not as a demand for bodies to demonstrate economic productivity but, rather, as a requirement that bodies accept the presumptions of the categories; e.g. individuals designated as “disabled” will experience less pleasure and individuals classified as “intersex” should attempt to qualify for binary gender classification instead.

These examples illustrate the role of bodily categorization in the analysis of tort claims. In each of the examples cited above, courts reached conclusions about whether plaintiffs could recover based on categorizations of the plaintiffs' bodies. In some instances, such as those involving the claims of women, people of color, and older plaintiffs, the categorizations are linked with a failure of economic productivity. In other cases, the categorization of the body will prompt courts to presume injury without further evidence. While the recovery outcomes differ, the analysis is roughly the same. In each instance, an assessment of the body’s productivity follows its categorization. These analytical practices reflect the liberal legal presumption – so prevalent in tort law – that bodies are meant to be categorically productive; that is, productive as men or women, as able-bodied or disabled, and as raced or aged, in both the economic and cultural realms. Moreover, bodies that are not categorically productive – bodies that cannot be categorized and linked with assumptions about productivity – cannot state a claim. Put differently, the presentation of a categorically productive body is a condition precedent to recovery in tort law.

Each of these examples also illustrates how legal practices help to construct certain categories of individuals as “outsiders” to tort law, in ways that are similar to those observed by Engel in “The Oven Bird's Song.” In the bodily identity context, claimants are constructed as “outsiders” both in terms of the limited viability of the claims of those who are deemed categorically unproductive before their claim of injury and in terms of the rapidity with which tort law assumes that other types of bodies can no longer be productive after injury (e.g. people with disabling injuries). In each case, the bodies are “outsiders” to tort law in the sense that they are no longer (or never were) linked with productivity.

The “outsiders” in “The Oven Bird’s Song” faced a similar fate. In most instances, the individuals were considered “outsiders” even before they attempted to pursue legal claims. Going to court did not help them to escape this assessment, despite the promise of a fair hearing. Although it is not a focus of Engel’s study, the “outsider” designation stemmed, in some instances, from perceived bodily differences. Engel notes, for example, that some community members alluded to race and ethnicity when describing their own “outsider”
status or the status of others.\textsuperscript{17} For these community members, as with many others who attempt to pursue tort claims, the "outsider" classification is literally written on the body.

As Engel recognized, tort litigation operates in ways that reproduce and help to construct social hierarchies. Of course, legal narratives reproduce and construct hierarchies in other areas of the law as well. But it is in tort law that the body itself is most closely scrutinized and that bodies act—more so than any other field of law—as material repositories of culture.\textsuperscript{18} Because of this, it is in tort law that the growing cultural demand for freedom from bodily categorization is likely to be experienced most acutely.

**CHALLENGES TO THE DEMAND FOR CATEGORICAL PRODUCTIVITY**

2016 opened with the deaths of two wildly popular, gender-fluid cultural icons: David Bowie and Prince. Among their many fans, Bowie and Prince came to signify a desire to be free of the expectations of gender and other bodily categories. Like Auden, both Bowie and Prince in their early days associated freedom with the death of "Him" and the emergence of Her. Bowie and Prince both wore eyeliner, high heels, and catsuits; Prince was partial to ruffles as well. As their popularity grew, however, both increasingly expressed a desire not to be categorized at all. Bowie was famously noncommittal about his sexuality. Prince sang, "I'm not a woman/I'm not a man/I am something that you'll never understand."\textsuperscript{19} Later, when Prince got into a feud with his record label, he changed his name to an unpronouncable symbol that fused the sex signs for male and female. When asked what he was doing, Prince declared that he was trying to tune into to a new, undefined "freequency."

