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BEYOND DISCRIMINATION LAW
Realizing Equality Through Other Laws, Such as Tort Law*

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INTRODUCTION

Social hierarchies based upon traits such as gender, race, sexual orientation, and disability currently affect people's access to many basic goods—for instance, housing, medical care, education, and secure and meaningful employment. Such hierarchies also affect people's ability to exercise their basic legal and political rights, such as the right to legal counsel and the right to vote. In recent years, discrimination theorists have looked to domestic antidiscrimination laws as one way of combatting these severe and pervasive social hierarchies. They have argued that rather than seeing the purpose of antidiscrimination laws narrowly, as that of ferreting out illicit prejudices in certain cases, we should see their purpose more expansively, as tools in the struggle for a society that is not structured by such pervasive hierarchies.[1]

However, if we care about creating a society without pervasive inequalities of status based on traits such as gender, race, or sexual orientation, we need to look beyond antidiscrimination laws. We need to think, more broadly, about the impact of many different

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1 *See*, *e.g.*, Joseph Fishkin, Bottlenecks: A New Theory of Equality of Opportunity (2013) (discussing the importance of loosening "bottlenecks" in which underprivileged groups have restricted opportunities); Tarunabh Khaitan, A Theory of Discrimination Law (2015) (defending a sufficientarian account of discrimination law); Niko Kolodny, The Pecking Order: Social Hierarchy as a Philosophical Problem (2023) (exploring social hierarchy as the root of many political ills); Sophia Moreau, Faces of Inequality: A Theory of Wrongful Discrimination (2020) (arguing that discrimination wrongs others when it fails to treat them as each other's equals).

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areas of law on subordinated social groups. One reason for this is that antidiscrimination laws have not in practice been a particularly effective way to combat social hierarchies in the United States.[2] But a further reason is that there are countless ways in which other laws—for instance, family law, employment law, IP law, constitutional protections, contract law, and tort law—set up our choice situations to begin with, silently and invisibly making it possible for empowered groups easily to do certain things while placing significant costs on other groups' attempts to do those same things.[3] As scholars in many areas of law are recognizing, we need to consider how the rules and practices in these areas, too, can either help in the struggle for status equality or hinder it. We need to examine the ways in which a variety of legal rules and practices can implicitly devalue people with certain traits, inadvertently perpetuate harmful stereotypes about them, or unfairly penalize them for possessing these traits, denying them opportunities available to others.

This paper takes up this challenge, looking in particular at tort law. I shall lay out some of the different types of rules and practices within tort law that have contributed to the subordination of groups such as racial and ethnic minorities, women, members of LGBTQ+ communities, and people with disabilities. But my aim in doing so is not simply to call attention to these particular rules and their effects. Others have done this already. My aim is to do something new: to use ideas from discrimination theory to develop a *general characterization* of the ways in which legal rules and practices—whether in tort law or in other areas of law—can perpetuate inequalities of social status. We need such a general

2 Their scope of application has been narrowed by American courts. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479 (2003); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006); Michael Selmi, *Indirect Discrimination and the Antidiscrimination Mandate, in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 250 (Deborah Hellman & Sophia Moreau eds., 2013). In addition, judicial interpretations of the Administrative Procedure Act have created obstacles to claims for racial, ethnic, or gendered disparate impact. *See* Cristina Isabel Ceballos et al., *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370 (2021). Finally, attempts to address disparate impact by singling out certain groups, such as racial minorities, for special ameliorative treatment have been held to violate the Fourteenth Amendment. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023). *See also* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

3 *See*, *e.g.*, Danielle Kie Hart, *Contract Law & Racial Inequality: A Primer*, 95 ST. JOHN'S L. REV. 449 (2022) (on the way in which contract law perpetuates racial inequalities); Tonya M. Evans, *De-Gentrified Black Genius: Blockchain, Copyright, and the Disintermediation of Creativity*, 49 PEPP. L. REV. 649 (2022) (on the devaluation and misappropriation of Black artistry through IP law); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 146 (1987) (on the impact on women of constitutional protections for freedom of speech); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 336–47 (1992) (on the impact on women of employment law and child welfare laws); Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985–2005) and Its Limits*, 49 MCGILL L.J. 1143, 1148–73 (2004) (on the impact on same-sex couples of criminal law, employment law, and family law).

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characterization so that we can move beyond piecemeal critiques of particular legal rules and can begin to develop a shared understanding of which kinds of legal rules and practices are problematic from the standpoint of social subordination, and why. So although this paper focuses on tort law, I hope that the framework it sets up will be of interest also to those working in other areas of law.

The paper is in five sections. Section I explains why tort law is a particularly fruitful place to look when seeking to develop a general characterization of the ways in which legal rules and practices subordinate certain social groups. This section of the paper also lays the groundwork for the ensuing discussion by distinguishing inequalities in social status from purely economic inequalities. Sections II and III of the paper then lay out my main arguments. Section II presents examples of the different kinds of rules and practices in tort law that can subordinate. Section III uses these examples and draws on the work of discrimination theorists to develop a general classification of the ways in which legal rules and practices can contribute to pervasive social hierarchies on the basis of traits such as gender, race, sexual orientation, and disability. Section IV considers some more specialized questions in tort theory (and so can be passed over by those who do not have an interest in these questions). I explain here why my general classification is useful not only to self-described "social justice tort theorists"[4] but also to mainstream tort theorists, who have not traditionally been understood as concerned with issues of social subordination. I argue that mainstream tort theories, even on their own terms, imply that at least some of these ways of subordinating people are problematic. Finally, section V turns away from theory and considers some of the more pragmatic benefits of having a general classification of the ways in which legal rules contribute to unfair social subordination.

One important terminological note, before I begin: throughout the paper, I shall use the term "rule" in a capacious sense, to refer both to formal legal rules and also to more informal customary practices within a legal system.

I. WHY TORT LAW?

Why is tort law a fruitful place to look when developing a general characterization of the ways in which legal rules subordinate certain social groups? One reason is that there is a considerable amount of data to work with in this area of law because quite a number of torts scholars in the United States, the United Kingdom, and Canada have focused in recent years on the ways in which particular rules of tort law take the perspectives and needs of the privileged as normal, while ignoring those of marginalized social groups, or even explicitly disadvantage certain people because of their gender, their race, their sexual orientation, or their disability.[5] Some of the earliest scholarship in this vein focused on the

4 Martha Chamallas, *Social Justice Tort Theory*, 14 J. TORT L. 309 (2021).

5 See the articles cited in section II, *infra*.

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standard of "the reasonable person" in negligence law and the ways in which judicial interpretations excluded the perspectives of women.[6] Since then, others have gone on to examine ways in which this standard is interpreted that disadvantage people undergoing conversion therapy and people with certain disabilities, thereby exacerbating their already marginalized social status.[7] Martha Chamallas and Jennifer Wriggins have done pioneering work on the ways in which seemingly ordinary and neutral doctrines, such as the requirement of factual causation in negligence law, have been interpreted in light of stereotypes about women and racial minorities.[8] In addition to Chamallas and Wriggins, many other American tort scholars have critiqued the practice of calculating wrongful-death damage awards using race- and gender-based statistics about wages and work-life expectancy and have given quite nuanced analyses of the many ways in which this practice both devalues the lives and work of women and racial minorities and provides a perverse incentive for defendants to locate risky or toxic activities in low-income neighborhoods, thereby increasing the disadvantages faced by such social groups.[9] Relatedly, in Canada, legal scholars have criticized Canadian courts for their assessment of damages in residential schools litigation, which would often "revictimize the plaintiff for being an Aboriginal person."[10]

So there is considerable data available to us about the rules of tort law and ways in which they seem to perpetuate inequalities between groups marked out by protected grounds of discrimination. However, what these investigations have lacked is a *systematic* explanation of why such rules are problematic. For although the scholars who developed these social justice–based critiques of tort law have engaged with ideas from critical race theory, feminist theory, queer theory, and disability theory, they have not yet worked out a shared vocabulary or a shared understanding of the nature of the injustices on which they

6 Joanne Conaghan, *Tort Law and the Feminist Critique of Reason, in* Feminist Perspectives on the Foundational Subjects of Law 47 (Anne Bottomley ed., 1996); Leslie Bender, *Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575 (1993); Mayo Moran, Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard (2003).

7 Craig Purshouse & Ilias Trispiotis, *Is Conversion Therapy Tortious?*, 42 Legal Stud. 23–41, 35 (2022); Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 Cath. Univ. L. Rev. 323, 341–46 (1999); Okianer Christian Dark, *Tort Liability and the 'Unquiet Mind': A Proposal to Incorporate Mental Disabilities into the Standard of Care*, 30 T. Marshall L. Rev. 169 (2004).

8 Martha Chamallas & Jennifer Wriggins, The Measure of Injury (2010).

9 *Id.* ch. 6; Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL into Tort Damages*, 96 Notre Dame L. Rev. 1479 (2021); Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 Cal. L. Rev. 325 (2018).

10 Kent Roach, Blaming the Victim: Canadian Law, Causation, and Residential Schools, 64 Univ. of Toronto L.J. 566 (2014).

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are focusing.[11] Neither have they engaged with the philosophical work on equality and subordination done by discrimination theorists. This is unfortunate. Over the past twenty years, a distinctive field of "discrimination theory" has evolved, in which legal scholars from around the world have worked together to develop theories of what makes different forms of exclusion on the basis of protected grounds of discrimination wrongful or harmful, of how discriminatory policies perpetuate social hierarchies, and of why this is problematic.[12] I shall try to show in section III of the paper that ideas from this field can helpfully be used by torts scholars—and scholars in other areas of law—to develop a shared and more systematic understanding of what is problematic about these different legal rules. Doing so might enable tort scholars writing about the needs of different marginalized groups to see their work not only as contributions to the political agenda of their particular interest group but as contributions toward the broader struggle against unjust social hierarchies—and ultimately, as I shall argue in section IV, as relevant even to mainstream tort theory.

There are, however, two important challenges that might be made to any attempt to use tort law to address problems of social hierarchy. These are challenges both to the particular work within tort law that I shall draw upon in section II and also to my attempt to come up with a helpful general classification of the ways in which these legal rules perpetuate inequalities. In the remainder of this section of the paper, I shall lay out both challenges and explain my replies.

The first challenge comes from those tort theorists who have not traditionally focused on issues of social justice, and indeed whose theories may seem inimical to the incorporation of social justice–based concerns. For example, for "corrective justice" tort theorists, justice in any particular case depends only on correcting a wrong done by this defendant to this plaintiff.[13] If a certain legal rule has the effect of exacerbating unfair social hierarchies, this is unfortunate, but it is not the kind of injustice that tort law aims to rectify:

11 Some important groundwork has been done by Chamallas and Wriggins (both in THE MEASURE OF INJURY, *supra* note 8, and *Social Justice Tort Theory, supra* note 4) to bring together social justice–focused analyses of tort law. But as I argue later in section IV of this paper, social-justice tort theory still lacks a theoretical foundation so is not itself a "theory" yet. Similarly, although Yuracko and Avraham have argued that tort law's approach to remedial damages is discriminatory based on race and gender, they do not appeal to discrimination theory or try to analyze this as part of a more general problem with tort law. *See* Kimberly A. Yuracko & Ronen Avraham, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017).

