HUMAN TORTS

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Human Torts is the first article to describe how ordinary municipal tort lawsuits in the United States provide essential remedies for human rights abuses. Despite the rising level of hate crimes, bullying, corporate malfeasance, and other private acts that result in great harm and can lead to civil litigation, American scholars have never explored how everyday tort claims grounded in purely domestic common law doctrine between private, non-state actors are in fact human rights claims even if never pleaded as such in U.S. courts. Framing tort litigation as a form of human rights protection may appear to be a novel aspirational proposal, but comparative law reveals that most countries in the world follow this horizontal approach. Strikingly, a close look at the genealogy of tort law indicates that the United States also once did the same. Only in the last half century has the focus on rights been eclipsed due to the imposition of an instrumental, economic account of tort law that seeks to balance the costs of human interactions at the risk of commodifying the value of life. In response, this Article proposes practical ways to re-integrate the rights perspective into tort law. In doing so, it presents a "progressive" view of torts in a world in which private actors wield great power yet are not held sufficiently accountable for the harms they cause to innocent individuals and communities.

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INTRODUCTION

In recent years, we have witnessed (often through social media) increasing instances of hate crimes, bullying, corporate malfeasance, and other acts where private individuals and companies cause serious harm to other private individuals and communities. Certainly, the climate of the U.S. presidential election of 2016 led to an alarming proliferation of private individuals committing hate crimes and bullying against other

private individuals, often based on race and ethnicity.[1] All of these incidents can be pled as ordinary municipal tort claims seeking civil damages in state courts based on causes of action like battery, intentional infliction of emotional distress, gross negligence, and recklessness, among others. Notably, these suits could also be framed as human rights claims.

For example, civil suits can bring relief to individuals who suffer from hate crimes and bullying. In April 2017, a suit was filed in a federal district court on behalf of Tanya Gersh, a Jewish woman who became a target of an orchestrated harassment campaign led by Andrew Anglin, a leading extremist member of the "alt-right" who uses a web forum to rally white nationalist followers. Anglin targeted Gersh by encouraging his followers to troll and terrorize Gersh and her family with anti-Semitic threats and messages. Upon receiving some 700 threatening and harassing messages, Gersh suffered severe mental distress that led to other physical health issues and required trauma therapy. The lawsuit accuses Anglin of intentionally inflicting emotional distress and invading Gersh's privacy and seeks compensatory and punitive damages.[2] Similarly, civil suits can hold individual predators accountable. Such has been the case with comedian and entertainer Bill Cosby who became the subject of sexual assault allegations in 2014 that spanned almost four decades and involved nearly sixty women. Accusations of rape, drug-facilitated sexual assault, sexual battery, and child sexual abuse have led to not only criminal charges but also a slate of civil lawsuits alleging intentional torts of battery and assault.[3] With the uncertainty of the criminal proceedings, the civil suit may be the only form of accountability for the women who alleged they were harmed by Cosby. These types of suits against Anglin and Cosby can also be reframed as violations of the most basic human rights such as the right to physical and mental integrity under international human rights law, grounded in treaty and international customary law.

Lawsuits against powerful companies also offer plenty of illustrations of the overlap between ordinary torts and human rights. For example, toxic tort claims may hold a business accountable for polluting the environment and causing grave harm to residents of the community where they operate. Such was the case when residents of Aliso Canyon, California sued the company that allowed thousands of gallons of methane gas in 2015 to spew into their community, causing

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1 The Southern Poverty Law Center has helped to track these trends. *See Hate & Extremism*, SPLC, https://www.splcenter.org/issues/hate-and-extremism (last visited July 9, 2017).

2 Complaint, Gersh v. Anglin, No. 17-0050 (D. Mont. filed Apr. 18, 2017).

3 Casey C. Sullivan, *Cal Supreme Court Lets Cosby Sexual Assault Suit Move Forward*, FINDLAW BLOG (July 27, 2015, 2:45 PM), http://blogs.findlaw.com/california_case_law/2015/07/cal-supreme-court-lets-cosby-sexual-assault-suit-move-forward.html#sthash.MyH5J6DF.dpuf.

serious injury to their health and well-being. To hold the company accountable and seek compensation, they filed a number of tort claims, including negligence and nuisance.[4] Notably, human rights claims also contemplate communities seeking damages for environmental harms that result in dramatic damage to their health.

Companies may also be sued for harmful products. For example, in February 2016, a St. Louis court ordered Johnson & Johnson (J&J) to pay $72 million, including punitive damages, to women whose fatal ovarian cancer could be traced to the company's talcum powder which evidence shows the corporation knew to be cancerous.[5] As the largest maker of health care products, J&J faces 1200 similar suits.[6] Although pled as an ordinary tort of negligence and failure to warn about an "unreasonably dangerous and defective" product, the same cause of action could be framed as a violation of the right to life and health.[7] Civil litigation against companies not only vindicates the rights of these women, but contributes towards deterrence and prevention of new harms.

Whether you frame all of these cases in tort or human rights law, both frameworks rest on the right to bodily and mental integrity and security. Under both national and international legal theories, the injured individuals have a right to an adequate and effective remedy to enforce these rights. By assuring redress through the civil justice system, the government fulfills both its constitutional and international obligations to assure this right to a remedy which ultimately vindicates the underlying substantive right.

Strikingly, few American scholars have posited or fully explored the critical overlap between human rights law and "ordinary" tort law between two private individuals. Nor have they argued that the civil justice system is in fact an essential mechanism for enforcing human rights within U.S. borders. Rather, any exploration of the overlap between international human rights law and domestic law focuses more narrowly on cases brought under the Alien Tort Statute, which requires judges to apply human rights norms but involves only foreign plaintiffs and defendants, and often requires a nexus to a state actor. Or alternatively, some scholars have examined the overlap between human rights, constitutional torts, and civil rights since they provide individuals with a remedy for abuse at the hands of state actors. Despite

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4 Michael Martinez, *Porter Ranch Gas Leak: Legal Woes Mount for SoCalGas*, CNN, http://www.cnn.com/2016/02/02/us/california-attorney-general-porter-ranch-gas-leak-lawsuit (last updated Feb. 2, 2016).

5 *See generally* Tim Bross & Jef Feeley, *J&J Must Pay $72 Million over Talc Tied to Woman's Cancer*, BLOOMBERG NEWS (Feb. 23, 2016 9:42 AM), http://www.bloomberg.com/news/articles/2016-02-23/j-j-ordered-to-pay-72-million-over-talc-tied-to-ovarian-cancer.

6 *Id.*

7 Complaint, Fox v. Johnson & Johnson, No. 1422-CC09012-01 (Mo. Cir. Ct. June 23, 2014).

these inroads, American scholars have uncharted territory to explore with regard to how everyday tort claims grounded in purely domestic common law doctrine between private, non-State actors are in fact human rights claims even if never pleaded as such in U.S. courts.

Human Torts is the first article to describe how tort law claims in the United States are in fact a type of human rights litigation even if we do not call what is going on "human rights"—yet. After briefly presenting evidence of the growing recognition that international law imposes a duty on non-State, private actors to respect human rights norms, I offer a typology for understanding common cases of tort adjudication as a form of human rights vindication—something I term "human torts." I describe a selection of cases into two subsets that highlight embedded human rights claims: the first instance deals with illustrative cases where an individual is suing another private individual for a tortious act, such as in the case of violence against women as well as bullying and hate crimes. The second instance offers examples of cases where an individual or group of individuals sues a company for damages in tort for a violation of their human rights, such as through environmental pollution as well as defective products. Through these brief summaries, I will show that even if not explicitly stated, the ordinary tort causes of action such as battery and assault, trespass, defamation, and products liability serve a vindicatory function by enforcing human rights and assuring victims an adequate civil remedy.

Framing tort law litigation as a form of human rights litigation may appear to be a novel proposal. It is not. A significant number of foreign jurisdictions apply this approach through the "principle of horizontality." Moreover, in its early origins, U.S. tort law included a "primary rights" analysis which referred to the substantive right to be free from bodily and mental injury.[8] This comprehensive account of primary rights has unfortunately been undermined by an instrumental, economic account of tort law that has eclipsed any focus on rights. I argue, however, that we should recover our understanding of human torts to strengthen this essential legal remedy for protecting our most fundamental rights.

This Article builds on an important group of contemporary American scholars who have recognized the relevance of a rights analysis through the theories of *corrective justice* and *civil recourse*. Although aiming to complement these important theories, I argue that they could do more to stress the importance of primary rights over "secondary rights," which refer to the procedural rights to a civil remedy. This approach would help to balance the focus to not only be about defendants, their duties, and their wrongs, but also on plaintiffs and their rights. Specifically, I pose that we begin the torts analysis with

8 *See infra* Sections II.C, III.A, and III.B.

a two-step analysis that first identifies the primary rights, which then gives rise to the secondary procedural right to access an adequate and effective civil remedy.

Focusing on the existence of primary rights (which are also human rights) in ordinary tort law serves several important functions. First, this framework helps empower marginalized, disempowered victims to address pressing societal issues of public importance while also meeting their justice needs. Very often it is difficult to establish human rights claims in domestic courts as such claims often rely on protections afforded by international treaties. A human tort, however, may be easier to establish because it offers private individuals the ability to seek relief through state law in domestic courts based on tort claims. Second, a human tort claim better addresses the pervasive impunity of non-State actors, such as powerful companies and abusive individuals. In a pure international law setting, it is nearly impossible to find a legal remedy to hold accountable non-State actors who violate human rights unless it amounts to an international crime. Understanding tort law as human tort law would permit some civil recourse in those circumstances where a non-State actor has harmed the rights of an individual or community. Importantly, in providing this remedy, state courts will be helping the United States fulfill its international obligation to assure the existence of a system for providing an adequate and effective remedy for human rights violations. Ultimately, this Article's proposal presents a "progressive" view of torts that seeks to reshape the normative view of torts as not just an instrument for sorting out costs of co-existence but of protecting and vindicating the fundamental rights of the less empowered members of society to assure balance and accountability of the more powerful.

This Article proceeds in six parts. Part I briefly describes why applying a human rights–based lens to tort law is consistent with the growing recognition of non-State actors as capable of abusing human rights, even though international law has eclipsed this view despite declarations and treaties that recognize individuals' duties to refrain from harming other individuals. Part II offers a practical taxonomy of everyday tort cases to illustrate the overlap between tort law and human rights law. Part III proposes that this human rights lens reflects the original intent of U.S. tort law by discussing early tort law scholarship and jurisprudence that reveals an early focus on "primary rights." Part IV contextualizes the concept of human torts within the theories of *corrective justice* and *civil recourse*, arguing that both could do more to emphasize primary rights. Part V offers guidelines on how a human rights claim may be implemented through pleadings which articulate a primary rights analysis. Finally, Part VI concludes with a discussion of why introducing *human torts* represents an important evolution of tort theory, in particular emphasizing that it empowers victims to assure

accountability for human rights violations caused by non-State actors while also preserving the civil justice system as an essential element of a rule of law–based democracy.

I. NON-STATE ACTORS, DUTIES, AND RIGHTS

Conceptually speaking, U.S. scholars do not typically apply a human rights lens to interpret cases of "ordinary" tort law cases in which a private party seeks redress from another private party. Rather, they typically associate human rights claims with wrongful acts occurring elsewhere—*over there*—and by corrupt or violent governments.

For this reason, it is not uncommon for the association between the concept of "torts" and "human rights" to lead to discussion about litigation arising out of the Alien Torts Statute (ATS).[9] The ATS gives district courts original jurisdiction to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[10] The language of the statute itself facilitates the conceptual overlay of torts and human rights and offers the clearest examples of how U.S. law explicitly incorporates international human rights norms into U.S. law. Since the 1980s, the ATS has led to hundreds of cases of foreign citizens seeking a civil remedy in U.S. courts for human rights violations.[11] And while ATS litigation has produced a unique niche in which U.S. courts are applying human rights norms, these cases reinforce the idea that human rights violations occur abroad since these cases involve foreign parties and foreign events.[12]

With regard to conceptualizing human rights violations here in the United States, some academics are more likely to recognize this conceptual overlap between human rights and civil rights cases.[13] The

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9 Alien Torts Statute, 28 U.S.C. § 1350 (2012). For a critical examination of the overlap between tort and human rights with relation to these claims, see Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505 (2016).

10 28 U.S.C. § 1350.

11 *See* John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches,* 42 VAND. J. TRANSNAT'L L. 1, 4 (2009). In 2013, the U.S. Supreme Court substantially limited the reach of the ATS in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). This case has led commentators to speculate as to the continued vitality of this law to allow courts to hear human rights claims. *See* Matteo M. Winkler, *What Remains of the Alien Tort Statute After* Kiobel, 39 N.C. J. INT'L L. & COM. REG. 171, 172 (2013).

12 GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES (1st ed. 2008); Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights. Harms*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 45, 48–49 (Craig Scott ed., 2001).

13 Douglass Cassel, *Civil Rights and Human Rights: A Call for Closer Collaboration*, 34 CLEARINGHOUSE REV. 440 (2000); Anne Wagley & Ann Fagan, *Powerful Laws for Civil Rights Activists: The Human Rights. Treaties Are Part of U.S. Law*, 51 GUILD PRAC. 65 (1994).

analogy flows more easily since the legal theory of a civil rights action resembles the more traditional human rights analysis that requires the identification of a State (government) actor who breaches a fundamental norm.[14] Constitutional torts mirror traditional human rights suits which allege facts of government abuse.

Yet, academics and practitioners rarely apply a human rights lens to understand the function of ordinary tort law between private individuals litigating a tort claim in U.S. courts. In part, this oversight occurs because the traditional legal analysis of a human rights claim seemed to require the identification of state actions or omissions.[15] The origins of the human rights architecture explains, in part, this tendency to focus on the state nexus. Certainly, the drafting of the Universal Declaration of Human Rights (UDHR) and subsequent human rights treaties arose in response to the atrocities of Nazi Germany and the realization that sovereigns could not be fully trusted to protect the well-being of all of their citizens without some external normative obligations and oversight.[16] As an organizing principle of human rights law, the State assumes a focal point in a system designed to curb government abuse especially given asymmetrical power relations.[17] The focus on States also makes sense since treaties are signed, ratified, and executed by sovereign nations.