Although Bowie and Prince were not especially political, many gender activists consider them heroes. The New York Times eulogized Bowie as the "patron saint of defiant outcasts" and credited him with bringing queer culture into the mainstream.\textsuperscript{20} Prince was described as "an artist who defied genre."\textsuperscript{21} But Bowie and Prince were not just admired by gender activists. Public grieving over their deaths was widespread. Spontaneous tributes to both artists

\textsuperscript{17} Engel, *Oven Bird's Song*, 555. \textsuperscript{18} Jain, *Injury*, 152.
erupted all over the world, especially for Prince. Even the White House was lit purple for a night in his memory.

In an article entitled "Listen to My Body Tonight: How Prince’s Transgressive Spirit Broke Boundaries,” NPR’s Ann Powers tried to explain why so many people were finding Prince’s death so difficult. According to Powers, it was partly Prince’s defiance of categories. “Prince gave us a new way into our bodies that was brainy, full of feeling and committedly defiant of categories.” But it was also that Prince provided a vision of how things might be different, of how people might “truly overcome the divisions that both define and continually limit our lives” and become more fully themselves. Prince’s music, Powers wrote, taught us “something vital” about the “multiple realities that pulsed beneath our own skins.” Others wrote similar things about Bowie’s cultural significance.

These sentiments are remarkable because of how well they correspond with more academic perspectives on the current cultural emphasis on the classification and categorization of bodies. Susan Bordo, for example, has expressed concern about the obsession with medical categorization of body “pathologies” and the demand for homogeneity of women’s bodies through plastic surgery, dieting, and physical training. Foucault described this type of control as “biopower,” which he believed was a response to the need for well-regulated bodies to maintain the capitalist system of production. Since the aim of biopower is to make people more productive, medical baselines increasingly focus on idealized conceptions of how bodies should perform, rather than the performance characteristics of average bodies. Over time, Foucault argued, we have become expert in diagnosing and treating the pathologies ourselves.

Foucault’s description of the operations of biopower resonated with many cultural and political figures, especially in the United States, where it seemed that what Foucault described had special relevance for contemporary cultural

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23 Ibid. See, e.g., Rogers, Was He Gay, Bisexual or Bowie? Yes.
and political experience. Drawing upon Foucault, several American scholars decried the demand for bodily normalization, especially in the contexts of gender and disability. Bordo, for example, described the myriad ways in which women's bodies were controlled through bodily classifications and how women learned to control themselves in response. Around the same time as this scholarly outpouring, Bowie and Prince became icons of cultural resistance to these same forces.

The politics of this cultural resistance, on the surface at least, have little to do with Foucault and his broader claims about the relationship of biopower to capitalism. Social critic Camille Paglia, for example—a defender of capitalism and no fan of Foucault—has named David Bowie as one of her most important influences. But there is a common theme of resistance to the increasing regulation, classification, and categorization of bodies—practices Foucault had described as critical to the operation of biopower. There are also some similarities in the tenor of the resistance. Foucault believed that resistance would take the form of an insistence on bodily pleasures. This is a clear theme in Paglia's work, but also one that runs through the cultural performances of musical icons such as Bowie and Prince (especially). It can also be seen in the new emphasis on pleasure, rather than productivity, among legal scholars writing about the body.

There are also echoes of Gilles Deleuze, with whom Foucault shared a close intellectual relationship. The similarities with the sentiments expressed by Auden in "No, Plato, No" are also remarkable. Deleuze's scholarship called for experimentation with bodily identity. Of particular note, Deleuze asked us to try to imagine bodies without organs. For Deleuze, a body without organs was a way of imagining the body as something other than an organized whole with the aim of productivity. Like Auden, Deleuze was concerned with freeing up the body to experience pleasures that cannot be captured by categorical demands such as male/female, crazy/sane, or, we might add, able-bodied/disabled. Experimentation with bodily identity, Deleuze speculated, might allow for individuals to get outside the categories and experience a more authentic "becoming."