12 In addition to the works cited in note 1, *supra*, see KASPER LIPPERT-RASMUSSEN, BORN FREE AND EQUAL (2014) (focusing on harmful effects, especially on welfare); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2008); BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT (2015); SANDRA FREDMAN, DISCRIMINATION LAW (3d ed., 2022).

13 For foundational work on corrective justice, see ERNEST WEINRIB, CORRECTIVE JUSTICE (2012); ARTHUR RIPSTEIN, PRIVATE WRONGS (2016); John Gardner, *What Is Tort Law For? Part I. The Place of Corrective Justice*, 30 LAW & PHIL. 1 (2011).

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according to corrective justice theorists, we must look to other areas of law to do that. To take another very different kind of tort theory, economic theories too may seem hostile to the aim of using tort law to address problems of social subordination.[14] It is unclear whether the legal rules that promote economically efficient behavior, on any conception of what it involves, will always or even often work to the benefit of subordinated social groups.

I shall try to show in section IV of the paper, however, that once we adopt the kind of classification that I propose, we can see that whether tort law should care about status inequalities is not a question with an all-or-nothing answer, on any theory of tort law. Rather, it depends on the way in which a given rule contributes to the subordination of a certain social group. It is, I shall argue, a myth that corrective justice theorists should not be concerned with the perpetuation of social inequalities: some of the ways in which legal rules can subordinate people are, in fact, illicit even on corrective justice's *own terms*. Similarly, I shall suggest that economic theories of law should ultimately find certain social hierarchies deeply problematic, and not only when their elimination would result in the most economically efficient outcome. Of course, not every theory of tort law is going to imply that every instance of social subordination is problematic. But I shall try to show that, with the classification I propose, we will more easily be able to see which forms of subordination are troubling for which theories. And importantly, we will be able to see that *no* theory of tort law implies that status inequalities are never tort law's business.

A different sort of challenge to the project of this paper comes from those legal scholars who argue, as did Kaplow and Shavell, that tax law is a far better area of law than tort law to use if we are concerned with inequalities. Kaplow and Shavell urged in the 1990s that any redistribution of income would simply be much more efficient if accomplished through the tax system than through the revision of legal rules in other areas of law, such as tort law.[15] They argued that if the rules of tort law were altered so as to impose a tort tax on high-income defendants that low-income defendants would not have to pay, this would create a "double distortion," whereby high-income potential tortfeasors would both reduce their work effort and take excessive care. By contrast, under an alternative tax regime that was properly designed, they argued, there would only be the single distortion of reducing their work effort. If they are correct, then why should we look to

14 For foundational work on economic theories of tort law, see R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); William A. Landes & Richard A. Posner, The Economic Structure of Tort Law (1987); Richard A. Posner, Economic Analysis of Law (1973); Guido Calabresi, The Cost of Accidents: A Legal and Economic Analysis (1970).

15 Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667, 674–75 (1994); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. Legal Stud. 821, 827–32 (2000).

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tort law at all, if our concern is with inequalities? Why is it not more efficient just to look to tax law to correct the problem?

I have two replies to this challenge. First, much of the literature since Kaplow and Shavell has argued that in fact there are benefits to redistributing income or wealth through legal regimes other than tax law.[16] So it is not clear that tort law is an inappropriate vehicle to use in redressing social inequalities. But second, and much more importantly, this challenge is mistaken both in its understanding of the aim of my paper and in its understanding of the kind of inequality that I and social justice tort theorists are concerned with. The aim of my paper is not to introduce a new rule into tort law—for instance, that we should take money away from high-income defendants and give it to low-income plaintiffs. My aim is rather to suggest that a variety of existing rules in tort law silently and invisibly perpetuate social hierarchies, and that we need to start thinking about how we might adjust these rules or change our interpretation of them in ways that accomplish what the original rule aimed to accomplish without having these undesirable social consequences. And crucially, the kind of inequality that is relevant to my argument is not *economic* inequality but *status* inequality. Whether legal rules perpetuate the lower status of groups marked out by traits such as race or gender is not a question that could be settled simply by looking into whether, on balance, these rules increase the wealth of those with low incomes. It depends at least in part on other things, such as whether the rules perpetuate biases against groups marked out by a protected ground of discrimination, or give credence to false stereotypes about them, or compound past injustices against them.

Of course, the level of wealth of members of a certain social group is not unrelated to their social status, and a legal rule can certainly help to subordinate a certain social group if its use over time disproportionately disadvantages members of that group economically—for instance, by lessening their chances of recovery because of their gender or their gender identity, or by lessening the damages they can receive for certain injuries because of their race or the particular kind of disability they have. But it is important to my analysis that we investigate whether this happens because of biases, stereotypes, or assumptions about the traits that these groups possess, and it is important that we explore how legal rules presuppose and in turn perpetuate these biases, stereotypes, and assumptions. As we will see, biases can devalue the lives of members of these groups or cast doubt on the reasonableness of their responses in particular situations. Similarly, false

16 Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 Vand. L. Rev. 1653, 1658–73 (1998); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. Legal Stud. 797, 802–07 (2000); Ronen Avraham et al., *Revisiting the Role of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 Iowa L. Rev. 1125, 1144 (2004); Zachary Liscow, *Is Efficiency Biased?*, 85 U. Chi. L. Rev. 1649, 1696–98 (2018); Zachary Liscow, *Redistribution for Realists*, 107 Iowa L. Rev. 495 (2022); Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. Chi. L. Rev. 649 (2022).

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stereotypes about such groups can lead us to mischaracterize their injuries and misunderstand what is required for compensation. If we are to understand the ways in which the rules of tort law subordinate such groups, these are the kinds of mechanisms on which we must focus. So the questions this paper asks are different from the questions about income or wealth inequality of the kind that Kaplow and Shavell and others have pursued.

I turn now to the main argument of the paper, looking first at a variety of different kinds of rules of tort law that perpetuate the subordination of certain social groups.

II. TYPES OF LEGAL RULES THAT SUBORDINATE

We can divide the rules within tort law that have perpetuated the unfair subordination of certain social groups into several broad types. In this section of the paper, I shall offer a few examples of each type of rule. My aim in this section is not to be comprehensive: this is not a catalog of every rule within tort law that has a problematic subordinating effect. Rather, my aim is to present a few noteworthy examples of rules of each type. Once we have these examples in hand and have thought a little about the mechanisms through which they subordinate certain groups, we can proceed in section III to build a general classification of the ways in which legal rules subordinate. (Recall, once again, that I am using the term "rule" in a broad sense to encompass both formal legal rules and more informal but common legal practices, ways of doing things that are generally understood as correct or appropriate.)

A. Gatekeeping Rules

We can start with gatekeeping rules—doctrines that determine, within a given jurisdiction, who has standing to bring a tort claim of a certain sort, who they can in principle sue, and which jurisdiction's laws apply to them. For instance, within nuisance law one must, in most jurisdictions, have a certain kind of proprietary interest in the property affected by the nuisance to bring a claim. Hence, the owner of that property can sue in nuisance law, and so can a lessee, but homeless friends or family who are temporarily staying with them generally cannot, because they lack the relevant proprietary interest.[17] This is a gatekeeping rule for plaintiffs which, though not deliberately designed to leave those without ownership or rental rights dependent on those who do have these rights, nevertheless functions to do this. It leaves those whose housing is precarious dependent on those who have secure housing, for only the latter can bring this kind of legal claim.

The doctrine of qualified immunity in the United States is another example of a gatekeeping rule that perpetuates status inequalities.[18] Under this doctrine, public officials,

17 *See*, *e.g.*, Ivory v. IBM Corp., 964 N.Y.S.2d 59 (N.Y. Sup. Ct. 2012).

18 First introduced by the Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967).

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including police officers who have responded with excessive force, cannot be sued unless a court in some previous case involving nearly identical circumstances has ruled that this behavior was unconstitutional.[19] Given the difficulty of finding a case with nearly identical circumstances, this doctrine makes it much more difficult, if not impossible, for victims of excessive police violence to succeed in lawsuits against police officers. Given that in the United States, Black persons are disproportionately the targets of aggressive policing, the doctrine of qualified immunity exacerbates the disadvantage they experience. After the killing of George Floyd, the doctrine came under considerable scrutiny as one of a number of doctrines that not only prevent the public from holding the police accountable for excessive violence but also help to normalize violence against subordinated racial groups, implying that it must be warranted.[20] But although some jurisdictions, such as New York City, have since created new local civil causes of action protecting victims from excessive police force and have banned the use of qualified immunity as a defense in these lawsuits, the federal government's attempt to abolish the defense of qualified immunity through the George Floyd Justice in Policing Act stalled at the Senate.[21]

While these two examples of gatekeeping rules are both common-law rules, other gatekeeping rules are statutory. One particularly important group of statutory gatekeeping rules are the rules governing limitation periods. These rules stipulate the periods of time within which lawsuits of particular types in a given jurisdiction must be commenced. Such rules serve the valuable purpose of protecting defendants from the possibility of being indefinitely open to a lawsuit. The rules look quite neutral, as they apply to everyone. So they might not appear to perpetuate any sort of social inequality. Nevertheless, they can leave vulnerable, disempowered groups unable to pursue otherwise valid legal claims or to recover from them, and, as we will see later in our analysis of some of the Canadian residential schools litigation, limitation rules can also interact with other legal rules in ways that compound the injustices suffered by marginalized social groups, disadvantaging these groups because they were the victims of a past injustice.

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19 For the most recent Supreme Court pronouncement on the doctrine, see Pearson v Callaghan, 555 U.S. 223 (2009).

20 For a good overview of media criticism of the doctrine at the time, see Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. Times (Oct. 18, 2021), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/SXL4-AMNY]. For academic commentary, see Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 Duke L.J. 1701 (2022); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 Mich. L. Rev. 1405, 1457–60 (2019). Qualified immunity had been questioned even before the shooting of Floyd. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 8–12 (2017). For attempts to defend the doctrine, see Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1854 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 82 (2018).

21 *See* City Council Int. 2220-A (N.Y. 2021); Felicia Sonmez & Mike DeBonis, *Republicans, Democrats Unable to Reach Deal on Bill to Overhaul Policing Tactics in the Aftermath of Protests over Killing of Black Americans*, Wash. Post (Sept. 22, 2021).