Yet, many of the central human rights instruments that lay the foundation for this human rights system also recognize that individual, non-State actors are also capable of violating human rights and have duties to refrain from infringing on the rights of other individuals. Indeed, international human rights law imposes a duty on non-State actors to respect the human rights of other individuals.[18] This is not a novel, contemporary interpretation of human rights law, but rather can be traced back to its origins even if few scholars or practitioners have

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14 Indeed, many of the protections in the U.S. Bill of Rights can also be found in human rights treaties. For example, a claim of torture violates the Eighth Amendment as much as it does provisions in the Convention Against Torture. Martin A. Geer, *Human Rights and Wrongs in our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—a Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 95 (2000) (offering a reinterpretation of the Eighth Amendment through a human rights lens); Stanley A. Halpin, *Looking over a Crowd and Picking Your Friends: Civil Rights and the Debate over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT'L & COMP. L. REV. 1, 17 (2006) (examining how domestic courts apply human rights norms to interpret the Eighth Amendment).

15 Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence As a Human Rights Issue*, 58 ALB. L. REV. 1119, 1124 (1995).

16 Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 5–6 (1982); Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257, 261 (1984) (explaining how the human rights system arose following the Nazi regime).

17 CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 432 (3d ed. 2014) ("In human rights discourse, the state is the key actor.").

18 Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992).

focused on this principle since the birth of international human rights law.[19]

From its start, the founding treaties of the international human rights system explicitly include reference to a duty incumbent on all individuals to respect the human rights of other individuals. For example, Article 29(1) of the UDHR states that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible."[20] Moreover, Article 29(2) clarifies that

> [i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[21]

Furthermore, the obligation placed on individuals becomes clearer when read together with Article 30 which clarifies "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."[22] Although the Declaration is not a binding treaty, some argue that it is international customary law that sets forth obligatory norms.[23] Regardless, similar language can be found in hard law instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).[24]

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19 Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 5 (Philip Alston ed., 2005) (writing that until recently the topic of non-State actors only got "passing recognition" from scholars but this attention was not very systematic or coherent); Fernando Berdion Del Valle & Kathryn Sikkink, *(Re)Discovering Duties: Individual Responsibilities in the Age of Rights*, 26 MINN. J. INT'L L. 189 (2017) (aiming to recover the tradition of individual duties as integral to the historical origins of international human rights).

20 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

21 *Id.*

22 *Id.*

23 Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 298–99 (1995).

24 Article 5(1) of the ICCPR reads:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec.16, 1966). Article 17 of the ECHR is labeled "Prohibition of abuse of rights" and reads:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

European Convention on Human Rights, Convention for the Protection of Human Rights and Freedoms art. 17, Nov. 4, 1950, 213 U.N.T.S. 221.

Regional human rights systems also adopt a special emphasis on duties and human rights. For example, Article 28 of the African Charter on Human and Peoples' Rights states: "[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."[25] The general limitation provision in Article 27 states that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."[26] As Chirwa explains, "African societies conceived of guarantees of human rights as embodying individual obligations. The basis of the right/duty dialectic lay in the African notion that an individual formed an integral part of the community."[27] Similarly, the American Declaration of the Rights and Duties of Man, adopted by Latin American countries and the United States in 1948, emphasizes human rights and duties equally.[28] For example, in Article 28: "[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy."[29]

The articles of most of these treaties and declarations can be read in conjunction with the language of their preambles to reinforce the interpretation that individuals have duties to respect the rights of others. Specifically, the UDHR preamble refers to "every individual and every organ of society" in setting the standard for striving for universal respect for human rights.[30] Similarly, the International Covenant on Social, Economic and Cultural Rights establishes the same code of conduct in its preamble which reads: "[*r*]*ealizing* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."[31]

Despite this clear language in the foundational human rights documents regarding the duties of individuals, this aspect of human rights protection never gained much recognition in the decades that followed the creation of the human rights legal regime. The concept of individual duties went to the wayside, and some proposed an absolute requirement of identifying a state nexus to successfully allege a human

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25 Org. of African Unity [OAU] Charter, *African (Banjul) Charter on Human and Peoples' Rights*, art. 28, OAU Doc. CAB/LEG/67/3 (June 27, 1981), http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

26 *Id.* at art. 27.

27 Danwood Mzikenge Chirwa, *In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights*, 8 AFRICAN HUM. RTS. L.J. 294, 303 (2008).

28 Org. of American States [OAS], *American Declaration of the Rights and Duties of Man* (May 2, 1948), https://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm.

29 *Id.* at art. 28.

30 G.A. Res. 217 (III) A, *supra* note 20, at pmbl.

31 G.A. Res. 2200 (XX1) A, pmbl, International Covenant on Social, Economic and Cultural Rights (Dec. 16, 1966) (emphasis added).

rights violation.[32] Subsequently human rights practitioners were trained to focus on States as the relevant perpetrators in the discussion of human rights issues.[33] Legal theorists promoted the idea that while rights regulate the public acts of government to prevent the abuse of power, they do not touch the private sphere where individuals are presumed equal and enjoy full autonomy, freedom, and liberty to conduct their lives free from imposition.

This myopic vision blinded us to see how non-State actors violate the human rights of others on a daily basis. For example, every day in the news we hear examples of how individuals and corporations negatively impact the rights of others.[34] State-centric theories ignore the impact of systemic factors that "impede the full exercise by individuals of their freedom and make them vulnerable to victimisation by others in both the private or public spheres."[35] We see in the news every day that "private actors can be as powerful as governmental institutions and thus can be as oppressive as the state."[36] Certainly, non-State actors are everywhere. They are typically defined as groups "created voluntarily by citizens; are independent of the state; can be profit or non-profit-making organizations; have a main aim of promoting an issue or defending an interest, either general or specific, and, depending on their aim, can play a role in implementing policies and defending interests."[37]

Non-State actors include large private institutions like voluntary associations (e.g., labor or religious), trade unions, armed resistance groups or terrorist bands, corporations, multinationals, universities, private prisons, and churches, among other categories. Importantly,

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32 For example, Nigel Rodley insisted that the term "human rights" only described a relationship between a person and a government and should never to be used to describe a relationship between two private actors. Nigel S. Rodley, *Can Armed Opposition Groups Violate Human Rights?*, *in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY 297 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

33 August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37–38 (Philip Alston, ed., 2005) (writing that "international as well as national lawyers have traditionally been trained to conceive of human rights as fundamental guarantees and standards of legal protection for individuals against the power, and particularly, the abuse of power, of states"); TOMUSCHAT, *supra* note 17, at 419 ("[H]uman rights violations can, in principle, be committed only by states and/or the persons acting on behalf of the state . . . ."). This focus can be seen in many of the classic texts of international law written by the leading scholars in the field. *See, e.g.*, THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 1 (2009) ("As used in this book, the international law of human rights is defined as the law concerned with the protection of individuals and groups against violations of their internationally guaranteed rights, and with the promotion of these rights.").

34 Zehra F. Kabasakal Arat, *Looking Beyond the State but Not Ignoring It: A Framework of Analysis for Non-State Actors and Human Rights*, *in* NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE 9 (George J. Andreopoulos, Zehra F. Kabasakal Arat & Peter H. Juviler eds., 2006).

35 Chirwa, *supra* note 27, at 297.

36 Willmai Rivera-Pérez, *What's the Constitution Got to Do with It? Expanding the Scope of Constitutional Rights into the Private Sphere*, 3 CREIGHTON INT'L & COMP. L.J. 189, 195 (2012).

37 Alston, *supra* note 19, at 15.

non-State actors also include ordinary individuals. Given the inclusiveness of the definition, we have far more contact on a daily basis with private individuals than with state agents. Moreover, organized forms of private power can have significant magnitude and non-State actors impact the lives of many individuals while also exerting increasing influence over international and domestic policy.[38] In some cases, "governments are often controlled by elites with little interest in protecting the rights of others, and [with the effect that] even democratically elected governments cannot always be trusted to protect the rights of minorities."[39] With inequality of power, individuals become more vulnerable and in more need of institutional remedies to counterbalance this power imbalance.[40]

In light of this reality, some commentators critique the artificial line drawn between the private and public sphere.[41] Instead, "what constitutes the private sphere is dependent on state norms and their enforcement, what is deemed to belong to said private sphere does only so because the state has established it as such. Therefore, the argument goes, there should be no distinction [between public and private law]."[42] In response to this realization, a recent line of scholarship has begun to reinvigorate the interpretation that non-State actors can also violate human rights norms and thus should be held accountable.[43] For example, Professor Philip Alston argues for this position noting that the world is a "much more poly-centric place than it was in 1945 and that she who sees the world essentially through the prism of the 'State' will be seeing a rather distorted image as we enter the twenty-first century."[44]

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38 Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331, 381 (2005-2006).

39 John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 20 (2008).

40 Dawn Oliver & Jorg Fedtke, *Comparative Analysis*, *in* HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY 503–04 (Dawn Oliver & Jorg Fedtke eds., 2007).

41 As Hunt argues, "relations between private individuals as well as relations between individuals and the state are moulded by both legislation and the common law, and . . . the state lurks behind both forms of law . . . . [I]t becomes artificial and dishonest to constrain the reach of fundamental rights protection by limiting it to the so-called public sphere." Murray Hunt, *The "Horizontal Effect" of the Human Rights Act*, PUB. L. 423, 425 (1998); Colm O'Cinneide, *Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights*, 4 HIBERNIAN L.J. 77, 80 (2003); *see also* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law,* 100 YALE L.J. 1281, 1311 (1991) (stating that "the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability").

42 Rivera-Pérez, *supra* note 36, at 194. This scholarship includes considerations of private law generally, although this Article focuses on its relation to tort law. In general, the term private law refers to the norms that regulate relations between private parties. Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 846–51 (2006).

43 ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 53–56 (2006) ("If human rights once offered a shield from state oppression in the vertical relationship between the individual and the state, they now also represent a sword in the hands of victims of private human rights abuses.").

44 Alston, *supra* note 19, at 4.

One of the most visible expansions of the application of international law to individuals arises with regard to those who violate *jus cogens* norms, which impose a duty on natural persons under international law not to violate fundamental norms which translate into international crimes like piracy, aircraft highjacking, forced labor, genocide, war crimes, and crimes against humanity.[45] For example, the U.S. Second Circuit recognized this legal principle in *Kadic v. Karadzic*, holding that a Bosnian Serb non-elected politician fighting in the Balkan wars could be held liable for international crimes.[46] Importantly, this case, brought under the ATS, clearly establishes that liability for these types of violations can be civil as much as it can be criminal, holding even corporations and private individuals accountable.[47] Similarly, the 1973 Convention on Apartheid explicitly states that apartheid and "similar policies and practices of racial segregation and discrimination," as defined in the agreement, "are crimes violating the principles of international law," and that "[i]nternational criminal responsibility shall apply . . . to individuals," not just government representatives.[48]

Conceptually, one hurdle to recognizing that non-State actors violate human rights comes down to an apparent lack of enforcement mechanisms. While a few international courts have prosecuted non-State actors for the types of international crimes mentioned in the preceding paragraph, most claims against non-State actors cannot be adjudicated in an international tribunal nor a human rights monitoring body.[49] Indeed, as discussed, the international human rights system is state-focused and its oversight mechanisms only judge state behavior. It is the lack of enforcement mechanisms that some commentators point to in order to argue that there is no such thing as human rights violations at the hands of non-State actors. In essence, non-State actors cannot "break" or breach international treaty law because it does not

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45 Celia Wells & Juanita Elias, *Catching the Conscience of the King: Corporate Players on the International Stage, in* NON-STATE ACTORS AND HUMAN RIGHTS 151 (Philip Alston, ed., 2005).

46 Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) ("We do not agree that the law of nations, as understood in modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

47 Reinisch, *supra* note 33, at 37. Courts in the Third, Fourth, Seventh, Ninth, Eleventh, and D.C. Circuits have since held that corporations are subject to liability under the ATS. *See, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011), *cert. granted and judgment vacated*, 133 S. Ct. 1995 (2013); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Krishanthi v. Rajaratnam, No. 09-05395, 2011 WL 2607108 (D.N.J. June 30, 2011); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702 (D. Md. 2010), *rev'd*, 657 F.3d 201 (2012).

48 G.A. Res. 3068 (XXVIII), art. 1 International Convention on the Suppression and Punishment of the Crime of Apartheid (1974). For a general discussion, see THE RIGHT TO LIFE IN INTERNATIONAL LAW 66, 274 (B. G. Ramcharan ed., 1985).

49 *See* CLAPHAM, *supra* note 43, at 28–29 (arguing that lack of international enforcement mechanisms does not mean public international law is inoperative).

apply to them. This opinion amounts to the assertion that the lack of an enforcement mechanism indicates the lack of a right.

Yet as pointed out by U.N. Special Rapporteur Olivier De Schutter: "the lack of an institutional mechanism in international human rights law authorizing legal persons other than States to be sued directly can by no means be interpreted as meaning that the international law of human rights does not at present impose obligations on legal persons, and in particular corporations."[50] De Schutter's comment reflects the conundrum of how to explain the appearance of a lack of accountability mechanisms which contributes to a perception that non-State actors not only do not have obligations to respect human rights norms but also that they enjoy complete impunity when they do violate these laws. Another alternative interpretation is to conceptualize how existing enforcement mechanisms can serve this purpose, namely private tort law.

II. HUMAN TORTS: THE APPROACH THAT WILL SECURE THE GREATER ACCOUNTABILITY OF POWERFUL PRIVATE ACTORS

How are we to conceive of a private law mechanism achieving effective remedies for human rights violations? The following Part offers a taxonomy of tort cases that can be viewed through the lens of human rights. I will present two subsets of cases to organize my analysis. First, I will look at examples of torts cases that involve one individual suing another private individual for damages. Second, I will present cases where it is an individual or group of individuals suing a corporation.

In none of these cases do the parties plead a claim based on a human rights theory of liability. Nor do judges employ an interpretative framework that refers to human rights law in their reasoning. For the purposes of this Part, I merely want to illustrate the types of cases that potentially could be framed as human rights claims. Importantly, the sample of cases is necessarily limited to the types of actions that typically show up as tort suits. Thus, this Part does not discuss cases based on contract disputes.

Moreover, the types of rights that would most likely rise to the level of a human rights violation will constitute those that involve the more serious type of interference with the integrity of a person's body or mind, although they may also interfere with property. For example, the right to life and security is a fundamental human rights norm.[51] Thus

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50 Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 232 (Philip Alston ed., 2005).

