Creating a Just System of Civil Recourse – Articulating the Controlled Instrumentalist Approach for Marginalized People

Rukmini Banerjee

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Creating a Just System of Civil Recourse –  
Articulating the Controlled Instrumentalist Approach for Marginalized People

Submitted to 
Professor Paul Hurley

By 
Rukmini Banerjee

For 
Senior Thesis  
2023-2024 Year  
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Abstract

A system of civil recourse is a precondition for a just society. In this paper, I outline the ideal version of a system of civil recourse and analyze the accounts of various liberal philosophers to explain how a non-instrumental and mutual accountability theory of civil recourse best encapsulates its stated purpose. I analyze the American system of civil recourse, specifically tort law, and argue that it bypasses the threshold of tolerable injustice for marginalized people in the United States. Using Tommie Shelby’s framework in Dark Ghettos: Injustice, Dissent, and Reform, I argue that marginalized people are not obligated by the conditions of the tort system, because the tenets of reciprocity have been violated. Marginalized people are not required to follow a social scheme that does not intrinsically value them or respect their claims. To respond to the state of intolerable injustice that marginalized people operate in, I articulate a framework of controlled instrumentalism. Controlled instrumentalism can be deployed within a non-instrumentalist framework to reform a system of tort law that fails to achieve the threshold of tolerable injustice. Controlled instrumentalism aspires to achieve non-instrumental conditions but also constrains how individuals pursue non-instrumentalism because the tenets of non-instrumentalism cannot be violated during reform efforts. I then study prominent frameworks of tort reform and clarify how controlled instrumentalism either fits in, accommodates, or improves said frameworks. Finally, I tease out an important implication in the controlled instrumentalist project and explain how it provides greater avenues for marginalized people to operate within the law by clarifying how and when marginalized people are justified in pursuing alternate cases and setting aside precedents and procedures.
# Table of Contents

Abstract .............................................................................................................................. 2  

Introduction ...................................................................................................................... 6  

Chapter 1 – Defining a System of Civil Recourse .............................................................. 12  
  Part 1 - Civil Recourse as a Necessity in a Just Society ................................................. 12  
  Part 2 – The Ideal Theory of Civil Recourse .................................................................. 15  

Chapter 2 – Evaluating our System of Civil Recourse ....................................................... 28  
  Part 1 - Tommy Shelby’s Framework for Resistance ....................................................... 28  
  Part 2 - Applying Shelby’s Framework to Tort Law ....................................................... 32  

Chapter 3 – Articulating the Controlled Instrumentalist Approach ................................. 36  
  Part 1 - Reforming a Broken System .............................................................................. 36  
  Part 2 - The Insufficiencies of Instrumental Reform ...................................................... 36  
  Part 3 - Moving Forward: Controlled Instrumentalism ................................................. 45  
  Part 4 - Distinguishing Controlled Instrumentalism ...................................................... 51  

Chapter 4 – Controlled Instrumentalism Situated in Tort Reform ..................................... 54  
  Part 1 - Controlled Instrumentalism in Current Tort Accounts ....................................... 54  
  Part 2 – Pursuing Incremental Reform as Controlled Instrumentalists ............................ 66  

Chapter 5 – Expressions of Self-Respect Through Controlled Instrumentalism ............... 67  
  Part 1 - Addressing the Objections to Law ................................................................. 67  
  Part 2 - Creating a Framework of Resistance in Tort Law ............................................ 69  
  Part 3 – Expressions of Self-Respect within Law ......................................................... 73  
  Part 3 - Clarifying the Role of Controlled-Instrumentalism ......................................... 82  

Conclusion ....................................................................................................................... 84  

Bibliography ..................................................................................................................... 89
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Introduction

One perpetual question of any political community is how to address conflict. In a society with difference, how can we handle a clashing of values, desires, and outcomes? How do we handle the same values and outcomes conflicting? The common answer most people immediately think of is democracy, creating a system of governance that accommodates every voice through its processes. However, how do we deal with difference on an interpersonal level? When individuals turn against one another, how can those disagreements be reconciled? How can we repair the relationships between individuals so that they can continue to live alongside one another in the same political community? People can turn towards other community members to serve as impartial arbitrators, but sometimes disagreements are more significant, and it is not sufficient to turn to other members of the polity to resolve them. In those cases, a higher authority must be appealed to.

Some might say that the criminal legal system is this higher authority. When individuals break the law, the state is able to prosecute them and provide punishment. The criminal legal system might be sufficient at allowing the state to hold individuals accountable, but it has no power to provide damages and compensation or to repair the relationships between persons. Its chief purpose is to hold individuals accountable to the law. It does not care about addressing any harm caused or restoring mutual accountability between individuals. Thus, the criminal legal system alone is still not an adequate higher authority to resolve interpersonal disputes between individuals.

The higher power I believe society appeals to in order to resolve relational disagreements between persons is the civil recourse system or tort law. However, unlike criminal law, many people in society do not know what tort law is or what it purports to do. Tort law is an unwritten system of law that addresses cases where one party has wronged another party, and the wronged
party seeks recourse against their wrongdoer. The tort system can hold the wrongdoer accountable and set damages to be paid out to the wronged party. Tort law is chiefly concerned with providing a pathway of recourse for wronged parties against their wrongdoers. The state’s role is to merely serve as an arbitrator and facilitator in the conflict between the two parties. The criminal legal system operates to hold law-breakers accountable to the state while tort law functions to allow victims to hold their wrongdoers accountable.

The question then is that if tort law is this vital system of recourse between people, why is it rarely used as such? Why is our familiarity with it not as intimate as our understanding of the criminal legal system? Why has tort law remained so obscure and inaccessible to the general population? A just society requires a robust system of civil recourse in order to protect its citizens. Is our society a just society? Can it be so if citizens do not identify with and have faith in their system of civil recourse?

In this paper, I seek to understand the inadequacies of tort law in America, the implications these inadequacies have for our society, and permissible avenues of resistance we can take in pursuit of a better system of civil recourse. My exploration starts by first examining what tort law is and how it ought to function. I then outline how ideological differences, such as race, gender, and class, manifest in tort law and affect how it is able to legitimately adjudicate difference and address conflict. I argue that the theory of tort law does not match up to its practice, and instead of serving as a vehicle of justice, torts have been perverted into another means of perpetuating systemic discrimination. Ultimately, the paper becomes an examination of how individuals are permitted to respond to injustice within tort law and the strategies we can take to better protect the most vulnerable members of the polity. My paper focuses on how the most marginalized navigate through tort law with a particular focus on race because I believe
that is a lacuna in the literature I am uniquely well-suited to address. However, I do bring in other forms of marginalization throughout.

In Chapter 1, I establish that a robust system of civil recourse is a precondition for a just society and outline how a just system of civil recourse ought to function. I clarify that criminal laws are not sufficient at providing recovery when individuals experience harm, because they do not allow citizens to hold other citizens or institutions accountable for the harm they cause. I then go on to examine the theory that undergirds a system of tort law. I contrast non-instrumentalist and instrumentalist accounts of tort law and argue that the non-instrumentalist interpretation of tort law is the only version that is a sufficient system of civil recourse. I then go through the various non-instrumental traditions and explain that a framing of tort law as restoring mutual accountability best encompasses how tort law must provide damages and serve as a process to restore the relationship between persons.

In Chapter 2, I clarify our obligations in a system of tort law in a just society, but then go on to establish that for marginalized people, tort law has breached the threshold of tolerable injustice. I use Tommie Shelby’s framework in *Dark Ghettos: Injustice, Dissent, and Reform* to delineate between our obligations in a just society and an unjust society. I argue that in a just society, individuals are obligated to follow the social scheme because citizens are not allowed to benefit from a social scheme without also fulfilling their obligations to said social scheme. However, in a society that has breached the threshold of tolerable injustice, we are not required to abide by the social scheme, because the condition of reciprocity has been violated. A person cannot be expected to follow a social scheme that systematically marginalizes and exploits them. I use this framing to argue that for marginalized people, tort law has bypassed the threshold of tolerable injustice. Specifically, I utilize Cheryl Harris’s analysis of whiteness as property to
illustrate that tort law operates as a system of ideological white supremacy and allows marginalized people to be exploited by white folks in order to protect whiteness while also ignoring the claims of marginalized folk.

In Chapter 3, I articulate a framework that can be deployed, within a non-instrumentalist approach, to reform a system of tort law that fails to achieve the threshold of tolerable injustice. I label this approach controlled instrumentalism. I argue that pure instrumentalism will not be a beneficial approach to reform, because pure instrumentalism dictates the ends of marginalized people and reduces marginalized people to mere means in a political project. I also illustrate how instrumentalism allows for actions to be taken that undermine law as an enterprise and has no clear stopping point. I then explain that a form of controlled instrumentalism can be utilized in order to aspire to social goals that will better tort law while also ensuring how we pursue those goals will not undermine the enterprise of tort law and respect the agency and claims of marginalized people. Controlled instrumentalism will allow us to aspire to the correct social goals while controlling our approaches with non-instrumental constraints.

In Chapter 4, I examine how controlled instrumentalism fits in various tort accounts that also seek to guide the reformation of tort law. I examine the works of Martha Chamallas, Mari Matsuda, and Richard Delgado. I argue that Chamallas’s work very neatly fits in as a controlled instrumentalist account because she sets her goal as the elimination of bias but only in a way that does not undermine tort law. She argues that because of pervasive systemic discrimination, tort law does not compensate the full spectrum of wrongdoing and devalues the damages and claims of marginalized people. Her account lays out how torts can better fulfill its stated goal of addressing the full extent of wrongdoing. Mari Matsuda’s account, on the other hand, is more difficult to classify as instrumentalist versus controlled instrumentalist. She argues for an
understanding of causation that moves away from assigning responsibility to assigning blame to whoever has the greatest power to deter harm. She perverts torts away from its foundation of accountability but also continues to emphasize individual responsibility and reasonable foreseeability. I argue that while Matsuda’s account may have ambiguities, it is best understood as a controlled instrumentalist account because controlled instrumentalism accommodates her core claims the best. Finally, I examine Richard Delgado’s theory of legal instrumentalism. I admit that his account is a pure instrumentalist account, but I believe it can be vastly improved if it is altered to be a controlled instrumentalist account. Instrumentalism cannot be reconciled with Delgado’s understanding of social justice, but controlled instrumentalism can pursue a robust form of social justice while also respecting law as an enterprise.

In Chapter 5, I tease out an important implication of my view and outline pathways that controlled instrumentalism allows marginalized people to take within the constraints of law. I explain that because law is an enterprise that bypasses the threshold of tolerable injustice for marginalized folks, marginalized people have selective freedom when operating within the rules of tort law. I concretize this idea by examining two main approaches. First, I argue that marginalized people are allowed to pursue alternate tort cases when there are no present tort claims to describe the harm they experienced. Marginalized people can pursue alternate tort claims in order to get some form of recourse, but they are still subject to the non-instrumental constraints and cannot undermine the enterprise of law. Second, I argue that lawyers and judges, on behalf or behest of marginalized people, can set aside procedures and precedents of tort law when those procedures and precedents inhibit as opposed to empower the pursuit of justice. I also clarify that this approach is subject to the non-instrumentalist constraint and can only be utilized by individuals or in collaboration with individuals for whom tort law falls below the
threshold of tolerable injustice. Evidently, I cannot disprove the fact that law is an inherently limited means of reform, but in the chapter, I use controlled instrumentalism to carve out more space for marginalized people to take when working through the law.

Ultimately, my thesis seeks to understand how our current system of civil recourse has failed, because some of the differences it aims to help us overcome, like race, gender, and class, have remained entrenched in its structures. To repair harm and address wrongdoing is to reject and combat any systems that unjustly oppress and reduce a group of people. Thus, if we are to create a robust system of civil recourse that can resolve conflict and repair harm, tort law must actively mitigate these systems of discrimination while also working towards their elimination in its practice.
Chapter 1 – Defining a System of Civil Recourse

Part I - Civil Recourse as a Necessity in a Just Society

In this section, I will be arguing that a cornerstone of any just society is a system of civil recourse. I will establish this claim by clarifying how statutory and criminal methods are not sufficient to address the kinds of wrong civil recourse adjudicates. I will then explain what I believe the ideal theory of civil recourse is and how this kind of non-instrumental theory best serves to handle the wrongs experienced by private individuals.

John C.P Goldberg and Benjamin Zipursky define the “Principle of Civil Recourse” as “the victim of a legal wrong [being] entitled to an avenue of civil recourse against the one who wrongs her.”

Following this principle, Goldberg and Zipursky argue that a law of civil recourse, also known as the law of torts, is “organized around the principle that where one person has acted in a manner the law deems wrongful to, and injurious of, another, the victim has a right to be provided with a power to redress the wrong through a civil action.” Therefore, tort law can be understood as the idea that private individuals ought to be able to selectively tap into institutional frameworks to hold other private individuals or corporations and organizations accountable. Tort law addresses fundamental questions of human interaction, in that it is primarily concerned with how individuals ought to treat one another and what our obligations to each other are. When these fair terms of interaction are violated, this constitutes a wrong, and the wronged individual is able to pursue recourse. Because a tort is a private wrong, this necessitates a private response or compensation provided from the private entity that did the wrongdoing.

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2 Ibid., 3.
Goldberg explains that “for a wrong to be a tort, it must in principle generate for its victim a private right of action: a right to seek recourse through official channels against the wrongdoer.” ³

I believe the rights of individuals in a just society necessitate being able to utilize the state to hold wrongdoers accountable. Civil recourse is an idea that the tenets of liberal philosophy properly understood commit us to. Liberal philosophers such as William Blackstone and John Locke argue that the formation of civil society necessitates giving up certain entitlements in order to gain other more robust rights and liberties. ⁴ The state is the apparatus created to ensure equality between individuals as well as the rights and liberties of individuals are enforced. With a combination of statutes and legislation, the state creates the terms of equal and just interaction between individuals. When these terms are violated, the state can prosecute the offending individual and hold them accountable through punishment and the criminal legal system.

Criminal prosecution ensures the state is able to hold individuals accountable for violating the equal terms of interaction among citizens, but without a system of civil recourse, private individuals are not able to recover when they are injured by those who violate the equal terms of interaction. As Goldberg and Zipursky note, the state has a monopoly on the use of force, so the state may be able to punish a wrongdoer through criminal law, but an individual is not able to seek any damages for harm or wrong they personally experienced without a system of civil recourse. ⁵ Any harm that occurs to private individuals would be forced to lie and remain unaddressed. As a result, the rights of citizens must be understood to include the ability to hold

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⁴ Ibid., 982.
⁵ Goldberg and Zipursky, Recognizing Wrongs, 122.
other individuals accountable for harms committed against them. In his treatise on *the Social Contract*, John Locke argues that individuals have the right to respond to wrongdoing committed against them in the state of nature. When joining civil society, this right has been forgone to ensure that citizens do not unjustly turn on their fellow citizens. However, this leaves citizens defenseless under the actions taken by other citizens and institutions that wrong them.

There is a consensus among Western liberal philosophers that there are certain kinds of wrongs where victims ought to be able to use the state to restore their rights. Locke argues that only the entities injured by an action ought to be able to pursue reparation against their injurer, and the state is obligated to provide an avenue to exercise the right to reparation. Kant also argues that only particular injuries were actionable by the state while others had to be addressed by private individuals due to the localized nature of the harm occurred. I emphasize Kant and Locke’s theories because their ideas formed the basis of some of the most commonly acknowledged theories of tort law, specifically John CP Goldberg and Benjamin Zipursky’s theory of civil recourse as well as Arthur Ripstein’s theory of Private Wrongs. The overlapping consensus amongst liberal theorists underscores the necessity to separate private wrongs experienced by individuals and public wrongs experienced by the polity and the state. Criminal law exists to address public wrongs, but a system solely comprised of criminal law leaves private wrongs unaddressed. Tort law is thus justified as addressing the private wrongs demarcated by this distinction. Stephen and Julian Darwall clarify this concept when they explain bipolar moral

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7 Ibid., 196.
obligations as “directed duties whose violation entails that the violating obligor has injured and, at least other things equal, wronged his obligee, also conceptually entail an authority to address claims and demands.” Bipolar moral obligations are personal, requiring the remedy be personally given from the wrongdoer to the wronged. The nature of the wrongs tort law addresses explains its colloquial name, “private law.”