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Another set of rules that are helpfully regarded as gatekeeping rules are the rules that govern which country's laws must be applied in transnational tort cases. Sometimes these rules, too, can exacerbate status inequalities. In a recent negligence case, an appellate court in Canada directly considered whether the fact that the laws in the place where a tort occurred would discriminate against female plaintiffs was relevant to whether a Canadian court should apply the local laws or substitute Canadian law.[22] The case concerned the collapse of a factory in Bangladesh operated by a Canadian company, which killed 1,130 people. The plaintiffs argued that Canadian tort law should be applied rather than Bangladeshi law because Bangladeshi law includes Sharia law and Sharia law does not distribute damages equally between male and female heirs of the deceased. The Ontario Court of Appeal upheld the decision of the Superior Court judge that because the unequal provisions of Sharia law were relevant only at the stage of assessing damages, because they would affect only a very small number of plaintiffs, and because a court could opt to sever these provisions when calculating damages for these plaintiffs, there was no sufficiently weighty public policy reason to make an exception to the general principle that the law to be applied is the *lex loci delecti*, the law of the place where the tort occurred. But the court did not rule out the possibility that in a future case, a rule that perpetuated an inequality between men and women *at the stage of assessing the merits of the plaintiff's case* and that could *not* be severed might give a court reason to apply Canadian tort law instead.

B. Framing Rules

A second broad class of legal rules that contribute to the subordination of certain social groups are what we can call "framing rules." Framing rules determine what counts as a legally cognizable cause of action in a given jurisdiction—for instance, in tort law, which harms count as torts in a given jurisdiction. These rules can perpetuate significant status inequalities between social groups.

Sometimes, harms that are much more likely to befall members of certain social groups do not fit neatly inside the box of a legally cognizable tort because members of this group have not had the political or legal influence to be able to get this type of harm recognized as a tort. Where there is no other source of redress for this type of harm, members of this group must suffer silently, without compensation, and often under the stigma of the assumption that no wrong has been done to them and they are responsible for the resulting hardships they face. Domestic violence is a good example of a harm that falls through the cracks in many jurisdictions and that is disproportionately suffered by women, by members of LGBTQ+ communities, and particularly by racialized women and racialized members of LGBTQ+ communities. Many jurisdictions do not have a specific tort of domestic or family violence.[23] Although some of the harms sustained by victims of

22 Das v. George Weston Limited, [2018] ONCA 1053 (Can.).

23 Though for one exception, see California's Civil Code, which has, since 2003, recognized a tort of domestic violence: CAL. CIV. § 1708.6.

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domestic violence can be adequately recognized and compensated through existing torts, such as assault and battery, others arguably cannot. For the harms done by domestic violence need to be understood cumulatively and in the context of the coercive control exercised by perpetrators of domestic violence over their victims: they involve not just a series of separate incidents of physical violence, but prolonged psychological abuse.[24] To adequately recognize these harms in the law, we need, as Koshan and Soweter have argued, a way "to name, and compensate for, *patterns* and not just incidents of abuse."[25] Moreover, in many jurisdictions, divorce laws provide no avenue for compensation. Very few American states, and no Canadian provinces, consider family violence when calculating awards of spousal support.[26] And although victims of family violence can seek recourse through the criminal law, this avenue leaves them without a civil remedy. For all these reasons, a lower court in Canada recently recognized a new tort of "family violence."[27] This part of the judgment was overturned on appeal last year, but equality rights advocates have argued that this was a mistake.[28]

A related problem of framing rules leaving out harms that are more often sustained by subordinated social groups can occur when a court explicitly refuses to recognize a certain harm as a tort, deciding that this harm is best remedied elsewhere in the law. Sometimes, the remedies offered elsewhere in the law do not adequately compensate victims or do not carry with them the social message that victims of such harms have personally been wronged. For instance, in Canada, attempts to create a tort of discrimination have been blocked by the Supreme Court. In *Seneca College v. Bhadauria*, the Canadian Supreme Court held that the existence of a provincial human rights code that addressed complaints of discrimination "excludes any common law action based on an invocation of the public policy expressed in the code."[29] That human rights code, however, did not in fact

24 *See also* Fiona Kelly, *Private Law Responses to Domestic Violence: The Intersection of Family Law and Tort*, 44 Sup. Ct. L. Rev. 321 (2009).

25 Jennifer Koshan & Deanne Sowter, *Torts and Family Violence: Ahluwalia v Ahluwalia* 7, Canlii Connects (Sept. 15, 2023), https://canliiconnects.org/en/commentaries/92441.

26 Though for two exceptions, see the recent amendments passed in New York and California requiring courts to consider domestic violence when dividing assets and awarding spousal support: N.Y. Dom. Rel. § 236B(5)(d)(14); Cal. Fam. § 4320(i).

27 Ahluwalia v. Ahluwalia, [2022] ONSC 1303 (Can.).

28 Ahluwalia v. Ahluwalia, [2023] ONCA 476 (Can.). For criticism of the appellate court's rejection of the tort, see Koshan & Sowter, *supra* note 25.

29 Seneca Coll. v. Bhadauria, [1981] 2 S.C.R. 181, 195 (Can.) [hereinafter *Bhadauria*]. Subsequently, in a Canadian Supreme Court case Justices LeBel and Fish held in dissent that *Bhadauria* "went further than was strictly necessary" and that "the development of tort law ought not to be frozen forever on the basis of this *obiter dictum*." Honda Canada Inc. v. Keays, [2008] 2 S.C.R. 362 ¶ 119. At the time, scholars hoped this might open the door to future recognition of a tort of discrimination. *See* Soloman Lam, *Honda v. Keays: A Landmark Case For Employment Rights*, theCourt.ca, (July 4, 2008), https://www.thecourt.ca/honda-v-keays-a-landmark-case-for-employment-rights/ (suggesting that the case was "inviting future challenges to the *Bhadauria* ruling"). But to date, no such litigation has been successful.

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guarantee all plaintiffs a hearing, because plaintiffs' claims were brought forward to be heard by a tribunal only if they were *also* deemed to have a sufficient "public interest" dimension to them.[30] So in spite of the Court's assertions in *Bhadauria* that there was an alternative means to tort law available to the plaintiff to have her claim heard and redressed, the reality in practice was that there was no equivalent means.[31] Moreover, although the refusal to recognize discrimination as a tort applies to everyone—nobody in Canada can now bring a tort claim for discrimination—it affects subordinated social groups most keenly because these are the groups that most often face discrimination.[32]

C. Building-Block Rules

Once a plaintiff brings a particular tort claim using the tort laws of a given jurisdiction, they are subject to the rules that structure that tort in that jurisdiction. These rules we can call "building-block rules," since they form the building blocks of torts. Much of the work that has been done by torts scholars recently on the adverse impact of tort-law rules on subordinated social groups has focused on building-block rules and the ways in which such rules devalue the lives and responses of members of these groups, perpetuate false and often negative stereotypes about them, and make it more difficult for them to succeed or to recover as much as members of other social groups.

One quite basic building-block rule within negligence law is the objective standard, which is applied to both defendants and plaintiffs. The defendant is deemed to have acted negligently only if they did not do what a "reasonable person" in their position would have done.[33] Under the doctrine of contributory negligence (or its more plaintiff-friendly version, the doctrine of comparative negligence), a plaintiff can have their damages reduced if the defendant shows that the plaintiff did not take sufficient care for their own safety.[34]

30 John I. Laskin, *Proceedings Under the Ontario Human Rights Code*, 2 Advoc. Q. 280, 299 (1980); R. Brian Howe & David Johnson, Restraining Equality: Human Rights Commissions in Canada 54–55 (2000).

31 For discussion of whether there should be a tort of discrimination, see Jeffrey Radnoff & Pamela Foy, *The Tort of Discrimination*, 26 Advoc. Q. 309 (2002–2003) (arguing that there should be such a tort because human rights statutes are an inadequate solution); Rakhi Ruparelia, *I Didn't Mean It That Way: Racial Discrimination as Negligence*, 44 Sup. Ct. L. Rev. 81 (2009) (defending a tort of negligent *racial* discrimination); Elizabeth Adjin-Tettey, *Picking Up Where Justice Wilson Left Off: The Tort of Discrimination Revisited, in* One Woman's Difference: The Contributions of Justice Bertha Wilson 113 (Kim Brooks ed., 2009) (analyzing the decision of the Court of Appeal in *Bhadauria* and its potential); Sophia Moreau, *Discrimination as Negligence*, 40 (supp. 1) Can. J. Phil. 123 (2012) (suggesting that discrimination is tort-like).

32 For discussion of the relationship between discrimination and subordination, see Moreau, *supra* note 1, ch. 2; Kolodny, *supra* note 1, ch. 13.

33 As first outlined in the cases of Vaughan v. Menlove, [1837] 132 Eng. Rep. 490, and Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224 (U.K.). In the latter case, the court refers to the reasonable person as the everyman, the "man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves." *Id.*

34 *See* Restatement (Second) of Torts § 463 (1965).

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Although the objective standard is presented within negligence law as neutral and impartial—a standard that we would all deem reasonable, regardless of our particular values or circumstances, and that we can all fairly be held to—nevertheless, tort law scholars have criticized the application of the standard in many cases as reflecting only the perspectives and interests of empowered social groups.[35]

For instance, early feminist work on the objective standard argued that judges more often assessed what a reasonable defendant would do in light of "male" ideas about efficiency, rather than "female" ideas about caring and consideration.[36] Most scholars have now moved away from this particular critique on the grounds that it relies on problematic, gendered assumptions about how men and women reason. But there is still a concern that, in spite of the standard appearing impartial, courts may deem certain risky behavior "reasonable" in boys or men but not in girls or women who behave in those same ways.[37]

In a similar vein, scholars writing about whether victims of conversion therapy can successfully sue their therapists in negligence law have noted that whether a judge rules that a given therapist acted "reasonably" in recommending conversion therapy will likely depend on whether the judge accepts the "status-based judgement of contempt or disdain for non-heterosexual identities" that underlies such therapy.[38] Moreover, they note that those therapists who present themselves not as medical professionals but as faith-based healers will be held to a lower standard of care, one that reflects what is viewed as reasonable within their own community of faith-based healers. Given that such communities normally view nonheterosexual identities as a sign of illness or immorality, this interpretation of the reasonable-person standard turns it into a very partial standard, and one that reinforces negative stereotypes about LGBTQ+ identities.

Finally, disability theorists have charted the ways in which, before the relatively recent enactment of statutes protecting people with disabilities, some American courts assumed that the reasonable plaintiff with a disability would always travel with an assistive device or companion—a guide dog, a sighted friend, a wheelchair.[39] The result was that plaintiffs with disabilities who ventured out in public on their own without such assistance were

35 *See* Chamallas & Wriggins, *supra* note 8; Yuracko & Avraham, *supra* note 9; Yuracko & Avraham, *supra* note 11.

36 Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 32 (1988); Wendy Parker, *The Reasonable Person: A Gendered Concept*, 23 Vic. Univ. Wellington L. Rev. 105 (1993); Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury*, 23 Anglo-Am. L. Rev. 334, 342–45 (1994).

37 See the discussion of McHale v. Watson [1966] HCA 13, in Moran, *supra* note 6 at 60–83; *see also* Joanne Conaghan, *Tort Law and the Feminist Critique of Reason, in* Feminist Perspectives on the Foundational Subjects of Law 57 (Anne Bottomley ed., 1996) (arguing for an expansive view of feminist concerns and modes of reasoning); Joanne Conaghan, *Tort Law and Feminist Critique*, 56 Curr. Legal Probs. 175 (2003) (same).