51 Adopted in 1948, the UDHR proclaims the right to life in Article 3. G.A. Res. 217 (III) A, *supra* note 20, at art. 3. The International Covenant on Civil and Political Rights includes this right in Article 6. G.A. Res. 2200, *supra* note 24. Significantly, scholars have pointed out that the Human Rights Committee has expressed the view that Article 6 imposes a duty on the state

for the purposes of this Article, I chose to focus on torts that more obviously implicate these fundamental rights, such as intentional torts, gross negligence, recklessness, and strict liability in the form of product liability. While I do not rule out that my proposed interpretation may apply to other tort theories left out of my typology, I do not make that argument here. I am also not arguing that tort law can vindicate every possible human right, given that this body of law covers a vast number of rights including economic, social, and cultural rights. However, if my interpretive model were to be adopted it might lead to the creation of new tort theories to accommodate new types of rights violations, a topic for another day. Finally, my model in no way implies that State actors and governments should not continue to be held primarily liable for failing to protect, ensure, and guarantee fundamental rights. Rather, part of their duty is to assure the accountability of private non-State actors which includes a well-functioning civil justice system. Moreover, the model I present does not exclude the possibility that there may be certain instances where an alternative administrative approach to assuring reparations could be more appropriate when there are many victims of serious human rights violations.[52]

To be clear, the selection of tort doctrines in this typology all protect negative rights to personal freedom and autonomy. While this assertion may at first appear rather conservative and libertarian in nature, I would argue that instead I am promoting an account of "progressive" torts given that the underlying rationale of this model is to address significant power imbalances in which the plaintiff is usually in a weaker position to defend her rights and thus relies on the State's civil justice system to enforce and protect these rights.[53] Ultimately, the analogy with protecting individuals from the abuse of the government applies here but instead shifts the focus on the need to protect individuals from other powerful non-State actors.

"to take *positive measures* to ensure the right to life, including steps to reduce infant mortality rates, prevent industrial accidents, and protect the environment." THE RIGHT TO LIFE IN INTERNATIONAL LAW 66 (B.G. Ramcharan, ed, 1985) (emphasis added) (citation omitted); *see also* International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

52 Lisa J. Laplante, *Just Repair*, 48 CORNELL J. INT'L L. 513, 518 (2015) (discussing the use of administrative reparation schemes for massive human rights violations).

53 I am adopting the definition of "progressive" here from the progressive property movement which also seeks to reintroduce a more formal approach to rights with the view of addressing power inequities and the need to recognize marginalized groups of individuals who benefit from this approach to law. *See, e.g.*, Timothy M. Mulvaney, *Progressive Property Moving Forward*, 65 CIRCUIT 349 (2014). I thank Kali Murray for helping me understand this view of my argument.

A. *Individual Versus Individual*

1. Violence Against Women

A human rights lens can be applied to interpret torts claims brought against perpetrators of violence against women. In the United States, one in four women experience domestic violence during their lifetime.[54] "Every year, between two and five million women suffer violence at the hands of a partner," including rape and murder.[55] For many years, these abusers were virtually judgment-proof due to marital immunity and other bars to recovery resulting in a small number of cases going forward in the courts.[56] Domestic violence was relegated to the private sphere, considered beyond the reach of human rights law, resulting in feminist critique.[57] But recent developments in domestic tort law have begun to carve out remedies for victims of domestic abuse.[58] In U.S. courts, tort actions are available to those who suffer physical or emotional harm at the hands of abusive partners.[59] Applicable torts for a battered litigant would be assault, battery, and intentional infliction of emotional distress.[60] Such was the case in *Uribe*

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54 *Extent, Nature, and Consequences of Intimate Partner Violence*, CDC, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html (last visited July 16, 2017). Women account for eighty-five percent of the victims of domestic violence. *Id.*; *see also* ELIZABETH M. SCHNEIDER ET AL., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 10 (3d ed. 2013).

55 Radha Mohan, *The Jessica Lenahan Neé Gonzales Story,* 27 CONN. J. INT'L L. 391, 396 (2012); *see also* NAT'L INST. OF JUSTICE CTRS. & PREVENTION, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 5 (Nov. 1998), https://www.ncjrs.gov/pdffiles/172837.pdf (female victims averaged 3.1 assaults per year, which equates to approximately 5.9 million physical assaults perpetrated against women annually). For example, a 2009 study revealed that sixty-eight percent of women knew their offenders. *See* U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2009 (Oct. 2010), https://www.bjs.gov/content/pub/pdf/cv09.pdf; *see also* COLORADO COALITION AGAINST DOMESTIC VIOLENCE, LAW ENFORCEMENT TRAINING MANUAL 2009, 1–5 (2d ed. 2003) (reporting that forty-two percent of all female homicide victims were killed by an intimate partner).

56 *See* Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319 (1997); Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543 (1992).

57 *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319 (1993).

58 SCHNEIDER, *supra* note 54, at 783; *see also* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268 (1996).

59 *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010); Jennifer Wriggins, *Domestic Violence Torts,* 75 S. CAL. L. REV. 121 (2001).

60 SCHNEIDER, *supra* note 54, at 783. For example, in a more historical case, *Lusby v. Lusby*, the court permitted a battery action in tort to proceed against the plaintiff's husband on the grounds that he had raped her. 390 A.2d 77 (Md. 1978). Maryland had a criminal law exemption to tort immunities for marital rape. MD. CODE ANN., CRIM. LAW § 3-318 (2014).

v. Uribe, in which a wife brought a claim in California court against her husband for brutal beatings over a period of sixteen years.[61] Defamation may be available in instances where a partner humiliates his spouse in public through false accusations.[62]

Other torts may include the relatively new tort of intentional infliction of emotional distress where injuries arise out of emotional rather than physical abuse.[63] In *Feltmeier v. Feltmeier*, the Supreme Court of Illinois found on public policy considerations that an action for intentional infliction of emotional distress between spouses or former spouses based on conduct occurring during marriage should not be barred.[64] Significantly, part of the court's reasoning rested on a gap in state law criminalizing domestic crime. The court explained:

> the Illinois legislature, in creating the Illinois Domestic Violence Act of 1986 (Act) has recognized that domestic violence is a "serious crime against the individual and society" and that "the legal system has ineffectively dealt with family violence in the past, allowing abusers to escape effective prosecution or financial liability." However, . . . while the Act created the crime of domestic battery and "provides a number of remedies in an effort to protect abused spouses and family members, it did not create a civil cause of action to remedy the damages done." Thus, it would seem that the public policy of this state would be furthered by recognition of the action at issue.[65]

In recent times advocates have helped to bridge the private-public divide by holding states accountable for domestic violence as a human rights violation given the clear power imbalance.[66]

Domestic violence and other forms of sexual violence are claims that could be framed as human rights violations, most notably using the framework established by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is the most comprehensive international treaty on women's issues.[67] CEDAW's focus is on improving civil rights and the legal status of women.[68] Although CEDAW does not explicitly prohibit violence against women,

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61 *See* Complaint, Uribe v. Uribe, No. HG05203993 (Cal. Super. Ct. filed July 17, 2007), 2007 WL 7143272.

62 SCHNEIDER ET AL, *supra* note 54, at 784.

63 *See* Ellman & Sugarman, *supra* note 58.

64 798 N.E.2d 75 (Ill. 2003).

65 *Id.* at 271.

66 *See* Yankin Ertürk, *The Due Diligence Standard: What Does It Entail for Women's Rights?*, *in* DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 27–28 (Carin Benninger-Budel ed., 2008).

67 *See Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. WOMEN, http://www.un.org/womenwatch/daw/cedaw/cedaw.htm (last visited Sept. 13, 2017) [hereinafter U.N. WOMEN].

68 *See* Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L L. REV. 57 (2007).

the treaty has been interpreted to include this protection.[69] Similar to most human rights treaties, CEDAW puts an affirmative duty on States who have ratified the Convention to eliminate any "distinction, exclusion, or restriction based on sex."[70] They must ensure that domestic laws against these harms and both civil and criminal remedies in the event that women suffer these harms.[71] Failure to comply with these obligations constitutes a violation of international law.[72]

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69 *See id.*

70 CEDAW defines discrimination against women as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Id.; *see also* U.N. WOMEN, *supra* note 67 (stating that states that have ratified CEDAW are legally bound to put its provisions into practice).

71 U.N. WOMEN, *supra* note 67.

72 Article 5 of CEDAW also mandates that states must take steps to

> modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Adams, *supra* note 68, at 114. The most important example may be the CEDAW Committee's general recommendation declaring that gender-based violence (i.e., "violence that is directed against a woman because she is a woman or that affects women disproportionately") that "impairs or nullifies the enjoyment by women of human rights," including the rights to life, security of person, and equality in the family, is discrimination covered by CEDAW. *See* Comm. on the Elimination of Discrimination Against Women, *General Recommendations*, General Recommendation No. 19, U.N. Doc. A/47/38 (1992). The committee stated that the obligation on parties under Article 2(e) is to "take all appropriate measures to eliminate discrimination against women by any person" and therefore includes the obligation to address gender-based violence; it recommended specific steps parties should take in that respect:

> (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;
>
> (ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women; [and]
>
> (iii) Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.

Id. The committee's interpretation became the basis for a declaration adopted by the U.N. General Assembly. The declaration tracks the recommendation in many respects, including by stating that States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

> (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
>
> (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence from violating the right to food of others . . .

G.A. Res. 48/104, art. 4, Declaration on the Elimination of Violence Against Women (Dec. 20,

Other regional and specialized human rights treaties also strive to protect the rights of women. For example, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women defines and prohibits violence against women.[73] It also reaffirms the right of every woman to have her physical, mental, and moral integrity respected, and guarantees the right to personal security.[74] CEDAW and other treaties require the State to provide a remedy to an individual who suffered the violation of her right to personal integrity.[75] Thus, the same claims brought as suits in tort fulfill this international obligation to ensure a remedy for human rights violations.

2. Bullying

Bullying constitutes another area where tort law overlaps with human rights law. The Journal of the American Medical Association defines "bullying" as "a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one."[76] The bullying can occur verbally (i.e., name calling, threats, taunts, "malicious teasing"), physically (i.e., hitting, kicking, taking personal belongings), or psychologically (i.e., spreading rumors, intimidation, social exclusion).[77] Bullies often will focus on target groups defined by their

1993); *see also* Comm. on Economic, Social and Cultural Rights, *General Comment No. 14*, ¶ 35, U.N. Doc. E/C.12/2000/4 (the duty to protect the right to health requires parties, inter alia, "to prevent third parties from coercing women to undergo . . . female genital mutilation"); Comm. on Economic, Social and Cultural Rights, *General Comment No. 18*, ¶ 25, U.N. Doc. E/C.12/GC/18 (2005) ("The obligation to protect the right to work includes the responsibility of States parties to prohibit forced or compulsory labour by non-State actors."). The committee concluded that states may "be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation." Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19*, ¶ 9, U.N. Doc. A/47/38 (1992). *See generally* CLAPHAM, *supra* note 43, at 319–34 (reviewing treaty bodies' statements on private duties).

73 *See* OAS, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, at art. 7(d), 33 I.L.M. 1534 (1994).

74 *Id.*; *see also* Human Rights Institute, *Jessica Gonzales v. United States of America*, COLUM. L. SCH., http://www.law.columbia.edu/human-rights-institute/inter-american-human-rights-system/jessica-gonzales-v-us (last visited Aug. 14, 2017) (the petition is based on the argument that in failing to provide Ms. Gonzales with an adequate remedy, the U.S. government violated international human rights law).

75 *See* Laplante, *supra* note 52; Rashida Manjoo, *The Continuum of Violence Against Women and the Challenges of Effective Redress*, 1 INT'L HUM. RTS. L. REV. 1, 23 (2012).

76 Tonja R. Nansel et al., *Bullying Behaviors Among U.S. Youth: Prevalence and Association with Psychosocial Adjustment*, 285 J. AM. MED. ASS'N 2094, 2094 (2001).

77 Tracy Tefertiller, *Out of the Principal's Office and into the Courtroom: How Should California Approach Criminal Remedies for School Bullying?*, 16 BERKELEY J. CRIM. L. 168, 173 (2011).

sexual orientation, gender, race, ethnicity, disability, religion, culture, social class, and economic status thus becoming a form of discrimination.[78] Cases reveal that bullying occurs in a wide range of settings, including schools, workplaces, and assisted living facilities. Arguably, hate crimes constitute the most severe form of bullying.

Increased national attention has arisen due to high profile cases of "bullycides" in which students commit suicide after relentless bullying by their peers.[79] With regard to bullying among school children, almost fifty percent of students may be bullied at one time or another.[80] Those students falling into target groups, such as the LGBT, tend to experience a higher level of bullying.[81] Nancy Knauer writes that "[o]ver the last fifteen years, our understanding of bullying has experienced a radical redefinition. . . . [What] we once dismissed as 'horseplay' or 'teasing' has increasingly been labeled as unacceptable and, in some instances, criminal."[82] This tipping point has even led to greater national focus including the U.S. Department of Education holding its first ever "Bullying Summit" in Washington, D.C. in 2010 where the former U.S. Secretary of Education, Arne Duncan called for governmental and non-governmental partners to devise a national strategy to reduce bullying.[83]

As the nation comes to grips with this phenomena, new legal standards are appearing in the courts as a result of "the flood of current lawsuits explicitly pleading causes of action of bullying and cyberbullying."[84] While the term "bullying" is not always explicitly

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78 Abraham Magendzo Kolstrein & Maria Isabel Toledo Jofre, *Bullying: An Analysis from the Perspective of Human Rights, Target Groups and Interventions*, 21 INT'L J. CHILD. RTS. 46, 48 (2013).

79 *Id.* at 46–58 (2013). Some of the more well-known cases include that of Tyler Clementi, who jumped off a bridge at Rutgers University after students posted videos of him engaged in sexual acts with a man; Phoebe Prince who was bullied by schoolmates for dating the wrong guy; and Megan Meier who was bullied by the mother of a classmate online.

