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**A Theory of (In)justice: The Failure of Tort Law to Secure Equal Respect
for Women and a Feminist Contractarian Framework for Reform**

submitted to
Professor Paul Hurley

by
Eva Augst

for
Senior Thesis
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Abstract

Traditional approaches to philosophical theories of tort law have systematically undermined the individual worth and security interests of women. However, torts also provide a particularly powerful avenue for reform, in that they embody the public power of private law and offer individuals the opportunity to seek recourse and accountability for wrongs. In this paper, I offer a framework for such reformist approaches to tort philosophy, predominantly inspired by Jean Hampton's "Feminist Contractarianism," which requires that women be recognized as individuals with intrinsic worth who are deserving of respect. To accomplish this, I first note the particular relevance of social contract theory to tort philosophy, in the sense that both fields aim to establish and uphold fair terms of just and reasonable interaction among individuals. I then engage with the various deficiencies, both in classical social contract theory and in instrumentalist and non-instrumentalist theories of tort law, to adequately recognize women as individuals and to protect their corresponding security interests. I utilize scholarship by Martha Chamallas & Jennifer Wriggins to examine the relevance of these deficiencies in torts regarding domestic violence and sexual harassment cases, and assert that although non-instrumentalist theories provide the best framework for affirming individual worth, they have still historically failed to do so in the case of harms against women. Finally, I provide a framework for reform, based in respect for individual worth, dignity, and self-mastery consistent with the aims of non-instrumentalist approaches, that explicitly upholds protections for women – potentially with broader implications for other marginalized groups.

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Introduction

Utilizing critical social contract theory, specifically Jean Hampton's feminist contract test, this paper advocates for a paradigm shift in the philosophy of tort law that more adequately acknowledges and provides damages for harms disproportionately experienced by women.

Chapter I revisits classical social contract theory to reexamine the ways in which social orders are constructed via contract to agree upon terms of acceptable behavior and standards of fair governance. Taking care first to recognize foundational variations in social contract theory, Section A distinguishes between Hobbesian contractarianism and Kantian contractualism. Secondly, this reexamination of classical social contract theory contains a critical element (Section B), largely inspired by the epistemological framework of Carole Pateman and Jean Hampton, that challenges the notion that classical social contract theory ensures freedom and autonomy for all members of a society. Instead, the construction of the social contract in classical theories relies on false conceptions of neutrality and effectively excludes women from the category of the individual. The implications of this exclusion for the place of these groups in society are diminished respect for the dignity of women as persons and subsequently greater likelihood of dismissal of their claims to wrongs and individual autonomy.

Chapter II elucidates the various philosophical approaches to the field of tort law, namely the key distinction between instrumentalist and non-instrumentalist theories. Upon considering the implications of these two approaches, I make the argument that non-instrumentalist approaches such as the one provided by Arthur Ripstein offer a

more potentially fruitful avenue for recourse for historically marginalized groups. In particular, Section B calls attention to the tensions within instrumentalist theories that purport to recognize wrongs, but justify this recognition through effect on social benefit: whether or not the action in question *is* wrong is not under consideration, merely whether it is socially beneficial to take the action to be wrong.¹ Section C recognizes that tort law, despite being fundamentally private law, has a particular public dimension in that it shapes social norms and expectations that are reinforced by the oversight of the state. This paper takes the view that torts present an application and demonstration of the normative standards established in the social contract.² Understanding this shaping in the context of critical social contract theories begins to reveal the ways in which tort law has historically upheld norms of subordination and exclusion, particularly of women, as characterized by the contract relationship.

Chapter III provides context for the specifically gendered implications in the historical and normative constructions of tort law, particularly in concepts of reasonableness, duties of care, and standards of outrageous conduct. This chapter examines the evolution of domestic violence and harassment as torts (Sections A and B), particularly the ways in which these intentional torts have been undervalued, marginalized, and sometimes completely ignored as opportunities for damages and accountability. Drawing from the scholarship of Martha Chamallas and Jennifer Wriggins, this chapter aims to make explicit the ways in which tort law decisions have,

¹ I am indebted to my conversations with Professor Paul Hurley in the formulation of this point.

² See Peter M. Gerhart, *Tort Law and Social Morality* (Cambridge ; New York: Cambridge University Press, 2010), xxii, who conceives of tort law as “the handmaiden of social morality.”

even unintentionally, perpetuated normative standards of female subjugation, and reveal the effects of this perpetuation on women's status in the sphere of law and subsequently in the moral fabric of society. Section C explores theoretical explanations for how this may have occurred on both instrumentalist and non-instrumentalist accounts, recognizing that both theories are inadequate in their traditional form to protect the interests of women and provide them with reliable avenues for recourse.

Chapter IV expands upon the critique of instrumentalism running throughout the paper to demonstrate how these accounts fail to provide accountability for wronging actors, and relatedly how they do not encourage agency for the wronged individual. Non-instrumentalist accounts achieve these aims more effectively and are thus more useful tools for social reform, but still fall short when it comes to women's interests. Namely, the traditional omission of women from the category of the reasonable individual has proven to perpetuate their social oppression and failed to respect their intrinsic worth and autonomy. I utilize Hampton's contract test and requirement of non-exploitation to philosophically justify proposed feminist reforms to tort law, advocating for greater recognition of, and protection against, wrongs experienced disproportionately by women. Integrating the contractualist assertion of equal moral worth and access to determining fair terms of interaction, the paper uses the very aims of tort philosophy to denounce its traditional failures, and to provide justification for its reform.

I | Social Contract Theory

Social contract theory is traditionally based in the idea that societies form around the basis of a contract, freely agreed to by its individual members, that outlines the rules, standards, and expectations of behavior. The contract additionally addresses what forms of protection are guaranteed by the state, and to what extent state coercion can be justified. Critical contract theorists amend this framework by acknowledging the ways in which this theory is violated by the exclusion of particular people and groups from the category of the individual, and further by recognizing the nature of the contractual relationship with regard to these historically excluded groups.

A. Classical Contract Theorists

Classical social contract theory is typically understood as having originated with Thomas Hobbes' *Leviathan*, with other conceptions of the theory found in the work of John Locke, Jean-Jacques Rousseau, and later in the Kantian interpretations by John Rawls and Thomas Scanlon. Though each of these philosophers has widely varying outcomes in their assessments of the contract, they are centrally concerned with the rational justification behind social contracts, or why and how members of a society can rationally agree upon rules and standards of living in some social arrangement. The social contract forms conventions of social interaction and standards of governance. For the purposes of my argument, I will focus first upon the bases established by Hobbesian contractarianism, and second on those of Kantian contractualism. This section serves to

elucidate the foundations of social contract theory, and to emphasize its enduring prevalence in the moral and political structures of modern society.

1. Hobbesian Contractarianism

Hobbesian contractarianism originates in the assertion that humans are self-interested and rational beings. To act rationally is to act in pursuit of one's best interests, in order to satisfy them to the maximal extent possible. From this view of human nature, Hobbes constructs an idea of what life would be like for humans in an environment without civil society, which he calls the State of Nature. In these circumstances, with everyone attempting to pursue their own interests without law or cooperation, life would be, as he famously put it, "nasty, brutish, and short," with everyone attempting to gain control of resources, etc. by any means necessary.³ Because we, as rational beings, have an interest in sustaining our lives and pursuing long-term goals, this state of existence is undesirable.

Thus, we construct a social contract in order to live more peaceably and subsequently longer, affording us greater opportunities to pursue our interests. However, this contract does not arise out of any foundation of intrinsic trust or value placed on other individuals, or on peaceful interaction with them. The Hobbesian view of parties within the social contract, rather, is that they are fundamentally self-interested and view other human beings with purely instrumental value. Morality, in Hobbes' view, serves as a means through which to advance one's individual

³ Thomas Hobbes, *Leviathan* (Newburyport: Open Road Media, 2020), chap. 13, 84.

interests, and is a wholly constructed concept.⁴ Interactions with other individuals within the constraints of society are afforded value based on the utility that they can provide.

2. Kantian Contractualism and John Rawls

Though it is important to situate social contract theory with an acknowledgment of Hobbesian contractarianism's influence, this paper will utilize argumentation inspired largely by the Kantian social contract tradition, exemplified by scholars such as Kant himself, Jean-Jacques Rousseau, and later John Rawls. Rather than characterizing interactions via their ability to fulfill individual desires and self-interest, actions have a moral character outside of their instrumental outcome and utility to the individual. Members of a society are committed to some standards of morality not because these standards provide them with an optimal outcome, but because they believe that these standards are based in some fundamental ethical value. These theories are explicitly not instrumental; rather, they recognize the intrinsic value of individuals and associated fundamental moral commitments. The aim of social contract theory under this view is more so to recognize substantive moral demands of individual freedom and evaluate how well the principles of political engagement adhere to these moral guidelines. These fundamental commitments are translated into principles of justice and just interaction, which then underlie rules and frameworks of legal justice. On this view, those who are

⁴ See Thomas Hobbes et al., *Man and Citizen: De Homine and De Cive* (Indianapolis: Hackett Pub. Co, 1991): *De cive*, 3.21: "every man is presumed to seek what is good for himself *naturally*, and what is just only for peace's sake and *accidentally*" (emphasis added); and *De homine*, 11.4: "good is said to be relative to person, place, and time... the nature of good and evil follows from the nature of circumstances."

considered individuals party to the social contract have intrinsic rather than instrumental value to other members.

The Rawlsian conception of the social contract is particularly influential, and relies upon this Kantian form of reasoning. His theory is comprehensive and complex, but for the purposes of this paper, the focus will remain primarily on his conception of the individual, and how these individuals interact with one another.