38 Purshouse & Trispiotis, *supra* note 7, at 35.

39 Milani, *supra* note 7, at 341–46.

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sometimes held contributorily negligent. Indeed, one judge found a man who was blind to have been contributorily negligent even when he was using a guide dog because he "failed to put forth a greater degree of effort than one not acting under any disabilities to attain due care for his safety." Somewhat ironically, the same judge went on to refer to this as "that standard of care which the law has established for everybody."[40]

A different set of building-block rules that tort scholars have critiqued as contributing to subordination are the rules that govern recovery under negligence law for psychiatric harm when that harm is unaccompanied by a separate physical injury.[41] Although the complete barriers to recovery for psychiatric harm that used to exist in tort law have been eliminated in most jurisdictions, framing rules that make it more difficult for plaintiffs to recover for psychiatric injuries than for physical injuries are still in place in many jurisdictions. For instance, although the Canadian Supreme Court recently held that plaintiffs no longer need to prove that they suffer from a medically recognized type of psychiatric illness,[42] and although the Court explicitly noted that "the distinction between physical and mental injury is elusive and arguably artificial,"[43] the Court nevertheless kept in place the requirement that psychiatric injuries be "serious and prolonged" and that they be the kind of injury sustained in "a person of ordinary fortitude."[44] Physical injuries do not have to clear either of these thresholds in order to be compensable. This both directly disadvantages plaintiffs with mental illnesses and contributes to the marginalization of those with mental illness as a group, insofar as it lends official support to the stereotypical idea that mental illnesses are more easily fabricated and exaggerated than physical ones and the stereotypical idea that if those with mental illness only had greater fortitude—more willpower, or more virtue—they would be able to fix their problems themselves.

A third set of building-block rules that have been critiqued by torts scholars as contributing to social subordination are the rules surrounding the privacy tort of "public

40 Cook v. City of Winston-Salem, 85 S.E.2d 696, 702 (N.C. 1955).

41 *See* John Murphy, *Negligently Inflicted Psychiatric Harm: A Re-Appraisal*, 15 Legal Stud. 415 (1995) (discussing tort law's history of marginalizing psychiatric harm); John C. P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625 (2002) (focusing on the law of emotional distress); Anne Bloom, *Zen and the Art of Tort Litigation*, 44 Loy. L.A. L. Rev. 11, 19 (2011) (arguing that tort law places too much emphasis on bodily harm); Anne Schuurman & Zoe Sinel, *Matter over Mind: Tort Law's Treatment of Emotional Injury, in* Private Law in the 21st Century (Kit Barker et al. eds., 2017); Louise Bélanger-Hardy, *Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis*, 36 Dalhousie L.J. 103 (2013) (arguing that it is a mistake to require proof of a recognizable psychiatric illness); H. Teff, *Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries*, 57 Cambridge L.J. 91 (1998) (proposing liability for pure psychiatric harm); Ian Freckelton & Tina Popa, *Recognisable Psychiatric Injury and Tortious Compensability for Pure Mental Harm Claims in Negligence*, 25 Psychiatry, Psych. & L. 641 (2018) (expressing skepticism of *Saadati*'s potential to extend liability).

42 *See* Saadati v. Moorhead, 2017 SCC 28.

43 Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 ¶ 8.

44 *Id.* ¶¶ 9, 15.

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disclosure of private facts." This tort has been used quite successfully in some jurisdictions to protect women from cyber harassment, and thereby to combat the subordination of women through the internet.[45] However, the tort has at the same time been developed in ways that make it difficult for members of LGBTQ+ communities to "selectively disclose" their sexual orientation or their gender identity—that is, to disclose it in certain contexts while keeping it private in others. As Anita Allen has explained, courts tend to take a "once out, always out" point of view regarding LGBTQ+ identities.[46] They often fail to recognize that one's sexual orientation or gender identity can still count in some contexts as a "private fact" (for instance, in relation to one's parents or co-workers) even if one has chosen to disclose it in other contexts (for instance, at an intimate gathering of friends or at a large, anonymous social event). Courts have also denied in some cases that the publication of someone's sexual orientation or identity is "highly offensive," on the grounds that society as a whole now celebrates LGBTQ+ identities.[47] So the building-block rules that define this privacy tort—the rule that the defendant must have disclosed a "private fact" and the rule that the publication of this fact must be "highly offensive"—have been interpreted by judges in ways that do not accurately reflect the perspective of LGBTQ+ members and that feed into certain stereotypes about these groups. These stereotypes include the idea that they are now fully accepted within our societies, that they therefore really have nothing to complain about, and that they are done no injury when others reveal their identities in contexts in which they do not want them revealed.

D. Remedy-Governing Rules

Once a plaintiff has cleared the relevant gatekeeping rules, framing rules, and building-block rules, they must confront the rules that govern remedies. Two types of remedy-governing rules in tort law, in particular, have been critiqued by tort scholars as contributing to the subordination of particular social groups: (i) the practice of basing wrongful-death damage awards on gender- and race-based statistics on wages and work-life expectancy and (ii) the practice of measuring what a plaintiff who has developed a disability has lost by looking to the impairment itself rather than to her environment and the absence of various supports for her within it.

With respect to gender- and race-based statistics on wages and work-life expectancy, American tort scholars have given nuanced analyses of the ways in which the history of exclusion and devaluation of women and racial minorities in the workforce has resulted in

45 Jane Doe 72511 v. M.(N.), 2018 ONSC 6607 (recognizing the tort for the first time in Ontario). This case was followed by VMY v. SHG, 2019 ONSC and cited in E.S. v. Shillongton, 2021 ABQB 739 (recognizing the tort in Alberta).

46 Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711 (2010).

47 *Id.*; *see also* Clay Calvert et al., *Defamation Per Se and Transgender Status: When Macro-Level Value Judgments About Equality Trump Micro-Level Reputational Injury*, 85 TENN. L. REV. 1029 (2018).

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lower wages for these groups, as well as lower work-life expectancies.[48] As they have noted, the practice of estimating a plaintiff's lost wages or lost years of work life based on these lower figures then compounds the unfairness suffered by members of these groups, partly because it penalizes them for being victims of prior injustices and partly because it creates perverse incentives for employers to locate particularly risky enterprises (for instance, oil refineries or facilities for storing or transporting toxic chemicals) in low-income neighborhoods. This places these risks on the shoulders of those whom it will be cheaper for them to compensate should the risks materialize into harms.

A related set of concerns has arisen in Canada in cases involving abuse in government- and church-sponsored residential schools. In such cases, courts have often assessed the plaintiff's damages for lost future earnings by considering the occupations of the plaintiff's siblings, on the assumption that if all or many of the plaintiff's siblings held only a particular low-paying, relatively unskilled job, it is unlikely that the plaintiff himself would have been able to hold down a better job, even if he had not been abused. For instance, in *Blackwater v. Plint*, the trial judge gave considerable weight to the fact that both of the plaintiff's brothers were loggers.[49] But of course, this was the occupation of his brothers in large part because systemic discrimination against Indigenous peoples had left them both without an adequate education and living in a remote area with few employment opportunities.

Disability theorists have also looked at the ways in which remedy-regulating rules perpetuate stereotypes about disabilities. Bloom and Miller have argued that the standard "make whole" approach to remedies in tort law fuels the misconception that plaintiffs with disabilities are less than whole and their disabilities are inherent physical or mental defects, rather than being in large part products of their social context and reflections of the supports that are available or unavailable to them.[50] Bloom and Miller have therefore urged that what plaintiffs who have been rendered disabled really need, by way of a remedy, is not an amount of money allegedly representing the damage that has been done to their bodies and their careers, but an amount of money corresponding to what they will

48 *See* Sharkey, *supra* note 9, Yuracko & Avraham, *supra* note 9; Yuracko & Avraham, *supra* note 11; *see also* Goran Dominioni, *Biased Damages Awards: Gender and Race Discrimination in Tort Trials*, 1 INT'L. COMP., POL'Y & ETHICS L. REV. 269 (2018); Loren Goodman, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 VAND. L. REV. 1353 (2017); Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies*, 49 MCGILL L.J. 309, 311 (2004); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 81–82 (1994).

49 Blackwater v. Plint, 2001 BCSC 997 ¶ 525.

50 Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011); *see also* Chamallas, *supra* note 4, at 321–22; Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. UNIV. L. REV. 1765, 1775–79 (2009) (arguing against the "make whole" theory and in favor of damages representing respect and accountability).

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need to adapt to their disability in their particular social context, which would demonstrate "respect" for who they are.[51]

III. WAYS IN WHICH SUCH LEGAL RULES PERPETUATE SOCIAL SUBORDINATION

I have now laid out some different types of legal rules and explored how some rules of each type within tort law have worked to perpetuate the subordination of groups such as women, racial minorities, members of LGBTQ+ communities, and people with disabilities. The analyses that I have so far given of these different rules were relatively narrow: they focused, as tort scholars have done, on the particular group whose interests were at issue in each case and on the particular aspect or aspects of each legal rule that worked to perpetuate their social marginalization. But I think something general can helpfully be said about what is going on in these different examples. I think we can use some insights from discrimination theory to identify *four general ways* in which such legal rules work to perpetuate status inequalities. This is of interest in and of itself. But in addition, this classification helps us to see just when and why various mainstream theories might actually support using tort law to lessen certain forms of social subordination. That is because, although some theories imply that it is not the purpose of tort law to redress all forms of subordination, even these theories treat certain sorts of bias and stereotyping as incompatible with the basic tenets of tort law. A general classification of the different ways in which legal rules can contribute to social subordination will therefore be important both in its own right and as a means to understanding how mainstream theories of tort law can support inquiries into tort law and social justice.

Importantly, the fourfold classification that I am about to lay out does not map directly onto the four types of legal rules I discussed in the previous section. Rather, as we shall see, a legal rule of any type can contribute to the social subordination of a particular group in any of the four ways listed below. These four ways of perpetuating the unequal social status of a particular group are also not mutually exclusive: a rule that exhibits the kinds of biases discussed in category A or B may also have the sorts of effects laid out in category C or D.

A. *Inherently Biased Rules*

Some of the legal rules that we considered in section III perpetuate the social subordination of a certain social group because they are *inherently biased* against that group. A rule is inherently biased against a certain group in the sense that is relevant here *only if that rule directs officials to treat people from that group in a way that disadvantages them relative to others, and only if it thereby devalues these people or their responses.*[52] So, to count as inherently biased, a legal rule must explicitly single out members of a certain

51 Bloom & Miller, *supra* note 50, at 745.

52 For important recent philosophical work on what it is for a discriminatory rule to devalue someone, see HELLMAN, *supra* note 12; EIDELSON, *supra* note 12.