80 Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal Standards Emerging in the Courts?*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 227, 228–29 (2011). The Josephson Institute Center for Youth Ethics surveyed over 43,000 high school students and reported in October 2010 that 47% of students reported they had been bullied in the past year; on the other hand, 50% of the students admitted that they bullied someone in the past year. *Id.*

81 R. Kent Piacenti, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POL'Y & L. 58, 61 (2011). According to some studies, between 15 and 25% of the general U.S. student population suffers from bullying "with some frequency ('sometimes or more often')." *Id.* By contrast, more than half of LGBT students reported experiencing harassment "often or frequently." *Id.* In a recent survey, nearly 90% reported "being verbally harassed (e.g., called names or threatened) at school because of their sexual orientation[,]" approximately 40% "reported being physically harassed (e.g., pushed or shoved) at school because of their sexual orientation," and almost 20% "reported being physically assaulted (e.g., punched, kicked, or injured with a weapon) at school in the past year because of their sexual orientation." *Id.*

82 Nancy J. Knauer, *Bullying Across the Life Course: Redefining Boundaries, Responsibilities, and Harm*, 22 TEMP. POL. & CIV. RTS. L. REV. 253, 253 (2013).

83 *See* Conn, *supra* note 80, at 228.

84 *Id.*

mentioned in these cases, they nevertheless concern facts which meet the standard definitions.[85] Typically, these suits name school employees and districts as the defendants, sometimes filing complaints with a local human rights commission.[86] At the same time, victims sue the individual perpetrators who might be other children and their parents. For example, in *Boston v. Athearn*, a claim was brought by the parents of a seventh grader against the other children who cyberbullied her by opening a fake Facebook page with her name and posting false statements about her including accusations of drug use and sexual behavior.[87] Asserting claims of defamation, libel, and intentional infliction of emotional distress deserving punitive damages, the pleadings allege "[t]he Defendants acted with willful misconduct, malice, fraud, oppression, wantonness and an entire want of care raising the presumption of conscience indifference to the consequences of their actions."[88]

A few scholars have already argued that bullying among children can be understood within a human rights framework.[89] For example, as early as 2001, Dan Olweus helped to raise awareness that "it is a fundamental democratic human right for a child to feel safe at school and to be spared the oppression and repeated intentional humiliation implied in peer victimization or bullying."[90] In particular, this protection is enshrined in the United Nations Convention on the Rights of the Child (UNCRC), which is the first legally binding universal instrument to comprehensively address the rights of a child. In terms of bullying, the most relevant provisions include Article 16(1) which prohibits the "arbitrary or unlawful interference with his or her privacy, family, home or correspondence, . . . [and] unlawful attacks on his or her honour and reputation."[91] The 1990 World Summit for Children endorsed the UNCRC and included protection from bullying and

85 *Id.* at 232–33. A review of lawsuits brought before 2000 by parents seeking to hold school districts liable for their failures to curb the bullying and harassment suffered by their children reveal very few explicit allegations of bullying. Rather, these court decisions reveal numerous lawsuits alleging school districts' negligent supervision of students. *See id.* In fact, "bullying" was not a term included in the prevailing legal dictionary at the time. *See* BLACK'S LAW DICTIONARY (6th ed. 1990).

86 Nabozny v. Podlesny, 92 F.3d 446, 449, 452 (7th Cir. 1996) (recounting that the student involved in the lawsuit was harassed for years for being gay; some of the acts consisted of name calling, but it escalated to physical violence including being struck, held down and mock raped by twenty students, being urinated upon, being pelted with nuts and bolts, and even kicked in the stomach causing internal bleeding).

87 Complaint at ¶ 11, Boston v. Athearn, No. 1213422 (Ga. Super. Ct. Sept. 13, 2013), 2013 WL 9977805.

88 *Id.* at ¶ 37.

89 ANTONELLA INVERNIZZI, THE HUMAN RIGHTS OF CHILDREN: FROM VISIONS TO IMPLEMENTATION 342–43 (Jane Williams ed., 2011) (including consideration of the topic of "bullying" as a human rights issue).

90 CHILDREN'S RIGHTS: MULTIDISCIPLINARY APPROACHES TO PARTICIPATION AND PROTECTION 297 (Tom O'Neill & Dawn Zinga eds., 2008).

91 G.A. Res. 44/25, art. 16, Convention on the Rights of the Child (Nov. 20, 1989).

harassment as part of the general protection of children.[92] Moreover, given that "[b]ullying is a discriminatory practice par excellence, as it serves to mark a student based on a particular trait (or lack thereof)," it also violates the international principles of non-discrimination.[93] International human rights instruments have emphasized the importance of eradicating all types of discrimination.[94] Many other international instruments also clearly establish the unlawfulness of discrimination based on personal or social circumstances especially if they affect the equality of rights and opportunities and the subsequent enjoyment of those rights.[95]

In certain cases, bullying may even be characterized as cruel, inhumane, and degrading treatment and even possibly torture when it involves severe physical and mental harm, and sometimes death, which is prohibited in international law in particular by the Convention Against Torture.[96] This type of bullying is often associated with hazing in college fraternities.[97] These cases lead to litigation against both the perpetrator and the fraternity and may involve intentional torts like assault, battery, intentional infliction of emotional distress, and wrongful death. For example, an intentional tort claim originated in the *Morrison v. Kappa Alpha Psi Fraternity* case, which arose out of a fraternity hazing incident in Louisiana in 1994 in which Kendrick Morrison, a freshman interested in membership in Kappa Alpha Psi, was physically beaten by Jessie Magee, president of the Tech Kappa chapter, during a gathering which took place in Magee's dorm resulting in serious head injuries and hospitalization.[98] Importantly, an appeals

92 M. Ann Farrell, *Bullying: A Case for Early Intervention*, 4 AUSTL. & N.Z. J.L. & EDUC. 40, 41 (1999).

93 *See* Kolstrein & Jofre, *supra* note 78, at 48.

94 Article 10 of the Convention on the Rights of Children states: "[t]he child shall be protected from practices which may foster racial, religious, or any other form of discrimination." *See id.* at 47.

95 *See* G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006); Iberoamerican Young Organization, *Iberoamerican Convention on Rights of Youth* (Oct. 10, 2005), https://www.unicef.org/lac/IberoAmerican_Convention_on_the_Rights_of_Youth(1).pdf; *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 1995); G.A. Res. 48/104, Declaration on the Elimination of Discrimination against Women (Dec. 20, 1993); G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966); G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965); United Nations Educational, Scientific and Cultural Organization [UNESC], Convention Against Discrimination in Education (Dec. 14, 1960), http://www.unesco.org/education/pdf/DISCRI_E.PDF.

96 For example, the UDHR, Article 5 states: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." G.A. Res. 217 (III) A, *supra* note 20, at art. 5. For a discussion, see Kolstrein & Jofre, *supra* note 78, at 48.

97 When formulating a definition of bullying, some legislatures borrow definitions attributed to hazing. *See* Piacenti, *supra* note 81, at 81.

98 Morrison v. Kappa Alpha Psi Fraternity, 738 So.2d 1105, 1105 (La. Ct. App. 1999); *see also* Kenner v. Kappa Alpha Psi Fraternity, 808 A.2d 178 (Pa. Super. Ct. 2002) (involving an

court upheld a lower court ruling to apportion fault to all persons (including intentional tortfeasors and negligent tortfeasors) and to limit liability of each wrongdoer to their percentage of fault.[99]

Arguably, acts rising to the level of hate crimes could also fit into this general category. In some cases, these events may even lead to death, which can be pled as a wrongful death suit. Such was the case when a wrongful death lawsuit was filed in a Mississippi court on behalf of James C. Anderson, an African American man who was assaulted by seven white teenagers in 2011 who were overheard as saying that they were looking to "go f—k with some n——rs."[100] They attacked and beat Mr. Anderson in the Metro Inn parking lot in Mississippi. Witnesses overheard one of the attackers shout: "White power!" As they left the victim, one teen drove over him, killing Anderson and told his friends that he "ran that n——r over."[101] None of the participants in the attack ever tried to stop it, call the police, or seek medical help for the victim.[102] This case would constitute a violation of the right to life, which is a universally recognized human right found in all human rights treaties.

B. *Individual or Community Versus Corporation/Company*

1. Environmental Harms

Environmental harms caused by companies that result in personal injury constitute another area where tort law provides a necessary remedy for human rights violations.[103] A whole area of "toxic torts" emerged as more cases were litigated to address certain environmental injuries that caused harm over the past century.[104] Although impacting

undergraduate initiate that brought negligence action against national fraternity and individual fraternity members for injuries initiate received during hazing. Kenner suffered from hypertension, renal failure, and seizures requiring hospitalization and kidney dialysis after being paddled two hundred times on his buttocks. The court overturned a summary judgment for the defendants, noting that the individual defendant who was the chapter advisor did have a duty of care to the plaintiff).

99 *Morrison*, 738 So.2d at 1120–21.

100 The Estate of James C. Anderson, et al., v. Deryl Dedmon Jr., et al., SPLC, https://www.splcenter.org/seeking-justice/case-docket/estate-james-c-anderson-et-al-v-deryl-dedmon-jr-et-al (last visited July 17, 2017).

101 *Id.*

102 *Id.*

103 *See* Int'l Maritime Org. [IMO], *International Convention on Civil Liability for Oil Pollution Damage* (Nov. 27, 1992), http://www.imo.org/en/About/conventions/listofconventions/pages/international-convention-on-civil-liability-for-oil-pollution-damage-(clc).aspx. The International Convention on Civil Liability for Oil Pollution Damage is an agreement between states, which is then implemented into domestic law, that gives private parties statutory rights to claims against other private parties for loss sustained due to marine oil pollution.

104 *See* Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737,

the environment, these cases also involve finding direct injury to a specific person or class of persons.[105] For example, the massive underground natural gas storage facility that spewed more than 150 million pounds of methane in the Los Angeles hills in October 2015 recently not only led to criminal charges but also civil torts suits filed by the residents of this community.[106]

One sees this development with regard to claims resulting from hydraulic fracking, which has become what some predict to be the new asbestos in tort litigation.[107] Technological developments have made it possible to release gas trapped deep in the impermeable shale rock formations in states like New York, Pennsylvania, Ohio, Tennessee, and West Virginia, among others.[108] This method entails shooting millions of gallons of water mixed with sand and chemicals up to ten thousand feet below the Earth's surface to extract natural gas.[109]

In the last decade, stories emerged to reveal that this new innovation did not come without a price. The documentary *Gasland* brought national attention to tap water being ignitable.[110] Residents of communities near fracking complained of black water with gas odors and rainbow swirls of gasoline. Many report losing smell and experiencing neurological nerve pain.[111] Scientific studies have revealed some of the serious health consequences associated with the chemicals used in the fracking process.[112]

749–53 (2011).

105 *Id.* at 750. *See generally* Mark A. Geistfeld, *The Tort Entitlement to Physical Security as the Distributive Basis for Environmental, Health, and Safety Regulations*, 15 THEORETICAL INQUIRIES L. 387 (2014) (offering an analysis of how environmental harms also constitute infringements on individual entitlements to security).

106 *See* Press Release, Los Angeles District Attorney's Office, District Attorney Jackie Lacey Files Criminal Charges Against SoCal for Aliso Canyon Leak (Feb. 2, 2016), http://da.co.la.ca.us/sites/default/files/press/020216_District_Attorney_Jackie_Lacey_Files_Criminal_Charges_Against_SoCal_Gas_for_Aliso_Canyon_Leak.pdf. The L.A. District Attorney charged the company that owns the storage well, Southern California Gas Co. with three misdemeanor counts for neglecting to report the leak in addition to a misdemeanor count over the pollutants. *Id.* If convicted, the company could be fined up to $25,000 a day for each day that it failed to notify the state regulatory office and for every day it polluted noting that it is important that the company "be held responsible for its criminal actions." *Id.*; *see also* Michael Martinez, *Porter Ranch Gas Leak: Legal Woes Mount for SoCalGas*, CNN (Feb. 2, 2016), http://www.cnn.com/2016/02/02/us/california-attorney-general-porter-ranch-gas-leak-lawsuit/index.html (explaining that L.A. District Attorney was to charge the company that owns the storage well, Southern California Gas Co., with three misdemeanor counts for neglecting to report the leak in addition to a misdemeanor count over the pollutants).

107 *See* Rosalie D. Morgan, *What the Frack: An Empirical Analysis of the Effect of Regulation on Hydraulic Fracturing*, 16 QUINNIPIAC HEALTH L.J. 77, 90 (2013).

108 Joe Schremmer, *Avoidable "Fraccident": An Argument Against Strict Liability for Hydraulic Fracturing*, 60 U. KAN. L. REV. 1215, 1215–16 (2012).

109 Morgan, *supra* note 107, at 81.

110 GASLAND (HBO 2009).

111 Morgan, *supra* note 107, at 87.

112 A recent study by The Endocrine Disruption Exchange (TEDX) examined 353 different chemicals used in fracking and found that health consequences in these areas include: skin, eye, sensory organ, respiratory, gastrointestinal and liver, brain and nervous system, immune,

The serious consequences of fracking has led to tort litigation. Often these claims relate directly to the contamination of water sources but rest on claims of property and personal injury invoking common law theories of trespass, nuisance, and strict liability for abnormally dangerous activity.[113] For example, in a largely agricultural county in Pennsylvania, members of the community filed lawsuits against companies participating in hydraulic fracturing for allegedly contaminating well water.[114] In *Berish v. Southwestern Energy Production Co.*, the plaintiffs alleged that due to releases, spills, and discharges from hydraulic fracturing they were exposed to "hazardous gases, chemicals, and industrial wastes" which caused "[p]laintiffs to incur health injuries, loss of use and enjoyment of their property, loss of quality of life, emotional distress, and other damages"[115] In *Fiorentino v. Cabot Oil & Gas Corp.*, the plaintiffs alleged that they were exposed to "combustible gases, hazardous chemicals, threats of explosions and fires," and as a result, they were "in a constant state of severe emotional distress consistent with post traumatic syndrome."[116] With the increasing dependence on natural gas as a reliable source of energy along with volatile energy prices, torts claims for property and personal injuries caused by fracking will only rise.[117]

It is possible to view toxic torts also through a human rights framework. The environment is often viewed as a precondition for the

kidney, cardiovascular and blood, cancer, mutagenic, endocrine disruption issues, and even death. THE ENDOCRINE DISRUPTION EXCH., SUMMARY STATEMENT 1 (Jan. 27, 2011), http://www.endocrinedisruption.com/files/multistatesummary1.-27-11Final.pdf. Theo Colborn et al., *Natural Gas Operations from a Public Health Perspective,* 17 INT'L J. HUM. ECOLOGICAL RISK ASSESSMENT 1039, 1042 (2011).