A key distinction Rawls introduces in his theory is that of reasonable versus rational individuals, in sharp contrast to the Hobbesian conflation of these concepts and assumption of instrumentalist rationality as natural. On the Rawlsian framework, rational beings pursue their own ends in a similar manner to the Hobbesian rational individual, and pursue their individual conceptions of the good. But reasonable beings, which Rawls considers ought to be those beings which form the social contract, pursue fair terms of cooperation, value other human beings intrinsically, and recognize that *within* this fair cooperative framework, each individual is entitled to pursue their own conceptions of the good.⁵

Cooperative institutions of society are thus upheld not through each individual's pursuit of their own interests, as in the Hobbesian model, but rather through both individual and collective intentions toward justice. Citizens both themselves want to act in accordance with agreed-upon principles of justice, and want others to do the same. On Rawls' account, influenced by Kant, humans are free and equal moral persons, and have a desire to express this by acting from principles of justice for the good of each, not

⁵ See John Rawls, *A Theory of Justice: Original Edition* (Harvard University Press, 1971), §26, <https://www.degruyter.com/document/doi/10.4159/9780674042605/html>.

merely themselves.⁶ Notably, individuals “each have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic structure of their society is to be governed.”⁷ Each individual recognizes in themselves and in others their intrinsic worthiness to participate in the formation of the social contract. Succeeding in compliance with cooperative principles of justice is thus the greatest realization of individuals’ nature as moral persons.

These appeals to reasonableness and rationality, and how they lend themselves to cooperative structures, are key to contractualist arguments, but as I will later indicate, they remain subject to the critical lens of feminist approaches that question the validity of the very source of this reasonableness, and whether these conceptions favor particular groups over others. For instance, Rawls himself had a particular oversight in his theory with regard to gender, as noted by Susan Moller Okin in her book *Justice, Gender, and the Family*. In his construction of parties in the original position, Rawls defines these parties not as individuals but as heads of families, presumably with attention to the fact that children ought to be subject to some form of paternalism and not expected to make individual decisions of justice at a young age.⁸ However, in doing so he assumes the justice of the family as an institution, and disregards the role of women as individuals apart from their status as wives and mothers, leaving them “completely unrepresented in the original position.”⁹ To his credit, Rawls accepted this criticism and amended his theory in a later text – but this instance of oversight

⁶ See Rawls, *Theory of Justice*, §79.

⁷ Rawls, *Theory of Justice*, §82.

⁸ See Rawls, *Theory of Justice*, §25.

⁹Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), 94.

demonstrates how easily even Kantian conceptions of the individual as having intrinsic worth can discount or disregard the worth or value of women and their perspectives in the construction of theory.¹⁰

A key aspect of Kantian contractualism is its view of the role that the contract can play in society with regard to freedom – specifically, Kantian contractualists view contract as a guarantor of individual freedom, upholding the right of humanity in one’s own person.¹¹ Contract is conceived as an institution through which individuals interact consensually to secure conditions of non-domination and uphold freedom. This concept will be essential to discussions of Ripstein later in the paper, and to the justification for reexamining the role of gender in contract and torts; although its recognition here is largely foreshadowing, it is important to note the centrality of this concept to Kantian social contract theory.

B. Feminist Contract Theorists

Feminist criticisms of social contract theory apply to both Hobbesian and Kantian approaches, albeit under different justifications. Two philosophers in particular have provided accounts of the inadequacy of classical contract theory along gendered dimensions: Carole Pateman and Jean Hampton. Both theorists place focus upon a key element of social contract theory of the conception of the individual, and recognize the ways in which women have historically been excluded from this conception. Pateman

¹⁰ John Rawls, *Political Liberalism*, Expanded edition. (New York: Columbia University Press, 2011), xxix.

¹¹ See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009), 17–20.

outlines the real formation of political and civil contracts and their violation of ideal principles of equal parties' agreement to the contract, whereas Hampton identifies a particular oversight of classical social contract theory in the realm of intimate relationships. Although the two authors reach different conclusions as to the relevance of social contract theory to feminism, both of their works provide illustrations of the key ways in which the theory has historically failed women.

1. Carole Pateman, *The Sexual Contract*

Pateman aims to demonstrate a specific inadequacy and often-overlooked oppressive force of social contract theory: its erasure of the sexual contract, and its construction of contracts that are patriarchal and female-subordinating in nature. The devaluation of sex as a factor in the construction of social contracts has allowed political right to become patriarchal right, while these contracts purport to secure freedom for all individuals.¹²

A key aspect of the very creation of political contract is the concept of the contracting individual, or as Pateman describes him, a being "endowed with the attributes and capacities necessary to enter into contracts, the most important of which is ownership of property in the person."¹³ In order to enter into a contract freely in the first place, an individual must have these attributes, which were historically denied to women. Classical social contract theorists provide justification for one man to govern another in that this relationship is legitimate because it is reached through free and mutual agreement; as explored above, this is typically the process by which "men

¹² Carole Pateman, *The Sexual Contract* (Stanford, Calif: Stanford University Press, 1988), 2.

¹³ Pateman, 5-6.

transform their natural freedom into the security of civil freedom.”¹⁴ But as Pateman argues, when some individuals are not party to the agreement that forms the social contract, as is the case with regard to women, their interests and personhood are not represented as equal, and their subjugation can be justified. Furthermore, Pateman asserts that although the theoretical social contract is a “political fiction,” actual legal and political contracts “exemplify the freedom that individuals exercise when they make the original pact.”¹⁵ Thus, the contracts formed under these conditions were given social and legal expression that allows this subjugation to endure.

This exclusion and subsequent domination is perhaps most overt in the context of the marriage contract and marital relationships. Curiously, although women did not have the capacities of individuals as entrants to the political contract, their entry into the marriage contract was not only possible but expected. Pateman views the marriage contract as a primary arena in which men can exercise patriarchal power: she draws attention to the origins of marriage contracts and the doctrine of coverture, under which wives were given the legal standing of property, owned by their husbands.¹⁶ Though coverture has long since been abolished in the United States, various remnants and influences of the doctrine remained enshrined in law, and divisions of power within the marriage contract still often favor men in effect. The importance of the marriage contract to the larger social contract has been obscured, and its political relevance diminished, in part due to its classification as a private rather than political institution.

¹⁴ Pateman, 5-6.

¹⁵ Pateman, 7.

¹⁶ Pateman, 14.

But as I will explore in Chapter IIIA in line with Pateman's critique, coverture doctrines and the origins of marital domination continue to have salient legal and political implications today.

Pateman laid the groundwork for feminist criticism of social contract theory through her recognition of the role that gender played in the construction of traditional theory on a civil and political level.¹⁷ But to expand upon the conception of the individual entered into the contract, I next call upon the work of Jean Hampton, who wrote "Feminist Contractarianism" in 2006 to emphasize the often-exploitative nature of intimate personal relationships along gendered lines. Hampton's work builds upon that of classical social contract theorists in her use of contract as a device for analysis of standards of obligation, but advocates for intrinsic value and respect for fellow individuals, specifically women, as a means to promote equal treatment and avoid exploitation and domination.

2. Jean Hampton, "Feminist Contractarianism" and "Righting Wrongs"

"Feminist Contractarianism" stands apart from many other feminist criticisms that dismiss social contract theory as unsalvageable or inherently patriarchal. There are two key aspects of Hampton's work that this paper draws upon. First, Hampton provides an additional account, along the lines of Pateman above, of the ways in which conceptions of reasonableness and the individual have particularly gendered bases.

¹⁷ Rather than granting freedom unequivocally to members of a contracting society, Pateman argues that the freedom and power provided to individuals by the social contract is inextricably linked to men's domination over women. Her advocacy is thus fundamentally different from Hampton's, in that she believes the aspiration to gain acknowledgement of women as individuals can never be fulfilled (see Pateman, 184). However, her influential recognition of women's exclusion from the category of the individual party to the social contract remains relevant.

Exploring this portion of Hampton's account is key to understanding the particular form of advocacy she presents, which forms the second piece: contrary to those who dismiss contract theory, Hampton recognizes it as a tool to assert and secure the worth and value of the individual, particularly in the case of women. She recognizes the deficiencies in traditional contract theory, but argues that upon their correction the theory serves as a powerful and necessary apparatus.

Hampton begins with an overview of psychologist Carol Gilligan's interviews with two children, Jake and Amy, which had the aim of constructing each child's moral viewpoint, particularly with regard to their relationships to others. In Hampton's view, the fascinating results demonstrate a tendency to "see the concerns of justice and friendship as distinct from one another," and she considers whether views on the matter may have gendered foundations.¹⁸ Gilligan's interviews formed the basis of her theory on the separate 'moral voices' of an 'ethic of justice' and an 'ethic of care,' which she argues are associated with men and women respectively. For example, upon asking Jake and Amy how best to allocate responsibility to oneself and responsibility to others, Jake answers succinctly that "you go about one-fourth to the others and three-fourths to yourself," while Amy's much more long-winded answer indicates a great deal more value accorded to the needs of others and her responsiveness to them.¹⁹ Though the association of solely gender with these answers is "controversial," Hampton argues that they indicate at least some difference in approaches to moral

¹⁸Jean Hampton and Daniel Farnham, *The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy* (New York: Cambridge University Press, 2007), 2.

¹⁹ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 1982), 35-36, as cited in Hampton, 3.

thinking, and ideas of what social morality ought to entail – both of which are in some way immature.²⁰ When both exist in different societal groups, *neither* a moral approach that has a tendency toward self-interest predomination nor one that leans toward acquiescence can appropriately serve to formulate “ways of interacting that are not only morally acceptable but also attack the oppressive relationships that now hold in our society.”²¹

Hampton then presents a version of contractarianism that utilizes the strengths of social contract theory while adequately responding to feminist critiques. Her first move is to recognize the relevance of private relationships to contractarian reasoning, through what she calls “the contract test”: “by invoking the idea of a contract we can make a *moral evaluation of any* relationship.”²² For example, the clause of non-exploitation necessary in just relationships ought to apply with equal force to intimate relationships, which previously remained ungoverned by the social contract. Hampton’s measure of non-exploitation as informed by the contract test requires that relationships, even “private” ones, not involve a pattern of “infringements of costs or the confiscation of benefits... that implicitly reveals disregard rather than *respect* for that person.”²³

Particularly within relationships based in affection, Hampton argues that this affection can be utilized as a lever for exploitation, as affective bonds can function to limit accountability for wrongs. For example, women may be less likely to recognize

²⁰ Hampton, 3.

²¹ Hampton, 8.

²² Hampton, 20, emphasis added.