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subordinated social group for a certain disadvantageous treatment. It must also devalue members of that group, implying that this treatment is appropriate for them because their lives are in some sense worth less than those of others, or their responses less reasonable, by virtue of being the life or the response of a member of this group.

In her work on social justice tort theory, Chamallas uses the term "bias" much more broadly, to denote not just the *deliberate devaluing* of a particular social group but the adoption of any rule that has disadvantageous effects on that group, regardless of whether these effects are deliberately imposed and regardless of whether they devalue members of the group.[53] Although Chamallas does not explicitly give a reason for extending the term so broadly, she seems to do so to highlight the fact that disadvantageous effects on a socially subordinate group can be *just as harmful* for that group as deliberate attempts to devalue them and their responses. But this broader use of the term "bias" goes against the grain of American antidiscrimination law, which recognizes a morally significant difference between deliberately treating members of one social group as though they are less valuable than others, on the one hand, and inadvertently disadvantaging them, on the other, with disparate treatment being understood as involving the former, and disparate impact the latter. Moreover, as we shall later see, certain mainstream tort theories, too, consider this distinction to be of moral importance and can more easily recognize the importance of preventing the deliberate devaluing of certain social groups. So I shall use the phrase "inherently biased" in its traditional sense, limiting its applicability to cases in which a particular social group is deliberately disadvantaged and devalued. As I shall argue, we can still recognize that there are other ways of contributing to social subordination without subsuming all of them into one category of "bias."

One of the most obvious inherently biased legal practices within tort law is the use of race- and gender-based statistics on wages and work-life expectancy in assessing damages.[54] This practice explicitly treats race and gender as reasons for thinking that certain plaintiffs would have earned less or lived fewer years than others if they had not been injured. Significantly, the reason this devalues women and racial minorities is *not* that lower projected earnings or a lower work-life expectancy is in and of itself demeaning: it is not always. Rather, the practice of assuming that such race- and gender-based statistics will be accurate even in the future *expresses a complacency about the systemic discrimination that led to these statistics*—a seeming acceptance of the traditional, discriminatory status quo and a reluctance to regard it as our collective responsibility to eliminate such discrimination in the future. In addition, the practice seems to assume that these groups are themselves incapable of rising above past circumstances, which perpetuates stereotypical assumptions

53 Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. Pa. L. Rev. 463 (1998).

54 Chamallas & Wriggins, *supra* note 8; Sharkey, *supra* note 9; Yuracko & Avraham, *supra* note 9; Yuracko & Avraham, *supra* note 11; Dominioni, *supra* note 48; Goodman, *supra* note 48; Adjin-Tettey, *supra* note 48; Chamallas, *supra* note 48.

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about their alleged lack of initiative and lack of effort (and which in turn can make it seem, erroneously, as though their problems are their own fault).

Another set of rules that are arguably inherently biased are the building-block rules that we examined earlier, which require that plaintiffs claiming purely psychiatric harm meet a higher bar than plaintiffs alleging some physical injury. Insofar as these rules explicitly distinguish between plaintiffs suffering only from a psychiatric injury and plaintiffs suffering also or only from a physical injury and require the former to prove that their illness was serious, prolonged, and would have arisen in "a person of ordinary fortitude," these legal rules seem to imply that those with psychiatric injuries or illnesses tend to exaggerate or fabricate their injuries and that their real problem is really a problem that is nobody else's responsibility but theirs: a lack of sufficient willpower or fortitude.[55]

B. Neutral Rules Interpreted in a Biased Way

Of course, many of the legal rules that marginalize social groups are not inherently biased: they do not, on their face, draw any distinction between these groups and others. Rather, they present themselves as neutral. But sometimes *they are interpreted by judges in ways that privilege the needs or the perspectives of certain empowered groups while mischaracterizing or ignoring the needs of a marginalized social group*. I shall call these "neutral rules interpreted in a biased way." Such biased interpretations are particularly problematic because, under the guise of neutrality, the legal rules then perpetuate false and negative stereotypes about a particular minority group. Like inherently biased rules, these biased interpretations make it more difficult for members of this group to succeed legally. But unlike inherently biased rules, the bias here is not overt or immediately apparent on the face of the rule. This can make it even more difficult to identify. And this can lead to a further harmful effect: it can give the appearance that the difficulties that members of these groups encounter when facing such rules *are their own fault*, and hence not problematic. In other words, the hidden nature of the bias in such cases can have a legitimating effect: it can make what is actually a problematic disadvantage seem quite appropriate.[56]

55 Some might argue that the law's different treatment of psychiatric harm need not reflect any bias against psychiatric injuries or the agents that suffer them. Rather, one always has a choice over to how to respond to a particular psychiatric injury, whereas in the case of merely physical injuries, there is no room for choice or agency; hence, there is a legitimate basis for distinguishing between psychiatric and physical injuries and holding the former to a higher bar. But this argument seems untenable. Many mental illnesses leave little room for choice, and many physical injuries *do* vary in their duration and severity in part *because of* choices that the agent makes. So although there might be reason to distinguish between illnesses exacerbated by our chosen actions and those not, there is no reason to think this division will neatly line up with the division between psychiatric harms and physical ones.

56 This legitimating effect gives us a further reason to separate these rules, which are neutral on their face but interpreted in a biased way, from rules that are inherently biased, rather than grouping them all together in a single category of "bias" in the way that Chamallas does, Chamallas, *supra* note 4. If the rules are all grouped together into a single category, it may be difficult to see which are invisibly legitimated and which are not.

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Some courts' interpretations of the objective standard in negligence law seem best understood in this way: as biased interpretations of what is supposed to be a neutral rule. The objective standard is not inherently biased against any particular social group. On the contrary, it presents itself as an impartial standard, capturing what is reasonable for everyone and what can fairly be asked of everyone alike. But, as we saw in the previous section, judges may interpret the objective standard in such a way as to demand that women defendants take more care than would be required of men in similar circumstances. They may demand that plaintiffs with disabilities take more care for their own safety than those without disabilities would have to take. Or they may relativize the standard to the beliefs of the community of faith-based healers that the defendant conversion therapist belongs to—which then distorts the standard so that it ends up reflecting a partial and demeaning set of beliefs. Although the objective standard, when interpreted in these ways, is clearly no longer impartial, it still *presents itself as such*. And consequently, the difficulties this standard then poses for women, people with disabilities, or members of LGBTQ+ communities misleadingly appear to have been their own fault. It can appear that the person with the guide dog ought to have taken more precautions or that the victims of conversion therapy should have known better than to put themselves in this position to begin with. The legitimating effect of biased interpretations of apparently neutral rules further contributes to the subordination of these groups by making it more difficult to see and to eliminate some of the causes of their disadvantage.

Another example of a set of rules that are themselves neutral but that have been interpreted in a biased way are those that structure the privacy tort of "public disclosure of personal facts." The rule that the defendant must have disclosed a "private fact" and the rule that the publication of this fact must be "highly offensive" are supposed to apply to anyone, regardless of their sexual orientation or their gender identity. But, as we saw earlier, some judges have deemed facts about nonheterosexual identities "private" only when they have never been disclosed in any social context and have ruled that the disclosure of these plaintiffs' identities in certain contexts is not "highly offensive" because society now celebrates LGBTQ+ communities. As Anita Allen has argued, this privileges a certain heterosexual understanding of identity—namely, that one's identity is always something one can comfortably disclose, in any context.[57] It also perpetuates false stereotypes about members of LGBTQ+ communities, such as the assumption that they do not really face discrimination any longer and are just hypersensitive, complaining when they really have nothing to complain about.

But neutral rules do not need to be inherently biased or interpreted in a biased way to perpetuate status inequalities. A quite different way in which the rules of tort law can contribute to social subordination is by being rules of the following sort:

57 Allen, *supra* note 46.

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C. Rules That Disproportionately Disadvantage Certain Social Groups in Ways That Contribute to Their Unjust Subordination

Sometimes, even if a rule is neither biased on its face nor interpreted by judges in a biased way, the application of that rule in a particular case can nevertheless end up disproportionately disadvantaging an already subordinate social group in ways that further contribute to their subordination. That is because tort law operates in societies that already have deep underlying status inequalities. Racial minorities, people with disabilities, and members of LGBTQ+ communities are frequently in vulnerable social positions across a variety of different social contexts: they own less property than others, they have less power and fewer opportunities than others, they more often live in poorer neighborhoods, and they are more likely than others to be in abusive relationships. As a result, even neutral rules of tort law that are neutrally interpreted can end up disproportionately disadvantaging these social groups in ways that contribute to their unjust subordination. Discrimination theorists have argued that this is one of the reasons that policies that impose an unjustifiable disparate impact on certain groups can wrong those groups: they disadvantage these groups in such a way as unfairly to *subordinate* them to others.[58] So the rules of tort law that fall into this third category have effects similar to those of policies that would be prohibited by disparate-impact laws.

Some of the framing rules that we considered in section III seem problematic for precisely the reason that they disproportionately disadvantage certain already subordinated social groups in such a way as to exacerbate their subordination. Think back, for instance, to the rules that recognize assault and battery as legally cognizable torts but that are silent on the matter of a general tort of domestic violence. Similarly, consider the rules that explicitly deny the status of a tort to discrimination. These legal rules are neutral on their face. They are not applied in a biased way: in jurisdictions that do not recognize domestic violence or discrimination as torts, *no* plaintiff can bring these tort claims. So these rules do not fit into either category A or category B. The problem with these rules is rather that domestic violence and discrimination are, in our societies, overwhelmingly harms suffered by already subordinated social groups—groups such as racial minorities, LGBTQ+ individuals, people with disabilities, and women. Hence, the rules that neutrally prevent everybody from bringing a tort claim of domestic violence or discrimination disproportionately disadvantage these already subordinated groups. And importantly, they do not only work to cause economic disadvantages for these groups. They disadvantage them in a way that perpetuates their subordinate *status*, for domestic violence and discrimination are among the important, abiding causes of the stigma and social exclusion faced by such groups, of their lack of social and political power, and of the lack of deference and consideration given to their perspectives.

58 *See* Moreau, *supra* note 1; Kolodny, *supra* note 1.

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Some of the gatekeeping rules of tort law that we considered earlier in section III also disadvantage certain social groups in ways that perpetuate their lower social status in society at large. For instance, the rule that one must have a certain kind of property interest to bring a claim in nuisance law applies to everyone, and judges are not themselves biased in its application: they deny standing to everyone alike who lacks the relevant kind of property interest. But in societies with a history of "redlining" Black communities or Indigenous communities (that is, declaring the areas in which they predominate too risky for mortgage loans) and societies with a history of discrimination against these groups in rental housing, even this neutral interpretation of a neutral rule in nuisance law can perpetuate their social subordination. That is because it primarily affects members of these social groups: they are overwhelmingly the people who lack a home and so are overwhelmingly the people who are unable to bring nuisance claims on their own. This rule ensures that such people lack yet another power and that there is yet another sense in which they remain reliant on those in whose homes they are staying.