113 *See, e.g.*, Berish v. Sw. Energy Prod. Co., 763 F. Supp. 2d 702, 704 (M.D. Pa. 2011) (noting that plaintiffs alleged "pollutants and other industrial waste, including the fracking fluid and other hazardous chemicals such as barium and strontium, were discharged into the ground and contaminated the water supply used by the Plaintiffs"); Fiorentino v. Cabot Oil & Gas Corp., 750 F. Supp. 2d 506, 509 (M.D. Pa. 2010) ("Plaintiffs allege that Defendants improperly conducted hydrofracturing and other natural gas production activities that allowed the release of methane, natural gas, and other toxins onto Plaintiffs' land and into their groundwater." (footnote omitted)). For more cases in which plaintiffs allege groundwater contamination or personal injury from fracking activities, see Complaint at 2–3, Harris v. Devon Energy Prod. Co., 500 F. App'x 267 (5th Cir. 2012) (No. 10-00708); Bombardiere v. Schlumberger Tech. Corp., No. 11-CV-50, 2011 WL 2443691, at *1 (N.D. W. Va. June 14, 2011); Complaint at 3–4, Mitchell v. Encana Oil & Gas (USA), Inc., No. 10-02555-L (N.D. Tex. filed Dec. 15, 2010); Complaint, Parr v. Aruba Petroleum, Inc., No. 11-01650-E (Dall. Cty. Ct. filed March 8, 2011); *see also* Keith B. Hall & Lauren E. Godshall, *Hydraulic Fracturing Litigation*, 15 ADVOC. 13 (2011).

114 *See* Hannah Coman, Note, *Balancing the Need for Energy and Clean Water: The Case for Applying Strict Liability in Hydraulic Fracturing Suits*, 39 B.C. ENVTL. AFF. L. REV. 131, 142 (2012).

115 Complaint at ¶ 1, Berish v. Sw. Energy Prod. Co., 763 F. Supp. 2d 702 (M.D. Pa. 2011) (No. 10-01981).

116 *See* Amended Complaint at ¶ 43, Fiorentino v. Cabot Oil & Gas Corp., 750 F. Supp. 2d 506 (M.D. Pa. 2010) (No 09-02284).

117 *See* Coman, *supra* note 114, at 132 (stating that by 2020, a predicted twenty percent of natural gas will come from hydraulic fracturing).

enjoyment of other human rights or alternatively their degradation, including the right to life.[118] This view was expressed in a separate opinion of the Vice President of the International Court of Justice in the *Gabcikovo-Nagymaros* case:

> the protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[119]

Often the environment is linked to the right to health and even the right to life.[120] In General Comment No. 14, the United Nations Committee on Economic, Social and Cultural Rights elaborated on the meaning of Article 12 stating that Article 12 includes a "wide range of socio-economic factors . . . and . . . underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."[121] General Comment No. 14 clearly indicates that the environment is considered a significant contributing factor to achieving an adequate standard of health, and environmental problems such as pollution are constructed as barriers to the full enjoyment of the right.[122] For that reason, Article 12 also requires "the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental

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118 A newer line of interpretation views the right to a healthy environment as a standalone entitlement. This understanding is still relatively new although various scholars have offered arguments for the recognition of this emerging right. *See* Bridget Lewis, *Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection*, 8 MACQUARIE J. INT'L & COMP. ENVTL. L. 36, 37 (2012). *See generally* Fatma Ksetini (Special Rapporteur for Human Rights and the Environment), *Human Rights and the Environment*, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994); DONALD ANTON & DINAH SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS (Cambridge University Press 2011); PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT (Oxford University Press 3d ed. 2008); PHILLIPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (Cambridge University Press 2d ed. 2003); Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65 (2002); Wolfgang Sachs, *Environment and Human Rights*, 47 DEV. 42 (2004); Dinah Shelton, *Human Rights, Environmental Rights and the Right to Environment.*, 28 STAN. J. INT'L L. 103, 112–13 (1991).

119 Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, 91–92 (Sept. 25) (separate opinion of Vice-President Weeramantry).

120 The International Covenant on Economic, Social and Cultural Rights establishes a right of everyone "to the enjoyment of the highest attainable standard of physical and mental health." G.A. Res. 2200 (XXI) A, *supra* note 95, at art. 12. A similar right is also enshrined in the Convention on the Rights of the Child; *see* G.A. Res. 44/25, *supra* note 91, at art. 17.

121 Comm. on Economic, Social and Cultural Rights, Rep. on its Twenty-Second, Twenty-Third and Twenty-Fourth Sessions, Annex IV, ¶ 2, U.N. Doc. No. E/C.12/2000/21 (2001), http://www.un.org/documents/ecosoc/docs/2001/e2001-22.pdf.

122 *Id.*

conditions that directly or indirectly impact upon human health."[123] Importantly, toxic tort claims provide an essential remedy for protecting the human right to a healthy environment and life within the domestic civil justice system.

2. Defective Manufactured Products

Product liability claims are an area of tort litigation that can be reframed as human rights claims as they relate to business liability for defective and hazardous products. These claims might respond to defective motor vehicles, unsafe food products, dangerous household items, and hazardous pharmaceutical and therapeutic devices that result in serious bodily injury or even death.[124] Some more well-known areas of product liability litigation include asbestos,[125] breast implants,[126] toys,[127] and salmonella in food.[128] Many of these cases may apply the tort

123 *Id.* at ¶ 15.

124 *See* Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, 32 J.L. MED. & ETHICS 556 (2004) (discussing several types of product liability claims that are subject to litigation). *See generally* John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT'L & COMP. L. 1, 3 (1998).

125 The knowledge of asbestos dangers is not new. In *Borel v. Fibreboard Paper Prods. Corp.*, the court found that the asbestos industry and others had actual knowledge of asbestos hazards back in the 1920s–30s. 493 F.2d 1076, 1083 (5th Cir. 1973). Asbestos is now banned or strictly regulated by over forty nations. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1819 (1992); Joel Slawotsky, *International Products Liability Claims Under the Alien Tort Claims Act*, 16 TUL. J. INT'L & COMP. L. 157, 162 n.29 (2007) ("No litigation in American history has involved as many individual claimants . . . resulted in as much compensation to claimants, compelled the number of defendants' bankruptcies . . . as asbestos litigation.").

126 In *Haltom v. Medical Engineering Corp.*, the plaintiff underwent breast reconstruction after a mastectomy and encountered serious health issues due to a faulty breast implant. The plaintiff alleged that the product was defective because the defendant knew that its extra thin shell was more likely to rupture and failed to adequately test the product. A jury awarded $4.5 million against a breast implant manufacturer, including $2.25 million in punitive damages. Haltom v. Medical Engineering Corp., No. 972-10013, 2000 WL 33956772 (Mo. Cir. Ct. 2000). In the *Hopkins v. Dow Corning Corp*. case, the plaintiff contracted mixed connective tissue disease as the result of the rupture of her implants. Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994). Evidence at trial established that the manufacturer failed to test them adequately and ignored knowledge of adverse health consequences associated with the implants because it was in a rush to develop and market the implants. *Id.* The manufacturer ignored the advice to redesign the implants to lessen the risk of leakage because it would be more expensive and difficult to produce. *Id.* Evidence of the manufacturer's knowledge of the long-term effects of the product coupled with its fraudulent statements and concealment after becoming aware of the problem led to an award of $840,000 in compensatory damages and $6.5 million in punitive damages under a theory of product liability. *Id.* Significantly, the verdict was influenced by the fact that the manufacturer' knowingly exposed thousands of women to a painful and debilitating disease for financial gain despite already being a "wealthy corporation." *Id.* For a timeline on this litigation see, *Breast Implants on Trial: Chronology of Silicone Breast Implants*, PBS, http://www.pbs.org/wgbh/pages/frontline/implants/cron.html (last visited Feb. 19, 2016).

127 *See, e.g.*, Carrie R. Frank, *Defective Toys: Definitely Not Child's Play*, PROD. LIAB. NEWSL. (2007), http://www.mandewebdesign.com/defective-toys-not-childs-play.htm.

doctrine of product liability.[129] Alternatively, they may plead "negligent entrustment" when a seller markets products they have reason to believe pose an unreasonable risk of harm to the recipient especially if the latter cannot exercise due care.[130] Some claims against large corporations, especially if brought as class actions, may end in settlement but are nevertheless pled as common torts.[131]

Cases that reveal a high level of disregard for the safety of consumers often lead to large punitive damage awards and products being discontinued or banned.[132] Indeed, if a company has actual or constructive knowledge of the product's dangerous properties and still sells or markets the product, the conduct may be deemed especially reprehensible suggesting a higher level of moral culpability, which arguably makes it even more akin to a human rights type violation. Indeed, the general protection of health and safety of products can be framed as general rights to life and security, as discussed in the previous categories of this taxonomy.[133]

For example, the pharmaceutical industry has been closely

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128 For example, a woman who suffered serious health consequences for allegedly having developed Salmonella from peanut butter sued one manufacturer under tort theories of negligence, negligence per se, and strict liability (i.e., product liability). *See* Washington v. Conagra Foods Inc., No. 13-34-TWT, 2015 WL 847430, at *1 (N.D. Ga. 2015). Although she did not have direct evidence of causation, the judge did not grant the defendant a motion to dismiss because circumstantial evidence created a sufficient prima facie case. *Id.*; *see also* Massey v. Conagra Foods, Inc., 328 P.3d 456, 458 (Idaho 2014) (involving a consumer who consumed poultry pot pies and subsequently developed salmonellosis, the strain of salmonella which matched the strain of salmonella found in the contaminated pot pies, and filed suit against the pot pie manufacturer, alleging claims of product liability and negligence).

129 *See* Goldring, *supra* note 124, at 15.

130 *See* Slawotsky, *supra* note 125, at 159 n.5; *see also* Timothy D. Lytton, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearm Manufacturers*, 64 BROOK. L. REV. 681, 683 (1998). For example, see *Hamilton v. Accu-Tek,* wherein plaintiffs effectively argued that the negligent entrustment doctrine was applicable to handgun manufacturers who sell to buyers likely to be involved in criminal activity. 62 F. Supp. 2d 802, 821–31 (E.D.N.Y. 1999), *vacated by* Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21 (2d Cir. 2001). Although the comparison between criminals and those who lack the capacity to exercise due care is subtle, it convinced Judge Weinstein that the handgun industry was negligent for marketing in areas where gun laws were too weak to protect consumers from the dangers of possible handgun shootings. *Id.* at 830–31.

131 *See* Richard Meeran, *Tort Litigation Against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States*, 3 CITY U. H.K. L. REV. 1, 3 (2011).

132 *See* Slawotsky, *supra* note 125, at 163. Large verdicts have been awarded by juries in asbestos litigation. *See* Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989); Press Release, Merck, Merck Announces Voluntary Worldwide Withdrawal of Vioxx (Sept. 30, 2004), http://www.pbm.va.gov/vacenterformedicationsafety/vioxx/DearHealthcareProfessional.pdf. *See, e.g.*, *DCX Ordered to Pay $20 Million Verdict*, US LAWYERS DB (Dec. 24, 2006), http://uslawyersdb.com/lawnews968. In the Vioxx litigation, a jury awarded $253 million against Merck. Diedtra Henderson & Sacha Pfieffer, *Merck Told to Pay $253m in Vioxx Suit: Texas Jury Says Drug Firm Liable in Man's Death,* BOSTON GLOBE (Aug. 20, 2005), http://www.boston.com/news/nation/articles/2005/08/20/merck_told_to_pay_253m_in_vioxx_suit.

133 *See* G.A. Res. 39/248, Consumer Protection, art. 3, 6 (Apr. 16, 1985); G.A. Res. 2200, *supra* note 24, art. 6, 9; The European Convention on Human Rights, *supra* note 24, at art. 2, 5.

scrutinized for practices which inflict great harm and often death on consumers, such as with the claims brought due to the serious health consequences from the anti-miscarriage drug Diethylstilbestrol (DES).[134] Merck became another high profile case when it had to pull the "blockbuster" drug Vioxx from the market in 2004 after it was revealed that the company knew of and hid the dangers of the product which caused heart attacks, strokes, and death because of its notable profits.[135] The company has faced thousands of civil lawsuits as a consequence. More recently in Pennsylvania, a trial court recognized the liability of a pharmaceutical manufacturer who produced a diet pill commonly known as "phenfen" which led to the death of a patient.[136] Finding that the drug contained a negligent design defect, the court noted:

> the public interest requires the holding of companies which make and sell drugs and medicine for use in the human body to a high degree of responsibility under both the criminal and civil law for any failure to exercise *vigilance* commensurate with the harm which would be likely to result from relaxing it.[137]

Significantly, the court recognized the power imbalance in these cases noting that the U.S. Supreme Court has declared that the "primary responsibility for drug safety rests with the manufacturer, which has 'superior access to information about [its] drugs, especially in the postmarketing phase as new risks emerge.'"[138] While not wanting to deter the development of new drugs, the court sought to protect the right to remedy provided by the state constitution.

The car industry provides another good example of companies that are capable of violating the basic rights of individuals. Some episodes of litigation take on "mythical" proportions like that of Ford's Pinto Sedan that resulted in massive litigation in the 1980s when it was revealed that the company decided against spending pennies to save lives from an unsafe gas tank that exploded with minimal impact.[139] Given the high level of malfeasance, charges of criminal recklessness were brought against the manufacturers.[140] Similarly, in a more recent case, a family won a claim for product liability and negligence based on facts which involved an exploding gas tank in an Oldsmobile that killed a child and

134 *See* Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487 (N.Y. 1989); *see also* Romvaldo P. Eclavea, *Annotation, Products Liability: Diethylstilbestrol (DES)*, 2 A.L.R. 4TH 1091 (1980).

135 *See* David R. Culp & Isobel Berry, *Merck and the Vioxx Debacle: Deadly Loyalty*, 22 ST. JOHN'S J. LEGAL COMMENT. 1 (2008).

136 Lance v. Wyeth, 85 A.3d 434, 436 (Pa. 2014).

137 *Id.* at 453.

138 *Id.* at 461.

139 Gary T. Schwartz, *The Myth of the Ford Pinto Case,* 43 RUTGERS L. REV. 1013, 1014 (1991) (discussing *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981)).