²³ Hampton, 21, emphasis added.

treatment as exploitative when they understand it as justified by bonds of love or care – in other words, in Amy’s ethic of care approach, through affording greater weight to others, particularly those with whom she shares greater bonds of care, she may be less inclined to prioritize herself and her needs, even when they are being neglected.²⁴

Hampton’s focus on respect for the individual here is key, and provides a clear moral basis for these contract relationships that is not founded purely in self-interest or equality, though these values are fundamentally involved in non-exploitation.

Following the Kantian tradition, Hampton establishes that there are two normative components involved in the conception of the person: those of human worth, and of a person’s legitimate interests. When conceiving of a social contract as something that all members of a society would reasonably agree to, Hampton argues that there is implicit recognition of not only individual value, but respect for the opinions and worth of others as well. This idea of human worth as the core of our moral considerations fundamentally informs Hampton’s feminist contractarianism and provides the central framework of this paper. The second component of legitimate interests follows from the first, which details that the fact that human beings have worth and value means that they have a legitimate interest in being treated with care by others. Treating someone with care, to Hampton, entails a normative theory of what is good for them, but which can be informed heavily by these legitimate interests that generate the intuitions recognized by the contract device.

²⁴ There are additional legal analogues for affection and family structures as being particularly limiting to accountability for violence against or exploitation of women, as will be explored in more detail in Chapter IIIA.

For feminist philosophy, the implications of this approach of valuing human dignity and worth are enormous; as Hampton puts it, “contractarian theory... can [help the feminist cause] because it unabashedly insists on the worth of each of us... this method enables us to conceive of both public and private relationships without exploitative servitude.”²⁵ Hampton’s proposed form of contractarianism, which retains some Hobbesian notions of asserting self-interest, requires that women avoid the kinds of relationships in which they have historically been exploited. She utilizes these Hobbesian elements to insist upon the recognition of women’s needs and autonomy, and to underscore the fundamental worth and intrinsic value of the individual deploying her contract test.

If we truly value the device of the contract, we should be able to use it to determine acceptable forms of interaction for *all* members of society, not only those in dominant positions. The application of Hampton’s contract test can assert the necessity of respect in all relationships: “in an ideal contract between equals, each person must respect the wishes of the other in order to achieve the agreement; hence, requiring mutual consent under these circumstances means requiring respect.”²⁶ Pateman correctly identified that classical contract theorists’ conception of the contract was based in subconscious patriarchal norms, but through expanding the terms of the contract to achieve what these theorists claim to have as their goal, Hampton’s theory can incorporate the views of women and enshrine women’s needs into the contract

²⁵ Hampton, 29.

²⁶ Hampton, 26.

itself. Contractarianism offers an opportunity to assert standards of behavior and dignity of the individual, and feminists ought to utilize it as such.

Several key concepts from another work by Hampton, "Righting Wrongs," also have relevant implications for this paper's conception of the individual, particularly in relation to how they affect social morality. As discussed above, Hampton takes a Kantian approach based in the intrinsic moral value of persons as ends-in-themselves, regardless of their place in a moral hierarchy, asserting that "morality demands of each of us that we respect the dignity of others and of ourselves."²⁷ Actions defying societal conventions of acceptable behavior cause moral injuries insofar as they violate respect for intrinsic human value.

In her discussion of moral injuries, Hampton is careful to make the distinction that although Kant did not believe that human worth could be degraded by an action as long as that individual retained their personhood, his theory does allow for an "appearance of degradation," or "diminishment," that can in fact constitute a moral injury that creates a loss of value.²⁸ These actions do not in fact lower the moral value of a person, which cannot be disputed. However, they treat the person in a way that intends to attribute less value to her than the Kantian theory would mandate. Representing someone through one's actions as having less moral value than she intrinsically holds presents a moral affront, both because we see it as a violation of her entitlements to value and because it attempts to make a particular statement about the value of this individual, threatening "to reinforce belief in the wrong theory of value by

²⁷ Hampton, 117.

²⁸ Hampton, 122, emphasis added.

the *community*.”²⁹ Despite the fact that these actions do not cause an actual loss of value, the *appearance* of loss of value, and the fundamental disrespect involved in this action, ought to be objectionable.

Despite the validity of this distinction, and the importance of emphasizing the fact that the fundamental moral value of the individual remains unchanged, it is also necessary to indicate that actual injury still occurs in these cases in the form of affecting victims’ ability to exercise their intrinsic values that remain. For instance, these types of moral injury may encroach on individuals’ agency, or hinder one’s ability to function in society in some meaningful way: being fired from one’s job for refusing to engage in sexual acts with one’s employer, though it may not remove one’s intrinsic worth, has particular consequences for one’s material status and subsequent ability to sustain oneself and thrive. Martha Nussbaum provides a particularly helpful distinction here, tied to her concept of individual dignity and intrinsic worth. Dignity, in her view, is never removed from the individual, but actions or living conditions can violate dignity, or make one’s life unworthy of the dignity it possesses: under these violating circumstances, “[individuals] retain dignity, but it is like a promissory note whose claims have not been met.”³⁰ The individual’s capabilities or functionings can be harmed in some fundamental way, setting back her abilities to exercise her intrinsic worth or dignity. Even if intrinsic worth is not lost, an affront to respect can still wrongfully injure an individual.

²⁹ Hampton, 127, emphasis added.

³⁰ Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011), 30.

A key aspect of Hampton's argumentation that this paper will align with is the notion that these actions of moral and capability injury and appearances of diminishing value have an additionally problematic dimension in that they are *expressive* of ideas of appropriate behavior. She gives the example of a rapist whose actions go unpunished by the state, arguing that this decision communicates that both the behavior and the associated moral diminishment of the victim were appropriate, and "reinforces the idea that women are objects to be possessed."³¹ Moral injuries are problematic in themselves through their disrespect of individual moral worth, but can have additionally troubling implications for public perception of fair terms of interaction when adjudicated through a central authority such as the state. These decisions can perpetuate a perception of individual moral value that is not in line with standards of human worth and respect. Despite the fact that these actions cause moral injuries, it becomes possible for them to not be *understood* as doing so, through a state apparatus that serves to define our ideas of normative concepts such as reasonableness and human worth. Being a victim of these wrongs may then be publically understood as demonstrative of lessened moral worth, despite the theory to the contrary.

This concept of the state's expression of appropriate behavior will prove significant in understanding tort law and its connection to social morality. Moral injuries were able to be perpetuated throughout the history of tort law, not through intent but through a deficiency in recognizing women's perspectives and valuing their human worth intrinsically. Although in torts it is the individual's choice to seek redress

³¹ Hampton, 133.

for wrongs, the state plays a key role in expression in its provision, or lack thereof, of legal recourse.

II | Philosophies of Tort Law

Intellectual approaches to tort law can be highly varied, but are typically assessed as divided into various schools, a few of which predominate the conversation surrounding tort philosophy, such as law and economics and corrective justice.

However, there is a particular philosophical divide that cuts across these schools: that between instrumentalism and non-instrumentalism. This section of the paper will focus primarily on this divide, and the prospective implications of each interpretative framework for social reform and the valuing of women's perspectives within tort law.

A. Instrumentalist Theories

Instrumentalist theory, in its most general sense, views tort law as an instrument for securing particular social outcomes. Torts are a means through which risks are appropriately allocated, behavior with harmful consequences is deterred, and compensation can be afforded in accordance with the level of social harm caused, or in order to achieve the maximization of a desirable outcome. Depending on the particular scholar, the concept of tort law as an instrument can serve to explain the reasons the field was developed, and/or justify the existence of tort law as a practice that promotes some social good. Central to all instrumentalist theory, however, is the notion that tort law functions primarily as a tool with which we can more effectively constrain and assess the varying utilities of social interactions.

The predominating school of thought in tort law today is law and economics, which is principally associated with instrumentalist theory. The practice of tort law,

under this view, ought to function in order to maximize wealth. Arising from principles of economic analysis, law and economics understands the law as assigning costs to actions in order to efficiently allocate risk and incentivize particular behaviors. This aim both explains the evolution of torts into its current form and justifies the need for tort law as a field.

For scholars like Richard Posner, the reason that tort law exists and has developed into a social practice, *and* the reason that it provides a particular social good, is that it has the power and indeed responsibility to bring about the most wealth-maximizing outcome: “the theory is that the common law is best (not perfectly) explained as a system for maximizing the wealth of society.”³² Posner thus recognizes both positive and normative aspects to his analysis, but the normative appeal is specifically based in efficiency, indicating that the justification is strengthened by that approach of economic analysis which he believes to have greatest explanatory power.³³ Posner’s project is largely a descriptive one, understanding torts as having developed primarily as a system of wealth maximization – but this descriptive project additionally supports the normative justification. To law and economics instrumentalists, the usefulness of tort law to society is the fact that it maximizes social wealth, and this practice endures and remains justified due to this being its fundamental aim. The history of torts, then, can be understood through this lens: that past legal decisions have largely been made with this wealth-maximizing goal, and we can understand legal

³² Richard A. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Law & Business, 1998), 27. Later editions take a somewhat more tentative approach (e.g. “much of the common law can be interpreted as aimed at maximizing the wealth of society,” in Richard A. Posner, *Economic Analysis of Law*, Ninth edition., Aspen casebook series (New York: Wolters Kluwer Law & Business, 2014)), 32.

³³ Posner, *Economic Analysis of Law*, Ninth edition, 31.

motivations and the formation of the common law as generally following these principles. Furthermore, we ought to consciously strive toward this goal in considerations of tort cases going forward.

Law and economics is the clearest example of an instrumentalist school of thought, but it is not the only form that instrumentalist approaches can take. Another key school of tort philosophy, corrective justice, can take both instrumentalist and non-instrumentalist forms – this section will now explore the former to illustrate a differently motivated approach to instrumentalism. Rather than being concerned primarily with maximizing wealth as in law and economics, corrective justice conceives of tort law as existing to correct a social wrong and re-establish a balanced order of justice. Corrective justice is less obviously predisposed to instrumentalism than law and economics, but instrumentalism can still play a foundational role in the corrective justice approach.