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29 Bordo, *Unbearable Weight;* Mackenzie, "Somatechnics of medico-legal taxonomies."
Judith Butler tackled a similar theme in *Bodies that Matter* (2003). Butler began with the observation that social survival requires individuals to enact the expectations of their designated categories, not only through social performance but also by corporeally enacting the physical demands of their categorization.\(^{33}\) Surgeries on the bodies of intersex infants are an excellent example of this. Butler noted that the gap between the normative expectations of the categories (binary sex identity) and the performance (an intersex body) exposes the limitations of the categories but also creates opportunities for resistance. The behavior of parents who refuse to consent to surgery on their intersex infants, for example, might be read as resisting the practice of binary sex categorization.

Butler suggested that those who engage in cross-dressing practices, like Bowie and Prince, also engage in resistance that, perhaps unintentionally, disrupts categories. And it is worth noting that Prince's alter ego—Camille—is widely believed to have been inspired by a nineteenth-century French intersex person, sometimes known as Camille, whose private journals were published by Foucault. Whether the nineteenth-century Camille was truly the inspiration for some of Prince's gender category-defying performances is almost beside the point. What is remarkable is that many of his fans understand Prince's performances as a form of resistance, in ways that are reminiscent of Foucault, Deleuze, and Butler.

Importantly, Bowie and Prince did not simply refuse to perform within the accepted categories; they also seemed to resist the concept of categorization itself. Something similar can be seen in the work of the French performance artist, ORLAN. In a project she calls "The Reincarnation of Saint-Orlan," ORLAN is undergoing plastic surgeries to make parts of her body look more like elements of bodies that are portrayed in famous works of art. Because ORLAN is drawing from different periods of time, and because her body is undergoing constant change, she is disrupting the notion of a stable categorical identity associated with the body. But it is also a project of affirmative identity-formation, as she selects different bodily elements based on what she feels they may presently represent, while simultaneously leaving herself open to further changes in what she refers to as her "nomadic" bodily identity.

Resistance to categories, and to categorical productivity, can also be seen increasingly in the choices and actions of many people who do not identify as gender activists or artists. The emerging practice of individuals with disabilities seeking to use in vitro fertilization processes to affirmatively select children

\(^{33}\) Judith Butler, *Bodies that Matter: On The Discursive Limits of Sex* (Routledge, 1993).
with the genetic traits associated with disabilities, for example, has been interpreted as a form of resistance to the category of “disability” and its negative connotations.34 Similarly, for individuals categorized as women, “letting yourself go” by not dying grey hair, or refusing to diet when society says you look too fat, might be read as resistance to the categorical demands of gender.

A subtler form of resistance emerging in everyday office practice involves placing one’s preferred pronouns and form of address at the end of an email. While many prefer conventional binary gender pronouns, e.g. she/he/her/him, there is a growing movement toward requesting the use of non-binary pronouns, such as “ze” and “hir.” Some people request the use of non-binary pronouns because they do not identify within the binary gender regime. Others request non-binary pronouns to show solidarity for others or simply because they would prefer not to be categorized according to a binary gender system, even if they do generally identify as male or female.

Sometimes the resistance takes a playful turn. As dying one’s hair has become increasingly de rigueur for women of a certain age, young women have begun dying their hair gray as a fashion statement. Many young celebrities, including Pink, Lady Gaga, Rihanna, and Jennifer Lawrence, have joined the trend and gone gray in recent times, and the practice has also started to become popular with young men. Perhaps unintentionally, the practice disrupts the categorical linkage between gray hair and aging. The widespread practice of tattooing among young, college-educated women is having a similar effect. While they were previously associated almost exclusively with the bodies of lower-working-class men, tattoos are no longer a reliable marker for this category, typically linked with lower productivity.