140 Malcolm E. Wheeler, *Product Liability, Civil or Criminal—The Pinto Litigation*, 17 FORUM 250 (1981).

inflicted severe burns on those who survived.[141] At trial, the family was able to show that General Motors intentionally failed to provide safety measures through the testimony of General Motors engineers who testified that the fuel tank walls were too thin and close to the ground. Internal documents indicated that a metal shield that would protect the vulnerable parts of the tank would have only cost $4.50 per vehicle.[142]

Recognition of these rights emerged as part of the rise of a consumer rights movement in the 1970s in response to the "massificiation of the consumer market"—referring to mass production, mass marketing, and mass consumption—that created new health risks for consumers and less accountability for large powerful companies.[143] The rise of this field followed on the heels of President Kennedy setting out four basic rights of consumers in 1962 that included the right to safety. Around that time, activists like Ralph Nader began to crusade for safer products, leading to a new awareness of the dangers of unregulated commercial products.[144] As with some of the other types of torts discussed in the previous section, the area of consumer protection also can be "understood as a device to counterbalance . . . inequality."[145] Consumer law is a mixture of both public regulation and prosecutions but also private litigation in contract and tort, which aims to compensate victims but also holds corporations accountable.[146] Thus, the main aim of this body of law is "the protection of individuals' safety from dangerous products."[147]

The need to protect consumers became more widely recognized at the international level almost a decade later in 1985 when the U.N. General Assembly unanimously approved the *Guidelines for Consumer Protection* (UNGCP).[148] The UNGCP have been likened to an international consumer bill of rights.[149] While the guidelines cover a

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141 Gen. Motors Corp. v. McGee, 837 So. 2d 1010, 1015 (Fla. Dist. Ct. App. 2002).

142 *Id.* at 1020.

143 HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 5 (Geraint Howells et al. eds., 2010) [hereinafter HANDBOOK ON CONSUMER LAW]. The authors of this edited volume point out that while the area of consumer rights is relatively new the concern is not. They explain "ever since humans have traded, there has been a need for the law's involvement, given the propensity of the seller to seek to gain advantage by providing short measures or inferior goods, which in some instances could harm the consumer's health." *Id.* at 4.

144 *See* HANDBOOK ON CONSUMER LAW, *supra* note 143, at 9. In 2015, Nader helped to established a museum to recognize the significant tort litigation that has led to heightened consumer protections. *See* AMERICAN MUSEUM OF TORT LAW, https://www.tortmuseum.org (last visited July 7, 2017). Ralph Nader's *Unsafe at Any Speed* revealed the inherent unsafe nature of the Corvair car, and in essence "marked the beginning of the organized consumer movement." Goldring, *supra* note 124, at 13.

145 HANDBOOK ON CONSUMER LAW, *supra* note 143, at 11.

146 Sinai Deutch, *Are Consumer Rights Human Rights?*, 32 OSGOODE HALL L.J. 537, 542 (1994).

147 HANDBOOK ON CONSUMER LAW, *supra* note 143, at 21.

148 *See* G.A. Res. 39/248, *supra* note 133.

149 E. Peterson, *The United Nations and Consumer Guidelines*, *in* CONSUMERS, TRANSNATIONAL CORPORATIONS AND DEVELOPMENT 343, 347 (T. Wheelwright, ed., 1986)

range of issues, in particular they protect consumers from "hazards to their health and safety" and address the need to assure the "availability of effective consumer redress" in the event that someone suffers harm from commercial goods and services.[150] More recently, the concept of consumer rights was enshrined in Article 38 of the European Union's Charter of Fundamental Rights.[151] Some national constitutions also include explicit reference to consumers' rights as a guarantee of health and safety.[152]

A handful of scholars have argued that consumer rights can be framed as human rights. In 1994, Sinai Deutch proposed that "basic consumer rights should be considered human rights."[153] Some twenty years later, in a recent handbook on consumer rights, it was declared that "[t]here is a strong link between consumer protection and human rights, which has been increasingly recognized in the international legislation during the last years."[154] Joel Slawotsky made the argument that product liability should be recognized as a universal principle under international law which could be litigated through the Alien Torts Act.[155] He writes

> in addition to the examples of customary international law embodied in the international agreements above, liability for the reckless disregard of the health and safety of others is a widely accepted principle of international product liability law. Product liability law is becoming a global phenomenon with the vast majority of nations recognizing it as a special field.[156]

One commentator equated the "selling of products known to cause death and serious injury" to murder and a violation of international human rights.[157] The growing business and human rights movement inspired by the U.N. Human Rights Council's unanimous approval in 2011 of the United Nations Guiding Principles on Business and Human Rights has also helped to raise awareness of how ordinary tort law can be a means for holding corporations accountable for human rights

(recognizing that international guidelines could serve as a type of "Charter of Human Rights" in the consumer area).

150 *Id.*

151 *See* European Union [EU], *Charter of Fundamental Rights of the European Union*, art. 38, EU Doc. 2000/C 364/01, http://fra.europa.eu/en/charterpedia/article/38-consumer-protection.

152 For example, Italy, Portugal, and Spain contain consumer rights in their constitutions. HANDBOOK ON CONSUMER LAW, *supra* note 143, at 36.

153 Deutch, *supra* note 146, at 540.

154 HANDBOOK ON CONSUMER LAW, *supra* note 143, at 18.

155 Slawotsky, *supra* note 125, at 183.

156 *Id.* (citing Mathais Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard*, 51 AM. J. COMP. L. 751, 756 (2003)); *see also* Iain Ramsay, *Consumers' Access to Justice: An Introduction*, *in* INTERNATIONAL PERSPECTIVES ON CONSUMERS' ACCESS TO JUSTICE 17–46 (Charles E. F. Rickett & Thomas G. W. Telfer eds., 2003).

157 Slawotsky, *supra* note 125, at 162, 178.

claims although framing them as ordinary tort doctrines, such as negligence.[158]

C. *Comparative Perspectives: The Horizontal Effect and* De Facto *Human Rights Enforcement*

As evidenced by the examples shared above, the law of tort serves a vindicatory function to assure individuals a remedy for violations of their fundamental human rights even when the perpetrator is a non-State actor.[159] Although these cases do not articulate a specific rights analysis, they *de facto* address the underlying human rights violations.

Certainly, focusing on non-State actors requires a "re-imagining" of the nature of the human rights regime and its existing concepts and procedures.[160] Yet, it is important to note that a comparative law perspective facilitates the understanding of tort law as not as outlandish as perhaps it may at first seem. Indeed, this approach is already adopted by many foreign jurisdictions around the world through what is commonly viewed as the "horizontal effect."[161] Countries in Europe, Asia, and Africa apply private law to hold non-State actors liable for

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158 Meeran, *supra* note 131, at 24 ("invoking tort law involves allegations of negligence rather than human rights violations . . . .could be regarded as diminishing the significance of the harm, but on the other hand has the advantages of simplicity and being potentially applicable to fundamental human rights violations . . . ."); Richard Meeran, *Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 378 (Surya Deva & David Bilchitz eds., 2015) (providing general examples of how negligence suits can be used to respond to human rights abuses).

159 *See* Paust, *supra* note 18.

160 Alston, *supra* note 19, at 38 (pointing out that social conditions and political realities have brought a "new awareness of the need to protect human rights, beyond the classic paradigm of the powerful state against the weak individual, to include protection against increasingly powerful non-state actors").

161 *See, e.g.*, Pedro Cabral & Ricardo Neves, *General Principles of EU Law and Horizontal Direct Effect*, 17 EUR. PUB. L. 437 (2011); Jennifer Corrin, *From Horizontal and Vertical to Lateral: Extending the Effect of Human Rights in Post Colonial Legal Systems of the South Pacific*, 58 INT'L & COMP. L.Q. 31 (2009); Vaios Karavas & Gunther Teubner, *http://CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on 'Private Parties' Within Autonomous Internet Law,* 4 GERMAN L.J. 1335 (2005); Eva Julia Lohse, *Fundamental Freedoms and Private Actors—Towards an 'Indirect Horizontal Effect*, 13 EUR. PUB. L. 159 (2007); Basil Markesinis, *Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany*, 115 L.Q. REV. 47 (1999); Gavin Phillipson, *The Human Rights Act, Horizontal Effect and the Common Law: A Bang or a Whimper*, 62 MOD. L. REV. 824 (1999); Kara Preedy, *Fundamental Rights and Private Acts—Horizontal Direct or Indirect Effect—a Comment*, 8 EUR. REV. PRIV. L. 125 (2000); Florian Roedl, *Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect*, 20 IND. J. GLOBAL LEGAL STUD. 1015 (2013); Marek Safjan & Przemyslaw Miklaszewicz, *The Horizontal Effect of the General Principles of EU Law in the Sphere of Private Law,* 18 EUR. REV. PRIVATE L. 475 (2010); Greg Taylor, *The Horizontal Effect of Human Rights Provisions, The German Model and Its Applicability to Common-Law Jurisdictions*, 13 KINGS L.J. 187 (2002); Mark Tushnet, *Issues of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003).

human rights violations through private tort law.[162] While some jurisdictions apply a direct horizontal effect which imposes duties directly upon private actors to adhere to human rights, others choose an "indirect" approach to interpret existing private law using human rights norms.[163]

German courts first established the Drittwirkung doctrine (i.e., "third party effect") by using human rights law to interpret private law.[164] The horizontal effect takes into account that private relations, traditionally regulated by private law, often involve parties with power imbalances due to wide-ranging systemic factors, making it "important for human rights to infiltrate into this arena so that the weak, vulnerable and disadvantaged can be given effective protection."[165]

Strikingly, despite robust academic discussion of the horizontal effect by foreign scholars studying its application outside of the United States, there is virtually no discussion of this doctrine within American legal scholarship. Only a few American scholars engage with the doctrine, and even then, they look more squarely at constitutional law and not private law *per se*.[166] Thus, this Article will be the first to provide

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162 Some examples of such countries include Ireland, Canada, Italy, Spain, Switzerland, Japan, South Africa, and New Zealand. As explained by Brüggemeier, "[i]n many European countries, it is now commonly acknowledged that fundamental rights (i.e. human rights, constitutionally protected rights and other rights considered as fundamental by the individual legal systems) do not only affect State-citizen relationships, but also relationships between private parties, at least in an indirect manner." Gert Brüggemeier et al., *Introduction* to FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION 1 (Gert Brüggemeier et al. eds., 2010). On its presence in Latin America, see Rivera-Pérez, *supra* note 36, at 197 (examining the overlooked application of the horizontal effect doctrine in Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Paraguay, Pert, Puerto Rico, Uruguay, and Venezuela). *See, e.g.*, Brüggemeier et al., *supra* note 162, at 1; Sibo Banda, *Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance*, 31 DUBLIN U. L.J. 263, 264–68 (2009); Cabral & Neves, *supra* note 161; Corrin, *supra* note 161; Karavas & Teubner, *supra* note 161; Lohse, *supra* note 161; Markesinis, *supra* note 161; Phillipson, *supra* note 161; Preedy, *supra* note 161; Roedl, *supra* note 161; Safjan & Miklaszewicz, *supra* note 161; Taylor, *supra* note 161; Tushnet, *supra* note 161.

163 O'Cinneide, *supra* note 41 ("Two major types of horizontal effect can be identified: 'direct horizontal effect,' where constitutional rights are given full horizontal application, and 'indirect horizontal effect,' where constitutional rights are applied indirectly to guide and shape the interpretation and application of existing private law."). Some countries, like South Africa, have gone so far as to make explicit inclusion of the Drittwirkung Doctrine in their constitutions. S. AFR. CONST., 1996, § 8(2) ("A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking account the nature of the right and the nature of any duty imposed by the right.").

164 JOHAN VAN DER WALT, THE HORIZONTAL EFFECT REVOLUTION AND THE QUESTION OF SOVEREIGNTY (2014).

165 Chirwa, *supra* note 27, at 308.

166 *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003) (explaining horizontality doctrine has not been "self-consciously appreciated in the United States, as it has elsewhere"). In addition to Professor Gardbaum, the shortlist of other scholarship includes: Helen Hershkoff, *Horizontality and the "Spooky" Doctrines of American Law*, 59 BUFF. L. REV. 455, 457 n.11 (2011) (citing The Civil Rights Cases, 109 U.S. 3, 25–26 (1883)); Knox, *supra* note 39, at 20; Margaret E. McGuiness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME

a descriptive account of how ordinary tort cases in the United States also serve a *de facto* horizontal effect even though there is not explicit recognition of this doctrine. In addition to garnering support from this comparative perspective, the next Part analyzes why the origins of the American tort also urges us to view torts as an essential means of enforcing human rights claims within U.S. courts.

III. A GENEALOGY OF RIGHTS IN TORT LAW

Most modern tort scholars do not view tort law as seeking to remedy the violation of *rights*. Indeed, the predominant view of torts is largely amoral insofar as its primary focus is on understanding tort law as a "scheme" in which judges set rules based on policy of when one person must pay for the losses he causes another, thus giving torts an instrumental function of allocating the cost of accidents.[167]

The roots of this amoral version of torts arose out of a line of theoretical discourse among scholars. Notably, as John Goldberg has noted, Oliver Wendell Homes posited through the vehicle of the famous archetypical "Bad Man" that the hypothetical client should not care what he *ought* to do, from a moral duty perspective, but rather what he *should* do from a legal duty perspective.[168] The Bad Man's only demand of his lawyer would be a reliable prediction of what type of conduct would invite court-ordered sanctions.[169] Thus, the common law of torts only served a regulatory function to achieve the public goals of deterring harmful conduct and compensating citizens for invasions of their security through judge-declared directives of proper conduct.[170] The Holmesian skepticism inspired the Legal Realism movement, which questioned the supposedly inherent conservatism of judicial talk of

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L. REV. 755 (2006); Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT'L L. & POL'Y 331, 388 (2006).

167 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 98 (Amer. Bar Assoc. 2009) (1881) (stating that the purpose of torts is "to secure a man against certain forms of harm").

168 *Id.*; *see* Oliver Wendell Holmes, Jr., 6 AM. L. REV. 723, 724 (1872), *reprinted in* FREDERIC ROGERS KELLOGG, THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY 92 (1984) ("The only question for the lawyer is, how will the judges act?").

169 HOLMES, *supra* note 167, at 75 ("[A]ny legal standard must, in theory be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was."); KELLOGG, *supra* note 168, at 92 ("The only question for the lawyer is, how will the judges act?").

170 *See* HOLMES, *supra* note 167, at 98 ("[T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbours, not because they are wrong, but because they are harms . . . . [Fault-based liability] is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury."). *See generally* THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. (Steven J. Burton ed., 2000).