For example, William Prosser, although his ideas typically fall along corrective justice lines, can also be said fundamentally to hold instrumentalist views as to the purpose and development of tort law. Prosser identifies certain practices as socially harmful or faulty in outcome, and calls for tort law to be justified by its ability to compensate for these social wrongs: “the purpose of the law of torts is to adjust... losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.”³⁴ This approach is also of instrumentalist origins, as the

³⁴ Cecil A. Wright, "Introduction to the Law of Torts," *Cambridge Law Journal* 8, no. 3 (1944): 238, as cited in Page Keeton and William L. Prosser, eds., *Prosser and Keeton on the Law of Torts*, 5th ed., Student ed., Hornbook series (St. Paul, Minn: West Pub. Co, 1984), 6.

objective of tort law here is to bring about a particular social outcome that “resets” the harm done by a wrong. Unlike law and economics, corrective justice does place particular focus on the wrong itself, and compensating those affected by it – the explanation for tort law’s existence is then not purely that of maximizing wealth or of creating a maximally efficient outcome. However, tort law remains *justified* by the fact that it can secure a beneficial social outcome, and its development also rests upon the outcomes that it can achieve.³⁵

Though the paper focuses primarily on this instrumentalist-non-instrumentalist divide, it is important here to note that law and economics remains the most prominent school of tort philosophy, and to present a preliminary refutation to this particular school along the lines of earlier feminist critiques. Law and economics approaches have particularly troubling implications for the role of torts with regard to women. Basing the wrongfulness of an action, or the deservingness of recourse, on whether maximal wealth is achieved may lead to the most efficient outcome. However, I argue here that wealth-maximizing or maximally socially efficient outcomes are not inherently just. Particularly in the case of the conditions of women and other historically marginalized groups, an aggregative, wealth-maximizing approach such as those taken by law and economics scholars may not carry much weight for the rights of minorities.

Torts provide a blueprint for what is socially acceptable behavior, and have, under law and economics conceptions, historically delineated as unacceptable those actions which are determined to have some nonzero disutility to societal wealth when

³⁵ See John C. P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2020), and their account of dual instrumentalism.

weighed against possible benefits of the action. In the case of wrongs experienced disproportionately by women, however, it becomes possible under this framework that the calculus of social wealth has not indicated that a wrong took place at all. When there is no intrinsic wrong to an action, and the aim of litigating the particular tort is to gauge its implications for wealth rather than to judge whether it violated the worth of an individual, instrumentalist theory has the potential to leave marginalized groups without a clear avenue for recourse.

Another potential area of criticism for the instrumentalist, wealth-maximizing approach of law and economics is with regard to economically marginalized groups, and the effect of reduced income or ability to pay on valuation of interests. To elucidate this criticism, it is useful to consider the case *United States v. Carroll Towing Co.*, and the resulting Learned Hand Test for liability – and the prevailing reading of the test by law and economics scholars.

The case involved a barge, the *Anna C*, that broke free from her moorings to a pier after a tugboat (owned by Carroll Towing) severed the *Anna C*'s connection to other barges moored at a nearby pier. The *Anna C* collided with a tanker and sank, dumping her contents (flour owned by the United States government). One question that arose in the case was whether the barge's owner ought to have been present and taken greater precautions against the incident. In the resulting opinion, Judge Learned Hand developed a test for liability as a function of three variables: "(1) the probability that she will break away; (2) the gravity of the resulting injury; (3) the burden of adequate precautions... liability depends on whether [burden] is less than [injury]"

multiplied by [probability].”³⁶ In the law and economics school, this test is typically read as stating that not taking precautions is reasonable when the cost of those precautions is greater than the expected damages: in Posner’s (slightly amended) formulation, “it is negligent to use a level of care at which the marginal cost of accident avoidance is less than the marginal benefit from avoidance.”³⁷ In other words, if compensating for the damages would be less expensive than taking the precaution to secure the barge more tightly to the pier, it is reasonable to not take the precaution; in this scenario, then, no compensation would be necessary, “because the injurer has taken all of the precautions that *would be* justified by their costs.”³⁸

Arthur Ripstein identifies a key problem with this approach, namely that standards of care on this measure are set by the anticipated cost of damages.³⁹ When precautions are justified by the cost of compensation, it is more acceptable to not take precautions against injuring individuals with smaller incomes or less valuable property. Individuals’ security interests are thus to some extent contingent upon their personal wealth. This formulation has particularly troubling implications for women, who are more likely to experience higher rates of poverty and financial insecurity.⁴⁰ Under a law and economics approach to the Hand Test, women’s security interests are thus

³⁶ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

³⁷ William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law*: (Harvard University Press, 1987), 87.

³⁸ Arthur Ripstein, *Equality, Responsibility, and the Law*, Cambridge studies in philosophy and law (Cambridge ; New York: Cambridge University Press, 1999), 59, emphasis original.

³⁹ Ripstein, *Equality, Responsibility, and the Law*, 59.

⁴⁰ “The Basic Facts About Women in Poverty,” *Center for American Progress*, August 3, 2020, <https://www.americanprogress.org/article/basic-facts-women-poverty/>.

systemically more likely to be undervalued – when individuals have less property to damage, it can be wealth-maximizing to allow them to be harmed.

These initial criticisms of law and economics are based primarily upon the emphasis it places on wealth maximization, which is not inherent to all instrumentalist approaches. Though it is important to understand how these wealth-maximizing bases can negatively affect minorities, to make the central argument of this paper it will become necessary to pursue a significantly more nuanced criticism of instrumentalist approaches as a whole – this criticism will be addressed after achieving some greater understanding of non-instrumentalist theory.

B. Non-Instrumentalist Theories

In contrast to these instrumentalist approaches, then, stand non-instrumentalist theories. This approach to torts understands the common law not as a mechanism through which wealth or social utility are maximized, but as a practice that upholds and secures the conditions of respectful interaction between individuals whose dignity is recognized intrinsically, regardless of whether any particular social benefit accrues as a result of these interactions.

Arthur Ripstein is a key proponent of non-instrumentalist tort theory, and develops his theory explicitly along the lines of Kantian and Rawlsian frameworks. Ripstein's legal philosophy is heavily influenced by Kant, particularly with regard to justifications of the coercive power of the state and the purpose of law. Namely, Ripstein shares Kant's paramount commitment to the protection of individual self-mastery, or

the notion that no person is in charge of another. On his view, state coercion is justified only by the extent to which it is consistent with and secures this right to self-mastery for all individuals. Legal organization and cooperative institutions are necessary to this end: “the consistent exercise of the right to freedom by a plurality of persons cannot be conceived apart from a public legal order.”⁴¹

Viewing tort law as an element of this coercive institution, Ripstein also conceives of tort law as justified by its connection to freedom and equality, and as functioning in order to establish the terms of interactions on the basis of fair cooperation.⁴² Although the conception of the law is grounded in a central morality, “the role of law and a conception of fairness are, as Kant put it, to make freedom possible.”⁴³ The purpose and justification of tort law are to recognize and condemn wrongs as violations of individual self-mastery, not simply to require compensation for them in order to achieve maximal social wealth. Law is necessary not to motivate or influence particular outcomes but to protect fair interactions among free equals: “the systematic protection of individual private freedom is *only* possible under public law, and public law *must* guarantee its various conditions.”⁴⁴ Individuals may thus be coerced in their capacities as legal persons, in order to uphold these just conditions of interaction.⁴⁵

⁴¹ Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009), 9.

⁴²Ripstein, *Equality, Responsibility, and the Law*, 2.

⁴³ Ripstein, *Equality, Responsibility, and the Law*, 4.

⁴⁴ Ripstein, *Force and Freedom*, 243, emphasis added.

⁴⁵ See Ripstein, *Equality, Responsibility, and the Law*, 104.

On the non-instrumentalist critique, it appears that instrumentalist approaches undermine the very purpose of tort law, that being to secure fair terms of interaction; while instrumentalists claim to appeal to concepts of fairness, reasonableness, etc., in reality these ideas are determined, not by a commitment to freedom or equality of persons, but through a utility calculation, or attention to outcomes rather than legitimate responsibility to respect one another's rights. Instrumentalist approaches, in short, do not truly recognize a wrong, but rather merely consider the outcomes of an action (or failure to act), and determine the action's "rightness" or "wrongness" based upon these consequences. On Ripstein's account, the risk of treating fundamental rights to freedom as instrumental in this manner is that they inherently become conditional; constraining the conduct of individuals could become justified through conceiving of the results of this constraint as beneficial on some measure.

Ripstein was, albeit to a lesser degree, also influenced by Rawls, particularly regarding fair terms of interaction and the genesis of standards of reasonableness. He adopts Rawls' strategy of fair terms of interaction being distinguished from the contents and outcomes of particular interactions by appealing to a just basic structure. In brief, a just basic structure requires that the terms of interaction ought not to be unduly influenced by those with greater bargaining power, but once terms are established, particular interactions within those terms have greater freedom of negotiation.⁴⁶ In a just society, "fair terms of interaction set limits within which people must moderate their behavior in light of the claims of others. Within those limits, people are free to do

⁴⁶ See Ripstein, *Equality, Responsibility, and the Law*, 9-10.

as they choose.”⁴⁷ Ripstein recognizes core areas of tort law as a particular element of the basic structure, employing standards of reasonableness to “set the limits of acceptable behavior” and distinguish between responsibility and luck.⁴⁸

Non-instrumentalist views of tort law as a guarantor of freedom and equal treatment, rather than as a means by which beneficial social outcomes are achieved, allow for greater potential of true recognition of respect for the individuals in a society, and for the terms of social cooperation that are agreed upon as just. In contrast to the conditionality of instrumental rights, under a non-instrumental framework “constitutional rights are expressions of the *innate right* of humanity... their grounds are not based on any claims about the *conditions that normally hold*.”⁴⁹ Non-instrumental views of the purpose and development of tort law additionally provide clear mechanisms of recourse even in the event that a wrong is not considered sufficiently socially impactful, on balance, to necessitate compensation. Minority groups such as women therefore are much more likely to have a claim to such recourse, because fair terms of social interaction respecting their status as individuals will respect their claim to be free from particular wrongful harms.

In short, instrumentalism views tort law as a means to an end, while non-instrumentalism views it as a practice that upholds our status as ends in ourselves. The latter view affords intrinsic value to fair terms of interaction, treating individuals

⁴⁷ Ripstein, *Equality, Responsibility, and the Law*, 9.