The gatekeeping rule of qualified immunity for police contributes in a similar way to the unfair subordination of Black persons in the United States. Black persons are disproportionately the victims of excessive police violence, for an array of reasons connected to the country's history of denigration and exclusion of them. Therefore, although the rule of qualified immunity bars *everyone* from successfully suing police unless a court in some previous case involving nearly identical circumstances has ruled that this behavior was unconstitutional, the rule primarily affects Black persons because they form the majority of victims of excessive police violence. And it works to perpetuate their unjust subordination in American society. It leaves them without legal recourse in such cases. It provides no incentive for police to respond in humane and dignified ways. And it sends the deeply troubling social message that excessive violence toward members of this group is acceptable.

Of course, it is not only neutral rules, neutrally interpreted, that can disproportionately disadvantage marginalized social groups in ways that contribute to their subordination. Inherently biased rules can do this as well. Think back to the biased practice of using race- and gender-based statistics about wages and work-life expectancy in assessing damages. It results in lower damage awards for women and members of racial minorities, and tort scholars have documented the fact that it also creates perverse incentives for companies engaging in particularly risky activities (such as the movement or storage of toxic chemicals or manufacturing processes that are especially dangerous) to locate these activities in areas predominantly populated by racial minorities who are paid lower wages and who have a lower life expectancy, so as to minimize damage awards when these risks materialize.[59] It then contributes to behavior on the part of others in society that sustains the unjust subordination of these groups.

59 Yuracko & Avraham, *supra* note 9; Yuracko & Avraham, *supra* note 11.

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There is one further way in which the legal rules of tort law seem to perpetuate the social subordination of certain groups. Some are:

D. Rules That Invite or Require Officials to Treat a Fact That Depends on a Past Injustice as a Reason for Further Disadvantaging Someone, Compounding That Prior Injustice

Sometimes, a legal rule invites or requires an official to take some fact that would not have been true of someone had that person not been a victim of a prior injustice and then treat that fact as a reason to further disadvantage them. When the official does this, *they allow that past injustice to generate a new form of disadvantage*. This arguably makes the justice system complicitous in the continuation of that injustice. To describe what happens in such cases, we can borrow an idea from the discrimination theorist Deborah Hellman: the legal system ends up "compounding a prior injustice."[60] This is an important further problem with the use of race- and gender-based statistics in calculating damages, quite apart from the problems we have examined so far. As tort scholars have documented, the lower salaries and lower life expectancies that the statistical tables are based on are the product of a history of systemic discrimination against these groups—discrimination in the workplace, discrimination in medical care, and discrimination in society at large. So, when judges use such figures as the basis for lower damage awards to women and members of racial minorities, they are allowing a prior injustice to generate a new disadvantage—i.e., a lower damage award—and they thereby become complicit in the continuation of that injustice.

The idea of compounding a prior injustice also helps explain the similarity between the unfairness in the use of these race- and gender-based statistics in calculating damage awards and the unfairness in the practice of basing damages for lost wages in residential schools litigation on the low salaries of plaintiffs' family members. This Canadian practice is not itself inherently biased against Indigenous peoples: it is a practice used in other torts cases as well. But in residential schools litigation, the plaintiff's family members' salaries reflect systemic discrimination. So the legal rule that directs judges to use these facts in calculating the plaintiff's damage awards compounds that past injustice.

Sometimes, it is not a single legal rule but multiple legal rules that work together in a given case to compound an injustice. The Canadian case of *Blackwater v. Plint* provides an example of this.[61] The plaintiff Frederick Barney's claims for emotional and physical abuse at one of the Canadian residential schools for Indigenous children were found to be

60 Deborah Hellman, *Indirect Discrimination and the Duty to Avoid Compounding Injustice, in* FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 105–22 (Hugh Collins & Tarunabh Khaitan, eds., 2018); *see also* Benjamin Eidelson, *Patterned Inequality, Compounding Injustice and Algorithmic Prediction*, 1 AM. J.L. & EQUAL. 252 (2021).

61 See the trial judgment, Blackwater v. Plint, [2001] B.C.T.C. 997 (SC), and the judgment of the Canadian Supreme Court upholding the trial judgment in this respect, Blackwater v. Plint, [2005] 3 S.C.R. 3.

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statute-barred: the limitation period for them had run out. Only his claim for sexual abuse at the school was allowed to proceed because the relevant statute placed no time limitations on lawsuits for sexual abuse. The trial judge noted that, in calculating the damages for which the defendants were responsible, he was bound to apply the crumbling-skull rule, according to which the defendant is not responsible for any damage done to the plaintiff independently of the defendant's actions. The trial judge went on to find that the statute-barred physical and emotional abuse sustained at the school, along with the extreme poverty and deprivation in the plaintiff's home before his attendance at the school, left him in an already-damaged condition that was not the defendant's responsibility and that needed to be deducted from his damage award.[62] The Supreme Court, on appeal, upheld the trial judge's ruling on these matters.[63]

Many scholars have found this decision troubling.[64] But they have struggled to explain why. The relevant legal rules—the limitation rules and the crumbling-skull rule—are neutral rules that the court applied in a neutral way. Kent Roach has claimed that the problem here was that the plaintiff was "revictimized for being Aboriginal."[65] There is something intuitively right about this characterization, but simply saying this does not explain where the problem lies. Moreover, one might wonder: how could the plaintiff have been revictimized by neutral legal rules that were neutrally applied? One explanation is that when these legal rules were applied against the backdrop of systemic discrimination against Indigenous peoples, the legal rules ended up *compounding the prior injustices* that the plaintiff had suffered. The crumbling-skull rule required the judge to reduce the plaintiff's damages by an amount that represented his past injuries. But those past injuries—the emotional and physical abuse at the school, and the deprivation at home—were themselves the result of injustices: namely, the systemic discrimination that the plaintiff's family suffered from because they were Indigenous and the discrimination the plaintiff himself suffered at the residential school. So the combination of the crumbling-skull rule and the limitations rule required the judge to consider facts that would not have been true of the plaintiff had he not been a victim of prior injustices (facts about the poverty of his home, facts about his emotional and physical abuse, and the fact that this abuse was statute-barred, which it would likely not have been had he not been so traumatized that he was unable to file a claim in a timely manner) and use them as a reason for reducing the plaintiff's damages.

62 Blackwater v. Plint, [2001] B.C.T.C. 997 ¶¶ 362–63, 517–24.

63 Blackwater v. Plint, [2005] 3 S.C.R. 3.

64 *See* Carole Blackburn, *Culture Loss and Crumbling Skulls: The Problematic of Injury in Residential School Litigation*, 35 Pol. & Legal Anthropology Rev. 289 (2012); Leslie Thielen-Wilson et al., *Troubling the Path to Decolonization: Indian Residential School Case Law, Genocide and Settler Illegitimacy*, 29 Can. J.L. & Soc. 181 (2014).

65 Roach, *supra* note 10; Sheila McIntyre, *The Supreme Court of Canada's Betrayal of Residential School Survivors: Ignorance Is No Excuse, in* Sexual Assault in Canada 151 (Elizabeth A. Sheehy ed., 2012).

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These legal rules thus compounded the prior injustices that he and his family had suffered and made the court complicit in the continuation of those injustices.

I have now outlined four ways in which tort law can perpetuate social subordination: through (A) inherently biased rules, (B) neutral rules interpreted in a biased way, (C) rules that disproportionately disadvantage certain groups in ways that contribute to their unjust subordination, and (D) rules that compound a prior injustice. Those familiar with discrimination law and discrimination theory will notice that these four categories form a spectrum, moving from rules that look and function rather like those that laws against *disparate treatment* prohibit all the way to rules that look and function rather like those that laws against *disparate impact* prohibit. The inherently biased rules in category A look like the kinds of policies that might fall afoul of prohibitions on disparate treatment: they directly distinguish between one person and others, on the basis of a protected trait or prohibited ground of discrimination, in a way that disadvantages and devalues that person and the group to which they belong.[66] The rules in category B are unlike policies that impose a disparate treatment, insofar as they are neutral on their face: rules such as the reasonableness standard and the building blocks of torts such as "public disclosure of personal facts" apply to everyone alike and do not single out any one group for differential treatment. But, once they are interpreted in biased ways, they *do* treat certain groups differently from others, in ways that directly disadvantage members of these groups, often on the basis of false stereotypes about them. So the rules in this category function *like* policies that impose a disparate treatment, even though they are on their face neutral. We might therefore say that category B straddles the line between disparate treatment and disparate impact, with rules that look initially neutral but ultimately function the way policies that impose a disparate treatment do, through explicit distinctions designed to exclude a certain group or treat them differently from others. That there could be such an in-between category is unsurprising: both discrimination theorists and courts in certain jurisdictions have suggested that the line between disparate treatment and disparate impact is not a firm one, and there can be cases that seem categorizable in both ways.[67] Finally, the rules in both category C and category D look rather like cases of unjustifiable disparate impact. The rules in these third and fourth categories do not distinguish, either on their face or even once interpreted, between the subordinated group and other groups. But they have a

66 For helpful analyses of disparate treatment by discrimination theorists, see Eidelson, *supra* note 12, at 16–26; Frej Klem Thomsen, *Direct Discrimination, in* The Routledge Handbook of the Ethics of Discrimination 19 (Kasper Lippert-Rasmussen ed., 2018).

67 *See* Hugh Collins & Tarunabh Khaitan, *Indirect Discrimination Law: Controversies and Critical Questions, in* Foundations of Indirect Discrimination Law (Hugh Collins & Tarunabh Khaitan eds., 2018); *see also* Moreau, *supra* note 1, ch. 2; British Columbia (Pub. Serv. Emp. Rels. Comm'n) v. BCGSEU, [1999] 3 S.C.R. 3 (discussing cases that could be characterized either as direct discrimination (disparate treatment) or as indirect discrimination (disparate impact)).

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disproportionately disadvantageous impact on a subordinated social group marked out by a protected trait. I have argued in earlier work that part of the point of disparate-impact laws is precisely to protect against disadvantages of a kind that contribute to the unfair social subordination of such groups.[68] This is why the rules in category C seem objectionable—it is not only the disproportionate disadvantage heaped upon such groups, but the fact that such disadvantage further entrenches their inequality of status in society at large. The rules in category D have a disproportionate impact that compounds a prior injustice. Deborah Hellman has argued that part of the point of disparate-impact laws is precisely to prevent courts and governments from compounding prior injustices and thereby becoming complicit in those injustices.[69] The rules in these last two categories, then, are objectionable for the some of the same reasons that policies with an unjustifiable disparate impact policies are objectionable, according to discrimination theorists.