"rights" and "duties,"[171] which were viewed as pretexts for "regressive formalism."[172] Rejecting formalism, legal theorists considered the "traditional account of tort practically, politically, and intellectually untenable."[173] They sought new ways to explain and defend tort law by focusing instead on positivism, empiricism, and utilitarianism.[174] Holmes displaced the concept of "wrong" with that of "harm" and argued that the job of addressing the harms of torts was better left to a "man of statistics and the master of economics."[175]

The purging of the perceived morality of tort law led to the evisceration of most notions of rights in tort debates.[176] This Part counters the modern view of torts. Viewing tort law as a means for vindicating human rights resurrects the spirit of tort law as it was originally conceived. Digging through the layers of time, it is possible to excavate a genealogy of rights in the development of tort law. Because this excavation is a critical step in understanding tort law as a means of enforcing human rights, the next Part offers a brief overview of the origin of tort law, and the jurisprudence it generated, in order to demonstrate that a rights perspective in tort law is not a novel, normative account of torts, but instead an interpretive analysis that merely reflects its heritage. Indeed, as the following Parts demonstrate, the concept of rights is deeply embedded in tort law.[177]

A. *Primary Rights in Early American History*

American colonists planted the seeds of today's system of tort law in the United States using the traditions they brought with them from English common law.[178] Most standard law textbooks offer first-year law

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171 John C.P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 325 (2011) [hereinafter *Tort in Three Dimensions*] (offering as an example the pretext of legal rules like contractual "privity" as a requirement to protect companies from paying for any harm caused by their careless product).

172 *Id.*

173 John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 564 (2003) [hereinafter *Twentieth-Century Tort Theory*].

174 *Id.*

175 Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).

176 As Benjamin C. Zipursky explains, "the intellectual history of the dominant trend of American tort theory grows out of Holmes's brash and unapologetic skepticism about concepts of duty and right." Benjamin C. Zipursky, *Rawls in Tort Theory: Themes and Counter-Themes*, 72 FORDHAM L. REV. 1923, 1927 (2004).

177 I borrow the idea of rights being "embedded" in tort law from Benjamin Zipursky, who likewise viewed the "substantive standing" principle which rests on the idea of rights as "far from eccentric [but in fact] the view that has always been embedded in tort law itself." *See* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 5 (1998) [hereinafter *Rights, Wrongs, and Recourse in the Law of Torts*].

178 *See* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 14 (abbreviated ed. 1995); *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 36–37 (2004).

students a primer on the medieval system of "writs" that provided redress for individuals injured by another. Until the sixteenth century, these "legal wrongs" constituted "breaches of the King's peace" and gave rise to an action in *trespass vi et armis* or "trespass-on-the-case" in which an individual could seek redress for the harms caused by another individual.[179] This writ system carved out rules to inform how each individual should refrain from interfering with the protected interests of other individuals. For example, a writ of trespass for battery would arise through inappropriate touching. Utterance of defamatory statements might support an action on the case.

Importantly the catalogue of conduct prohibited under this system was understood as protecting rights.[180] Seventeenth-century jurist Edward Coke interpreted the Magna Carta as requiring the monarch to protect each Englishman's "best birth-right" which included "his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong."[181] The English common law system sought to protect the life, liberty, and property of citizens by assuring a legal remedy against another private, non-State actor.[182] The rights aspect of tort law was largely influenced by the writings of English jurist William Blackstone, whose *Commentaries on the Laws of England* provided the basic text for early American legal education and practice.[183] Blackstone viewed tort law as an essential piece of the liberal State's system of law since it stood for the idea that governments owe citizens protection which requires "laws and institutions for declaring and vindicating basic rights, including the right to a law for the redress of wrongs."[184] This basic precept even appears in many of the original constitutions of the

179 *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 571 (3d ed. 1990) ("The civil law is designed to provide private redress for wrongs to individuals."); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law,* 76 B.U. L. REV. 59, 72–78 (1996).

180 The term "tort" derives from its medieval meaning of "twisted." D. J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 97 (1999) (noting that medieval usage tended to equate tort, trespass, and wrong).

181 EDWARD COKE, THE SELECTED WRITINGS OF SIR EDWARD COKE 873 (Steve Sheppard ed., 2003) (1600).

182 *But see* BAKER, *supra* note 179, at 478–90 (observing that nuisance law developed out of recognition of proprietary rights and entitlement to enjoy property appurtenant to such rights).

183 *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 16 (1975) ("It is impossible to overemphasize the impact of Blackstone on legal education in America."); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 748–49 (1976) (noting that Jefferson came to associate Blackstone with forces of reaction).

184 John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 560 (2005) (citing to examples of state constitutions such as the 1776 Maryland Declaration of Rights which reads "every freeman, for every injury done him in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right freely without sale, fully without denial, and speedily without delay, according to the law of the land").

states, which offer explicit guarantees of private action redress.[185]

Importantly, Blackstone defines a "wrong" as "an infringement or privation of the civil rights, which belong to individuals . . . ."[186] Blackstone understood common law to be grounded on "absolute" rights to liberty, security, and property, thus resonating with natural law ideas of rights.[187] Upon the violation of one of these rights, the remedial part of the law provided for the redress of those wrongs, as through the filing of a writ which offered a state-sanctioned legal remedy.[188]

This interpretation of tort law created an important distinction in the stages of determining a tort claim. Judges first determined whether the plaintiff proved a violation of an individual's right of person or property. If proven, this private wrong provided the grounds to trigger the claim for a remedy to make the defendant pay for the harm caused by the injury.[189] Understood in more modern and technical terms, Blackstone's description of tort law can be understood as consisting of a "primary right" which refers to a person's entitlement to be free from interference with rights associated with their life, liberty, and property; and "secondary rights" which refer to a person's entitlement to a civil remedy and possible compensation in the event of proving the violation of a primary right.[190]

Certainly, Blackstone recognized the two-step process of adjudicating legal disputes in early American case law, and this interpretation influenced judges as seen in early case law up to and into

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185 COVER, *supra* note 183, at 16 ("It is impossible to overemphasize the impact of Blackstone on legal education in America."); Nolan, *supra* note 183, at 748–49 (noting that Jefferson came to associate Blackstone with forces of reaction).

186 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. IV, at 5 (Clarendon Press 1st ed. 1966). Blackstone also refers to these actions as "private wrongs," "delicts," and "wrongful invasions." *Id.*

187 *Id.* at 125, 129, 134, 138. ("The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation."). *Id.* at 129. For discussion, see Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1242–44 (2001).

188 BLACKSTONE, *supra* note 186, at 54–56, 115–223 (providing examples of the various actions for wrongs to person and property).

189 BLACKSTONE, *supra* note 186, at 115–19 (treating causes of action for infringing the rights of persons or property as articulating private wrongs for which the law provides a remedy to victims).

190 Sometimes the secondary right is referred to as a "remedial right." *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 122 (1994). The distinction is explained as:

> Every general directive arrangement contemplates something which it expects or hopes to happen when the arrangement works successfully. This is the primary purpose of the arrangement, and the provisions which describe what this purpose is are the *primary provisions*. Every arrangement, however, must contemplate also the possibility that on occasion its directions will not be complied with. . . . The provisions of an arrangement which tell what happens in the event of noncompliance or other deviation may be called the *remedial provisions*.

Id. at 135.

the twentieth century. The next Section will explore how the two-step rights formula shaped early tort law jurisprudence.

B. *Primary Rights in Early Tort Case Law*

An examination of early case law reveals a clear recognition of not only the existence of primary rights but also that the first step in tort law adjudication was to distinguish the plaintiff's primary right that the defendant allegedly violated. If it were determined that a primary right had been violated, the plaintiff's secondary right to redress was activated. The secondary right represents a power to bring a claim and is procedural and dependent upon the purely substantive idea of a primary right.[191] Thus, this jurisprudence followed what I call the "two-step tort formula" which requires first finding a violation of a primary right which only then gives rise to the right of the secondary right of a remedy. Significantly, the two-step ordering resembles the formula used in human rights litigation before international monitoring bodies, such as the Inter-American Court of Human Rights.[192] Indeed, a human rights approach would instruct that a claim only activates the secondary right analysis if a plaintiff could *first* make a reasonable case that his primary right had been violated.

This idea can be traced back to Judge Story, who while a circuit judge articulated a view of tort law as a system of protecting rights by retroactively enforcing rights through civil actions. For example, in *Webb v. Portland Manufacturing Co.*,[193] which dealt with the diversion or obstruction of water in a stream, he noted:

> As to the first question, I can very well understand that no action lies in a case where there is *damnum absque injuria*, that is, where there is a damage done without *any wrong*, or *violation of any right of the plaintiff* . . . . Under such circumstances, unless the party injured can protect his right from such violation by an action, it is plain, that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances *no such inconsistency* . . . . The law tolerates no farther inquiry than whether there has been the *violation of a right*. If so, the party injured is entitled to maintain his action for nominal damages, *in vindication of his right*, if no other damages are fit and proper to remunerate

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191 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 44 (1913) ("As indicated in the preliminary scheme of jural relations, a legal power (as distinguished, of course, from a mental or physical power) is the opposite of legal disability, and the correlative of legal liability.").

192 Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22 NETH. Q. HUM. RTS. 347 (2004).

193 Webb v. Portland Mfg. Co., 29 F. Cas. 506 (Me. Cir. Ct.1838) (involving a bill in equity for an injunction by the plaintiff to prevent the defendant from diverting a watercourse from the plaintiff's mill, and for further relief).

him.[194]

Importantly, like Blackstone, Justice Story's interpretation of a *wrong* is that it constitutes a violation of a plaintiff's right, with the protection and enforcement of these rights being the central concern of the civil justice system. His reasoning rests upon English precedent.[195] Specifically, he quotes Lord Holt as saying:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[196]

Justice Story considers this principle to be "so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a juridical view, incontrovertible."[197]

The vibrancy of this approach in early tort law can be seen by state supreme courts citing to Justice Story's elocutions in *Webb*.[198] As declared by the Georgia Supreme Court in 1883:

> [W]herever there is a wrong, there is a remedy to redress it; that every injury imports a damage in the nature of it; and if no other damage is established, the party injured is entitled to a verdict for nominal damages . . . . *The law tolerates no further inquiry than whether there has been the violation of a right*. If so, the party injured is entitled to maintain his action for nominal damages in vindication of his right.[199]

Again, the court implies that the wrong in tort law suits relates back to the violation of a primary right. Therefore, the plaintiff has the initial burden of first proving which primary right was violated as part

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194 *Id.* at 507 (emphasis added).

195 *Id.* at 508.

196 *Id.*

197 *Id.*

198 The Supreme Court of Georgia in a suit between two riparian owners refers to Justice Story and writes:

> Justice Story discusses the question of *injury without damage*, in so clear and satisfactory a manner, that we feel entirely persuaded that all who love and reverence the principles of the common law, will be gratified to see them vindicated and maintained by one whose profound learning and wisdom in his profession has commanded the universal approbation of his countrymen.

Hendrick v. Cook, 4 Ga. 241, 263–64 (Ga. 1848). *Hendrick* was cited by the Supreme Court, New York County, New York in the early fraud case, *De Witt v. McDonald*, 58 How. Pr. 411 (N.Y. Sup. Ct. 1880) and by the Supreme Court of Indiana in a case dealing with the disturbance of an easement in *Ross v. Thompson*, 78 Ind. 90, 97 (1881). More recent cases in Georgia continue to cite to this principle. *See* Land v. Boone, 594 S.E.2d 741, 744 (Ga. Ct. App. 2004); Singh v. Lyday, 889 N.E.2d 342, 361 (Ind. Ct. App. 2008).

199 Nat'l Exch. Bank of Augusta v. Sibley, 71 Ga. 726, 734 (1883).

of pleading a general theory of liability. For example, in 1845 the Supreme Court of New York explained:

> Damage, in the sense of the law, may arise out of injuries to the person or to the property of the party; *as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect*. Thus, for injuries to his health, liberty and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. *The former are violations of the absolute rights of the person*, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, *but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie*.[200]

Different actions in tort may arise out of the general categories of primary rights.[201] For example within the primary rights theory of tort law, the liability theory of the tort "false imprisonment" arises out of the general primary right of liberty, or as viewed by one court "freedom of locomotion."[202]

Interestingly, these early courts established the basic elements of proving liability without necessarily explaining from where the plaintiff's "absolute rights" arise. Some courts pointed towards a type of natural law or social contract theory, as seen in the opinion written by a Pennsylvania judge who wrote:

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200 Hutchins v. Hutchins, 7 Hill 104, 108–09 (N.Y. Sup. Ct. 1845) (emphasis added) (discussing a case of fraud in a real estate).

201 In discussing case law on torts involving deceit and fraud, the Supreme Court of Georgia explained

> All wrongs of the character dealt with in these decisions involve an infringement of one of the primary rights of man, namely, that of "security of person." This class of wrongs notwithstanding the fact that the person upon whom they are inflicted may not suffer any actual injury necessarily violate the right of the injured party to protection in the security of his person; and, as was pointed out in the cases above cited, are properly classed as "injuries to the person" . . . it is said: "Torts to the person . . . include (1) bodily injuries, whether direct, as assault and battery, or consequential, resulting from negligence or otherwise; (2) injuries to the health or comfort of an individual; (3) torts which affect personal liberty."

Crawford v. Crawford, 67 S.E 673, 675–76 (Ga. 1910).

202 Riley v. Stone, 94 S.E. 434, 440 (N.C. 1917)

> False imprisonment is the unlawful and total restraint of the liberty of the person. The imprisonment is false in the sense of being unlawful . . . The right violated by this tort is "freedom of locomotion." It belongs historically to the class of rights known as simple or primary rights (inaccurately called absolute rights), as distinguished from secondary rights, or rights not to be harmed. It is a right in rem; it is available against the community at large. The theory of the law is that one interferes with the freedom of locomotion of another at his peril . . . Unlawful detention by actual physical force is unquestionably sufficient to make out a cause of action.

Id. (citation omitted).

> For myself I can see no reason why our duty towards others ought not to place limits upon our rights of property similar to those which it has put upon our natural rights of person. "Sic utere tuo non alienum laedas" expresses a moral obligation that grows out of the mere fact of membership of civil society. In many instances it has been applied as a measure of civil obligation, enforceable at law among those whose interests are conflicting.[203]

Indeed, many courts seemed to assume a natural rights origin of these rights, or alternatively relied simply on judge-made precedent that already recognized these so-called absolute rights.[204] Certainly property rights were one of the most clearly identifiable rights based on a type of natural justice.[205] Yet, the courts often recognized a given hierarchy in which bodily security and personal liberty rise above all other rights.[206]

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[203] Commonwealth *ex rel.* Attorney Gen. v. Russell, 33 A. 709 (Pa. 1896) (involving a town and water company that filed suit to enjoin an oil drilling company from polluting the river from where the town drew its water).