⁴⁸ Ripstein, *Equality, Responsibility, and the Law*, 11.

⁴⁹ Ripstein, *Force and Freedom*, 218, emphasis added.

with respect not because it will bring about a rational, beneficial outcome to do so, but because individuals are intrinsically deserving of respect.

C. Tort Law's Public and Private Dimensions

Before delving into a deeper understanding of tort law's social and political implications, it is necessary to frame the discussion within both its public and private dimensions. This section responds to potential concerns about the appropriateness of tort law, an ostensibly private institution, as a tool for public reform.

Tort law, though private in name, has largely public characteristics. The legal interactions take place among individuals, but it is the state that sets the terms within which they can act, the state that judges validity of claims and potential for recovery, the state that coerces that payment from the wrongdoing individual, etc. Significantly, the state recognizes which wrongs are compensable, thus demonstrating a judgment on whether or not the behavior ought to be societally acceptable. Regardless of the reasoning behind that decision, although the reasoning discussed at length above is key, in any case it is the state that expresses what claims individuals ought to be able to make.

The private dimension of torts does maintain particular relevance for this paper in the agency it affords to individuals. The wronged individual plays a key role in tort actions, namely that they have the power to decide whether or not to bring the case in the first place, in contrast to criminal law. As I will return to in Chapter IV, this avenue for self-advocacy and accountability is significant both to the individual and to larger

implications for future cases. Recognizing this role of the private individual asserts their fundamental right to autonomy and to just interactions in a social framework. The problem is that these private individuals have *not* historically been recognized as people with intrinsic value by the state, and their ability to advocate has fallen between the cracks. This undermines the purpose of tort law in the sense that it takes away the ability of the private individual to seek recourse for wrongs, or rather never offered it in the first place.

This private aspect of tort as opposed to criminal law has great potential for improving just terms of interaction on a societal level and empowering individuals, but the cooperation of and empowerment by the state is necessary to realize this potential. It is perhaps useful here to conceive of torts as an expression of the social contract: tort law ought to demonstrate fair terms of interaction, provide a framework for justifying (or not justifying) the coercive power of the state, and recognize the rights of each individual to play a role in achieving the terms of cooperation. The state, both in its support of these rights, and in its historical failures to protect the rights of certain groups, is fundamentally expressive of societal values and standards. When the state fails to recognize harms against women and restricts them from the establishment of these terms of cooperation, it complicitly upholds and perpetuates their social oppression as inferior moral individuals. Torts, in this way, represent important prospects for reform through enhanced recognition of duties of care; but where the state has systematically failed to protect security interests, tort law demonstrates the

particular harms of not recognizing individuals as equal moral beings party to the social contract.

III | Gender in Torts

The dynamics and recognition of gender, and associated forms of discrimination, have a storied history throughout the development of tort law. To consider the ways in which torts reflect and reinforce the social contract and its limitations, it is essential to outline several key ways in which torts have neglected to adequately understand or express the experiences of women and the particular harms they face. Therefore, this section will review the history and evolution of domestic violence and sexual harassment as torts, and demonstrate how the marginalization and devaluation of these cases has negatively affected women's place in the existing social contract as individuals of equal moral worth. It will also begin to sketch the contours of the applicability of Hampton's test of reasonableness to tort law, through recognizing the ways in which duties of care that ought to have been seen as fundamentally important were instead historically neglected.

Martha Chamallas and Jennifer Wriggins provide a significant account of the effects of gender and race on tort cases in their work *The Measure of Injury*, upon which this section draws. I posit that their scholarship provides two mutually reinforcing primary mechanisms that have perpetuated women's subjugation: structural marginalization and cognitive or standpoint blindness. The primarily structural aspect of exclusion acknowledges the marginalization of certain types of claims as less central to torts more broadly: "the gender dynamic in these cases does not favor individual male plaintiffs over similarly situated female plaintiffs but instead operates to disfavor

the *type* of claim that women plaintiffs are likely to bring.”⁵⁰ This is reinforced by the tendency of individuals in dominant positions to privilege their own perspectives as the reality of social circumstances; in other words, traditionally male-dominated worldviews are more cognitively appealing, and women’s experiences are less easily comprehensible.⁵¹ Harms against women are in neither sense consciously or conspiratorially undervalued, and yet the marginalization of their experiences is perpetuated in the law. Further, this marginalization has the effect of making protections for women’s interests appear additional or excessive, or in some cases shifting the claims to these interests to other areas of litigation, despite their applicability to intentional tort claims.⁵²

A. Domestic Violence

Recognition of domestic violence as an actionable tort emerged relatively recently, during the feminist movement of the 1970s and 1980s. Prior to this recognition, plaintiffs faced an insurmountable barrier to recovery for domestic violence: the doctrine of interspousal immunity prohibiting one spouse from suing the other. This doctrine began with its basis in coverture, mentioned above, a process originating in the English common law in the Middle Ages that merged a woman’s identity with that of

⁵⁰ Martha Chamallas and Jennifer B. Wriggins, *The Measure of Injury: Race, Gender, and Tort Law* (New York: New York University Press, 2016), 4, emphasis added. Significantly, Chamallas & Wriggins make the point that intentional torts such as battery and assault have been pedagogically and theoretically de-emphasized, namely in the Third Restatement of Torts (see Chamallas & Wriggins 63-64).

⁵¹ See Chamallas & Wriggins 186, and Siegel’s preservation through transformation phenomenon, see *infra* IIIC.

⁵² See *infra* IVA for a further exploration of why this shift is particularly problematic with regard to the recognition of women’s equal moral personhood.

her husband when they were married. This fiction of “marital unity” thus prohibited her from suing her husband as she would be suing herself, a logical impossibility.⁵³ Under this doctrine, a husband had explicit legal prerogative to use physical force against his wife as a form of “correction” or “chastisement,” and to elicit obedience.⁵⁴ Although the Married Women’s Property Acts and Earnings Acts began to recognize married women’s separate legal identities throughout the late nineteenth century, interspousal immunity laws remained, though often with the somewhat different justifications of “marital privacy” and preventing fraud through marital collusion to seek damages.⁵⁵ Judges perpetuated a narrow interpretation of this legislature granting women legal independence, and did not allow them to file suits of any kind against their husbands for some time; thus, though coverture was ostensibly abolished, women’s legal rights remained limited in practice.⁵⁶

With regard to the social impact of women’s access to tort claims, the implications of interspousal immunity are severe. Until a mere 30-40 years ago, interspousal immunity laws remained in place, precluding women from seeking any recourse from the law when they experienced spousal violence. The right to be free from repressive violence, and the dignity associated with the assurance of safety and security in one’s home, were not adequately provided to women experiencing this form of abuse. There was no reasonable duty of care placed upon husbands not to use

⁵³ See Lee Boomer, “Coverture,” *Women & the American Story*, n.d., <https://wams.nyhistory.org/settler-colonialism-and-revolution/settler-colonialism/coverture/> and Chamallas & Wriggins, *Measure of Injury*, 69.

⁵⁴ Reva B. Siegel, “‘The Rule of Love’: Wife Beating as Prerogative and Privacy,” *The Yale Law Journal* 105, no. 8 (June 1996): 2123, <https://www.jstor.org/stable/797286?origin=crossref>.

⁵⁵ See Chamallas & Wriggins, 69.

⁵⁶ Chamallas & Wriggins, 69, footnote 29.

physical force against their wives, and this followed from historical precedent: indeed, it was long considered *reasonable* for men to use violence against their spouse as a form of chastisement for disobedience or insubordination. Women were expected, therefore, to accept this abuse as a natural part of married life, and there was little social or legal advocacy on their behalf until the 1980s and 1990s.

When this advocacy did begin to emerge, it did not often take the form of tort lawsuits, and this trend continues today. Instead, suits alleging domestic violence were typically shuttled into family law to be raised during divorce proceedings, potentially to secure alimony. Although this legal recognition of domestic violence was an important step, as Chamallas & Wriggins argue, the monetary award of alimony does not equate to damages in a tort action.⁵⁷ Considering that domestic violence claims could map quite effectively onto the intentional torts of assault, battery, false imprisonment (through the abuser's restriction of the victim's freedom of movement), or intentional infliction of emotional distress (in verbal abuse cases), why is it that "very few instances of domestic violence ended up as tort cases"?⁵⁸

There are particular barriers that potential domestic violence plaintiffs face in attempting to file the action as an intentional tort. A significant problem is that there is simply very little compensation available for victims of domestic violence, as liability insurance has a myriad of workarounds and caveats that would not allow victims to receive damages. Homeowners' insurance, for example, often has policies in place that exclude coverage for intentional acts, which domestic violence clearly would qualify as.

⁵⁷ See Chamallas & Wriggins, 70.

⁵⁸ Chamallas & Wriggins, 70, and see Chamallas & Wriggins, 66.

Perhaps in a lingering shadow of interspousal immunity, these policies may also include a family member exclusion, denying damages for suits filed against a family member or spouse. Victims of domestic violence thus have very little available monetary compensation through torts, and have difficulty finding lawyers accordingly.⁵⁹

Additionally, the statutes of limitations for intentional torts such as domestic violence are notably short, typically only two to three years, as opposed to those of negligence, which can range from two to six. With respect to domestic violence in particular, short statutes of limitations present significant obstacles to the filing of tort claims. Abusive spousal relationships involve coercion and control, often both of the victim's emotional state and her financial stability and access to support. To safely file claims against their abuser, victims must be in a situation in which they are externally supported or independent, which may take many years to establish. Therefore, it is incredibly difficult, both emotionally and practically, for victims of domestic abuse to file tort claims against their spouse within a mere two to three years after the incident occurs.⁶⁰

Barring women from seeking tort damages in these ways also continues to have social ramifications. If tort law exists with the capacity to recognize and punish social wrongs, not doing so in this case sends a clear message that domestic violence is devalued in importance relative to other forms of physical harm. If women cannot reliably receive compensation after physically and emotionally traumatic experiences of

⁵⁹ See Chamallas & Wriggins, 70-72.