With these practices, we can also see the ways in which bodily identity is increasingly centered on creative presentation and alternative identity construction, rather than productivity (economic, social, or otherwise). For some, practices such as tattooing, hair-color changes, and piercings are a vehicle for personal reconstruction from the outside in, rather than the inside out. Through bodily identity, they are expressing the complexity of their identity experience, which is neither stable nor categorically confined. It is also worth noting that interviews with women dying their hair gray and obtaining tattoos reveal that these practices are, in part, an expression of a desire to become what David Engel’s community members might have viewed as “outsiders.” In other words, individuals are engaging in these practices because they do not

wish to fit in. Following Auden, we might also read these practices as a desire to be less responsible matter, both in terms of categorical productivity (conforming with the expectations of the categories) and with respect to economic productivity. For whatever reason, there appears to be simply less concern about complying with the demands for productivity.

These changing attitudes may be representative of a new form of individualism that will make its mark on law as well. Engel identified two distinct strains of individualism at play in “The Oven Bird’s Song.” One version emphasized the vindication of rights; a second emphasized self-sufficiency and personal responsibility. Engel found that the second brand of individualism was more prominent in the community he studied, particularly in discussions of personal injury cases. But the bodily identity practices described above suggest a third type of individualism in which an emphasis on creative self-expression may trump concerns about rights assertion or self-sufficiency. What remains to be seen is how these new values will shape the future for tort law, both in terms of how injuries are understood and the legal remedies that may available to address them.

IMPLICATIONS FOR TORT LAW

Currently, the two most dominant approaches to tort law – corrective justice and law and economics – focus heavily on the productivity of bodies. Both approaches look to changes in the productivity of the body to determine injury. Both approaches also assume that the legal remedy should seek to restore the body to its prior state of productivity or compensate the individual for a loss in productivity. Contemporary bodily identity practices pose a potential challenge to these approaches.

Judith Butler and others have drawn our attention to the role of culture and performance in the construction of bodily categories, such as gender, race, and disability. Because these categories are fundamentally performative, Butler argues, they can be disrupted by performances that fail to approximate the normative expectations of the category. The increasingly widespread experimentation with bodily shape-shifting, the growing resistance to demands to adhere to the expectations of the gender binary, and the decisions of some individuals categorized as “disabled” to affirmatively select for those categorical traits in their children, are all examples of category-disrupting performances.

As these category-disrupting practices go mainstream, tort law’s demand for categorically productive bodies is likely to be experienced as increasingly repressive. Perhaps more troubling, contemporary bodily identity practices expose the inability of the current system to address injuries that arise under conditions that do not conform to the assumptions of the categories. What happens, for example, when a body appears to be *more* productive after a disabling injury than it was before? Does this mean that this person has not been injured? And what happens if a plaintiff undergoes a categorical shift in identity, such as a sex change, mid-injury? Under which set of categorical assumptions about productivity (e.g., male or female) should the analysis proceed? These are some of the challenges that contemporary bodily identity practices pose for tort law.

We might ask a broader set of questions about the continuing utility of a tort system grounded in assumptions about categorical productivity, especially for plaintiffs who are either unwilling or unable to participate in the processes of categorical identity assignment. Should legally sanctioned bodily categorization be part of the price of entry to the tort system? Or is it possible for an injury to be remedied without forcing plaintiffs who do not wish to be categorized to pay this psychic cost? How might tort law engage in its own shape-shifting to address these concerns? And might some of these changes already be underway?

In recent years, tort scholars have begun to pay more attention to the relationship between narratives in tort litigation and cultural understandings of bodily identity. Several scholars have noted, for example, that when legal actors in tort cases repeatedly transmit the message that the bodies of people with disabilities are “tragic,” it is likely that this messaging also plays a harmful role in the construction of disability identity. Similarly, Chamallas and Wriggins have noted that the practices of legal actors in tort litigation likely help to enforce and construct social hierarchies along the lines of gender and race. In each of these ways, the practices of legal actors in tort litigation can be seen to help shape understandings of bodily identity outside the courthouse doors, in much the same way that Engel observed that the pursuit of legal remedies helped to construct some members of the community as “outsiders.” Relatively little consideration, however, has been given to the reverse side of the equation, i.e. how changing social conceptions of identity shape legal practices, which was a question that Engel also explored.