A system of civil recourse is required in order to ensure that individual citizens are able to have agency and address harm that has occurred to them as a result of the action of another individual or organization. Goldberg and Zipursky argue that the legal system ensures the right of individuals “to be free of certain kinds of interferences,” but if it is a right we have to be free from these interferences, then that necessitates we must be able to pursue recourse against those who harm us by violating our rights. Echoing Locke, I argue that the victim or survivor of wrongdoing must be the one to be able to put such a claim forth because if these are the rights we have as persons, the wronged person must also have discretion in determining how or if they would like their entitlements restored. Tort law defines our duties to refrain from injury as well as the protections we have from injury. It is this law citizens call upon when they are injured by the actions of others.

Part 2 – The Ideal Theory of Civil Recourse

Now that I have established why a system of civil recourse is required in a just society, I will outline how a system of civil recourse should optimally function. In this section, I will explain the ideal or optimal version of tort law and the moral basis behind this framework of adjudication. I primarily rely on the work of theorists such as Ripstein, Goldberg and Zipursky,

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and the Darwalls. While I do not subscribe to the entirety of any of the aforementioned accounts, I do take from each in order to build what I believe is the ideal version of civil recourse theory. My analysis of tort law will encompass both intentional and unintentional torts. Intentional torts occur when a person intends to cause harm with their action(s) by violating another person’s liberty and security interests. Unintentional torts are when a person negligently or carelessly harms another person through the violation of their liberty or security interests.

Before beginning my analysis, I will outline the most prominent theories within tort law and situate my scholarship among them. Tort law is mainly divided among two schools of thought – instrumental and non-instrumental theory. Instrumentalist accounts of tort law argue that tort law is a means to a social end. By classifying an action as a tort, instrumental theorists argue tort law is setting incentives and changing behavior. An action is counted as a wrong depending on whether it follows or disrupts the social goal. Instrumentalist accounts focus directly on social goals and indirectly on wrongs in so far as they achieve those social goals.

Because I believe instrumentalist theories pervert tort law from serving its essential function, I prefer to look towards non-instrumental theories when determining the ideal function of torts. Non-instrumentalist interpretations view tort law as having a substantive identity that delineates duties and rights outside of a social end. Non-instrumentalism grounds the purpose of torts as serving as a vehicle to pursue compensation and remedy in response to wrongdoing. Wrongs are evaluated based on their place in legal doctrine and social norms. In the non-instrumentalist tradition, torts are evaluated solely depending on the case in consideration. There is no thought for the greater social project that the case may aid or hinder. Non-instrumental

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11 Among instrumental theories, the interpretations subdivide into accounts that view the law’s purpose as maximizing wealth and other accounts that view the law’s purpose as prompting values such as equality or freedom.
accounts of tort law view tort law as a legal system for victims to hold their wrongdoers accountable, and I believe this interpretation of tort law preserves the agency of persons by viewing them as agents with their own ends and claims. Instrumentalism robs victims of agency by viewing their claims against wrongdoing as a tool in a social or political project. I believe the deprivation of agency renders instrumentalism an insufficient theory for tort law. Therefore, my account of tort law falls into the non-instrumentalist tradition.

Non-instrumentalism, unlike instrumentalism, believes that claims of wrongdoing ought to be evaluated using certain fundamental values. These values reflect non-instrumentalism’s emphasis on the intrinsic values of persons and the entitlement of persons to have claims against those who wrong them. Instrumentalism believes wrongdoing ought to be addressed depending on whether it benefits a particular social goal, so non-instrumentalism is markedly different due to its emphasis on only the violations of fundamental rights giving rise to an entitlement to hold the wrongdoer accountable and pursue recourse. However, non-instrumentalists disagree when characterizing the kinds of fundamental rights and obligations persons have and how recourse ought to be allotted. For example, Stephen and Julian Darwall argue that people have bilateral obligations that are grounded in the notion of mutual respect.\(^\text{12}\) For certain violations of bilateral obligations, mutual respect and accountability can be restored through tort processes. Arthur Ripstein, however, argues tort violations pertain to questions of freedom and adjudicate how the freedom of one person was used to violate the freedom of another.\(^\text{13}\) Tort adjudication thus becomes a question of restoring freedom to where it ought to be delineated.

\(^{12}\) Darwall, Morality, Authority, and Law, 20.
While non-instrumentalist theories may be grounded in different values, the emphasis on
our obligations to others and how violations in rights give rise to an entitlement of recourse is a
commonality. I will now outline the tenets of all non-instrumental theories. Non-instrumental
theories of tort law argue that tort law ensures that the liberty and security interests of persons
are protected through the provision of remedies in response to rights violations. Non-
instrumentalists assert that tort law rests on the well-known Latin maxim of *Ubi jus, ibi
remedium*, translated to ‘where there is a right, there is a remedy.’

Whenever there is a violation of an established legal right, there ought to be a means of remedying any harm caused
from the rights violation. Non-instrumentalism is also chiefly concerned with upholding the
rights of people. The rights of persons typically pertain to the liberty and security interests of
each person. As Arthur Ripstein, a prominent non-instrumental theorist, explains, “Fair terms of
interaction must allow people freedom to do as they please, but also make sure that they are
secure from the activities of others.” A balance between liberty and security must be struck. Tort
disputes arise when one person violates another person’s liberty and security interests with their
actions.

For intentional torts, it is easy to classify what actions ought to be remedied, but for
unintentional tort law, there are more considerations. Goldberg and Zipursky explain how for
intentional torts, “the key question for each is whether the act or conduct that constitutes the
impermissible interference was in fact performed by the defendant.” They go on to emphasize
how “neither the intention to injure nor carelessness as to injury is required for liability,” because
the act of an intentional tort such as battery inherently “constitutes an impermissible

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15 Ibid., 190.
interference.” For unintentional torts, tort law must adjudicate between the varied interests of citizens and whether relevant care was taken to account for the interests of others. In order to adjudicate the conflicting interests of people, tort law utilizes the concept of the reasonable person. Ripstein explains how the reasonable person is “the expression of an idea of fair terms of social cooperation.” Ripstein utilizes the Rawlsian definition of reasonable to clarify how “Reasonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept.” The reasonable person navigates society while ensuring the ends they seek do not interfere with the ability of others to seek their own ends as well. The reasonable person is a helpful thought experiment because it “makes it possible to take account of competing interests without aggregating them across persons.” By asserting that all persons have the same liberty and security interests, the reasonable person is able to delineate how people are required to take into account the liberty and security interests of others as they pursue their own unique plans and projects.

In order to determine the kinds of rights we have in a scheme of fair cooperation and mutual accountability; a framework of care and interests is helpful. The fair terms of interaction ensure our freedom to act and security from the actions of others are protected. To delineate the care we owe to others, tort law uses questions of standards and duties of care. Standards and duties of care can be used to understand both negligent and intentional torts. The duty of care determines what care is owed to other agents while the standard of care determines how much

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16 Ibid., 190.
18 Ibid., 7.
19 Ibid., 7.
20 Ibid., 6.
21 Some theorists, like Arthur Ripstein, disagree and believe standards and duties of care ought to be used to primarily understand negligence (Ibid., 48.).
care is owed to those agents. If one provides appropriate care to the relevant agents, one is determined to have acted reasonably. This framework is thought to be particularly relevant in negligence cases because if an individual exercises appropriate care, then they are not liable for any harms negligently caused. I believe standards and duties of care can also be helpful when attempting to delineate relational directives, a concept I will elaborate on later. Tort law recognizes that each person has their own interests, and the concept that different people have different ends can be accommodated by tort law because of the reasonable person and the frameworks of care it uses to preserve the interests of all people.

Disagreements within non-instrumentalism arise when attempting to identify the role of compensation and its effect or purpose in torts as well as when determining what obligates a tortfeasor to provide a remedy. The two main camps of theories that arose from this disagreement are corrective justice theories and civil recourse theories. Arthur Ripstein and other tort scholars such as Jules Coleman and Stephen Perry are corrective justice theorists. John CP Goldberg and Benjamin Zipursky as well as Stephen and Julian Darwall are civil recourse theorists. Both groups agree on the features of non-instrumentalism outlined prior. There is a consensus that there are liberty and security rights that all individuals possess, and when these rights conflict, tort law helps adjudicate these tensions to ensure the fair terms of interaction are upheld. I will now outline the main points of disagreement between corrective justice and civil recourse accounts that stem from the role of damages and the forces that connect plaintiffs and defendants in tort processes.

Corrective justice theorists such as Ripstein believe that compensation in tort law is meant to remedy any unfair losses victims experience. Compensation stems from an injured person’s need but also the necessity that “the loss properly belongs with the person who imposed
the risk.” 22 This rationale is described as “making the victim whole.” For the corrective justice theorist, a tort involves an unfair gain for the wrongdoer that stems from the loss of the wronged, and compensation ensures losses fall where they properly lie and restores “the status quo ante” or the victim’s pre-tort state. Corrective justice theorists, like Ripstein, typically use a Kantian framework of rights and duties to argue that a tortfeasor is obligated to pay damages when they take risks or deliberately take an action that knowingly infringes upon the rights of another. 23 This creates the duty of compensation for the tortfeasor. Compensation is the right of the tort victim. The combination of the duty and right is the relationality thesis and explains how wrong results in the duty of the tortfeasor to provide compensation for the tort victim.

Civil recourse theorists disagree with corrective justice theorists and believe torts are governed by relational directives that confer a legal power to victims. Goldberg and Zipursky, prominent civil recourse theorists, argue that tort law’s delineation of rules, duties, and rights ought to be best understood as duties enjoined with rights to create legal rules that they refer to as “directives” or “conduct rules.” 24 There are simple legal directives which “require persons to perform certain acts or enjoin persons from committing certain acts.” 25 There are also relational directives which concern one’s conduct towards another as opposed to just one’s conduct full stop. Goldberg and Zipursky argue that “to say that a person has a ‘relational or (dyadic) legal duty’ to refrain from doing A is to say that there is a relational directive under which doing A to another person or other persons is identified as legally required or prohibited.” 26 The legal right

22 Ibid., 84.
23 Ibid., 49.
24 Goldberg and Zipursky, Recognizing Wrongs, 16.
25 Ibid., 92.
26 Ibid., 84.
of one person stems from the legal duty of another.\textsuperscript{27} Tort cases are understood to be about relational directives, where one party has typically violated the right of another party by failing to fulfill their duty towards them. Combining this analysis with a framework of care and security interests, one could understand the care one owes as contributing to another’s security. Appropriate care can be understood as a project of having a duty to uphold the rights of others, thus creating a relational directive. Violating a standard or duty of care compromises one’s security interest. Tort wrongs are a violation of the right (security) of the victim and a failure to fulfill the duty (appropriate care) of the tortfeasor.\textsuperscript{28} The reasonable person helps clarify the relational directives one must follow in society as they pursue their individual interests and ends.

I believe the civil recourse theorist’s conception of relational directives exposes shortcomings in the corrective justice account of damages. Civil recourse theorists argue that certain injuries, such as noise pollution or reputational damages, cannot properly “be made whole,” because the nature of the offense is not physical.\textsuperscript{29} Even when the damage is physical, there are cases where the injury is so extreme that it will never properly be healed, making it impossible for the victim to become whole again. Therefore, the corrective justice notion of compensation becomes insufficient as a standard for the role of damages in tort law.

Civil recourse theorists use relational directives to clarify what binds tortfeasors and tort pursuers. As stated previously, corrective justice theorists believe that a successful tort action uses the moral responsibility of the wrongdoer to create a legal responsibility to compensate the wronged individual. However, civil recourse theorists argue that “the commission of a tort has a legal consequence,” and the consequence comes from “the creation of a legal power, and with it, \textsuperscript{27} Ibid., 93. \textsuperscript{28} Ibid., 112. \textsuperscript{29} Ibid., 155.
a corresponding liability.”

There is no legal duty created simply from wrongdoing, because if such a duty did exist then anytime a wrong occurred, a victim would be entitled to demand payment and a wrongdoer would be forced to pay without any suit requiring them. Civil recourse theorists believe the corrective justice framing is incorrect and instead argue that when one commits a tort, they become vulnerable to being sued and to having the victim’s demand for compensation upheld. Wrongdoing does not automatically create a legal duty, but a successful recourse does create a legal duty for the wrongdoer to provide compensation to the wronged individual. Stephen and Julian Darwall, notable civil recourse theorists, emphasize how “injured victims of violated bipolar obligations owed to them have a distinctive standing to hold their injurers responsible that neither third parties nor the community at large have.”

To summarize the distinction, corrective justice theorists believe torts are driven by a duty to repair a loss while civil recourse theorists argue that tort remedies are necessitated when a wronged individual chooses to hold their wrongdoer responsible for wrongdoing and the claim is recognized by the courts. For the civil recourse theorist, tort liability is driven by the rights defendants have to pursue injuries against wrongdoers, not the duty of wrongdoers to provide remedies. Tort law is victim-centered, not repentance-centered.

While civil recourse theorists maintain consensus on the relational directives that enjoin victims and tortfeasors, disagreement arises when characterizing the motivations behind torts as honor respect or second person respect. Goldberg and Zipursky’s account is an honor respect civil recourse account while the Darwalls’ account is a second-person or mutual accountability account of civil recourse. The Darwalls summarize this disagreement by characterizing Goldberg

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30 Ibid., 163.
31 Darwall, Morality, Authority, and Law, 19.
and Zipursky’s theory as driven by “retaliation or vindication” and their own theory as driven by “mutual obligations.”

Goldberg and Zipursky believe tort law allows victims to be vindictive and punitive in order to ensure victims are able to properly hold their wrongdoers accountable. To Goldberg and Zipursky, a tort is a form of retaliation against a wrongdoer. In contrast, the Darwalls believe torts allow victims to hold wrongdoers accountable for violating bipolar obligations and restore the state of being “mutually accountable equals.” Torts provide a public forum to “hold [a wrongdoer] answerable to [their victim] at the same time [the wrongdoer] holds [themself] answerable to [themself].” The Darwalls argue that the process of holding one’s wrongdoer accountable through tort law causes both parties to “enter into a relation of reciprocal recognition and mutual respect for one another as mutually accountable equals.”

I align with the Darwalls and believe tort law must restore mutual accountability between persons. Goldberg and Zipursky argue that tort law repairs the losses of victims, but I argue that this position is simultaneously committed to too much and too little. Depending on the nature of the harm, tort law may not ever be able to properly repair and redress the loss that occurred, so this is too lofty of a goal to center. Even if it were feasible to completely repair a victim’s loss, it is also an incomplete purpose, because in most cases, it is not just the loss to the injured that must be restored; the relationship between the injured and the injurer must also be addressed. Because we live in a society, the injurer and injured will likely have to continue living alongside one another. This is the nature of a society structured by relational directives. Therefore, the state of mutual accountability that existed among the injured and injurer must be restored. By

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32 Ibid., 31.
33 Ibid., 36.
34 Ibid., 37.
engaging in the tort process, a victim demands their injurer engage in a collective process to acknowledge the victim’s right and entitlement to respect as a citizen. This conception of tort law ensures it is a robust system of civil recourse that allows individuals to properly respond to wrongs committed against one another. The Darwalls’ framework accommodates a more nuanced understanding of recourse. It also ensures torts are not tied to the traditional idea of harm and is grounded in a robust understanding of wrongdoing.