The classification that I have proposed here takes us beyond existing tort scholarship in at least two ways. First, it enables us to see commonalities between the rules that fall into each category. Rather than focusing on only one particular rule or practice within tort law—for instance, the use of race- and gender-based damages tables—and analyzing it in isolation from other rules, this classification enables us to bring together this rule and others *that also compound prior injustices*, such as the rules at issue in the Canadian residential schools litigation that seemed unfairly to victimize Indigenous plaintiffs by compounding injustices against them. Noticing these commonalities might facilitate discussions, whether theoretical or strategic, between scholars and lawyers working on cases of each type. Second, the classification enables us at the same time to note important differences between the rules in the four different categories, differences that are blurred if we simply talk loosely about all of them as involving “bias” or all of them as involving “subordination” without clarifying in what ways groups are subordinated. There are, we saw, differences both in the *mechanisms* through which subordination comes about and in what makes these forms of subordination *morally objectionable*.

In the next section of the paper, I show that, in addition to being illuminating on its own terms, this classification helps to make it clear just how many theories of tort law leave room for revising legal rules that perpetuate social inequalities in one or more of these four ways. Before I turn to these theories, however, I should address an objection that one might raise in relation to this discussion. If, as I have suggested, the rules in categories A and B seem to work in the same ways that policies prohibited by disparate treatment laws work, and if the rules in categories C and D have effects similar to those had by the kinds of policies that are prohibited by disparate-impact laws, then why not

68 Moreau, *supra* note 1.

69 Hellman, *supra* note 12.

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look to antidiscrimination laws to eliminate them? Why try to alter tort law from within? Why not simply challenge objectionable rules under our existing antidiscrimination laws?

This objection seems both to presuppose an overly optimistic view of what is possible under existing antidiscrimination laws and to misunderstand the thrust of my suggestion. In suggesting that we move beyond antidiscrimination laws and investigate the ways in which other areas of law perpetuate or could alleviate social subordination, I am not proposing that we stop making use of antidiscrimination laws. Antidiscrimination laws are no doubt still helpful in certain cases, as a means of challenging policies that perpetuate social subordination. But a multipronged approach with which we also investigate many other areas of law and try to work *from within* them to determine whether and how particular legal rules ought to be changed could accomplish even more. Moreover, as I noted in the introduction of this paper, antidiscrimination laws have been less than efficacious in eliminating status-based inequalities. One reason for this is that American disparate-impact doctrine has been strictly cabined: for instance, although disparate-impact claims can be brought under federal civil rights statutes, the Supreme Court has largely prevented courts from adjudicating disparate-impact claims under the Fourteenth Amendment.[70] Hence, the legal rules in my categories C and D could likely not be successfully challenged under the Fourteenth Amendment. Relatedly, in some jurisdictions, the underfunding of the kinds of tribunals that administer antidiscrimination laws raises an additional barrier to successfully challenging legal rules through antidiscrimination laws. It means that it is simply not practicable or expeditious for many people to bring such challenges. Using existing tort law scholarship to advocate for internal changes to tort law—either through legislative change or through judicial reinterpretations of common-law doctrines—may be a better strategy than relying on claimants to come forward under antidiscrimination laws.

IV. MAINSTREAM THEORIES OF TORT LAW AND STATUS INEQUALITIES

The fact that many of the rules of tort law perpetuate social subordination and so entrench status inequalities in the ways that I have described is troubling from a moral standpoint. Moreover, there is something particularly troubling about the fact that it is the law—which is supposed to be an instrument of justice—that is perpetuating such status inequalities. But it is surely not the job of every part of our legal system to be concerned with every type of injustice. Which, if any, of these rules of tort law is it really tort law's responsibility to fix? And which sorts of public officials can legitimately fix them? One's answers to these questions will depend very much on one's view of the purpose and aims of tort law as a

70 *See* Washington v. Davis, 426 U.S. 229, 248–49 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (establishing that disparate impact claims can succeed under the Fourteenth Amendment only if some proof is given of a discriminatory intent or mixed motive).

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whole. The aim of this section of the paper is to demonstrate, using the fourfold classification developed in the previous section, that mainstream tort theory is in fact less hostile than might at first appear to the aim of altering the rules of tort law to lessen social subordination.

Tort theorists who write about the ways in which particular legal rules subordinate certain social groups do not normally lay out a broader theory of tort law that would explain why these problems are properly thought of as tort law's problems. This is understandable. Most of these tort theorists focus on a particular doctrine within tort law, and it is simply not their project to build a theory of tort law as a whole.[71] But if we are ultimately to defend the claim that public officials have a responsibility to revise such rules, we need to know which theories this aim is consistent with and which institutions—for instance, courts, legislatures, administrative agencies—can legitimately alter them. I do not have the space here to give a detailed analysis of each theory of tort law. But I do want briefly to present a number of prominent theories, suggest some of their implications, and suggest that actually, mainstream tort theory leaves more room for rectifying status inequalities than it might at first appear to.

What do mainstream theories of tort law imply about legal rules that fall into one or more of my four categories? Which kinds of rules, if any, do they imply that tort law ought to rectify? Let us first consider theories that treat tort law as a body of rules, distinct from public law, aiming to restore the equal status of a plaintiff and a defendant in the face of a wrong done to the plaintiff by the defendant. These are all theories that have their origins in Kantian "corrective justice," which is concerned purely with the formal equality of the plaintiff and the defendant and not with the broader social effects of the legal rules involved.[72] So they may seem to be particularly unpromising candidates for an attempt to justify eliminating the kinds of rules that perpetuate social inequalities.

But this is where it helps to have grouped the rules within tort law that perpetuate status inequalities into our four different categories. For when we look at the rules in

71 One exception is Chamallas, *supra* note 4. She suggested, albeit only briefly, that the goal of identifying and ameliorating systemic inequalities follows from "the compensatory ideal of tort law," *id.* at 315. But this seems a bit too quick. While many of the rules that perpetuate subordination in the ways I have discussed will disadvantage the particular plaintiff before the court and prevent them from being fully compensated; some will simply disadvantage defendants; and other rules may be used in ways that, while they do not end up preventing this plaintiff from being compensated, nevertheless work over time to devalue and disadvantage the group of which the plaintiff is a member. So we need a broader and more systematic explanation of why tort law should be concerned with social inequalities, not just an appeal to the aim of fully compensating the plaintiff.

72 For Kantian corrective-justice theories, see Weinrib, *supra* note 13; Ripstein, *supra* note 13; Gardner, *supra* note 13. For more modern versions of such theories, which are less formalist in character, see Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 Colum. L. Rev. 1395 (2016); Hanoch Dagan & Avihay Dorfman, *Substantive Remedies*, 95 Notre Dame L. Rev. 513 (2020); John C. P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (2020).

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categories A and B—that is, inherently biased rules and neutral rules that have been given a biased interpretation—we can see immediately that even the most formalist of corrective-justice theories implies that such rules are unjust *on tort law's own terms*. According to such theories, the aim of tort law is to "correct" a wrong done by the defendant to the plaintiff and to restore the purely formal equality of the parties. But, as proponents of these theories have acknowledged, a plaintiff and a defendant cannot interact as formal equals if the perspective or the interests of one of them are privileged over those of the other. And that is just what occurs when a rule devalues the life or the perspective of one of the two parties because of the social group to which they belong, or when a legal rule is given a biased interpretation that privileges the perspective of one of the parties and relies upon negative stereotypes about the other. So, even according to corrective-justice theories of tort law, the first two categories I identified in the last section—namely, inherently biased rules and rules that are neutral but interpreted in a way that privileges the perspectives of some at the expense of those of others—are ones that it is tort law's business to fix.

Hanoch Dagan and Avihay Dorfman's "just relationships" theory of tort law is in some respects similar to corrective-justice theories: it holds that the rules of tort law make it possible for us to interact fairly with each other.[73] But, in place of formal equality, they import into tort law certain liberal ideals of self-determination and an ideal of "substantive equality" concerned not just with people's formal or abstract status as persons but also with their real circumstances—the resources, opportunities, and powers that are actually at their disposal. Dagan and Dorfman argue that tort law must set fair terms of interaction between plaintiffs and defendants, seen as substantively equal, self-determining individuals. This means, they argue, that the rules of tort law must enable the parties "to respect each other for the persons they actually are," which requires not giving priority to one individual's aims or perspectives over the other's.[74] Clearly, a legal rule cannot respect the defendant and the plaintiff as the people they actually are if it devalues one of them because of their race or gender, or if it favors the perspective or the needs of one, or subjects the other to negative stereotypes. So Dagan and Dorfman's just-relationships theory, too, would hold that tort law can and must be concerned with revising both biased rules and neutral rules that have been interpreted in biased ways.

A third theory related to corrective justice is John Goldberg and Benjamin Zipursky's "civil recourse theory." It conceives of tort law as a means of ensuring that someone who has been wronged can hold a wrongdoer answerable to them.[75] Goldberg and Zipursky propose that what underlies tort theory is fundamentally "an idea of equal rights."[76] Like

73 Dagan & Dorfman, *Substantive Remedies, supra* note 72.

74 Dagan & Dorfman, *Just Relationships, supra* note 72, at 1398.

75 Goldberg & Zipursky, *supra* note 72.

76 *Id.* at 73.

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Dagan and Dorfman, they seem to have a conception of substantive equality in mind, rather than a purely formal conception. So their view, too, would not only permit but also encourage revising legal rules that are biased or that have been given biased interpretations.

It is untrue, then, that this type of mainstream tort theory leaves no room for us to critique rules of tort law that perpetuate status inequalities. But what about rules that fall into my third or fourth categories—namely, rules that disproportionately disadvantage certain social groups and thereby contribute to their unjust subordination and rules that compound a prior injustice? It might seem that these theories have a more difficult time explaining why such rules are problematic. On strict corrective justice theories, the only type of equality that judges adjudicating tort cases can consider is the formal equality of the parties. What effects these rules have on people's material situations or their social status, outside of the law, is irrelevant. So it is not clear that, on such theories, judges could legitimately alter tort law rules simply because they contribute to the unfair social subordination of certain groups. Similarly, the fact that a particular practice compounds a past injustice might appear, from the corrective-justice perspective, simply to be irrelevant: if the injustice that is compounded is not the kind of injustice that tort law should be concerned about, then why is there any reason for a judge to care about it?

These worries may be well-founded. But even Kantian corrective-justice theories recognize that *legislatures* are quite properly concerned with questions of distributive justice. So even if the more formalist of corrective-justice theories imply that judges cannot consider these problems in their development of the common law, the theories nevertheless seem consistent with legislatures making efforts to alter such rules by statute. Moreover, as I have noted, both Dagan and Dorfman, on the one hand, and Goldberg and Zipursky, on the other, have deliberately tried to build substantive equality into their theories in ways that I think give their theories even greater potential to advocate for changes made by judges to common-law rules of these third and fourth types. As mentioned above, Dagan and Dorfman explicitly depart from the traditional corrective-justice ideal of purely formal equality. For them, the type of equality that tort law rules must respect is avowedly substantive: the parties must be treated as equals "as the persons they actually are."[77] So the fact that a certain legal rule disproportionately disadvantages one party and the group to which they belong, and the fact that a certain legal rule compounds a prior distributive injustice done to one of the parties, would, on their view, give even judges at least some reason to revise it (to be weighed, of course, against other reasons for retaining it). For Goldberg and Zipursky, private law as a whole needs to be understood within the overall context of public law. Tort law is for them one of the ways through which a government discharges an important duty to its citizens. This is: its duty to provide a means through

77 Dagan & Dorfman, *Just Relationships, supra* note 72, at 1424.

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which civil wrongs can be redressed.[78] Precisely because private law, on this view, is developed by the state in fulfillment of one of its public duties, it follows that public officials—whether legislators or judges—are bound to develop private-law doctrines in ways that are consistent with public-law values, such as equal respect for the needs and the dignity of all. Permitting laws to remain in place that perpetuate pervasive status inequalities and permitting judges to rule in ways that compound prior injustices are arguably not consistent with these public-law values.