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16 See Bagenstos and Schlanger, *Hedonic Damages*; Bloom and Miller, *Blindsight*.
17 Chamallas and Wriggins, *The Measure of Injury*.
Engel found that perceptions of tort law, and the activities of legal actors engaged in personal injury litigation, were strongly influenced by the social changes around them, including the forces of globalization. In the community that Engel observed, changing social conditions prompted local actors to use the legal system as a means of shoring up boundaries that they believed were disintegrating in the community. But, as Engel also noted, the world these members of the community imagined they were protecting existed only in their minds.

Something similar might be said in the context of changing bodily identity practices. The assumptions about bodies on which the tort system currently relies were always a figment of our imaginations; changing bodily identity practices have simply made us more aware of their limitations. But tort law is a remarkably flexible instrument, perhaps uniquely attentive to changes in the social environment in which it operates. While the response of Engel's Sander County residents was to double down and protect existing perceptions from further erosion, tort law also has a long history of adapting to changing social conditions with new developments in the law.

Samantha Barbas' research on how privacy laws in the United States changed in response to new understandings of personal image provides an illustration of how such changes can take place, particularly as they relate to identity. In the nineteenth century, Barbas reminds us, reputations and social identities were somewhat fixed. All that changed in the twentieth century, however, when urbanization seems to have prompted people to experiment more freely with fluid social identities. As "impression management" became of greater concern, so too did an interest in protecting the right to control one's image. Since the mass media were perceived as a threat to individuals' ability to control their images, existing laws were expanded. Invasion of privacy and similar claims became important new tools through which individuals could shape and control their social identities.

Might we expect similar developments in response to changing beliefs and practices concerning bodily identity? Without more research, we can only speculate about the potential implications of changing conceptions of bodily identity for tort law in the future. What seems likely is that cultural developments will push tort law in the direction of what might be characterized as "anti-foundationalism," or less reliance on categorical assumptions in legal analysis. Instead, legal actors might focus more on the experiences of the

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38 Engel, Oven Bird's Song. 39 Ibid, at 53.
individuals involved. When confronted with plaintiffs with seemingly disabling injuries, for example, legal actors might focus on the conditions that gave rise to a particular condition becoming categorized as disabling. This, in turn, might prompt some questioning of the assumptions accompanying the categorization.

While disability may seem like an inherent, biological condition, culture plays an important role in setting the parameters of the category. As an example, at an earlier point in history, deafness was not viewed as a “disability” in the community of Martha’s Vineyard but rather as a “normal” difference, so much so that when researchers asked residents to identify who was deaf, residents in the communities were not able to do so.41 People in Geel, Belgium, which has been welcoming people with mental and emotional differences for centuries, report a similar experience.42

These examples expose the limitations of both “disability” as a category and the presumptions associated with it. The equation of disability with tragedy so often seen in tort law, for example, only makes sense if you assume that disability entails an inherently undesirable, and fixed, identity. But if disability identity is not fixed and only undesirable because culture makes it so, then there is the possibility of resistance to the categorization. There is also the possibility for individuals to present themselves with more complex identities, in which the cultural designation of disability may or may not play a significant role.

Under these circumstances, what may make the most sense is to simply focus on the experiences of individuals, in all their difficult-to-categorize complexity. Similar arguments can be made about the categories of gender and race, of course. In many ways, this is not a new approach so much as a return to a more evidentiary-based analysis that considers a multiplicity of views. And there are some signs that tort law is already moving in this direction, at least in certain areas. The Restatement (Third) of Torts, for example, now permits recovery in emotional distress cases, for a victim’s “family” members, even if they are not biologically or legally related to the victim.43 The approach acknowledges that the category of “family” is a fluid one, with diverse and changing parameters. By focusing on how individuals experience “family” rather than saddling each case with categorical

43 Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Section 48, Comment f (2012).
expectations, tort law is both a more nimble and more relevant tool for addressing injuries.