The Darwalls and Goldberg and Zipursky can be viewed as having complementary analyses if we understand being ‘empowered to respond to wrongdoing’ as a form of mutual accountability. To clarify, one could argue tort law ensures mutual accountability is restored by empowering victims to respond to their injurers for failing to fulfill their obligations towards one another. Goldberg and Zipursky and the Darwalls disagree on whether tort law ought to be understood as a law of responding against wrongdoing or a law of restoring mutual accountability, but I assert that these analyses can be complemented if one understands mutual accountability as a process of resolving cleavages caused by wrongdoing. For example, Person A cannot feel mutually accountable to Person B if Person A had previously been violated by Person B. This violation could have taken the form of Person A being used as a mere means to fulfill Person B’s ends (intentional tort) or Person B failing to take appropriate care and their unforeseen risk resulting in harm to Person A (unintentional tort). In order to feel as if they are equal with Person B, Person A must be empowered to respond to Person B’s violation by calling upon Person B to enter into a public forum and publicly apology and repent to Person A by providing damages. The disagreement between second-person and honor respect tort accounts stem from whether it is feelings of resentment, guilt, and vindication that motivate tort processes or mutual accountability. However, I find this discussion to be largely inconsequential due to the
possibility of guilt and vindication serving as productive emotions in the process of restoring mutual accountability.

I believe that empowering one to respond to their wrongdoers is in and of itself a means of restoring mutual accountability. One person wronging another violates equality between persons. By providing an injured person with institutional means of responding to their injurer, the state reasserts the idea of mutual accountability among citizens. By empowering victims to respond to their wrongdoers, tort processes invoke “the fundamental idea that individuals have obligations to and rights against one another, and that each person has an individual authority to hold others answerable for complying with obligations to him and his rights against them.” With this analysis, restoring mutual accountability and being empowered to respond to wrongdoing are intertwined ideas. Goldberg and Zipursky articulate their account in terms of a gallery of wrongs, and I believe that the Darwalls provide an overarching framework of mutual accountability that explains what kinds of wrongs ought to or ought not to be included in the gallery.

Now that I have established how the civil recourse account of tort law describes tort law’s optimal state, I will now explain how tort law provides damages to serve as the ‘remedy’ for wrongdoing. Damages are what restore the victim to a state of mutual accountability with the wrongdoer. The mutual accountability conception of damages necessitates compensation be able to take multiple forms in addition to monetary payments. For some harms, such as property damage, monetary payments may be sufficient to repair harm and relationships. However, in other cases, involving emotional, dignitary, or relational harms, compensation may require an apology or policy change. The remedy, conceived in terms of civil recourse theory, indicates that

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36 Ibid., 31.
the obligation just persons have towards one another is observed, recognized, and enforced. Tort law’s capacity to protect and repair the rights of persons ensures that the fair terms of interaction are upheld and maintained.
Chapter 2 – Evaluating our System of Civil Recourse

In an optimally functioning system of tort law, we are morally obligated to participate in its practice, because doing so would ensure that individuals are protected against encroachments to their freedom and security committed by other individuals, institutions, or organizations. However, a question then arises as to what our moral obligations are in a system of civil recourse that is impoverished or unjust. When our legal system operates below the threshold for tolerable injustice, are actions allowed as a means of resistance? In this section, I will outline what I believe is the threshold of tolerable injustice for a system of civil recourse and prove that our current system falls below the threshold.

Part 1 - Tommie Shelby’s Framework for Resistance

Tommie Shelby provides a model for articulating a threshold of tolerable injustice. In his book, Dark Ghettos: Injustice, Dissent, and Reform, Shelby articulates a framework of resistance for Black people in the inner-city ghettos. Shelby creates this framework by arguing that citizens of the ghettos live in subordinate and exploitative states that fall below the threshold for tolerable injustice. Before articulating my own framework, I will first outline Shelby’s in order to build my own account of resistance off of his.

Shelby argues that the analysis of the social arrangements one lives in affects their civic obligations in society. Shelby believes that there is a “set of legitimate claims and obligations individuals have within a fair overall social arrangement.”  

of social cooperation but is not receiving the full extent of benefits they are entitled to.\textsuperscript{38} Their labor and bodies are used to maintain rights and entitlements for others, but in return, they are subordinated.

Shelby contemplates three main possibilities for the basic structure of society in America – a fully just society, a society with moderate or tolerable injustice, and a fundamentally unjust society.\textsuperscript{39} He goes through each of these scenarios and delineates the various civic obligations one would have in each circumstance. Shelby believes natural duties apply no matter what, causing the social arrangements of society to be irrelevant when dictating whether they apply, so his analysis primarily focuses on how civic obligations fluctuate and change in society depending on the level of injustice. Shelby, like Rawls, believes one does not have any civic obligations in a society “that exceed[s] the limits of tolerable injustice.”\textsuperscript{40} Of course, in a fully just society, civic obligations are expected to be adhered by, but in a fundamentally unjust society, Shelby argues civic obligations do not hold because “reciprocity forbids the exploitation of fellow members of the society,” so when reciprocity is violated and members of society are being exploited by other members of the society, the wronged members are allowed to forsake their civic obligations.\textsuperscript{41} Even in a society with only moderate injustice and a just underlying social structure, Shelby quotes Rawls and emphasizes that “it is problematic for permanent minorities that have suffered from injustice for many years.”\textsuperscript{42} A marginalized group cannot be expected to comply with the social order if they continue to be subjugated and experience lesser

\textsuperscript{38} Ibid., 145.
\textsuperscript{40} Ibid., 214.
\textsuperscript{41} Ibid., 213.
\textsuperscript{42} Ibid., 219.
benefits and resources. Historical marginalization with no relative improvement in status, even in a society with an underlying just structure, is enough to warrant a suspension of civic obligations. When legitimate avenues for expressing discontent or dissatisfaction fail to produce results, committing crimes or stirring public unrest is one of the only methods of refusal and resistance one has, causing civic obligations to no longer apply to marginalized people.

Shelby outlines the various kinds of injustice and how each injustice merits different actions. He believes a society can either be moderately unjust but not fundamentally unjust or simply fundamentally unjust. In the case of the former, Shelby describes this case as “when the publicly recognized standards for judging the justice of the basic structure are sound but the institutional arrangement of the society fails to satisfy these standards.” The ‘professed ideals’ of society are “worthy of public recognition,” but the social arrangement does not meet the ideal standards. In this case, one could resist this through “appeals to public consciousness,” but if that action fails to produce results over many years and generations and the subordinated groups have continued to disproportionately suffer, their civic obligations are suspended and they are justified to engage in disruption. In the second case, where society is fundamentally unjust, he says drastic action is merited immediately because there is a “dominant ideology that advances a distorted view of what justice demands and that is widely endorsed because of narrow self-interest or illegitimate group interest.”

Shelby argues that even when the obligations of the ghetto poor are suspended, there are still constraints on the kinds of actions that are morally permissible. Although the subordinated state of the ghetto poor justifies decisions to commit petty crimes and refuse to work, he clarifies

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43 Ibid., 224.
44 Ibid., 224.
these actions are allowed in so far as they do not violate natural duties such as the duty to not be cruel, the duty of mutual respect, etc.\textsuperscript{46} Therefore, any reckless violence committed by the ghetto poor is still immoral, but intentional violence aimed at damaging property of the rich or harming a rapist are condoned.\textsuperscript{47} Shelby highlights that crimes and refusal to work should be done using the lens of the natural duty of justice. The duty of justice is defined as “requir[ing] each individual to support and comply with just institutions and, where just institutions do not exist, to help to bring them about.” Natural duties frame the sorts of resistance members of the ghetto poor are allowed to take to protest their unjust social arrangements and combat injustice.\textsuperscript{48}

Some argue that if the constitutional essentials of a liberal-democratic regime are secured then it is not acceptable to set aside civic obligations, but Shelby addresses this claim by explaining how constitutional essentials do not guarantee a legitimate regime. Rawls defines the constitutional essentials as the rights present in most democracies, such as freedom of speech, conscience, assembly, association, and, crucially, the basic material needs of all citizens.\textsuperscript{49} However, equality of opportunity and the difference principle are not included in the constitutional essential standards.\textsuperscript{50} People argue the constitutional standard ought to serve as the threshold for tolerable injustice, because “the constitutional essentials establish the political legitimacy of a social order by publicly affirming the equal status of all citizens under the rule of law.”\textsuperscript{51} In response to this argument, Shelby argues that if one asserts that the constitutional essentials are met in the US, they still “allow [for] too much inequality for the social order to

\textsuperscript{46} Ibid., 215.
\textsuperscript{47} Ibid., 220.
\textsuperscript{48} I will expand more on these ideas in Chapter 5.
\textsuperscript{49} Ibid., 214.
\textsuperscript{50} Ibid., 214.
\textsuperscript{51} Ibid., 214.
claim political legitimacy.”\textsuperscript{52} In the US, the ghetto poor are still exploited by their white and/or rich counterparts. Bringing back the idea of reciprocity, he concludes that the constitutional essential standard cannot be the standard for tolerable injustice because “it does ensure genuine conditions of reciprocity for the most disadvantaged in the scheme.”\textsuperscript{53} The interests of the most disadvantaged are placed secondary to the interests of the rest of society.

\textbf{Part 2 - Applying Shelby’s Framework to Tort Law}

In this section I will utilize Shelby’s framework as a guide to examine the state of civil recourse in America and whether the state allows for actions to be taken to address it. I will first define what I believe is the threshold for tolerable injustice in tort law. I will then clarify whether America falls below the threshold of tolerable injustice. I will then explain how I will delineate the kinds of resistance that ought to be taken in response to our present conditions.

Tort law’s upholding of ideological white supremacy begs the question as to whether the threshold for tolerable injustice has been breached. Cheryl Harris argues that ideological white supremacy codifies whiteness as a kind of property interest to be protected. She explains how “the valorization of whiteness [is] treasured property in a society structured on racial caste,” because “the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain”\textsuperscript{54} White people expect the privileges of whiteness and for the law to uphold and endorse that privilege. Harris’s analysis goes on to explain how whiteness has evolved and operated in constitutional law. I extend Harris’s account by arguing that tort law endorses whiteness through its recognition of the entitlements of whiteness as valid liberty and security.

\textsuperscript{52} Ibid., 215.
\textsuperscript{53} Ibid., 216.
interests. The property interest of whiteness is used to skew what is construed as reasonable and appropriate care. For example, tort law’s endorsement of whiteness means that white people are allowed to call people of color racial slurs and attack people of color for attempting to possess the rights and entitlements of whiteness i.e threaten the value and exclusivity of whiteness.

Martha Chamallas clarifies how injustice within tort law has corrupted its commitments. Chamallas starts her analysis by arguing that tort damages and remedies reflect “material disparities in larger society.”\(^55\) This means claims made by women, people of color, and other marginalized groups are prone to be awarded lower damages. Devaluation serves as a function for ideological white supremacy to ensure whiteness is privileged and anything else is diminished. Chamallas defines devaluation as “a kind of bias that affects value judgments about the worth of people’s lives, activities, interests and potential.”\(^56\) Devaluation is not an explicit legal concept, but it is used to highlight when the damages assigned in response to harm are not fair compensation due to historical marginalization. Chamallas points to the idea of race and gender tables for damage calculation to demonstrate how tort law has normalized devaluation.\(^57\) Chamallas then goes on to argue that systemic injustice within tort law has protected reproductive or maternal abuse; sexual exceptionalism; and racial insults, harassment, and discrimination.\(^58\) Courts do this by instituting higher barriers of proof or evidence to recognize these claims, making it difficult for plaintiffs to even turn to the Courts to pursue such claims in the first place.\(^59\) The hierarchy of harms is demonstrated by the rigid standards that must be met.

\(^{56}\) Ibid., 9.
\(^{57}\) Ibid., 9.
\(^{58}\) Ibid., 16.
\(^{59}\) Ibid., 16.
for any action to count as “outrageous conduct” or constituting “severe emotional distress.” The severe bias embedded in tort law also ensures that conduct that would be classified as outrageous or severe emotional distress, even by the unreasonable standards of the Court, is still often not recognized as such due to the way white supremacy and gendered violence have become normalized in society. Violence against women and people of color is seen as reasonable behavior.

It is difficult to proclaim America as a wholly unjust society, but using Shelby’s framework we can say America has breached the threshold of tolerable injustice. Shelby argues that any society that upholds the constitutional essential standards is not legitimate if it does not ensure reciprocity between citizens. If there is a group of citizens that are exploited by other citizens, that is a society without reciprocity. Select citizens are no longer intrinsically valued and their claims are not being respected. Due to devaluation, whiteness ensures that tort law confers fewer protections and benefits to people of color. Whiteness means the theoretical concept of restoring mutual accountability in tort law becomes the practical or actual concept of endorsing, privileging, and upholding whiteness as property.

I believe the existence of whiteness as property within tort law has perverted tort law from a system that restores mutual accountability to a system that relegates people of color to being subject to the ends of white people. The Darwalls argue that tort law upholds the dignity of persons by “embody[ing] this particular conception of persons as capable of holding themselves accountable to each other.” Tort law recognizes citizens as “capable of apprehending the rationales by which the law governs them and of relating standards to their view of the relation

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60 Ibid., 18.
61 Shelby, *Dark Ghettos*, 216.
between their actions and purposes and those of the community.” Therefore, when tort law does not allow certain groups to use tort law as a public form to hold those who wronged them accountable, tort law refuses the recognize the humanity of those people and their capacity as rational agents with entitlements and unique claims. I believe that tort law’s failure to serve as a system of civil recourse for people of color warrants a suspension of civic obligations. People of color cannot be expected to abide by or buy into a system of civil recourse that does not consider them as mutually accountable equals with their own claims and ends. If people of color continue to follow the obligations of tort law, they continue to accept that they have lesser claims and thresholds for appropriate care.

Tort law has been so thoroughly corrupted by ideological white supremacy and other forms of discrimination that it is actively perpetuating and exacerbating injustice. In “Criminal Process as Mutual Accountability: Mass Incarceration, Carcerality, and Abolition,” the Darwalls argue that the American carceral system fails to meet the standards of mutual accountability, rendering the system illegitimate. They go on to strengthen their claim by arguing that the criminal legal system is itself “responsible for producing social dynamics that undermine the possibility of mutual accountability in general.” The system is now perpetuating the same dynamics and ideologies that led to its own demise. I believe a similar argument ought to be made for tort law because tort law’s ability to devalue the harms of marginalize folks allows it to protect and enforce the entitlement of whiteness. Whiteness is defined as a property interest to be protected or state entitlement to be called upon, and tort systems have often been utilized to bolster these protections and entitlements. Ideological white supremacy is then magnified by the operation of tort law.

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63 Ibid., 188.
Chapter 3 – Articulating the Controlled Instrumentalist Approach

Part 1 - Reforming a Broken System

In Chapter 1, I established why a robust system of civil recourse is needed in a just society and then outlined what I believe is the ideal system of civil recourse. In Chapter 2, I examined how our system of civil recourse is impoverished and serves to amplify and magnify ideological racism. In this chapter, I will outline the broad-based approach we ought to take to reject our material conditions and change the system of tort law.

Before making my argument, I will situate how my account fits in with Shelby’s. Shelby’s analysis focuses on the exploitation of the people in the inner-city ghettos. When outlining my framework, I will be examining the exploitation and marginalization of people of color in tort law, but I will be utilizing an intersectional approach and will acknowledge gender, class, and other intersections as they arise. Even though my account will not examine the situation(s) of other groups as deeply, I believe the framework and approach for resistance and reform I articulate can be utilized by any oppressed group. When I refer to an oppressed or marginalized group, I am referring to a group of people who are systemically denied the rights and privileges they are entitled to as moral agents. Any group that experiences this kind of oppression exists in the state of exploitation that I seek to disrupt.