⁶⁰ See Chamallas & Wriggins, 73-74.

abuse, the law is expressive of a fundamental disregard for women's security interests as disproportionately greater victims of this form of violence. As Hampton puts it, "when the American courts, until recently, responded to spousal abusers with light punishment or no punishment at all, they were *expressing the view* that women were indeed the chattel of their husbands."⁶¹

B. Sexual Harassment

Another arena in which Chamallas and Wriggins argue that tort could be particularly useful, but has historically failed to serve as a form of advocacy for women and people of color, is workplace harassment.⁶² Similarly to domestic violence's shuttling into family law, Chamallas and Wriggins indicate that workplace harassment cases have also been steered out of torts in order to be litigated under civil rights statutes. Though there may be some benefit to utilizing these statutes, and to the fact that they have been explicitly delineated in law, viewing statutory remedies as sufficient perpetuates the assumption that pursuing tort remedies is unnecessary. There are two particular problems with this approach, the second of which I will predominantly focus upon. First, practical issues arise in utilizing civil statutes for workplace harassment claims, namely that recoveries are typically capped at low amounts, and that civil rights laws are generally inflexible to multidimensional discrimination.⁶³ Second, a particular

⁶¹Jean Hampton and Daniel Farnham, *The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy* (New York: Cambridge University Press, 2007), 140, emphasis added.

⁶² I will focus in this paper upon sexual harassment and discrimination experienced by women in general, with the understanding that women of color are disproportionately impacted by these forms of harassment and discriminatory content due to the intersections of their race and gender.

⁶³ See Chamallas & Wriggins, 76-77.

benefit to tort law as opposed to civil rights statutes is its expressive nature surrounding the acceptability of terms of interaction; on Chamallas & Wriggins' account, "the degree to which courts permit civil rights principles to migrate into tort law...is a good gauge of the responsiveness of the common law to distinctive types of injuries that disproportionately affect minority groups."⁶⁴ Further, considering harassment as a wrong to be remedied expresses that it is an unacceptable form of conduct under just terms of interaction.

Catherine MacKinnon provides an account of the development of sexual harassment as a tort occurring on an explicitly gendered basis. As MacKinnon indicates, it was not until *Barnes v. Costle* in 1977 that a court ruled that sexual harassment was based on sex within the context of Title VII; prior to this ruling, "a line of district court rulings in other circuits had all held that sexual preconditions for, or conditions of, work were not 'based on sex'... [Sexuality] was, those courts variously held, personal, biological, inevitable, universal, or not employment-related."⁶⁵ Courts did not connect sexuality and sexual acts with sex directly, but rather utilized legal hypotheticals to demonstrate that sexual abuses could be directed to either sex, therefore concluding that when these abuses were directed toward one sex this could not demonstrate sex discrimination. These decisions did not recognize a socially gendered aspect to sexuality indicating that "demands for unwanted sex are most typically predicated on the fact that an employee is a woman," or the power dynamics involved within sexual

⁶⁴ Chamallas & Wriggins, 77-78.

⁶⁵ Catharine A. MacKinnon, *Women's Lives, Men's Laws* (Cambridge, Mass: Belknap Press of Harvard University Press, 2005), 167.

relationships in the workplace – MacKinnon thus argues that these decisions neglected a key element of the real disrespect faced by women in these circumstances.⁶⁶

Another key shift occurred, on MacKinnon's account, with the case *Bundy v. Jackson*, which upheld that patterns of sexual solicitation in themselves could constitute a violation of antidiscrimination in the form of a hostile work environment. Significantly, MacKinnon argues that this holding recognized that "the harm is done to the equality interest of the woman herself... The injury is inflicted in and at work, but its impact on her is not confined to its impact on her work."⁶⁷ The injury of a hostile working environment is not only violating in the sense of creating harmful impacts on the woman in terms of her employment. Instead, the harm violates a deeper fundamental sense of dignity and personhood that undermines her status as an individual with equal intrinsic worth. This subordinating treatment may or may not lead to tangible impacts on quality of work or other measures, but "being treated as a sex object at work could be harmful *in itself*," particularly in an environment that purports to be governed by standards of equality.⁶⁸

MacKinnon's account demonstrates a key facet of this paper's argumentation: the common law did not adequately reflect the experiences of women, although women knew them to be true long before they became written law. The courts were essentially playing catch-up to existing morality and knowledge of life experiences. The legal acknowledgement of these facts, she argues, is thus not a practice that departs at all

⁶⁶ MacKinnon, *Women's Lives, Men's Laws*, 167.

⁶⁷ MacKinnon, *Women's Lives, Men's Laws*, 170.

⁶⁸ MacKinnon, *Women's Lives, Men's Laws*, 171.

from principle. In the *Barnes* decision, “[‘from aught that appears’] moved the issue from the air of conjecture to the ground of reality, where both common law and women live... factual questions... brought dynamism to equality law because, while women had been largely excluded from equality law, they had hardly been excluded from inequality in life.”⁶⁹ Workplace laws had operated on the principle of equality, but had insufficiently provided this equal protection in reality, due at least in part to the discounting of sex-based experiences and historical marginalization of women’s accounts.

Looking to improve conditions of workplace harassment law in the future, Chamallas and Wriggins point to the intentional infliction of emotional distress tort as an avenue to address workplace harassment claims, which has less stringent requirements and elements of proof than the statutory claims do. However, these claims hinge on the proof of “extreme and outrageous conduct” that historically has not encompassed discriminatory harassment. As of the writing of *Measure of Injury*, only California of all 50 U.S. states had classified workplace sex discrimination as per se outrageous conduct.⁷⁰ Without this discriminatory action being classified as outrageous, it became significantly more difficult to prove intentional infliction of emotional distress for these cases, leaving claimants without access to tortious redress.

Chamallas and Wriggins propose instead a dignity-based standard of outrageous conduct in accordance with the evolving understanding of civil rights violations in the workplace. This standard focuses less upon any effect of loss of honor, as was

⁶⁹MacKinnon, *Women’s Lives, Men’s Laws*, 169.

⁷⁰Chamallas & Wriggins, 78.

historically the standard for such cases, and more upon “whether a defendant’s conduct, as a whole, has the effect of seriously harming the plaintiff by targeting her as a second-class citizen who does not deserve to be treated with equal respect and consideration” – this would then classify the harassment as outrageous conduct.⁷¹ The benefit that existing civil rights statutes provide is that this newly developed standard has something to draw upon to define outrageous conduct, but the separate classification of workplace harassment as a tort is both philosophically and financially valuable. Treating workplace harassment as a wrong to one’s personhood “serves to vindicate the ‘intangible injury to personal rights’ caused by harassment that ‘robs the person of dignity and self esteem,’” reinforcing the status of women as equal moral persons deserving of respect.⁷² I will return to this proposed dignity standard shift and possible philosophical justification for it in Chapter IVB.

C. Theoretical Explanations: How Did We Get Here?

Reflecting upon what we now consider to be the unjust harms perpetrated against women described above, the natural question arises: how exactly did this happen? How is it that a portion of the law that claims to be dedicated to allowing equal recourse for individuals systematically failed such a huge portion of society for so long? To answer this question, the paper will explore both instrumentalist and non-instrumentalist theories of descriptive development to understand how tort cases

⁷¹ Chamallas & Wriggins, 84.

⁷² *Byrd v. Richardson-Greenshields Secur., Inc.*, 552 So.2d 1099 (Fla. 1989), 1104, as cited in Chamallas & Wriggins, 81.

operated over time to allow this oversight. Further, it will later argue that while both of these theories are problematic in their failure to account for the experiences of women, non-instrumentalist theories may have more potential for reform.

It may now become clear why instrumentalist accounts could have failed systematically to grasp and adequately account for the wrongs experienced by women: in short, this failure was permitted to occur because the consequences of allowing these wrongs to be recognized were not sufficiently great so as to merit considering them legitimate legal wrongs. Women's experiences of what we now understand to be domestic violence and workplace harassment were simply not considered to be causing detrimental outcomes for society, because the concerns of women as individuals were systemically undervalued, or because the development of law did not often take women's perspectives into account – likely some combination thereof.

MacKinnon provides an account of how these inequalities have been seemingly mitigated but in reality upheld, specifically with reference to sexual violations and the development of law from largely male perspectives. She argues that the law ostensibly prohibits sexual abuses against women, but the formulation of these prohibiting laws in fact allows for the permission of these acts to occur, specifically due to the fact that laws are typically designed by men: "In the areas of sexual assault and reproductive control specifically, these legal concepts have been designed and applied from the point of view of the accused rapist and the outsider/impregnator respectively, and *in the absence of the point of view of the sexually assaulted or pregnant woman.*"⁷³ This development need not be

⁷³ MacKinnon, *Women's Lives, Men's Laws*, 128-129, emphasis added.

conspiratorially malevolent towards women, or intentionally subjugating women. But the fact that laws surrounding sexualized experiences are designed and developed by those who do not experience victimhood of them as frequently allows for significant oversight to occur that does not uphold the principles of equality that the laws claim to provide. As MacKinnon put it, at the time of her writing, “most of the sexual assaults women experience do not fit the legal model of the ideal violation. Most rapes are by familiars not strangers, by members of one’s own ethnic group not others, at home not on the street.”⁷⁴ While purporting to promote equality and provide accountability for wrongs, the limited perspectives of male experience may in fact perpetuate the occurrence of these wrongs in subtle ways. By focusing primarily on the visible outcomes of sexualized abuses, and discounting the role of the intrinsic worth of women and their experiences, the law continues to allow women to be used as a means to an end of sexual pleasure, constituting “an index of social worth” and placing women in a degraded position.⁷⁵

This lack of consideration of the harms inflicted on marginalized groups is in line with fundamental concerns surrounding instrumentalist approaches initially brought up in Chapter II. Placing focus on outcomes and how they should be weighed, rather than how harms may potentially impact the personhood of the individual, allows for particular experiences to be more easily discounted. An action that causes moral harm to an individual by affecting their dignity or ability to exercise their intrinsic worth may not be considered a harm under this framework, in the event that the outcome it

⁷⁴ MacKinnon, *Women’s Lives, Men’s Laws*, 129.