We might take a similar approach with the category of “disability.” The overreliance on categories tends to push plaintiffs in tort litigation into categorically identifying as “disabled,” as if disability were a static condition that existed outside of culture. In real life, however, the experience of a physical condition varies over time. Not only do our bodies undergo continuous change, but our perceptions of the “disability” also undergo constant change in response to environmental and social conditions. A more fluid approach to the category might permit plaintiffs to express their identity, and their experience with “disability,” in more complex ways.

To be clear, this is not an argument that people who experience injuries that they or others categorize as “disabling” should not receive compensation. It is a plea for recognition that our current assumptions are problematic and at odds with how real people experience injuries that are categorized as “disabling.” As I have argued elsewhere, it is possible for tort law to compensate individuals for injuries – including the challenges associated with a forced transition into a new identity (such as disability identity) – and to compensate them for the discrimination that they are likely to experience as a result of that forced transition, without reifying the category of “disability” and the assumptions that accompany it.44

Similarly, this is not an argument against the use of categories in all circumstances. It is apparent that people can take pride in a categorical identity even as they feel constrained and limited by the normative expectations with which the identity is associated. It is also apparent that categories can be very useful in other contexts, such as aggregate measures of discrimination. Rather, this is a call to recognize the limitations of the assumptions that accompany the practices of categorization, particularly when the individuals involved do not identify with the categories to which they are assigned and the corresponding assumptions, however accurate those assumptions may be (or appear to be) in the statistical aggregate. In short, it is not that categories are without utility; they are simply insufficient for a meaningful assessment of any particular individual’s injuries.

Apart from the challenges to categories, some contemporary bodily identity practices also seem to pose a challenge to tort law’s focus on bodily productivity as a measure of injury and remedy. As others have noted, this focus on productivity skews the discourse and overlooks important aspects of

44 Bloom and Miller, Blindsight.
injury. For example, an emphasis on bodily productivity has resulted in a failure of the tort system to fully recognize, and compensate, the injuries of those who are presumed to be inherently less productive, such as people with disabilities and older people. It also ignores other qualities of would-be claimants, such as the capacity for interpersonal caregiving that is not linked to productivity. As Engel noted in "The Oven Bird's Song," narratives in American personal injury cases tend to emphasize the importance of self-sufficiency. This emphasis is particularly problematic for people with disabilities, women, and others who value their interdependence, but it also discourages claims, as those who do not wish to appear to be lacking in self-sufficiency may refrain from seeking compensation for their injuries.

What might tort law look like if the analysis of injury is untethered from the expectations of productivity and self-sufficiency? What sorts of injuries might become more compensable and how would we value the losses? Again, it seems likely that tort law in the future will move away from its current reliance on categorical assumptions, including the heavy reliance on actuarial assessments of injury. What will replace it is difficult to predict. At the very least, these developments seem to present an opportunity for a more complex of understanding of injury to be considered and for more voices in the community to have some say over when an injury has occurred and how to compensate for the loss. Perhaps, as was the case with personal image law, changing attitudes toward bodily identity will also result in the recognition of new claims that, for example, seek to protect individuals' interest in shaping and controlling their bodily identities.

Auden suggests that there is also the promise of something more, as yet (and perhaps always) undefined. Freed from the categorical demands for productivity, a more complex conception of injury law might be more attuned to the capacity of bodies for pleasure. Near death, Auden sought to embrace the flesh while eschewing attempts to define it. We see glimpses of what this might look like in the bodily identity practices of Prince, Bowie, and ORLAN. Legal actors in the future may ask us to rethink tort law to more freely allow its participants to explore these and other possibilities of becoming, what Auden might have called, irresponsible matter.

45 Chamallas and Wiggins, *The Measure of Injury*.