Part 2 - The Insufficiencies of Instrumental Reform

I will now recap the conclusions we have reached after the last chapter. Using Tommie Shelby’s understanding of the threshold of tolerable injustice, I have established that we live in a state of pervasive injustice. This state of injustice is not as dire as a fully unjust society, but it is still more unjust than a society with moderate or tolerable injustice. In our society, which has bypassed the threshold for tolerable injustice, we grant for the sake of argument that individuals retain their constitutional essentials. The Constitutional Essential Standard, as defined by John
Rawls, is the rights present in most democratic societies, such as speech, religion, and material necessities. While individuals have their constitutional essentials, there is no condition of reciprocity. Certain citizens in the body politic are readily and frequently exploited by others. Due to the constant state of exploitation that certain members of the polity live in, we have surpassed the threshold of tolerable injustice. Cheryl Harris outlines the nature of the exploitation that people of color, especially Black and indigenous people, experience. Harris asserts that whiteness is a kind of entitlement and property interest that allows white people to call upon the state to protect their elevated status and right to subordinate people of color. Whiteness allows Amy Cooper to call the police on Christian Cooper for merely daring to bird-watch in the park. This perpetual state, of knowing that your humanity, life, and livelihood exist at the whims of whiteness, is reality for people of color in America.  

When contemplating the state of exploitation that people of color experience in America, many argue that society ought to radicalize and use ‘any means necessary’ to achieve some kind of social justice. The argument is a common one and is typically espoused by young, disillusioned radicals who feel as if the system and all pathways of reform have failed them. This view is typically articulated as a form of instrumentalism. Instrumentalism, as described previously, is when people view systems, like the law, as purely operating to serve a social end. Hans Kelsen eloquently describes instrumentalism when he explains how it renders law “a coercive apparatus having in and of itself no political or ethical value, a coercive apparatus

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64 Note that the extent whiteness can impact a person and the severity of its impact largely depends on the exact nature of one’s race, ethnicity, class, gender, etc. How structurally compromised people are due to whiteness differs on a case-by-case basis and should not be flattened into one experience.
whose value depends, rather, on ends that transcend the law qua means."\(^{65}\) In terms of reforming our current society, instrumentalists typically believe that the state of pervasive injustice is so dire that people are justified in setting aside our natural and civic duties in order to fight for a new world (regardless if the people of the old world are destroyed in the process). Some people even ground this reproach using the idea of reciprocity. They argue that if only certain individuals are intrinsically valued in the world, it is ok if we set aside our value for everyone in order to build a society where everyone is valued. Instrumentalism allows and even embraces destructive approaches to reform as long as they are productive in achieving the stated social goal.

Richard Delgado’s piece on “Race, Legal Instrumentalism, and the Rule of Law” is a prominent example of an instrumentalist conception of law. In his account, Delgado uses the approaches of civil rights icons such as Gandhi and the Black Panthers.\(^{66}\) Like the civil rights activists he mentions, Delgado desires social justice and believes our current society is not one with social justice. He argues that the Black Panthers viewed law and the legal system as an entirely illegitimate enterprise. For the Black Panthers, their causes were to be advanced by any means necessary, regardless of whether their approaches followed the law or not. He describes how the Black Panthers believed the law ought to fit into their advocacy. The leaders of the Black Panthers “understood that the forces of law would often be arrayed against them, but that sometimes one could employ litigation, injunctions, and other legal strategies to make very real


progress for the [B]lack community." He goes on to describe this attitude as “seeing law in pragmatic terms, as sometimes legitimate and helpful, and at other times not.” To Delgado, law can be set aside or embraced as an enterprise depending on the moment in time and its relevancy. Law is legitimate in so far it upholds the causes one holds dear. He believes his view “demystify[ies] law, see[s] it as the social institution it is.” He justifies his view by arguing that oppressors utilize law through a legal instrumentalist view and calls for civil rights proponents to adopt their strategy in order to have the same leeway and freedom in taking action.

Returning to Shelby’s account allows one to understand how Delgado’s account or any instrumentalist strategy cannot be a permissible means of reform and resistance. Shelby outlines approaches various political philosophers advocated to address the injustice of the Jim Crow Era. He essentially asks the question – what actions ought to have been taken to better resolve the injustices from that period? When examining the various answers, he cautions about falling into the medical model, a term used to refer to approaches that fundamentally disregard the agency of those in the inner-city ghettos. A common answer to such a question is what Shelby calls a new integrationist approach. New integrationists believe interracial contact is a necessary component of addressing the injustices of Jim Crow. One new integrationist that Shelby focuses on is Elizabeth Anderson. Anderson argues that segregation leads to group-based disadvantages because Black people are firmly shut out from accessing social capital which also impedes their access to economic and educational opportunities. Shelby disagrees with Anderson’s emphasis on “residential integration as a legitimate mechanism for correcting the unjust disadvantages the

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67 Ibid., 391.
68 Ibid., 395.
69 Shelby, Dark Ghettos, 2.
70 Ibid., 95.
71 Ibid., 64.
He first claims that Anderson is giving too much credit to the impact of social capital and social exposure to decrease prejudice. He goes on to note how her approach places many burdens on Black people by expecting them to leave behind their communities and networks to live in hostile neighborhoods where people may or may not bother to put aside their prejudice and begin to see Black people as human. Anderson, while well-informed and well-meaning, falls into the medical model.

Shelby’s issue with Anderson lies in her presumption that she can dictate the ends Black people want as well as the burdens they must bear in order to achieve those ends. By advocating for forced integration, Anderson, a white woman, unilaterally decides what justice ought to look like post-Jim Crow. She decides that interactions with white people would provide Black people the most beneficial form of social capital post-Jim Crow. She believes that Black people can be forced to bear the social, economic, and political costs of integration, regardless of whether they agree or consent to the costs and the ends she chooses. Shelby faults Anderson by arguing that if achieving justice necessitates burdening the oppressed, then the oppressed are entitled to “maximal freedom in choosing the form that these necessary burdens take.”

Shelby’s analysis demonstrates how we can problematize instrumentalism for reducing individuals to mere means and failing to respect the intrinsic human value or natural duties of persons. As an instrumentalist, one unilaterally chooses a desired social end and instrumentalizes everything in pursuit of that end. The nature of oppression already forces marginalized folks to bear structural burdens and exploitation they did not choose. To then impose different burdens

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72 Ibid., 67.
73 Ibid., 72.
74 Ibid., 75.
75 Ibid., 69.
76 Ibid., 77.
and allow the exploitation of the marginalized in pursuit of your social goal is continuing a lesser version of what was already done to them. For example, in Brown v Board, the Court forced schools to integrate, and Black children were made to bus to hostile, racist, and inaccessible white schools. In these cases, Black children were ripped away from their communities and all they knew, so Black children suffered in the post-Brown Era and there was a massive layoff of Black teachers and Black principles. While the post-Brown Era may have been a slight improvement to the past, Black people continue to have a lack of agency and inadequate resources in the education system because of the lack of agency they were accorded in deciding how education ought to look post-Brown.

Shelby’s alternative to Anderson’s forced integration is a solution that he calls egalitarian pluralism. Egalitarian pluralism requires “desegregation, social equality, and economic fairness.” Shelby’s solution, notably, does not prescribe any particular policy or social outcome. His framework is chiefly concerned with endowing the residents of the ghettos with the capacity to determine their own ends. For example, Shelby specifies that this could look like ensuring that Black neighborhoods are just as well-resourced as white neighborhoods so that Black people do not have to travel or relocate to white neighborhoods for opportunities. Shelby does not specify an outcome for the ghetto poor, because he understands that the outcome is something he is not equipped to determine for them. He instead addresses how the ghetto poor have been systemically deprived of achieving the outcomes they desire through a lack of

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78 Shelby, Dark Ghettos, 67.  
79 Ibid., 68.
education and economic opportunity. Egalitarian pluralism helps restore the capacity of self-determination for the ghetto poor without violating their agency by determining their ends.

It is wrong to bypass the agency of marginalized people and use them as mere means for a social goal, but standpoint epistemology further problematizes this idea by asserting that people outside the inner-city ghetto are not equipped to decide their ends. In “Demarginalizing Standpoint Epistemology,” Briana Toole argues that “Standpoint epistemology is the view that an epistemic agent’s race or gender can make a difference to what she is in a position to know.” When applying Toole’s theory to Shelby’s account, we can understand why the instrumentalist approach is uniquely ill-suited. The instrumentalist approach bypasses the agency of people and reduces them to mere means, and it also chooses the end(s) that marginalized people ought to pursue and overlooks the epistemic advantage that the marginalized possess. Shelby demands that the ghetto poor be able to choose the burdens they take on in pursuit of reform and also what that reform ought to look like. He focuses on the agency piece, which I explained the importance of previously. Toole’s analysis of standpoint epistemology helps supplement Shelby’s analysis by articulating the point that he does not emphasize - we simply cannot decide the burdens or the ends of the ghetto poor due to our lack of epistemic privilege. Because we do not have the epistemic position of the ghetto poor, regarding their unique social and economic position as poor Black people in the inner city, we therefore cannot understand or know the ends that they desire for justice. Instrumentalists decide what ends other people ought to prioritize, and we cannot afford to be instrumentalists lest we choose the wrong ends for people who are already deprived of agency.

Instrumentalism informed by standpoint epistemology is still an impoverished approach to reform. One may argue that standpoint epistemology could be used to choose the correct ends for instrumentalism. With the correct ends adopted, we are thus justified in using the Andersonian approach and forcing people to bear the costs of achieving these ends. The instrumentalist who attempts to use standpoint epistemology would say that it is ok to force Black people to move to white neighborhoods because integration is an end Black people want. We should simply choose the goal of social justice and instrumentally pursue that. However, I argue that such an approach will still be immoral and fail to consider the nature of the harm when evaluating wrongs. Wrongs will still be evaluated in so far as they achieve the policy agenda and not based on the wrong’s violation of the standards and duties of care, the extent of the harm caused, etc. Another thing to question is whether standpoint epistemology can even be used to think of an end that genuinely represents all people. Social justice looks quite different for people. Someone’s version of social justice may be another’s version of pervasive injustice. To presume that we could adopt standpoint epistemology and think of a singular end that everyone in a marginalized group consents to seems quite flattening and reduces people to a monolith.

Instrumentalism allows for action to be taken in pursuit of a social goal that can be counterproductive and undermine the legitimacy of said social goal. For example, if the goal is to create social equality, instrumentalism would allow for the killing of anyone perceived to be lower (economically or socially) than the baseline standard of what an equal person is. If the goal is to encourage the city council of Los Angeles to pass a policy that would benefit houseless people, instrumentalism endorses threatening to burn down small businesses in Chinatown and Koreatown unless the policy is passed. Instrumentalism permits any sort of action that pursues the social goal, even if that action is ruthless violence and cruelty. Shelby allows us to
understand why we cannot have uninhibited recourse toward violence. Violence violates our natural duties, which we must always follow. One of non-instrumentalism’s central tenets is to uphold and recognize the intrinsic value of persons. From the intrinsic value of persons holds the idea that people cannot be treated as means to achieve aggregate social goals. Recognizing the intrinsic value of people commits us to abiding by our natural duties because to respect and recognize the value of people is to follow our natural duties. Thus, non-instrumentalism commits us to following our natural duties. Shelby extends this point and argues that “natural duties are unconditionally binding; in that they hold between all persons regardless of whether they are fellow citizens or are bound by other institutional ties.”

Natural duties are a moral requirement. If anyone is a moral person and values other people, then they are not allowed to set aside the welfare of their fellow citizen to pursue their end goal. Thus, one cannot morally justify instrumentalism, because to be an instrumentalist is to set aside our natural duties.

There is an inherent tension within the instrumentalist conception of social justice. Instrumentalists, such as Delgado, argue that society ought to use whatever means necessary to aspire to social justice. However, what is social justice if not respecting the intrinsic value of all persons? Social justice highlights that we cannot reduce people to mere means to achieve the ends of others. It emphasizes that it is not ok for people of color to be exploited in order to confer white people their whiteness. With this definition of social justice, it seems quite confusing to then choose to adopt instrumentalism, since instrumentalism is centered around the idea that we set aside the intrinsic value of persons in order to pursue a social end. When the instrumentalist pursues social justice, they act in ways that are contrary to social justice. By being an

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81 Shelby, *Dark Ghettos*, 213.
82 Ibid., 110.
instrumentalist, instrumentalists are then acting against their stated end. Our current state of injustice is due to our failure to uphold the natural duties of all citizens and respect the intrinsic value of people, so continuing to set those duties aside as we pursue reform is a contradictory approach. As a result, instrumentalism will make an already dire situation worse.\textsuperscript{83}

When an instrumentalist is successful, the result will simply be an instrumentalist account that continues indefinitely. Because social ends can always be improved and honed, instrumentalism can simply continue without an end. Delgado is an example of this kind of instrumentalism in that he advocates for all groups to continue to use the legal system to advocate for their own interests without delineating a stopping point in which people ought to respect law again. To Delgado, the law is permanently turned into an instrument that can be used for political gain. The instrumentalist account will last forever.

Part 3 - Moving Forward: Controlled Instrumentalism

In the previous section, I problematized instrumentalism and explained how it cannot be the approach we utilize as we attempt to pursue a more just society that does not violate the threshold of tolerable injustice. Instrumentalism may have seemed like the obvious choice, but after careful analysis, it becomes clear that instrumentalism alone justifies dangerous and counterproductive consequences that we cannot have in our quest for reform. Instrumentalism violates the non-instrumental commitments and the natural duties that we are all required to follow as moral persons. However, the question arises as to what our approach should be for justice. Non-instrumentalism is then the easy answer, but is non-instrumentalism alone sufficient? In this section, I will explain how non-instrumentalism will be key to shaping our approach moving forward because non-instrumental commitments are key to any just society.

\textsuperscript{83} I will expand more on this idea in Chapter 4.
However, reform and injustice in an inherently unjust society may require a bit more than non-instrumentalism, and in this section, I will clarify what that extra piece is. I believe that a form of controlled instrumentalism will allow us to have an effective but constrained approach to reform that will allow us to pursue a social goal but will not have counterproductive or harmful consequences. I will first explain what I envision controlled instrumentalism to look like, and then clarify the necessity of the approach in the proceeding paragraphs.

Controlled instrumentalism is a kind of instrumentalism that is constrained by non-instrumental commitments. Like regular instrumentalism, controlled instrumentalism is striving for a social goal. The social goal of controlled instrumentalism is to secure the conditions of a just society or secure non-instrumentalism i.e. intrinsically value people and empower them as agents with their own ends and the means to pursue them. This means having the fair terms of interactions secured as well as the terms of reciprocity as specified by Shelby. Controlled instrumentalism is controlled or constrained by our natural duties and non-instrumental commitments. Our non-instrumental constraints create the contours by which we can take action to achieve our social goal of a society with reciprocity for all people to be able to choose their ends. Controlled instrumentalism also dictates the goals we aim for because controlled instrumentalism must only set goals that secure the conditions for non-instrumentalism. To clarify, only goals that support the conditions for fair and equal cooperation are allowed under a framework of controlled instrumentalism.