I have been considering one set of tort-law theories, which might at first seem hostile to the enterprise of amending rules of tort law that perpetuate social inequalities but which, on closer inspection, seem more amenable to it. What about those theories that do not distinguish between public or regulatory regimes, on the one hand, and private law, on the other, but see private law as just another instrument of public regulation? As long as such a theory can incorporate the promotion of equality of social status as one possible goal of tort law, such theories would leave at least some room for altering legal rules that perpetuate the marginalization of such social groups.

But what about economic approaches to tort law, which care primarily about locating the legal rules that will maximize economic efficiency? There is surely no guarantee that the rules that result in the most economically efficient outcomes (however one defines this) will not be inherently biased or susceptible to biased interpretations, nor that they will never unfairly subordinate minority groups or compound past injustices. Scholars of law and economics have argued in some special cases that the most efficient outcome is sometimes the one that works to eliminate social subordination. For instance, Catherine Sharkey has argued that it is both more economically efficient and more just to replace gender- and race-based damage assessments in tort law with a "value of statistical life" methodology that incorporates a more individualized assessment and does not replicate systemic inequalities.[79] But this seems to be a happy coincidence in this particular case, rather than an enduring commitment of economic theory.

More worryingly, other economists have pointed out that when certain statistically efficient rules are repeatedly applied over time, this can lead to outcomes that are increasingly adverse to poor and marginalized social groups.[80] So efficient policymaking can sometimes over time end up exacerbating social inequalities. Daniel Giraldo Paez and Zachary Liscow have called this effect "policy snowballing."[81] They have argued, for instance, that certain disamenities, such as pollution, are disproportionately allocated to poor neighborhoods because the poor can pay less than the rich to avoid it and that this

78 *See* Goldberg & Zipursky, *supra* note 72 (especially ch. 4, "The Principle of Civil Recourse").

79 Sharkey, *supra* note 9.

80 Daniel Giraldo Paez & Zachary D. Liscow, *Inequality Snowballing*, 77 Rev. L. & Econ. 106180 (2024).

81 *Id.*

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disproportionate allocation then further reduces the ability of the poor to pay for the disamenity. This sets up the feedback loop that they call "policy snowballing," whereby disproportionate reductions in the earnings of the poor lead to more pollution, which in turn leads to an even greater reduction in the earnings of the poor. We should not, therefore, understate the potential tension between economic approaches to tort law and the goals of social-justice tort theory. However, the initial lesson of policy snowballing seems to be not that tort law is an inappropriate means of attempting to avoid such snowballing but simply that, when evaluating the rules of tort law, we need to evaluate them in their dynamic form rather than in their static form.

Moreover, it seems to me that if our concern is status-based inequalities rather than mere economic inequality, then even from the perspective of economic theories of the purpose of tort law, there may be some pressure to alter rules that perpetuate social subordination. This is so because even on economic theories of the purpose of tort law, tort law does not stand alone as a complete system for the regulation of behavior. Tort law is one part of a broader legal system, a system that aims not just at the efficient regulation of behavior but at the efficient regulation of behavior *within a just society*. And on most plausible accounts of justice, the pervasive and abiding subordination of certain social groups is incompatible with justice. Of course, to say this is not to offer a prescription for how economic theories are to reconcile their goal of efficient regulation of behavior with the broader demands of justice. But it is to recognize that even on this type of theory, these broader aims cannot be ignored.

V. BENEFITS OF A GENERAL CLASSIFICATION

I have tried to show that one benefit of the kind of general classification that I provided in section III of the paper is that it better enables us to see which status-based inequalities it is tort law's responsibility to attend to, on particular theories of tort law. It also enables us to notice that many established theories of tort law are in fact friendlier to the enterprise of working to eliminate such inequalities than they might at first appear. But there are also other, more pragmatic benefits to having such a general classification of the ways in which particular rules of tort law perpetuate status inequalities. I want to conclude by discussing some of these benefits.

Before I do, however, I want to note a caveat concerning the conclusions of my analysis. It would be a considerable oversimplification to conclude from the above that whenever a legal rule perpetuates a certain form of social subordination, this fact gives us an *overriding* reason to advocate for the rule's replacement. Many different factors must be considered when advocating for a change in the law, including the mandate of the institution charged with making the relevant rules, the feasibility of their changing a given rule, and of course the harms that alternative rules might cause. Moreover, status-based inequalities are not the only harms that a legal rule can bring about. In considering whether

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and how to change a given legal rule, we need to think not only about social subordination but also about other types of harms. I am not advocating, then, that we ought to change all rules that can be shown to contribute to social subordination or that all mainstream tort theories imply that all such rules ought to be changed. Nor should the classification in section III of the paper be read as a comprehensive decision-making procedure for determining when it would be beneficial or legally permissible to change a given rule: it is not that, but simply a way of marking out which rules are suspect. It seems highly unlikely that any attempt to outline a single decision-making procedure for determining which rules should be replaced would be successful. My argument is simply that we need to attend more closely to the different ways in which legal rules in a variety of areas such as tort law have an impact on status inequalities, and that my general classification will help us do so. But what specific action we end up taking in particular cases—whether we advocate for a new interpretation of a rule, or for its elimination, or for its replacement with some other rule—will all depend on the context, and I do not try to settle such questions here.

Turning now to some of the benefits of my classification of the ways in which legal rules can subordinate people, because it identifies commonalities among the rules within each category, it may encourage scholars working from the standpoint of different interest groups to collaborate, whether on research projects, or in litigation, or in forums such as the Tort Law & Social Equality Project.[82] It may enable them to see the problems that their particular social group is confronting as instances of a broader problem faced also by other groups and to learn from those other groups both about the nature of the particular problem they face and about possible solutions to it. Tort scholars working on race- and gender-based damages tables have already worked together in such ways. And those working on issues relating to disability and queer theory are beginning to collaborate. As Doron Dorfman has recently noted, many concepts in tort litigation "cross over from discourse related to queer individuals to discussions about the disability community," such as the importance of pride and questions about when one comes out.[83] Doron also notes that these two communities are often caught in a similar dilemma: they must decide among presenting their identity as they really experience it, as a source of joy and fulfillment; needing to hide it; and needing to present it as a source of injury in order to succeed in tort litigation.

A second pragmatic benefit to my general classification is that it may make possible a more coordinated approach in contesting rules that perpetuate unfair social hierarchies. There is a danger that if each subordinated social group focuses only on the very particular

82 *See* Tort Law & Social Equality Project, www.tortlawandsocialequality.ca (last visited May 22, 2024).

83 Doron Dorfman, post in *April Discussion Forum: Hurdles for LGBTQ+ Plaintiffs and Plaintiffs with Disabilities*, Tort L. & Soc. Equal. Project (Apr. 6, 2022).

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problems that seem to affect them without seeing their efforts as parts of a broader struggle for status-based equality, then some groups may end up advocating for legal rules that actually work to the detriment of *other* subordinated social groups.[84] A coordinated approach that is attentive to the impact of a given legal rule upon many subordinated social groups would help to avoid undermining the efforts of other groups. One example of an area of tort law where conflict between social groups is a very real possibility is wrongful-birth torts. Should a mother owe a duty of care in negligence law to her born-alive child for damage done to that child as a result of the mother's negligent driving when it was still a fetus?[85] The interests of women in protecting their autonomy and not being subject to unique duties of care while pregnant may count against recognizing such a duty, whereas the interests of people with disabilities in being protected and in recovering sufficient money from auto insurance to be able to pay for a lifetime of care may push in favor of recognizing this duty. Should a doctor owe a duty of care to a potential future child of his female patient of reproductive age, not to prescribe any drugs to the female patient that might potentially harm the future child?[86] If not, would the interests of children with disabilities, a socially subordinate group, be adequately protected? But if doctors were held by courts to owe such a duty, would they then be incentivized to avoid prescribing or even mentioning certain much more beneficial forms of treatment to their female patients—potentially depriving these patients both of excellent care and of autonomy, and further contributing to the subordination of women? It would help, in resolving such issues, for there to be conversations between advocates for women's rights and advocates for people with disabilities. They could profitably come together to explore the various ways in which various possible legal rules might perpetuate the unjust subordination of either group or might compound prior injustices against them and ultimately to work toward a solution that both groups might find acceptable.

Third, my general classification can also help us think more systematically about what exactly is morally troubling about the perpetuation of inequality in each of these different cases; about whether they are all of equal moral urgency; and about what to do in cases where alternative possible legal rules might each contribute to the social subordination of

84 For instance, Kimberlé Crenshaw has pointed out some of the ways in which mainstream feminist causes and arguments tacitly presuppose that all women's circumstances are like privileged white women's circumstances, and this thereby renders invisible many of the social realities that Black women confront. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. Chi. Legal F. 139 (1989); *see also* Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. Rev. 1418 (2012).

85 *See* Dobson v. Dobson, [1999] 2 S.C.R. 753.

86 *See* Paxton v. Ramji, 2008 ONCA 697, 92 O.R.3d 401.

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different groups, but in different ways. This is where it would be particularly helpful if we could begin a dialogue between tort scholars and discrimination theorists. Discrimination theorists have, over the past twenty years, developed a very nuanced set of theories about why it is wrongful or harmful to exclude or disadvantage people based on traits such as their race, gender, or sexual orientation or some intersecting combination of these, and many have developed related accounts of subordination and of the conditions necessary to eliminate unfair social hierarchies and to guarantee either equal freedom or equal opportunities for all. Tort theorists would benefit from engaging with these more general theories of why the particular sorts of injustices they are identifying in tort law are troubling and should be eliminated.

Finally, I hope that the general classification I have given of ways in which tort-law rules perpetuate status inequalities may be helpful to legal scholars working in areas other than tort law. For there are analogous problems with many other legal rules, both within private law and within public law. And certain forms of social subordination are of course sustained by multiple areas of law (and may indeed not be visible unless we move behind the narrow confines of one particular area of law, such as tort law, and start thinking about the ways in which rules from different areas of law interact). If we are to work effectively at eliminating unfair and pervasive status inequalities between different groups in our societies, we must think more deeply and more systematically, not just about how to craft antidiscrimination laws, but also about how to modify our other laws. Only then will we be able to lay down the necessary conditions for a true society of equals, one in which no group of people occupies an inferior status to others across many different social contexts.

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