⁷⁵ MacKinnon, *Women’s Lives, Men’s Laws*, 129.

generates is not objectionable for wealth maximization, social utility, etc. Tort law as a system of accountability is therefore unmoored from the very meanings of the words it uses – conceptions of wrongs are reduced to whether or not they provide social benefit instead of whether or not they are intrinsically wrong.

On a non-instrumentalist account, the question of why these injuries remained so consistently undervalued is perhaps a more complex one. As mentioned above, the non-instrumentalist explanation and justification for the formation of tort doctrine often coincide in the concept of the fundamental wrong. But then how could it be that these wrongs were not considered fundamental, or that they were systematically neglected? It becomes clear that non-instrumentalist theories were in some respect lacking – they did not accomplish the valuing of the individual as they purport to. For an answer to the question of why, it may be useful to return to Hampton's theory of expressive diminishment. Principles of equality may fail to be actualized when wrongs are repeatedly rationalized under state structures through a lack of recognition or retribution. Although the original Kantian concept was clearest with regard to the punishment of crimes, duties of respect for individuals' interest in security can appeal to the same idea of intrinsic worth.

In the context of torts, individuals have a fundamental interest in their personal security, and the violation of a duty to respect this interest represents and expresses a similar disrespect for that individual's intrinsic worth. Hampton argues that the role of the state in the context of this disrespect is key: "the state's behavior in the face of an act of attempted degradation against a victim is itself something that will either annul *or*

contribute further to the diminishment of the victim.”⁷⁶ When the state systematically fails to recognize harms as harms, potentially because of a lack of knowledge of female experience, this rationalizes and validates the continuation of these legal practices and the undervaluing of women’s experiences and testimonies of harm.

Chamallas provides an account in her article “Will Tort Law Have its #MeToo Moment?” of the ways in which gender inequality may have been perpetuated in this manner, despite substantial changes to the legal rules and rhetoric surrounding gendered issues and lack of intent for this perpetuation. She utilizes legal historian Reva Siegel’s concept of “preservation through transformation,” which refers to the preservation of basic social hierarchies while allowing for greater legal exceptions or piecemeal protections for vulnerable groups.⁷⁷ Significantly, this theory is structuralist, meaning that there is no necessity for conspiratorial motivations in such preservations, but rather that the social and material positions of those in power encourage them to maintain existing viewpoints and neglect others: they have “a built-in sympathy and appreciation for the protection of regimes which converge with their interests and privilege, alongside a relative indifference, obliviousness and discounting of consequent harms inflicted on marginalized groups.”⁷⁸ It is plausible that this obliviousness carried over into the very valuing of harms themselves: when male lawmakers and judges are considering what could constitute a harm to the moral foundations of the individual, to one’s dignity and worth, they lack the personal experience of diminishment and moral

⁷⁶ Hampton, 140, emphasis added.

⁷⁷ Siegel, as cited in Martha Chamallas, “Will Tort Law Have Its #MeToo Moment?,” *SSRN Electronic Journal* (2018): 4, <https://www.ssrn.com/abstract=3243841>.

⁷⁸ Chamallas, 4.

injury through actions related to sex, and are potentially more likely to overlook women's realities.

With expressive diminishment and preservation through transformation in mind, we now turn to the final chapter: understanding the development of this reality, what is the enduring significance of tort theory, and how can we approach and justify its reform?

IV | Non-Instrumentalism and Critical Social Contract Theory: An Approach to Reform

The final chapter of the paper addresses the concerns of the inadequacy of both traditional schools of thought with regard to women's security interests. To reach a theory of torts that sufficiently encompasses women's experiences and intrinsic worth as individuals party to the social contract, feminist reforms to non-instrumentalist theories are in order. These reforms, though necessarily innovative, do not represent a fundamental departure from the central values that non-instrumentalist theories hold.

A. Non-Instrumentalism and the Individual

We can now return to the problem posed above in Chapter IIA, that instrumentalist theory as a whole is a much wider umbrella than solely the law and economics school and requires a more nuanced line of critique to understand why instrumentalism provides a less appropriate avenue in torts for recourse to women. Utilizing instrumentalist approaches can have a particular appeal, not only because of the draw of wealth-maximizing accounts like law and economics, but because this approach appears to be an effective means for achieving a social goal. On a different instrumentalist account, perhaps one could simply change the goal from pure wealth maximization to something that is appealing to activist groups – say, for example, we changed our approach to tort law in order to achieve social outcomes of nondiscrimination or social justice, through incentivizing equitable treatment and altering allocations of risk to incorporate punishment for discriminatory actions.

Indeed, this is the goal of many critical legal scholars who utilize instrumentalist approaches.⁷⁹

But I argue for a more fundamental change to our understanding of tort law, and of the conceptions that underlie it, informed by the Kantian contractualist accounts explored above. Taking steps to achieve the social goal of nondiscrimination, for example, does not adequately recognize discrimination as a legitimate wrong, merely as something that no longer is considered to be a socially beneficial or wealth-maximizing outcome. Using tort law to achieve a particularly nondiscriminatory social outcome without understanding the action as harmful in itself places this outcome on precarious ground in terms of justification.

In its connection to contractualism, this paper's account provides a particular strength in opposition to instrumentalist approaches. On this view, the aim of a social contract ought to be to secure reasonable and just terms of interaction, and to do so through valuing individuals, and by extension their security interests, intrinsically. Achieving this aim is not fulfilled by setting goals and utilizing tort law as a means to achieve them; rather, these terms of interaction are based in the *process* that underlies the eventual outcome, whatever outcome that may be. Valuing individuals' dignity as an inherent good preserves and secures the standing of marginalized groups in society as people to be respected, while valuing dignity merely as a means by which to achieve what is considered to be a beneficial outcome could leave these groups vulnerable.

⁷⁹ For instance, see Richard Delgado, "Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law," *University of Pennsylvania Law Review* 143, no. 2 (December 1994): 379, <https://www.jstor.org/stable/3312533?origin=crossref>.

There is something particularly powerful and necessary about considering these discriminatory or disproportionately violent actions to be intrinsically harmful. An efficacious reformist approach utilizes non-instrumentalist conceptions of the value of the individual as an end in themselves in order to promote self-advocacy and individual empowerment in the realm of torts.

There are two particular ways in which using tort law as a tool to achieve a social outcome can undermine the unique capacity that it holds to require respect for, and dignity of, the individual. First, conceptions of a beneficial social outcome do not in fact encourage *accountability* in any meaningful sense. Bringing about an outcome in which wrongdoers in positions of power are held accountable for their actions may be an admirable goal, but it is fundamentally separate from recognizing *why* it ought to be necessary to hold them accountable: because they have committed a fundamental wrong or moral injury. When the approach to recognizing the wrong is on the side of the outcome rather than the process, there is no clear expression of the wrongness of the act itself. Rather, what is expressed is to what extent the outcome of the action is societally desirable or undesirable. Placing this focus upon outcome abstracts from the wrongful action itself, and from its perpetrator. In contrast, non-instrumentalist approaches themselves encourage accountability by protecting the fundamental interests of the victim. A man who sexually harasses one of his female employees ought to be held accountable for the wrongfulness of his actions through the explicit recognition of her security interest in bodily autonomy and his violation of it. The aim of achieving a general social outcome of decreased workplace harassment does not in

itself demonstrate why this man's action was harmful, or even that it was fundamentally wrong; the instrumentalist approach merely recognizes the outcome of workplace harassment as undesirable.

Second, and interrelatedly, using torts as a tool to achieve a social outcome does not encourage the *agency* of the individual to recognize and advocate for their experience of harm. It may appear at a glance that encouraging individuals to consider how their experiences have weight in a social moral calculus by understanding their impact on the outcome may be beneficial. But under an instrumentalist framework, individuals may advocate for themselves *only* insofar as their experiences have impact and contribute to some social good. It is more powerfully beneficial to marginalized groups to recognize their unique experience of harm as something fundamentally wrong, regardless of what social outcome this recognition brings. When individuals are able to be secure in the fact that their dignity was violated, or that their interests were fundamentally disrespected, it offers them much greater claim to agency in their self-advocacy. It is useful here to return to Ripstein's account of Kant's innate right of humanity and the role of independence and self-mastery therein, particularly with regard to bodily powers.⁸⁰ Individuals have the right to be capable of setting their own purposes, and "you are independent if you are the one who decides which purposes you will pursue," including in the context of the choices in use of one's body.⁸¹ If one's body is used, violated, or put at risk to accomplish the purposes of another, that

⁸⁰ See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass: Harvard University Press, 2009), Chapter 1 Section II.

⁸¹ Ripstein, *Force and Freedom*, 14.

person's right to independence has been violated. Recognizing this right in the context of law encourages retributive action on the part of the wronged individual, because they are aware of how and why they have been wronged and have a legal framework to make a claim based on that wrong. Simply knowing that the outcome of what happened to them was socially undesirable does not encourage self-advocacy to the same extent.

Accountability and advocacy go hand-in-hand under a non-instrumentalist account that places value on respect for the individual. Individuals have greater access to these resources of accountability when they are able to appeal in their advocacy to a particular way in which they suffered a wrong. For instance, Chamallas & Wriggins advocate for the prioritization of women's interests in sexual integrity as triggering a duty of care, as will be explored in greater detail in section B.⁸² This duty of care serves as a clear path to recourse for wrongs *and* to the ability to hold wrongdoers accountable, giving women a clear claim to violation in cases of harassment. Female autonomy is recognized as inherently valuable, and its violation is thus recognized as a wrong. Meaningful reform is accomplished through this fundamental valuing, not through simply appealing to the language of wrongs and duties of care in order to achieve a particular social goal.

B. Women's Interests

Non-instrumentalist approaches to tort law are thus more conducive to meaningful social reform. But even on these accounts, systematic issues have arisen

⁸² See Martha Chamallas and Jennifer B. Wriggins, *The Measure of Injury: Race, Gender, and Tort Law* (New York: New York University Press, 2016), 189.

with respect to gender, particularly in the lack of recognition of women's security interests as significant. Utilizing the work of critical social contract theorists as outlined in Chapter I, this section recognizes how the very conceptions of reasonableness that inform the standards of non-instrumentalist approaches are flawed with respect to gender, and how we can accordingly justify a feminist reimagining of these fundamental standards of care in relation to the individual.