To compare instrumentalism and controlled instrumentalism, one could conceive instrumentalism as a raging forest fire that decimates everything in its path until it eventually flutters out. Controlled instrumentalism, on the other hand, is a controlled forest fire that is contained and secured the entire time. People decide when and where the fire blazes and are also
able to put out the fire when the time is appropriate, and the forest has burned enough to allow for maximal growth and minimal destruction. Controlled instrumentalism is like instrumentalism because it sees a structural failure in society and creates the goal to eliminate the structural failure by securing the conditions of non-instrumentalism. However, the particularities of what the social goal is, the steps that are permissible to achieve the goal, and what counts as an achievement of the goal are all framed, constrained, and controlled by non-instrumentalism. A purely non-instrumentalist strategy will not suffice because we do not live in a society where the conditions needed for non-instrumentalism are secured. Therefore, non-instrumentalism is a state we must aspire to, which leads us to the strategy of controlled instrumentalism. Controlled instrumentalism works to secure the conditions for non-instrumentalism and uses the tenets of non-instrumentalism to dictate the permissible actions that can be taken. Because controlled instrumentalism aspires toward a social goal, it is still a form of instrumentalism.84

Non-instrumentalism is the optimal constraint for controlled instrumentalism because controlled instrumentalism requires we always abide by our natural duties, thus curbing the more destructive tendencies of instrumentalism. As we clarified in the previous chapter, an uninhibited

84 Shelby would argue that a purely non-instrumentalist strategy does suffice because a purely non-instrumentalist strategy dictates pursuing controlled instrumentalism in non-ideal circumstances. Non-instrumentalism suffices when the conditions for non-instrumentalism have been secured and society is operating ideally. When you are in a society where the conditions for non-instrumentalism have not been achieved, it requires aspiring to those conditions. In non-ideal circumstances, a non-instrumentalist strategy necessitates first securing the conditions for ideal interaction. To clarify, non-instrumentalism, in non-ideal situations, will take the form of controlled instrumentalism. Shelby describes the theory that accounts for interaction in a just society as ideal, and the theory that accounts for interaction in an unjust society as non-ideal. What Shelby refers to as ideal theory is what I call non-instrumentalism while Shelby’s non-ideal theory is what I call controlled instrumentalism. Shelby and I are referring to the same concepts but are using different names for them. I could continue to use the ideal and non-ideal distinction, but in the concept of torts, non-instrumentalism and controlled instrumentalism are more helpful.
instrumentalist would allow one to harm an innocent and continue to exploit one’s fellow person in the name of pursuing a social goal. As Shelby points out, “Only someone who holds a purely instrumental or utility-maximizing conception of reason could think that an unjust social order rationally justifies a war of all against all.”

A non-instrumentalist believes that there are requirements to respect people that constrains what we can do in pursuit of our goals. Even when the threshold of intolerable injustice has been breached, a non-instrumentalist is not permitted to temporarily set aside their value for people and become an instrumentalist, because then the non-instrumentalist did not truly value people in the first place. Let us go back to the previous example of encouraging the city council of Los Angeles to pass a policy that would benefit houseless people. Controlled instrumentalism could potentially allow for vandalizing the property of the ultra-rich, but it does not allow us to harm the property of small business owners trying to make ends meet. Our natural duties do not allow people to destroy the property of small businesses, because doing so would violate the agency of ordinary working-class people, but destroying the property of the ultra-rich would be a form of resistance against their rampant accumulation of wealth at the expense of the ghetto poor. It would be reasonable to violate certain laws but not others where violations would transgress our natural duties.

Shelby outlines our natural duties in his account. He mentions the duty to not be cruel, the duty to not cause unnecessary suffering, the duty to respect the moral personhood of others, etc. These natural duties provide the contours of what is justifiable in all situations, even those that occur when the threshold of tolerable injustice is breached. One cannot claim to be an instrumentalist

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85 Ibid., 219.
86 I will expand more on this point in Chapter 5.
and intrinsically value people and then decide to stop valuing people once the threshold of tolerable injustice has been breached. If one does that, then they are not truly valuing people.

Importantly, controlled instrumentalism fulfills the duty of justice, one of our most important natural duties. Shelby explains how the duty of justice “demands, most fundamentally, that each of us respect and support just institutions, particularly those that lay claim to our allegiance and from which we benefit.”\(^\text{87}\) However, we are adopting a strategy of controlled instrumentalism when we have passed the threshold of tolerable injustice, so presumably we are acting in a society with unjust institutions. In our current society, this version of the duty of justice cannot apply. However, Shelby argues that the duty of justice will apply differently in a society that has bypassed the threshold of tolerable injustice in that it will demand that “we help to establish a just social order and to reform unjust institutions.”\(^\text{88}\) Thus, controlled instrumentalism is compatible with the duty of justice because it has a stated social goal to rid society of its unjust social structure and secure the terms for non-instrumental interaction. Shelby goes on to explain how the weakest form of the duty of justice still demands that “we not be indifferent to societal injustices. Even if we cannot make a positive contribution to social reform and cannot entirely avoid some complicity or compromises with an unjust system, we should at least care about injustice.”\(^\text{89}\) This version of the duty of justice is something that everyone, regardless of their social standing, is required to follow. Shelby’s analysis helps us understand that controlled instrumentalism is not merely a useful strategy to pursue but a strategy we are required and necessitated to pursue as moral agents who are bound by our natural duties.

\(^{87}\) Ibid., 57.
\(^{88}\) Ibid., 57.
\(^{89}\) Ibid., 58.
Controlled instrumentalism allows for radical action that is purposeful and effective without resulting in needless damage or harm. It suspends the civic obligations of marginalized people, empowering them to selectively disobey the conditions of tort law because individuals are not required to follow unjust institutions if they have bypassed the threshold of tolerable injustice. However, just because civic obligations are suspended, does not mean individuals can set aside the rest of their natural duties. As previously mentioned, natural duties set the parameters for permissible action. These duties do not preclude violence and destruction, but ensure that when such actions are used, innocent people are not harmed, and actions preserve their principled character by continuing to uphold reciprocity and the intrinsic value of persons. The non-instrumental constraints ensure that there are requirements that constrain what you can legitimately do in pursuit of your goals, but controlled instrumentalism still allows people to pursue their goals and take radical action.  

Controlled instrumentalism is strategically useful because, without the constraint of non-instrumentalism, even well-meaning non-instrumentalists slip into instrumentalism. Shelby’s indictment of Anderson clarifies the value of controlled instrumentalism. To briefly recap, Shelby disagreed with Anderson’s proposal of forced integration, because it deprived Black people of their agency and presupposed their ends. Shelby explains that Anderson’s proposal takes the background structural injustice in society as given and does not attack the root cause of injustice. She presupposes that inner-city ghettos that are majority Black will always be under-resourced and does not question whether that reality in and of itself is deeply problematic. Anderson is well-meaning and intends to put forth her ideas for the cause of racial justice. She, in fact, probably believes in the tenets of non-instrumentalism and just interaction. However,  

\[90\] I will expand more on this in Chapter 5.
because we are in a non-ideal situation in society, she is slipping into instrumental thinking when approaching reform and downgrading the agency of marginalized folks while also advocating for lesser solutions. The medical model, an instrumentalist model by its very nature, is tempting for the reformist, so controlled instrumentalists ensure that the well-meaning non-instrumentalist stays focused even in non-ideal situations.

Part 4 - Distinguishing Controlled Instrumentalism

I will now summarize how controlled instrumentalism operates differently from pure instrumentalism. Controlled instrumentalism still sets and achieves goals, but our goal is to achieve the conditions for non-instrumental interaction where all people are valued and have reciprocal capacity and respect. Pure instrumentalism ignores the intrinsic value of people in pursuit of their goal but controlled-instrumentalism acts to uphold the intrinsic value of people as their goal. To clarify, controlled instrumentalism is uniquely used in cases beyond the threshold of tolerable injustice, because it allows us to pursue policies and actions to change our material circumstances and set aside our civic obligations while continuing to respect the intrinsic value of persons. Our respect for the intrinsic value of persons and adherence to our natural duties constrain the actions we can take and the goals we choose to adopt.

An important yet subtle difference between controlled instrumentalism and pure instrumentalism is the goals or outcomes they choose to pursue. Controlled instrumentalism pursues goals that endow people with capacities. Instrumentalism, on the other hand, pursues an end. They have a picture or vision of society they seek to enact. To clarify this distinction, controlled instrumentalism wants to increase resources and reduce inequities because it aims to empower agents to pursue their ends. Controlled instrumentalism does not seek to dictate what ends agents should act for, although it does demand agents uphold natural duties when pursuing their own ends. Controlled instrumentalism may pursue incremental outcomes, but these
outcomes will be dictated by securing the conditions for the rich exercise of agency for individuals below the threshold of tolerable injustice. For example, an outcome that controlled instrumentalism may pursue is increased tort damages for survivors of racial violence. Another outcome may be creating a tort for racial slurs. We are pursuing capacities that people may utilize but we are not mandating their utilization nor dictating how people ought to use these capacities. Controlled instrumentalism, like pure instrumentalism, allows us to engage in violent rebellion and revolution, but unlike pure instrumentalism, it must be done with a legitimate framework that preserves the natural duties of persons. Controlled instrumentalism is grounded in an understanding that our reality lacks the basic conditions for a just society, necessitating we set our goal as securing these conditions.

<table>
<thead>
<tr>
<th>Instrumentalism</th>
<th>Controlled-Instrumentalism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pursues ends by any means necessary, even if it means reducing people to mere means and violating the natural duties of persons</td>
<td>Pursue goals using whatever means, but our means cannot violate our natural duties, undermine the intrinsic value of persons, or impose undue burdens on exploited populations</td>
</tr>
<tr>
<td>Pursue any specified end</td>
<td>Pursue goals that secure the conditions for non-instrumental interactions</td>
</tr>
<tr>
<td>Decides a singular end for everyone to pursue and uphold</td>
<td>Decides goal(s) that everyone must pursue or take care to not undermine, and the goal endows people with capacities, so people can determine and pursue their own ends</td>
</tr>
<tr>
<td>Take radical and revolutionary action to achieve the end</td>
<td>Take radical and revolutionary action to achieve the goal(s)</td>
</tr>
<tr>
<td>Always aiming to more perfectly achieve the social end.</td>
<td>Once the conditions of just interaction are secured, the controlled instrumentalist reverts to non-instrumentalism and stops striving for a social goal.</td>
</tr>
</tbody>
</table>

Figure 1. Comparing Instrumentalism and Pure Instrumentalism

This chart utilizes the language of goals and ends. To clarify, I conceive an end as a state that you are trying to bring about. An end is something you always aspire to and can never robustly achieve. A goal is similar to an end in that it is something we work towards. However, a goal can be met, unlike an end. A goal is met when an agent has fulfilled their duty or adhered to the moral principle guiding their action. I will now provide examples of the two ways a goal can be deemed as met. If my goal is to feed 63 dogs, I succeed when I fulfill my duty of feeding 63
dogs. If my goal is to be respectful, I succeed if I treat you by aligning with the moral principle of respect. We will return to this language of goals and ends in the next chapter.

Controlled instrumentalism also highlights the inadequacy of non-instrumentalism in a society that bypasses the threshold of tolerable injustice. When examining the typical non-instrumentalist account, like Goldberg and Zipursky, it is clear that non-instrumentalism cannot secure justice in a society that has bypassed the threshold of tolerable injustice. Non-instrumentalism inherently presupposes that tort law is able to equally adjudicate between the conflicting claims and interests of people. It takes for granted that the same relational directives equally apply to everyone. When society has bypassed the threshold of tolerable injustice for particular individuals, non-instrumentalism cannot act to uplift the claims of marginalized people and allow them to be equally recognized, since non-instrumentalism does not permit any consideration other than the wrongdoing at hand. Non-instrumentalism cannot accommodate the fact that in a non-ideal situation, when society has bypassed the threshold of tolerable injustice, the civic obligations of marginalized people are suspended and relational duties shift. While non-instrumentalism is the ideal system in a just society, in an unjust society it is insufficient at reform, and as mentioned in Chapter 2, even exacerbates and perpetuates systemic injustice.
Chapter 4 – Controlled Instrumentalism Situated in Tort Reform

In the last chapter, I outlined how we are morally obligated to utilize an approach of controlled instrumentalism. Our society has breached the threshold of tolerable injustice, so a committed non-instrumentalist will engage in a form of controlled instrumentalism in order to secure the conditions for non-instrumental and fair interaction. Controlled instrumentalism sets the goal of aspiring to non-instrumental conditions and constrains the approach we must take to reach this goal. In this section, I will outline how controlled instrumentalism ought to be utilized in tort law. I will explain how prominent accounts of tort law can be profitably read as accounts of controlled instrumentalism. Not only can these accounts be read as advocating for controlled instrumentalism, but using a lens of controlled instrumentalism makes these accounts more persuasive and coherent.

Part 1 - Controlled Instrumentalism in Current Tort Accounts

In this section, I will be examining various tort accounts and explaining why they ought to be understood as controlled instrumentalist frameworks. I will first go over “Social Justice Tort Theory” by Martha Chamallas and explain how her account is a controlled instrumentalist account. I will then analyze “On Causation” by Mari Matsuda and argue that Matsuda’s account is at its strongest when viewed through the lens of controlled instrumentalism. Finally, I will revisit Richard Delgado’s account of legal instrumentalism and elucidate how the account is vastly improved when altered to fit the controlled instrumentalist school of thought.

In “Social Justice Tort Theory,” Martha Chamallas outlines how torts can better compensate the full spectrum of harm and wrongdoing. She explains that “tort law reflects and sometimes reinforces systemic forms of injustice in the larger society.”91 She goes on to identify several

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aspects of tort law that uphold and perpetuate systemic injustice. She examines how tort law devalues the harms of marginalized people, lacks a tort for racial insults, and upholds unreasonable standards for proving emotional and dignitary harm as opposed to physical harm. She argues that while these policies may not have been formulated with the intent of upholding whiteness and perpetuating injustice, their implementation has nevertheless continued to disproportionately harm people of color, women, and other marginalized groups. In order to combat the systemic biases within tort law, Chamallas argues that social justice principles ought to be borrowed from critical race theory, civil rights law, and feminist theory. She believes the principles enshrined in these schools of thought will help practitioners of tort law “updat[e] the legal picture and delv[e] more deeply into the sources of persistent bias.” To eradicate the sources of persistent bias, she advocates for reforms such as the abolition of devaluation and race-based damage calculations.

Chamallas does not explicitly situate her account in the instrumentalist or non-instrumentalist tradition. Her account uses language that easily fits into both categories. However, in a private conversation during a Claremont McKenna College seminar, Chamallas admits that the goal of Social Justice Tort Theory is to ‘eliminate bias.’ She believes tort law must aspire “to identify, address, and ameliorate the effects of … systemic inequalities and disparities.” This sentiment is explicitly non-instrumentalist because it rests on the idea that torts must treat people as equals and provide people with equal resources for recourse. When Chamallas later says, “to attain

92 Ibid., 14.
93 Ibid., 19.
94 Ibid., 8.
95 Professor Paul Hurley’s Social Justice Tort Law Class in discussion with Martha Chamallas, November 2023
justice for the individual, systemic forms of injustice must be taken into account,” she is relying on the non-instrumental understanding that tort law’s purpose is to address wrongdoing and achieve justice. To be a proper system of non-instrumentalism, it necessitates directly addressing injustice.

Social justice tort theory focuses on ensuring tort law meets its stated purpose. Tort law’s purpose is to compensate the full spectrum of harm and wrong and ensure that the intrinsic value of all persons is respected. However, tort law is currently operating as another means by which systemic injustice is perpetuated. Chamallas’s account seeks to address the lacuna between tort law’s stated goal and its actual implementation. If one calls Social Justice Tort Theory an activist project, Chamallas may respond by highlighting how it is a shame to need such activism in order to fix the failures of tort law.

Social justice tort theory is best understood as a controlled instrumentalist account. When Chamallas lists the aims of social justice tort theory, she states that its “ambitious aspiration is to achieve justice in the distribution of wealth, opportunities, and privileges in society, breaking down structural barriers and challenging implicit and cognitive biases that reproduce longstanding disparities in virtually every facet of social and economic life.” She believes that all people deserve recourse and an ability to rectify wrongdoing, but systemic bias ensures that tort law’s pathways of recourse are insufficient for particular groups. Chamallas desires a just distribution and lack of structural barriers and biases. Our current system is not allowing for fair and equal interactions nor respecting the intrinsic value of persons, so we must take action to address current inequities. In other words, the factors that hinder non-instrumental conditions

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97 Ibid., 6.
98 Ibid., 1.
must be eliminated. This is a goal that is incredibly compatible with the controlled-instrumentalist account because it is centered around respecting the intrinsic value of all people and eliminating systems that disrespect the value of people. Chamallas advocates for the reforms she lists because their implementation will ensure that the well-being and claims of all people are acknowledged and redressed. With this understanding, we can see how the best interpretation of social justice tort theory is a controlled-instrumentalist interpretation because Chamallas’ core claims align with controlled instrumentalism’s tenets.

One may be tempted to disagree with this analysis and argue that Chamallas is a plain instrumentalist who is aspiring to the social goal of social justice. However, I believe she specifically chose the goal of social justice, as well as the other incremental goals she outlines, because they endow individuals with greater capacities within tort law. They expand the kinds of ways in which marginalized people can pursue recourse as opposed to dictating what ends marginalized people ought to have. Social justice tort theory proposes reforms that “counteract cultural biases and make tort law more responsive to systemic injury” while also “open[ing] up tort law to address widespread social harms that have been largely relegated to legal domains.”

Chamallas also does not believe we can pursue social justice through any means necessary. She believes we ought to aspire to social justice in order to ensure tort law meets its stated function and that the intrinsic value of all people is respected. If someone were to pursue social justice in a way that undermined the law and its purpose, she would not endorse such an action. Chamallas

99 I will not respond to the claim that Chamallas is a pure non-instrumentalist since she explicitly states that she has a goal of securing social justice and reducing bias in torts. Because of how she laid out her argument, it does not seem necessary to address this claim.
100 Ibid., 18.
believes in the elimination of bias but with particular constraints, making the account a form of controlled rather than unbridled instrumentalism.

In “On Causation,” Mari Matsuda explains how current notions of causation only identify particular manifestations of injury and do not redress systemic injury and harm. She argues that when causation is construed narrowly, it excludes marginalization as a legal cause. Her account questions how broadening conceptions of causation could reconceive fault and liability for different types of injustice. Importantly, she highlights how traditional tort approaches tend to constrain torts’ radical potential because current notions of causation limit causation to what is identified as the but-for cause. This understanding of causation eludes systemic causes from being recognized in tort adjudication. The but-for cause is the cause that had the event in question not occurred, the wrong in question would not have happened, but in cases of systemic harm, the but-for cause is labeled as an individual or singular perpetrator as opposed to recognizing the broader system that led rise to the harm. For example, Matsuda argues that individuals who uphold patriarchy ought to be liable for sexual violence because their actions create the conditions that permit sexual violence and protect offenders. The legal system will indite the actions of particular men (if we are lucky) but it will do nothing to address the broader culture that allowed and perpetuated said harm.

Matsuda’s account relies upon non-instrumental ideas of upholding individual responsibility and the standard of reasonableness. She emphasizes how she believes “in individual responsibility, because the human condition calls for it.”

102 Ibid., 2202.
103 Ibid., 2203.
104 Ibid., 2209.
responsibility allows us to hold others accountable and “right wrongs.” Matsuda describes this form of accountability as “a human need.” It is hard to understand her articulation of this concept as anything other than a non-instrumental idea because instrumentalism is only concerned with accountability and righting wrongs as a means to achieving the social end. Later in the text Matsuda also uses the principles of notice and breach. Notice asks, “did you know or could you have reasonably known” about the harm in question and breach asserts that an act “is not breach unless you act unreasonably.” Her usage of the principles lends itself to the non-instrumental idea of reasonable foreseeability in that people should only be held accountable for unreasonable actions. Reasonable foreseeability ensures that individuals are only held accountable for harm they could reasonably prevent. Instrumentalism, however, does not care about reasonable foreseeability, because it will prosecute individuals for actions they could not have reasonably prevented if prosecuting the individual will help achieve the social goal.

Matsuda’s account slips into instrumentalism when she argues for an understanding of causation that focuses on deterrence as opposed to responsibility. Matsuda argues that causation should be defined by “tak[ing] the harm and figur[ing] out who is in the best position to prevent it.” She believes causation ought to be reformed because current notions of individual responsibility and causation are not sufficient for addressing violence and other societal ills. Matsuda believes that “every effect has multiple causes, and in a responsible society we should identify as the responsible causes all those that could have made a difference.” With this conception of causation, it is no longer about identifying and holding accountable who is

105 Ibid., 2009.
106 Ibid., 2214.
107 Ibid., 2211.
108 Ibid., 2211.
responsible for an action but rather who could have stopped an action. Matsuda “would find liable anyone in the chain of distribution who had reason to foresee harm, and who failed to take reasonable steps to prevent harm.”\textsuperscript{109} This is clearly an instrumentalist idea in that causation is now used to pursue a policy agenda about reducing violence and is no longer about identifying who is responsible for wrongdoing. People and their claims are reduced to political tools and mere means. Causation would prosecute a parent for child neglect they could not prevent if prosecuting said parent would help reduce future violence (even if said parent is technically innocent of wrongdoing).

While there are clear ambiguities within Matsuda’s account, I believe the best way to understand her framework is through controlled instrumentalism. It is difficult to strictly define Matsuda as an instrumentalist or non-instrumentalist because there are strong elements of both in her account. Technically there could be both an instrumental and non-instrumental interpretation of her ideas. However, I believe that elements of both theories can be accommodated with controlled instrumentalism. Controlled instrumentalism can embed Matsuda’s expanded notion of causation within the context of a non-instrumental framework. Therefore, I believe this controlled instrumental reading is the best way to understand Matsuda’s account because it preserves and fits in with her core claims even if other claims must be set aside. Parts of Matsuda’s account cannot be reconciled with controlled instrumentalism, but other, more central, parts can be.

Controlled instrumentalism resolves the internal tension within Matsuda’s account. It allows Matsuda to care about individual liberty and reasonable foreseeability while also expanding cause and minimizing harm. Controlled instrumentalism would not allow for Matsuda

\textsuperscript{109} Ibid., 2214.
to completely pervert cause to justify a wide-scale policy agenda, but it would allow for an expansion of cause in that cause could be used to hold companies and other institutions accountable. Non-instrumentalism requires that cause must still be grounded in identifying who is responsible for the wrong in question that ripened into harm, but now systemic factors can also be identified as a cause. Matsuda’s suggested reformation of cause removes any notion of responsibility and frames torts as a kind of omnipotent check against undesirable behavior. Controlled instrumentalism endorses the reform of expanding cause but also constrains the reform enough so causation’s core notions are preserved. Causation can be broadened to include systemic factors as a but-for cause, but we cannot take causation away from its grounding in responsibility and accountability.

Controlled instrumentalism preserves Matsuda’s core insights in a way that pure instrumentalism cannot. Matsuda motivates her account when she explains how “individual bad deeds and individual spiritual estrangement cause our collective illness, and collective illness is never cured by leaving individuals to their own resources.”\(^{110}\) We need systems of care, responsibility, and ownership that ensure that individuals are treated with the respect and care they deserve. We must be able to repair harm and wrongdoing when it is done, both institutionally and communally. However, when tort law moves away from its purpose of redressing wrong, there are wrongs that will go uncompensated, and individuals will be left ‘to their own resources.’ Arguably worse, people and institutions that are innocent and have not even committed any wrongdoing could also be held liable. Thus, reading Matsuda’s account as instrumentalist, causes it to go against the very thing it professes to stand for.

\(^{110}\) Ibid., 2201.
Unlike non-instrumentalism, controlled instrumentalism would also favor causation’s expansion because expanding causation would better identify wrongdoers and ensure victims can pursue compensation from corporations, the state, and other institutions. Reforming causation will result in better identification of who and what systems ought to be held accountable for wrongdoing. Matsuda is correct in that current notions of causation are not adequate for identifying who may be at fault for particular wrongs, especially those with systemic causes. When we are examining the case of drug-addled parents who failed to provide their child proper care, our current notions of causation easily identify the parents culpable, but with Matsuda’s broadening, avenues of recourse against the state and other institutional bodies also become open. If tort law wants to serve as a mechanism to hold wrongdoers accountable, it must be able to prosecute sources of systemic bias as well.

Controlled instrumentalism allows Matsuda to remain committed to non-instrumentalism while also advocating for reform. If we understand the categories of tort law as only instrumentalism or non-instrumentalism, we can empathize with Matsuda’s issue. She is committed to non-instrumentalism and the understanding that individuals must be held accountable for wrongdoing and also be able to seek recourse for wrongdoing. However, she also understands that there is pervasive injustice in tort law and that our current methods of adjudication are insufficient at rectifying it. In the current landscape, there is no way to hold non-instrumental commitments and also pursue reform, so Matsuda simply attempted to walk the thin line between the two but ultimately failed. Controlled instrumentalism resolves Matsuda’s hermeneutic deficit and provides a new way forward where non-instrumental commitments can be centered and upheld, but reform is also pursued. Controlled instrumentalism is the new language that can resolve Matsuda’s incoherencies in her account.
In “Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law,” Richard Delgado argues that proponents of civil rights ought to utilize a form of legal instrumentalism and see law as solely a tool by which interests ought to be furthered. I have already referenced Delgado’s argument at length during prior chapters, but I will provide a quick summary. Delgado argues that law is a tool to be utilized and followed in select moments when it benefits a group’s interest. Such a tactic ought to be used because it is one that dominant groups use to vie for power, so marginalized groups ought to use law in the same way to gain the upper hand.

Unlike Matsuda, Delgado does not merely slip into instrumentalism but rather actively embraces it when he coins his ‘legal instrumentalism’ theory. In the previous chapter, I explained how Delgado’s theory has incoherency because the notion of social injustice he is attempting to combat is undermined by the instrumentalist approach. I will now further expand upon this idea and outline why Delgado’s notion of social justice is antithetical to instrumentalism.

Delgado’s definition of social injustice indicates that his conception of social justice must be non-instrumentalist. Delgado outlines the kinds of injustice he believes legal instrumentalism will combat. He argues that “our current condition is the direct result of our subordination” so there is a need for a theory that will explain “what folks like us should do” in response to such subordination.111 The subordination of people of color is driven by large powers that promote their interests using any means necessary.112 Dominant groups have an image of people of color, but especially Black people, as ‘Other.’ The ‘Other’ refers to the fact that “people simply do not think of [people of color] as individuals to whom love, respect, generosity, and friendliness are

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112 Ibid., 398.
Dominant groups dehumanize people of color and do not accord them the respect and value they deserve. Delgado’s notion of the social injustice that people of color face is predicated on a lack of value and respect. This necessitates his definition of social justice be one that includes valuing and respecting people. Non-instrumentalist social justice believes that social justice is respecting and valuing all persons equally. While Delgado does not specify his idea of social justice, a non-instrumental conception of social justice is the most plausible definition that comes out of the argument of social injustice that he makes.

Delgado cannot be an instrumentalist if he desires to pursue social justice. Instrumentalism, as established in prior chapters, inherently cannot recognize the intrinsic value of people because it reduces individuals to mere means in pursuit of their social goals. Individuals and their claims against wrongdoing have no value because all that matters is whether or how individuals can be weaponized to achieve the social goal. As discussed in the previous chapter, Delgado’s instrumentalism will never be able to achieve social justice, because it cannot aspire to value people equally using an approach that does not value people. Delgado believes that the rule of law is always weaponized against marginalized groups, so they do not adopt the same strategies as dominant groups. He believes that “large institutions never subscribe to the rule of law, at least never venerate it in the way everyone tells minorities they are supposed to do.” Delgado does not pause to consider that marginalized groups do not utilize the strategies of dominant groups, because those strategies would merely continue to dehumanize marginalized people albeit in a different way.

113 Ibid., 401.
114 Ibid., 397.
I believe that Delgado’s theory can be vastly improved through specific alterations that allow it to be read as a controlled instrumentalist account. Delgado is correct in that marginalized people ought to pursue social justice because pursuing social justice would better secure the terms of free and fair interaction as well as ensure that the intrinsic value of all persons is respected. However, pursuing social justice through pure instrumentalism undermines social justice, so our approach must be constrained by non-instrumental considerations. As we pursue social justice, we must make sure to value all people equally and recognize their claims. Delgado desires a better and more equitable legal system that properly attends to the concerns of all people, yet his flippancy to set aside the law when it pleases him seems like his approach may undermine the law as opposed to reforming it. While social justice ought to be pursued, it cannot be pursued in a way that reduces legal legitimacy and causes people to buy less into law as a practice. If law is seen as a tool as opposed to a system of accountability and responsibility, people will fail to be protected by it, leading to more exploitation and further working against social justice.

A controlled instrumentalist reading of Delgado’s account helps clarify why it is permissible to aspire to social justice but not white supremacy. In Delgado’s account, legal instrumentalism can be a tool used to further all causes by any means necessary. It is not clear why dominant groups cannot continue to be legal instrumentalists and pursue their interests. If Delgado wants to be able to explain why marginalized groups can pursue social justice, but dominant groups cannot pursue white supremacy, he might appeal to considerations of justice i.e. non-instrumental values. Non-instrumentalism explains that white supremacy is not a permissible goal to aspire to because it undermines and reduces the value of marginalized people through their exploitation and subordination. Controlled instrumentalism explains why only causes like
social justice are permissible causes because they secure the conditions for non-instrumentalism and empower people to engage in free and equal cooperation.

Part 2 – Pursuing Incremental Reform as Controlled Instrumentalists

It is important to understand that controlled instrumentalism supports the use of incremental changes in order to secure the conditions for non-instrumental interactions in tort law. Tort law can be understood as bypassing the threshold of tolerable injustice due to the way in which it protects the property interest of whiteness and allows for people of color to be exploited by white people, thus violating the tenets of reciprocity. However, this overarching injustice comes from nuances of the tort processes that protects whiteness, so strategic controlled instrumentalist may advocate for various reforms, such as the creation of a tort for racial insults, forbidding damages calculated on the basis of race, and combatting devaluation of the harms of marginalized people. Controlled instrumentalism sets the overarching goal of securing the conditions of non-instrumentalism, but it can also set incremental goals that will be necessary to achieve in order to eventually fulfill the overarching goal. The various accounts we just examined can be understood as identifying the root cause of injustice that puts torts past the threshold of tolerable injustice while also explicating the kinds of incremental goals we must aspire to in order to secure the conditions for non-instrumental interaction.

Controlled instrumentalism provides a framework for sweeping reform, but absent the capacity for that reform, it also allows for incremental butterfly changes to be made. Sometimes the present conditions make it so pursuing sweeping reform is not possible, so we must work towards incremental changes. Controlled instrumentalism allows us to pursue those incremental goals while still working for larger overarching radical goals. Chamallas’ “Social Justice Tort Theory” follows a similar model to this logic in that she outlines incremental improvements we ought to make but also the sweeping reforms said incremental changes are in service of.
the conditions for revolution and radical action are not in place, there are still micro and minute changes that can be made.

Chapter 5 – Expressions of Self-Respect Through Controlled Instrumentalism

Part 1 - Addressing the Objections to Law

In Chapter 1, I argue that a system of civil recourse is a precondition for a just society. Without a system of civil recourse, individuals will be beholden to other individuals and institutions with no means of individual restitution. In Chapter 2, I outline how the ideology of white supremacy in America bypasses the threshold for tolerable injustice by ignoring the intrinsic value of people of color and their claims of recourse. I explain how the pervasiveness of white supremacy has perverted America’s tort system to another means by which people of color are exploited. In Chapters 3 and 4, I illustrate how a form of controlled instrumentalism can be utilized in the legal system to create more robust and accessible pathways of recourse for people of color. In this chapter, I will be exploring a significant implication of my account and will explain how controlled instrumentalism has the resources to expand pathways of recourse for marginalized people.