Ripstein's account of non-instrumentalism in *Equality, Responsibility, and the Law* acknowledges this deficit in attention to gender at points, namely to advocate further for standards that are not based in instrumental conceptions of rights and liberties; for instance, in a note on the relevance of the reasonable person standard, he writes that "the reasonable man was too often male in nature as well as name, and the law was correspondingly insensitive to important security interests."⁸³ Later, in his advocacy for objective standards of responsibility, Ripstein recognizes the detriments of past standards that were indifferent to significant interests, particularly in the case of the lack of recognition of women's interest in being free of sexual harassment.⁸⁴

Placing a focus on gender and the harms of historical failure to recognize its effects is thus compatible with Ripsteinian non-instrumentalism, though acknowledgement of the effects of gender on standards of reasonable responsibility

⁸³ Arthur Ripstein, *Equality, Responsibility, and the Law*, Cambridge studies in philosophy and law (Cambridge ; New York: Cambridge University Press, 1999), 19.

⁸⁴ See Ripstein, *Equality, Responsibility, and the Law*, Chapter 3.4-3.5.; Ripstein 88. Ripstein utilizes a discussion of *Vaughan v. Menlove* (*Vaughan v. Menlove*, (1837) 132 E.R. 490 (C.P.)) to indicate that objective standards of responsibility are necessary to moderate activities with regard to the legitimate claims of others, and that adherence to standards of reasonableness are not conditional on individual conceptions of what is reasonable, but rather based in cooperative societal relations. The standard is thus objective in the negative sense of being not subjective.

remain largely unaddressed in his theory. In concert with the important work of Chamallas & Wriggins, Hampton, and to some extent MacKinnon, I aim to elucidate further the importance of recognizing the fundamental interests of women as individuals.

Before diving into the potential solutions to these traditional failures, omissions, and under-valuations, a word to those who may find these solutions unnecessary or inordinate. In calling for reform to these standards, this paper in fact appeals to what they claim as their basis: protection of the individual's innate right to self-mastery, under a cooperative social framework. What may appear to be a reactionary change is instead a condemnation of past hypocrisy, and a call to more fiercely advocate for the fundamental rights of all individuals, including women. Although this reform may include protections that seem exceedingly supplementary, they are in fact justified under the central tenets of non-instrumental theory.

If torts is concerned with the interaction of individual liberty and just standards of cooperation, it is prudent to consider how the concept of the reasonable individual, and the following terms of cooperation set by those individuals, have been affected by gender. The key move here is the incorporation of something akin to Hampton's contract test that requires respect for the individual in all relationships, and protection of that individual's fundamental security interests. In essence, this is a realization of Ripstein's self-mastery with a particular eye to how that concept has been inadequate to protect the interests of women. Therefore, our approach to torts ought to incorporate non-instrumentalist conceptions of the self that we understand via critical contract

theory – women as individuals with intrinsic dignity and worth, and harms against them and their autonomy as inherently problematic.

One area in which this supportive framework is most clearly valuable is in Chamallas & Wriggins' approach to workplace harassment and the standards involved in intentional infliction of emotional distress claims, as explored briefly in Chapter IIIB. The authors call for a shift in the basis of the standard itself, which they claim has historically been honor-based, valuing reputation, honor, and chastity: "the severity of sexualized conduct directed at women is generally judged by its capacity to sully the reputation of a 'respectable' woman."⁸⁵ They recognize the ways in which this honor-based standard has historically functioned to delegitimize women's right to sexual autonomy – courts did not typically take into account whether the sexual contact was unwanted by the victim, and were instead primarily concerned with whether her reputation was harmed. Recall that Chamallas and Wriggins instead call for a shift to a dignity-based standard, under which "the inquiry shifts to whether a defendant's conduct, as a whole, has the effect of seriously harming the plaintiff by targeting her as a *second-class citizen who does not deserve to be treated with equal respect and consideration*."⁸⁶ What is the particular harm of the current form of the standard? It does not question whether the fundamental rights of the plaintiff as an individual were harmed, but rather what the effect was on the *perception* of the plaintiff, or the material circumstances that arose as a result of the decision. In contrast, the dignity-based standard appeals to

⁸⁵ Chamallas & Wriggins, 84.

⁸⁶ Chamallas & Wriggins, 84, emphasis added.

the necessity of treating the plaintiff with respect, valuing her intrinsic worth as an individual, and protecting her from wrongfully exploitative relationships.

This paper provides the philosophical justification for this shift to occur, by appealing directly to the fundamental rights of the individual and securing just terms of interaction via tort decisions. Chamallas & Wriggins provide throughout their account significant concrete concepts for reform that center around similar principles of valuing women as individuals, such as promoting tort claims for workplace harassment, allowing more accessible recovery for intentional infliction of emotional distress claims, and lengthening statutes of limitations for domestic violence claims. A reformist framework utilizing Hampton's contract test is justificationally valuable to this advocacy that Chamallas & Wriggins provide, and potentially applicable in the context of torts more broadly.

Within these forms of violence and discrimination against women is a violation of a fundamental duty of care, not merely in the sense of a legal wrong, but with regard to their very humanity and dignity as individuals. Securing a fundamental duty of care for women's autonomy and security is not simply a goal of feminist tort movements for the purpose of allowing for greater lawsuits and damage awards, though this is a particular benefit not to be discounted. Rather, it additionally requires reform of the way we conceive of wrongs, and what ought to be considered a violation of the justifiable terms of interaction that we agree to. Just interaction is the goal of societies operating under contract, and clearly there is something lacking within the existing contract that has not adequately and reliably offered protection for women as a

marginalized group. Understanding why this has occurred, and what can be done about it through the mechanism of torts, allows for meaningful social change and greater respect for women as individuals.

C. Conclusion and Broader Implications for Gender Expression

Though I have focused primarily throughout this paper upon the experiences of women, particularly in relations of subjugation to men upheld by the state, affirming intrinsic individual worth may have implications for questions of gender expression in torts more broadly. To expand the conclusions of this paper, I briefly explore ways in which the reforms advocated above could contribute to ongoing conversations of gender in tort law – and perhaps beyond.

As Anne Bloom accounts in her 2010 article “To Be Real: Sexual Identity Politics in Tort Litigation,” transgender and intersex individuals have also been historically excluded from equal moral personhood in their seeking of damages for wrongful acts.⁸⁷ She cites various cases in which claims were denied due to the state’s adherence to traditional, binary concepts of gender, including *Littleton v. Prange*, 1999. Christie Littleton was a transgender woman who, after the death of her husband Jonathan Littleton, filed a wrongful death claim against his doctor as his surviving spouse. Despite the fact that the legal validity of their marriage had not been previously questioned, and that a Texas court had altered Christie’s birth certificate to reflect her gender identity, the trial court deemed her marriage to Jonathan illegal because she was

⁸⁷ Anne Bloom, “To Be Real: Sexual Identity Politics in Tort Litigation,” *North Carolina Law Review* 88, no. 2 (January 1, 2010): 357, <https://scholarship.law.unc.edu/nclr/vol88/iss2/2>.

“created and born a male.”⁸⁸ She was thus denied the capability to bring a cause of action as Jonathan’s surviving spouse. Although the majority opinion recognized various ways in which Christie clearly did not consider herself to be a man and had not since childhood, the court rejected her ability to determine her individual gender identity, asserting that “Christie Littleton *is* a male.”⁸⁹

Similarly to the argumentation of this paper, Bloom emphasizes the ways in which legal rulings against the “realness” of trans people provide “political and cultural legitimacy for views that are advocated outside the courthouse doors;” in other words, these rulings are *expressive* of the state’s oppressive attitudes towards individuals that deviate from traditional understandings of gender.⁹⁰ In the aftermath of the *Littleton* decision, for instance, a lesbian couple from Houston was permitted to marry despite Texas’s laws against same-sex marriage – but this was not a victory for recognition of LGBTQ rights. The marriage was permitted only because one of the women, Jessica Wicks, was transgender and assigned male at birth, thus making the marriage legally between a man and a woman under *Littleton*.⁹¹ Although the outcome for the couple was likely a happy one, the process by which it was permitted expressed profound attitudes of disrespect toward Wicks and toward trans women more broadly, sending the clear message that her status as a woman was not legally recognized, and that the state accordingly did not support her individual freedom to live as a woman.

⁸⁸ *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), 225, as cited in Bloom, 374.

⁸⁹ *Littleton*, 231, emphasis added.

⁹⁰ Bloom, 398.

⁹¹ “Court Ruling to Let Texas Lesbians Wed,” *Tampa Bay Times*, <https://www.tampabay.com/archive/2000/09/02/court-ruling-to-let-texas-lesbians-wed/>.

Through taking a view of tort law as ensuring freedom and self-mastery for individuals, and securing them against violations of that freedom, this paper's approach to torts could provide a particularly revolutionary arena regarding gender expression in the law. Queer theory has historically advocated for reexamination of socially constructed categories of the individual, and for the importance of valuing human experience in legal and political spheres; Bloom, for example, advocates for the importance of "[listening] to a plurality of perspectives on what 'realness' means... [and] making space for greater attention to lived experiences with sexual identity."⁹² Although I will not deliberate at length here, the reforms this paper advocates for may effectively map onto these approaches, and may deserve further exploration in various contexts of gender and law.

Throughout this paper, I have painted a relatively bleak picture: the area of law perhaps most equipped to assert the innate right of the individual has instead systematically undermined women's worth, freedoms, security interests... the list goes on – all while ostensibly purporting to support these protections. My analysis of the significant work by Chamallas, Wriggins, and MacKinnon demonstrates the failure of even non-instrumentalist approaches to truly provide this support. Understanding the foundations of classical social contract theory, the historical neglect of recognizing women as individuals of equal worth becomes all the more salient.

However, tort law also provides a particularly powerful space in which to push back against these traditionally exclusionary principles. It has the capacity to shift and

⁹² Bloom, 423.

morph, to empower individuals, to assert the inalienability even of previously unrecognized rights – in a sense, tort law can assist in the rewriting of the social contract to establish and uphold truly just terms of interaction. Through unequivocally expressing the importance of individual worth and the right to self-mastery, torts can help us to continuously fashion conditions of equal respect.

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