People believe that the law is an insufficient method of reform because the law is inaccessible. The Center for American Progress notes that in more than 75% of tort cases, at least one litigant lacks a lawyer. People of color, women, LGBTQ+ folks, low-income people, and disabled people are more likely to need legal assistance but are the least likely to receive it. It is also important to emphasize that this is a barrier unique to civil law, because civil law, unlike criminal law, provides no overarching right to counsel. Every state has a right to counsel for

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particular civil cases, but most civil cases that involve fundamental rights like housing and
discrimination do not qualify. If you cannot afford a lawyer in a tort case, you are at a clear
disadvantage, making the tort system accessible only to the rich and privileged.

Accessing the legal system also requires people to be aware of their legal rights and
claims, but many people do not know the full extent of protection the law provides, causing
available pathways of recourse to go unused. The Center for American Progress highlights that
“Without access to legal advice, many are unaware of their legal rights and potential claims.”\textsuperscript{116}
Past studies have found that 80\% of the legal needs of people in poverty and 40 to 60\% of the
legal needs of people in the middle class are unmet. It is also important to note that the actual
figure might be larger, since studies rely on self-reporting, so many legal needs might be unmet,
but Americans do not identify them as such. If people are experiencing emotional distress or
dignitary violations, but do not even know that they are experiencing wrongdoing, how would
they even know to go to the legal system for help?

I do not seek to refute the idea that law is an incomplete means of recourse because the
empirical and historical record has proven this claim true. Working through the law is a luxury
that only certain people can afford. The most marginalized are often shut out of the law even
though they arguably need its protection the most. In this chapter, I wish to highlight an
interesting implication of controlled instrumentalism and explain how I believe the theory can
still be of use to people who struggle to fit their experiences within its confines. I will explain
how controlled instrumentalism can provide more expansive pathways to reform. I will argue
that as a condition of justice, controlled instrumentalism permits particular people to pursue
alternate cases and violate the norms of tort adjudication. To make this point, I will be drawing

\textsuperscript{116} Buckwalter-Poza, “Making Justice Equal”
upon the parallel with Shelby and will use his explanation of how the ghetto poor ought to be able to commit crimes to start a discussion on how similar claims can be made in the arena of tort law. Shelby creates a framework of resistance and refusal for those in the ghetto poor, and I believe we can use his account to create a parallel framework of resistance against the injustice within tort law. My goal here is not to make definitive claims as to how and when these kinds of actions ought to be taken in torts, but I do hope to start a discussion that will eventually lead to future scholarship in this area.

Part 2 - Creating a Framework of Resistance in Tort Law

I will now illustrate how controlled instrumentalism can create a framework of resistance and refusal to act against the constraints of tort law. While I will not be able to flesh out every part of this framework, I will attempt to clarify how and when controlled instrumentalism justifies using alternate approaches when pursuing social justice.

Shelby’s argument about why the ghetto poor do not have civic obligations is a helpful parallel for my analysis. Shelby frames his argument in terms of considerations of justice. For the ghetto poor, it is difficult to make a fulfilling living considering the lack of security, opportunity, and resources. Jobs that provide meaningful work with enough pay are few and far between. The ghetto poor are exploited by society but are also alienated from societal benefits. To survive, Shelby notes that some people in the ghetto rely on crime to either be or supplement their income. When examining whether or not it is reasonable for the ghetto poor to commit crimes, Shelby clarifies the question by asking “Do these forms of transgression [against civic obligations] express an unwillingness to honor the fair terms of social cooperation that others accept and abide by.”

117 Shelby, Dark Ghettos, 196.
118 Ibid., 212.
non-instrumentalism. When the ghetto poor commit crimes are they seeing others as a mere means and refusing to respect their intrinsic value?

Shelby argues that the ghetto poor live in a social scheme that has bypassed the threshold of tolerable injustice, so the ghetto poor do not have civic obligations and can therefore commit crimes within the constraints established by controlled instrumentalism. He explains that “Civic obligations are owed to those with whom one is cooperating in order to maintain a fair basic structure.”\(^{119}\) Civic obligations are grounded in the value of reciprocity. Shelby relies on Rawls to emphasize that one cannot gain from the social scheme without abiding by the obligations that create it. As a citizen, you are the recipient of goods and services provided by the scheme of cooperation or the state, so a citizen is obligated to fulfill their civic obligations to the state. Accepting the benefits of a social scheme but refusing to abide by the rules that make said benefits possible would be opportunistic and unjustified. However, Shelby also highlights that “we do not have obligations to submit to unjust institutions, or at least not to institutions that exceed the limits of tolerable injustice.”\(^{120}\)

When there are unjust institutions that do not provide the goods, services, and rights we are entitled to, we do not have civic obligations. In Chapter 2 I already outlined how Shelby proves we have bypassed the threshold for tolerable injustice. With that analysis, combined with his conditions for civic obligations, we will be able to understand how Shelby makes the case for the ghetto poor to commit crimes.

Shelby contextualizes why the ghetto poor feel empowered to break the law and commit crimes. He observes that the ghetto poor believe they are forced into low-paying jobs that barely allow them to secure their basic needs because more affluent citizens need the cheap labor of the

\(^{119}\) Ibid., 213.

\(^{120}\) Ibid., 214.
ghetto poor to keep costs and taxes low.\textsuperscript{121} As a result, “From the standpoint of many poor ghetto residents, the social order lacks legitimacy.”\textsuperscript{122} Instead of providing equal benefits and services meant to protect the rights of all citizens, the social scheme operates “to contain, exploit, and under develop the black urban poor, to deny them equal civic standing and punish them when they decline to accommodate themselves to injustice.” There is a lack of reciprocity in the current social order, and the ghetto poor understand this injustice when they reflect on their material circumstances.

When framing why and how crime can be a meaningful form of action for the ghetto poor, Shelby refers to the duty of self-respect. He argues that the duty of self-respect “is fulfilled by recognizing and affirming one’s equal moral worth as a person.”\textsuperscript{123} He goes on to mention how the duty “also provides a reason to resist injustice.”\textsuperscript{124} When one expresses self-respect, they are “standing up for oneself when one has been treated unjustly, rather than meekly acquiescing.”\textsuperscript{125} Self-respect entails asserting your intrinsic value in a system that refuses to recognize it. When intrinsic value is not mutually recognized, “The duty of self-respect demands action from those who have been wronged.”\textsuperscript{126} When the ghetto poor commit crimes, it is an expression of self-respect.

I am now going to briefly restate my argument on why the pervasive discrimination in tort law has surpassed the threshold of tolerable injustice. Tort law currently operates as a system that reifies and further perpetuates systemic injustice. Material inequities are exacerbated through

\begin{footnotes}
\item[121] Ibid., 218.
\item[122] Ibid., 218.
\item[123] Ibid., 221.
\item[124] Ibid., 221.
\item[125] Ibid., 221.
\item[126] Ibid., 221.
\end{footnotes}
the devaluation of the harms of people of color and the subsequent unequal damage payments. Many of the harms people of color experience are not even recognized, and conversely, the entitlements of white people to exploit and abuse people of color are fiercely protected. Tort law is a system of civil recourse where people of color are not being treated as ends entitled to equal respect and are devalued to protect the entitlement of whiteness.

A system of civil recourse that does not recognize and adequately compensate the harms of people of color violates reciprocity. Shelby defines reciprocity as the idea that “Each citizen should be secure in the thought that he or she has equal standing within the scheme of cooperation.” If you are to live in a system of civil recourse that secures reciprocity, you as an individual must know that you and your claims have equal standing to others. You are required to respect the claims of other people and institutions, but other people and institutions are also required to respect your claims. For people of color in America, reciprocity remains a mere ideal. The tort system privileges whiteness at the expense of the rights of people of color. Shelby believes that the social scheme “should be organized so that it publicly conveys to each participant that his or her interests are just as important as any other participant’s,” but our system of civil recourse indicates the exact opposite. Shelby argues that it becomes justifiable for the ghetto poor to object to their unequal treatment when their exploited state is being taken advantage of by those more affluent. I argue that it is justifiable for people of color and other marginalized people to object to their unequal treatment in the system of civil recourse because their exploited and vulnerable state is being taken advantage of by dominant bodies to secure their privilege, wealth, and entitlements.

127 Ibid., 216.
128 Ibid., 216.
Part 3 – Expressions of Self-Respect within Law

For individuals who live in a system of civil recourse that bypasses the threshold of tolerable injustice, the civic obligations that in a just society would bind people to the laws structuring the tort system do not apply to them. Due to a lack of these obligations, they are justified in expressing their duty of self-respect through alternative approaches within the law. In this section of the chapter, I will be examining two approaches to expressing self-respect through law. I will also outline how controlled instrumentalism constrains expressions of self-respect. When illustrating this argument, I will draw back on the parallel with Shelby and use his framework for how and when the ghetto poor can commit crimes to create my own framework for actions in torts.

When examining how one can express the duty of self-respect within tort law, I will focus on two main approaches. The two approaches endeavor to address similar injustices within torts in different ways. The first approach will argue for pursuing an alternate tort case by alleging someone committed a wrong other than the one that actually occurred. When tort law does not adequately provide means of securing recourse for a particular wrong, pursuing a claim for a different wrong can be an alternate means of securing recourse. The second approach will provide a course of action for how individuals who are not marginalized can use their positions of power in the tort system to aid marginalized people. This approach is meant to be used in collaboration with marginalized people pursuing tort claims. The second approach is to set aside precedent and the rules and procedures of tort law to either defend someone who has committed ‘a wrong’ or pursue recourse for wrongdoing. When our lines of precedent and procedure have been shaped and defined by white supremacy and other injustices, they may need to be set aside to properly compensate individuals. Systemically biased precedents and procedures make it difficult to bring particular cases forward and even recognize certain tort claims. Setting aside
these procedures will allow for the claims of marginalized people to be fairly recognized in torts. Throughout my analysis, I will outline how these approaches can only serve as resistance against the pervasive injustice in tort law as long as they continue to abide by the tenets of non-instrumentalism.

Pursuing an alternate tort claim may be a necessary course of action when tort law does not provide adequate means of securing recourse. Tort law’s purpose is to redress harm and wrongdoing. However, recourse is provided based on our modern understanding of wrongdoing, which takes time to evolve and has often gotten it wrong before getting it right. I argue that in a society that has breached the threshold for tolerable injustice, if someone’s claims are not being fairly recognized within tort law, they are entitled to pursue an alternative tort claim to serve as a form of proxy recourse for the actual harm they experience. I will now provide an example of what I mean to clarify. For example, let us say there is Person A who experienced Harm X. Harm X is very painful and hurts Person A. It was Person B that hurt Person A, and Person A cannot seek recourse from Person B for Harm X, because the law does not recognize Harm X. The law’s understanding is incorrect, so Person A cannot pursue a tort claim for Harm X, but they can pursue a tort claim for Harm Y and receive comparable damages. When there are no existing torts for a claim to be recognized, all one can do is sue under an alternate tort that the claim does not exactly fit under. Certain misrepresentations might have to be made, but these misrepresentations are warranted considering the pervasive injustice in tort law. Non-instrumental constraints dictate when and how Person A may pursue an alternate claim, but regardless alternative tort cases can be used in select cases to address emotional and dignitary harms that we currently are not able to compensate properly.
This strategy is contingent on the fact that there are wrongs occurring that the law currently does not adequately redress. This is a fact I have proven in prior chapters. For example, as I mentioned previously, there is no official tort for racial insults, and there is no tort for intentional discrimination. In “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,” Richard Delgado examines the harms caused by racial slurs and racial stigmatization. He cites various studies and experiments that prove how hearing racial slurs has a significant impact on the psychology of people of color and even impacts personal and professional prospects.\(^{129}\) The harm of a racial slur and racial stigmatization is incredibly significant, but the law does not currently have the language to robustly compensate for it. The wrong will not be recognized under the existing tort claims. Due to the inadequate resources in tort law, it is justifiable for people to turn to other torts to gain compensation. For example, let us say Person A is called a racial slur by her employer, Person B. Person A is angry and indignant. She knows a court of law is unlikely to accept a tort for racial insults, so instead she sues Person B for emotional distress in order to seek damages. Person A was not actually emotionally distressed, but that is the closest existing tort. Suing for emotional distress is the easiest way for Person A to get recourse from Person B since there is no tort for racial insults or intentional discrimination.

Alternate tort claims can also be used to combat devaluation. Martha Chamallas writes about how devaluation is “a kind of bias that affects value judgments about the worth of people’s lives, activities, interests and potential.”\(^{130}\) Devaluation occurs because damages are calculated using race and gender-based calculation tables. As a result, marginalized folk tend to receive less


damages because they have a lesser future value (due to systemic discrimination). In order to combat devaluation, someone may exaggerate or elevate their tort claim in order to achieve an adequate amount of damages. For example, let us say that Person A experiences emotional distress because of her husband. Person A is a woman of color, and her husband is white. She is aware that the courts will view her future value less and that whiteness will protect her husband. She might deserve damages of at least ten thousand dollars, but the courts will only reward her two thousand dollars due to the racially biased damage tables. As a result, when pursuing an emotional distress claim, she exaggerates her distress to get the amount she actually deserves.

In cases where the law puts marginalized people in a bind due to their commitment to justice, it may be justifiable to utter falsehoods about the facts of a tort claim. One might argue that I am calling for people to outright lie when pursuing tort claims, which feels like a very slippery slope that could easily lead to catastrophic consequences. However, I argue that the situations in which I call for uttering falsehoods, distinguish the act from lying. Seana Shiffrin, in her book *Speech Matters: On Lying, Morality, and the Law*, argues that there are “suspended contexts” where “the normative presumption of truthfulness is suspended because these contexts serve other valuable purposes whose achievement depends upon the presumption’s suspension and the fact and justification of the suspension are publicly available.”

In these suspended contexts, the truth may be a secondary concern due to exceptional circumstances. I argue that the circumstances where I call for uttering falsehoods are these suspended contexts. We have a legitimate claim for people not to harness our moral integrity as a means of victimizing us. In tort law, there might be circumstances where the system will unfairly victimize you unless you utter

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a falsehood. For example, when a woman sues her husband for assault and battery, the Court asks her whether she had an affair with her husband’s best friend. The woman did have an affair with her husband’s best friend, but she knows she cannot admit this because it will cause the Court system to dismiss her claim due to pervasive sexism. As a result, the woman utters a falsehood to avoid being victimized and demeaned by the tort system. For individuals who live in a society that bypasses the threshold of tolerable injustice, there may be circumstances where the legal system holds their commitment to justice against them. In those cases, uttering falsehoods is justified because this is a justified suspended context where the normative presumption of truthfulness is suspended in pursuit of justice.

There are clear restrictions when pursuing alternate cases. This approach is subject to the restriction that it must not violate the tenets of non-instrumentalism. We cannot reduce the intrinsic value of people and take torts away from its central purpose of empowering victims. Tort law is still about restoring mutual accountability between persons, so there are constraints on the kinds of alternative claims one can file. For example, the wrongdoer in the alternate case must be the same as the wrongdoer in the filed case. If Person B is the actual wrongdoer, the alternative case must also be filed against Person B. We cannot force someone else to bear the brunt of wrongdoing just because the person who actually did wrong us cannot be prosecuted for whatever reason.

Community reflection must be used in order to ensure the tort pursued is equivalent to the wrong that actually occurred. This aspect of the approach is the most difficult to get right and the most difficult to be sure that we got right. How can we know that the case we are pursuing will actually get us the amount of damages we are entitled to? How do we know the amount is not too much or too little? If the amount is the right amount, is the stigma or connotation of the harm
equivalent? These are more subjective considerations that have to be taken into account, but they are difficult to objectively get right. However, I argue that reflection within marginalized communities might be able to help with this aspect of practicing bad law. Whenever people of color experience some kind of marginalization, we tend to turn towards other people of color to validate our experiences and calibrate the severity of the harm that occurred. I personally can recall countless conversations with friends and family where I detail off-putting interactions and ask for their perspective. Was I wronged or am I reading into things? Typically, the answers I receive are quite similar within my community, forming a consensus inadvertently. Most people will say I was wronged or most people will say I was overthinking about the situation. Either way, the point is we can turn to our communities to be validated or checked about our experiences, and I believe a communal process like this will allow marginalized people to verify that the false claims they pursue are appropriate.

If false tort claims are pursued, they must be pursued due to considerations of justice, not for mere personal gain. Shelby clarifies this idea when he argues that crime should not be

132 There is a strong argument that marginalized people may also have flawed conceptions of wrongdoing and harm. As a result, putting the onus on them to pursue false cases might be risky. However, I argue that marginalized people still have a better understanding of wrongdoing, even if it is imperfect, relative to dominant groups because of standpoint epistemology, so their methods of recourse will still be better than the status quo. Also, lawyers and justice, compelled by their duty of justice, can act to aid marginalized people in this process and help them understand the alternative wrongs they can pursue.

133 There are also instances recorded online where we can see marginalized people supporting or disagreeing with people of color when they articulate what they believe is wrongdoing. For example, when Halsey, a popular singer, talked about how hotel shampoos do not work for Black hair types, a lot of Black people on Twitter responded and said Halsey’s complaints were overblown since hotel shampoo frankly does not work on anyone’s hair type. However, when popular model Anok Yai talked about how frustrated she was because she constantly had to do her own make-up and bring her own foundation to set due to the inadequacy of white make-up artists, the internet validated her.
committed to “gain power, status, or riches.”\textsuperscript{134} He argues that his approach of resistance is “(at best) as survival tactics, means of self-defense, or expressions of justified rebellion.” To clarify how this idea applies in tort law, false cases cannot be pursued so one can simply gain more money or ruin another’s reputation. Falsifying cases must be a question of an individual not achieving appropriate recourse due to injustice within tort law. It cannot be someone simply wanting more money or filing a false case for purely selfish or opportunistic reasons. Expressions of self-respect must be done out of respect for the law in order to reform the law.

The above approach outlines actions that marginalized people can take to resist and combat the systemic discrimination within torts, so this next approach will outline how lawyers and judges who may not necessarily be marginalized can take actions on behalf or behest of marginalized people. The previous approach is born from the standpoint of the marginalized person who is below the threshold of tolerable injustice because only marginalized people have no civic obligations in a society that has bypassed the threshold for tolerable injustice. Alternate tort cases can only be pursued by marginalized people, who will choose how and when their claims go forth. The second approach I will outline can be used by the lawyers and judges who want to utilize their capacity to help torts recognize the claims of marginalized people. Lawyers and judges will only be able to take this approach in collaboration with marginalized people and their wishes.

In a society that has bypassed the threshold for tolerable injustice, lawyers and judges ought to be able to set aside unjust tort procedures and precedents. The rules and procedures of tort law should be designed to allow lawyers to best advocate for the claims of their clients and for judges to evaluate those claims. However, due to pervasive systemic discrimination, many of

\textsuperscript{134} Shelby, \textit{Dark Ghettos}, 226.
the procedures and precedents in tort law are insufficient at recognizing and protecting the claims of certain individuals. Because we live in a society that has bypassed the threshold for tolerable injustice, individuals are not able to work within the law to change unjust precedents and procedures. The law does not respect the claims of those whose treatment falls below the threshold of tolerable injustice (marginalized people) so it cannot expect them to abide by its procedures and norms. Therefore, when the rules of the law are constraining and inhibit the pursuit of justice, procedures and precedents can be ignored. When the legitimate claims of individuals are ignored by tort law, procedures and precedent are blockades to justice instead of productive tools. Cutting across legal lines will actually lead to the correct outcome and act in pursuit of justice.

In a society that has bypassed the threshold for tolerable injustice, precedent and procedure can only be set aside when tort law systematically refuses to acknowledge the intrinsic value of people and their claims. Matsuda argues that our current tort system was created to protect class and racial interests.\textsuperscript{135} She is correct in that there are aspects of our current tort system meant to hoard wealth and privilege in the hands of the few. While substantial progress has been made to equalize civil recourse, there are vestiges of the old tort system when it comes to attachment to precedent and needlessly high burdens of proof for emotional and intentional harm. In select instances of the aforementioned cases, it may be appropriate to forgo the standards of proof or ignore precedent and devalue the relevance of cases. Tort law’s tendency to always be deferential to precedent and prior verdicts works against progress and justice when prior verdicts have been decided in the name of white supremacy and patriarchy. The rules of law are constraining, so we have to break them to achieve meaningful progress.

\textsuperscript{135} Matsuda, “On Causation,” 2201.
There are a variety of situations where ignoring precedent and/or procedure will be warranted. For example, there might be a wrong that occurs, but it is not presently recognized as a wrong, because tort law currently has an impoverished or incomplete understanding of wrongdoing. In that case, a lawyer might bring the case forward or a judge might consider the case under the new category despite what precedent and procedure say. Another situation where it might be warranted to ignore procedures is when they reflect systemically unjust positions that discount certain people. An example of such a procedure is the hierarchy of values within tort law that prioritizes physical harm over emotional harm. In some states, current tort procedure dictates that states cannot provide recovery for emotional distress claims unless the plaintiff has had a physical manifestation of the emotional distress. This procedure unfairly shuts out many people from qualifying for recourse. These procedures and norms within torts disproportionately affect and diminish claims pursued by marginalized people and have huge implications when those groups pursue recourse. If these procedures were to be ignored or shifted, it would be significantly easier to achieve recourse for marginalized people.

It is important to remember that the approach I am advocating for is a form of controlled instrumentalism, so it is still beholden to non-instrumental conditions. Precedents and procedures can only be ignored by individuals below the threshold of tolerable injustice and only during cases that go against the tenets of non-instrumentalism. i.e. only in cases when wrongs are not being compensated or the intrinsic value of people is not being respected. Setting aside precedent and procedure should also only be done as a question of justice, not personal gain. For example, we reject the privileging of emotional harm over physical harm since emotional harm torts disproportionately affect women and the current legal dichotomy of interests blocks women’s pathways to recourse.
Some may argue that I am advocating for people to be bad lawyers and bad judges and simply act as policymakers. However, I believe that it is important to understand that the procedures and precedents being ignored are impoverished on the basis of justice. We are violating tort law out of respect for the framework of justice it purports to implement. If we are committed to the tenets and principles of tort law, we would also be committed to the abolition of said procedures and the overturning of said precedents. In a society that has not breached the threshold for tolerable injustice, we would simply undergo the painstakingly long process of using the appropriate channels to overturn precedent and change procedures. However, since the threshold of tolerable injustice has been breached, marginalized people do not have civic obligations to use political and legal systems. Thus, people are allowed to take radical action for justice.

Part 3 - Clarifying the Role of Controlled-Instrumentalism

Controlled instrumentalism sanctions expressions of self-respect, because it recognizes that tort law’s violations of reciprocity make it difficult for marginalized communities to work within the law to reform it. It is difficult to constantly attempt to break through a new line of precedent and spur a domino effect of change. In a society that has bypassed the threshold of tolerable injustice, there must be greater avenues that the most vulnerable in society can take in order to advocate for themselves and their communities.

Controlled instrumentalism is predicated on the idea that we can violate and break the law out of respect for the project of the law. A robust system of civil recourse has a framework of justice it seeks to implement. It aims to restore mutual accountability between parties and empower victims to respond to wrongdoings. When that framework of justice is not met, then we can violate tort law out of respect for the framework we are aspiring for. Our actions are controlled but also framed and principled. We are challenging the law out of respect for the law,
unlike pure instrumentalists who challenge the law for their own personal gain. You are only entitled to take such liberties with the law when you are acting out of respect for and commitment to the law.

Allowing for a form of refusal and resistance for those who cannot access the law preserves the self-determination of the most vulnerable within controlled instrumentalism. Controlled instrumentalism will take time to change doctrine if it can only operate within the law, and if you are marginalized, you will not want to wait until doctrine catches up with the insight you already possess. If controlled instrumentalism can only be practiced by those who have access to the best lawyers, then the majority of marginalized people will not be able to advocate for themselves. This would be against the tenets of controlled instrumentalism because we would continue to unfairly restrict and limit the capacity of marginalized folk. By creating a variety of ways in which marginalized people can act in conjunction with others to disrupt the law and advocate, marginalized people have greater self-determination.

While I cannot delineate the precise kinds of strategies that can or cannot be taken by marginalized folks, I do seek to tease out the implications of controlled instrumentalism. I cannot claim to resolve all of its inaccessibility, but I hope this discussion illuminates how even marginalized people who do not have access to tort law, as it currently operates, can still work through the law in other ways.
Conclusion

My thesis started as an attempt to understand how we can move forward after wrong has occurred. As I embarked on my exploration, I was led to the system of tort law and became uniquely intrigued by its transformative potential. However, I was soon startled by how limited its pathways of recourse were and how insufficient the system was at providing recourse for some of the most common wrongdoings that occurred in our society and were informed by racism, sexism, classism, etc.

Ultimately, I seek to create a path forward and a way we can move beyond our current society into a just society. I describe and critique our current system of tort law but only to create something better. I understand that our current systems of rectifying harm and wrong cannot continue as they are, because they are failing to address critical grievances in ways that disproportionately affect already marginalized communities.

In my first chapter, I examined why this project is worth taking up – why is a system of civil recourse something we need? Using the works of various classical liberal philosophers, I was able to explain that without a system of civil recourse, individuals will never be able to hold other individuals responsible for repairing wrongdoing or compensating damages. Criminal and statutory law cannot fit this purpose. I then clarified what I believe is the ideal version of tort law. This is the end system that we should aspire to in our reform efforts. I argued that only a non-instrumental and civil recourse model of tort law will be adequate because harm-repair models are insufficient at repairing relationships and non-physical harm.

In my second chapter, I examined our current system of tort law. I wanted to understand how it operates relative to the ideal system of tort law we are aspiring to. Using Tommy Shelby’s framework in Dark Ghettos: Injustice, Dissent, and Reform, I argued that the tort system in
America has breached the threshold of tolerable injustice because it has violated the condition of reciprocity. The tort system expects marginalized people to abide by its conditions of legitimacy without acknowledging the intrinsic value and claims of marginalized people. Because tort law has breached the threshold of tolerable injustice, marginalized people do not have any civic obligation to obey it and are permissibly allowed and even morally encouraged to resist the injustice within tort law.

In Chapter 3, I clarified a form of advocacy that can be used to combat against the injustice within tort law. I outlined a method of resistance called controlled instrumentalism. Controlled instrumentalism argues that those beyond the threshold of tolerable injustice are able to pursue social goals that will create the conditions for non-instrumentalism. However, their pursuit of these social goals is constrained by the rules of non-instrumentalism. Using a form of controlled instrumentalism, marginalized people can pursue social goals that will better the tort system but only using means that respect the intrinsic value and agency of people. Controlled instrumentalism also only allows social goals that create the conditions for non-instrumentalism. Radical action can be taken by marginalized people, but unlike instrumentalism, this radical action must be controlled by the conditions of non-instrumentalism. Plain non-instrumentalism does not permit the pursuit of social goals, so a form of controlled instrumentalism is the best course of action moving forward. I also explained that a proper non-instrumentalist would also commit themselves to a form of controlled instrumentalism in a society that has bypassed the threshold of tolerable injustice.

In Chapter 4, I examined the accounts of various tort scholars and explained how these accounts either fit into or must be altered to fit into controlled instrumentalism. I argued that “Social Justice Tort Theory” by Martha Chamallas is a controlled instrumentalist account. It sets
the social goal of reducing bias and justifies its approach by explaining how tort law is not compensating the full spectrum of harm and wrongdoing. I then explained how Mari Matsuda’s “On Causation” can be a controlled instrumentalist account only if the account is altered slightly. Matsuda argues that causation should move from a responsibility account to a deference account, because she believes this would allow for tort law to find systems and institutions liable for the harm they have caused. A controlled instrumentalist would agree causation should be broadened and that institutions should be held responsible for wrongdoing, but it would reject the notion that causation must be perverted into a policy tool. If Matsuda’s account is altered, controlled instrumentalism can refine the account while continuing to accommodate Matsuda’s core claims. I then went on to examine “Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law” by Richard Delgado. I argued that Delgado is not a controlled instrumentalist, but his account is vastly improved when it is changed to be a controlled instrumentalist account. Only controlled instrumentalism can accommodate pursuing a robust notion of social justice.

In Chapter 5, I pursued a particularly significant implication of my account for the actions of victims of systemic injustice and their representatives in our current non-ideal circumstances. I outlined how marginalized people can pursue alternate cases when the current legal language does not recognize the wrongdoing that they have experienced. I also argued that lawyers and judges, in collaboration with marginalized people, can set aside legal procedure and precedent when procedure and precedent work against justice instead of operating in pursuit of it. Throughout the chapter, I explained how these strategies can only be used during particular instances and with particular conditions because they are constrained by the rules of non-instrumentalism. The tenets of tort law can only be set aside only out of respect for tort law and in pursuit of justice.
There are a variety of ways in which I hope my account will be expanded upon. First, there is a lack of available scholarship that examines how the tort system is inadequate at compensating the claims of people of color. Richard Delgado, Martha Chamallas, Jennifer B. Wriggins, and others have worked in this area, but more research must be done. In my thesis, I attempted to bring some of the insights from critical race theory to tort law in order to explain how devaluation and racial exceptionalism operate. In particular, I utilized Cheryl Harris’s notion of whiteness as property to explain how the claims of people of color are devalued in service of protecting whiteness. In the future, I hope that scholars can continue to take the insights of critical race theory to further examine how the claims of people of color are treated in torts and possible measures that can be taken to combat this. In particular, I hope more work is done to elaborate on how racial exceptionalism functions.

My thesis also facilitates a larger conversation about reparations. If we take the insights of controlled instrumentalism far enough, it aspires to create a society where all individuals have an equal standing to pursue claims and have their intrinsic value respected. However, in a society where many of the worst historical atrocities and wrongs have gone uncompensated, can the conditions of non-instrumentalism ever be met without a robust program of reparations? Especially for Black and Indigenous people in America, many of the wrongs they experience in contemporary society can be connected to the transatlantic slave trade and America’s colonization. Can tort law be viewed as compensating the full extent of wrongdoing if it allows historical wrongs to remain uncompensated? My thesis provides new resources for justifying an expanded role for torts in securing reparations. That is not a discussion I explicitly take up in this thesis, but it is a discussion I believe my thesis can be used to continue. Rahul Kumar, Alfred
Brophy, and other scholars have written extensively on reparations and tort law, and I hope my thesis is used to add more scholarship to the conversation.

Law is a powerful tool of reform and advocacy. Tort law, to me, has always been particularly intriguing because of how it seems to combine the best of social norms and institutions in its operation. Its formalization gives it wide-spanning power and influence, but its unwritten form and grounding in social practice ensure that it can accommodate changes as societal understanding evolves. If we are committed to reform and change, law is one of the most important means we must use, and a just legal system is also one of the most important ends we must aspire to. I hope this thesis resituates how we view the law and the ways it can inspire radical and revolutionary action.
Bibliography