[204] In *Kosciolek v. Portland Ry., Light & Power Co.*, the Supreme Court of Oregon recognized that

> The natural rights of a person at common law are the right of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property . . . Natural rights are those which grow out of the nature of man and depend upon personality as distinguished from such as are created by law and depend upon civilized society, or they are those which are plainly assured by natural law.

160 P. 132, 133–34 (Or. 1916).

[205] *See* Kamm v. Flink, 175 A. 62 (N.J. 1934).

> The case pleaded falls naturally into the classification of an actionable infringement of a property right, i.e., the right to pursue one's business, calling, or occupation free from undue interference or molestation. The wrongful act charged was the malicious interference with appellant's business. . . . Natural justice dictates that a remedy shall be provided for such unjust interposition in one's business. . . . The right to pursue a lawful business is a property right that the law protects against unjustifiable interference. Any act or omission which unjustifiably disturbs or impedes the enjoyment of such right constitutes its wrongful invasion, and is properly treated as tortious. . . . This right to pursue one's business without such undue interference, and the correlative duty, are fundamentals of a well-ordered society. They inhere basically in the relations of those bound by the social compact. They have their roots in natural justice.

Id. at 66–67.

[206] For example, in 1861, the Supreme Court of Errors of Connecticut expressed this view in a wrongful death suit in which the issue was whether the executor of the decedent's estate had sufficiently set out an alleged injury to constitute a cause of action based on the fact that a negligent railroad collided with and killed the decedent. The Court proclaimed:

> The intestate's right of personal security has been wrongfully invaded, and that is distinctly alleged as the cause of action. In both cases the law attaches an injury to such a wrongful act. But aside from this inference of law, it is alleged in the declaration that the blow was so violent as to produce the death of the intestate. And is this no injury? If to take one's liberty or one's property without justification is an injury, how much more is the taking of human life? *The elementary books, in speaking of absolute rights, classify them thus:–1st. The right of personal security; 2d. The right of personal liberty; and 3d. The right to acquire and enjoy property*. If these rights are valued in this order of preference, then every man of common

Significantly, the approach to understanding rights in early tort law mirrors the philosophical discussions of the origins of human rights law.[207]

Despite any clear consensus on the origins of rights in tort law, they nevertheless gained a sanctimonious feel, with a violation giving rise to a presumption of an actionable injury.[208] Judge Cardozo's opinion in *Palsgraf v. Long Island Railroad Co.*, one of American tort law's most famous cases, reflects this principle. Significantly, academic commentators often overlook the primary rights account in the *Palsgraf* case. Yet, interpreting *Palsgraf* in light of earlier jurisprudence helps to highlight the function of primary rights in tort law as a system of rights protection. Judge Cardozo made more than just casual reference to the general term "primary right" and instead employed the very technical understanding that the two-step torts equation begins with a focus on primary rights.[209] If a violation of primary rights is found, the court then may proceed to the other technical elements of the tort equation (such as duty, proximate cause, and damages) in order to determine whether and to what extent the defendant is liable for damages.[210]

> understanding would at once pronounce it absurd to hold that it is no injury to a person to take his life, while it is to strike him a light blow. Such a distinction is not worth talking about, and has no foundation or existence in the law, as it has none in common sense.

Murphy v. New York & New Haven R.R. Co., 30 Conn. 184, 187–88 (Conn. 1861) (emphasis added). In a 1910 case, the Supreme Court of Georgia also recognized bodily security as a supreme right:

> All wrongs of the character dealt with in these decisions involve an infringement of one of the primary rights of man, namely, that of "security of person." This class of wrongs notwithstanding the fact that the person upon whom they are inflicted may not suffer any actual injury necessarily violate the right of the injured party to protection in the security of his person; and, as was pointed out in the cases above cited, are properly classed as "injuries to the person." Mr. Hilliard, in his work on Torts, classifies separately "torts to persons" and "torts to property," treating among the former wrongs of the same and kindred nature with those dealt with in the decisions . . ., while among the latter he includes "fraud" as a wrong to property.

Crawford v. Crawford, 67 S.E 673, 676 (1910); *see also Kosciolek*, 160 P. at 134 ("The natural rights of a person at common law are the right of personal security in the legal enjoyment of life, limb, body, health, and reputation, the right of personal liberty, and the right of private property.").

207 COSTAS DOUZINAS & CONOR GEARTY, THE MEANINGS OF RIGHTS: THE PHILOSOPHY AND SOCIAL THEORY OF HUMAN RIGHTS (2014).

208 Webb v. Portland Mfg. Co., 29 F. Cas. 506, 509 (Me. Cir. Ct. 1838) ("[W]henever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages.").

209 Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928) ("Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.").

210 *Id.* at 101.

> The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the

In Cardozo's interpretation of tort law, a plaintiff's secondary right to a remedy refers to both: (1) the access to a civil procedure to determine the viability of substantive claims and causes of action (such as negligence or an intentional tort, among others, which derive from the historical claim of trespass); and (2) damages (reparations) for any resulting consequences in the sense of any material or emotional costs associated with the violation of the primary right. Cardozo traces this view that tort law is about protecting plaintiffs' rights to bodily security to "the most part of ancient forms of liability, where conduct is held to be at the peril of the actor."[211]

Notably, Cardozo was not offering a novel formula but merely applying the legal approach of his time. Indeed, it would seem that while Judge Andrews disagreed with other aspects of Cardozo's opinion, he agreed with the basic precept of tort law being designed to protect primary rights, which when violated give rise to the secondary right to a remedy.[212] Both judges consistently employ the notion of *protecting* rights in explaining the theory of negligence and tort law generally.[213] The sentiment throughout both Cardozo's majority and Andrews's dissenting opinions seems to convey that tort law was not merely a mechanism for allocating the costs of risk and compensating for incidental damage from human interactions but rather carried the more lofty goal of protecting individual rights. In fact, Andrews's view of the protective purpose of tort law leads him to declare his more expansive view of duty as being owed to the world.[214]

Significantly, *Palsgraf*'s view that the law of torts is a system of protecting rights leads to a nuanced interpretation of some of the more technical concepts that arise in the tort equation. First, tort law is relational in that a claim for damages can only occur if a tortfeasor's

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> consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort. We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary.

211 *Id.* at 99.

212 *Id.* at 103 (Andrews, J., dissenting) ("The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence.").

213 For example, in *Palsgraf*, Justice Cardozo writes "[i]f the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as *to entitle him to be protected against the doing of it* though the harm was unintended." *Id.* at 101 (majority opinion) (emphasis added). Andrews' view of a system of protecting rights is reflected by his basic definition of negligence. Recall the quote "[n]egligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails *to protect oneself from the dangers* resulting from such acts." *Id.* at 102 (Andrews, J., dissenting) (emphasis added).

214 *Id.* ("Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone.").

actions cause injury to a plaintiff.[215] Yet, even if a claim for damages is relational and injury specific, a primary right is not. Personal rights recognized in tort law, such as bodily security, remain constant. They do not depend on an act of a tortfeasor to suddenly exist. What the tortfeasor's action does, if it is deemed to have interfered with a constant primary right, is to trigger the plaintiff's right to a remedy to vindicate the primary right. Linking this point to the discussion above on the duties of non-State actors in human rights law, discussed in Part I, this early interpretation of tort law also supports the notion that a right can be violated by an action regardless if done by a State or non-State actor.

Second, early decisions help to highlight the vindicatory aspect of the civil justice system. If tort law is about protecting rights, then civil remedies can be conceived as the means of enforcing them. This protective stance supports the indirect horizontal effect in which the State is obligated under international law to *ensure* the protection of those within its jurisdiction and offer an adequate and effective remedy in the event that such protection fails, as discussed in Part II.

Third, *Palsgraf* offers a very specific definition of the concept of *wrong*, one that mirror's Blackstone's definition. In fact, Cardozo recognizes the "shifting meaning" and instability of the terms "wrong" and "wrongful" and clarifies that "[w]hat the plaintiff must show is a 'wrong' to herself, i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one."[216] In this way, Cardozo ascribes a very technical definition to the legal concept of wrong as not reflecting common, every day notions of bad behavior, which ultimately entails a moral judgment, but rather, a very specific moment in which an act transgresses "bounds of her immunity"—an immunity held by the plaintiff which can be understood as the right to be free from interference.[217] Importantly, Cardozo suggests that in a legal sense the concept of wrong is synonymous with the concept of a rights violation.[218] The content of the wrong necessarily flows from the content of the right: to know what is *wrong conduct* requires knowing what right defines its wrongness in the legal sense.[219] We cannot judge as a legal wrong the freestanding nature of a defendant's conduct (no matter how much we may disapprove of this behavior) if it does not

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215 *Id.* at 101 (majority opinion) ("Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right . . . .").

216 *Id.* at 100.

217 *Id.* at 99.

218 *Id.* at 101 ("Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports [read to mean or to signify] the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security." (internal quotation marks omitted)).

219 *Id.*

infringe upon a primary right. As Cardozo explains, with the song of tort, the "[a]ffront to personality is still the keynote of the wrong."[220]

Again, the universality of this interpretation of the meaning of *wrong* comes through Andrews's shared view of the legal equation focusing squarely on the hard-cold fact of an "act" which affects the rights of another.[221] The moment of engagement between a defendant and plaintiff creates the legal relationship that makes tort law suddenly relevant. This moment of realizing a specific act by the defendant against the plaintiff's person or property causes a "legal injury" which in fact can be understood as an injury of a primary right.[222]

Professor John Goldberg refers to the Blackstonian approach to tort law at the time of the founding of the United States as the "traditional account" of tort law.[223] He explains that in these earlier times American jurists "operated with a certain conception of 'tort'" as the civil side of common law by providing redress for "injurious wrongs committed by a citizen—or, in certain instances, a State actor—against another."[224] Goldberg conjectures:

> if one had asked a thoughtful lawyer from the early Nineteenth Century what purpose tort law served, he probably would have answered that it was one part of a system of common law that, overall, aimed to specify and protect individuals' rights to bodily integrity, freedom of movement, reputation, and property ownership.[225]

Despite the prevalence of primary rights in early tort law, this approach slowly declined in the twentieth century, with modern cases mostly eclipsing the important role of primary rights.[226] Indeed, history buried the foundational core of tort law as a victim-focused system of rights protection.

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220 *Id.*

221 *Id.* at 102 (Andrews, J., dissenting) ("Negligence may be defined roughly as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect oneself from the dangers resulting from such acts.").

222 "Injury" is defined generally as "[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice," and "[h]arm or damage." *Injury*, BLACK'S LAW DICTIONARY (10th ed. 2014). This interpretation comes from Andrews's own: "The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence." *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

223 *Twentieth-Century Tort Theory*, *supra* note 173, at 516–18.

224 *Id.* at 516.

225 *Id.* at 517–18.

226 The primary rights focus in case law did not end with *Palsgraf*, even if it did wane over the decades. *See, e.g.*, St. Matthews Bank & Trust Co. v. Mitchell, 71 S.W.2d 2, 2 (Ky. 1934) ("In order to constitute a tort, not only must a right and duty exist, but there must be conduct constituting a breach of duty and a violation of right. There must be a wrong done; the absence of legal injury is fatal to the existence of a tort."). It is still possible to find cases that embody Cardozo's interpretation of primary rights in modern tort doctrine, even if it is not the dominant approach.

IV. RE-INSERTING RIGHTS IN THE TORT EQUATION

In response to the modern trend that eclipses rights in the tort equation, I propose that we resurrect the spirit of early accounts of tort law as a mechanism to protect and vindicate rights. In a sense, adopting this position requires a rights renaissance in tort adjudication, a movement that is already underway. In fact, in presenting my model, I build on existing theories of *corrective justice* and *civil recourse* which arose in large part as a response to the instrumentalization of tort law.[227]

A. *Rights Revival in Tort Law*

In proposing that tort law put more emphasis on a primary rights analysis to enhance human rights protection, I am not presenting necessarily a controversial or novel argument. Rather, I expand on a growing body of scholarship that already recognizes the relevance of primary rights. Indeed, two leading scholars in this movement, Professors John Goldberg and Benjamin Zipursky, assert that "[t]hinking about torts in terms of rights—in particular, thinking about the several different respects in which rights figure in the law of torts—will provide a more accurate account of tort law's structure. It will also enable us to attain a greater appreciation of tort law's normative underpinnings."[228]

My proposal is also inspired by corrective justice scholarship which aims to redirect the conversation about torts from a neutral, instrumental understanding of the law towards a justice-based understanding.[229] A leading proponent of this theory, Ernest Weinrib, argues that tort law balances conflicting needs and interests by turning them into rights and duties.[230] His premise is that all individuals have a correlative right to be free from certain injuries by others and thus also

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227 As Professor Mark A. Geistfeld observed recently, "[i]n response to the efficiency interpretation of tort law, a number of scholars have argued that tort law is best understood as a form of corrective justice. Under the principle of corrective justice, tort liability must be justified solely in terms of individual rights and their correlative duties." Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 180 (2012).

228 John C.P. Goldberg & Benjamin C. Zipursky, *Rights and Responsibilities in the Law of Torts*, *in* RIGHTS AND PRIVATE LAW 251 (Donal Nolan & Andrew Robertson, eds., 2012).

229 *Rights, Wrongs, and Recourse in the Law of Torts*, *supra* note 177, at 4–5. This movement was influenced in part by a parallel movement by constitutional law scholars to debunk "extreme forms of positivism and empiricism, the failure of legal realism to deliver a positive program" by offering moral and political theories to "rehabilitate traditional notions of liberty, justice, rights and duties by establishing that they are applicable in the modern world, do not necessarily align with laissez-faire, and need not be conceived of as mere empty labels behind which judges hide." *Twentieth-Century Tort Theory*, *supra* note 173, at 564.

230 ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56–83 (1995).

have a duty not to inflict such injuries.[231] Thus, a violation of the first order rights gives rise to the secondary right (and duty) to repair.[232] Overall, the aim of corrective justice is restorative, to make the plaintiff whole, return the *status quo ante*, and restore equilibrium.

Similarly, the theory of civil recourse, developed by Professors Goldberg and Zipursky, also focuses on the idea of repairing the violation of primary rights. Professors Zipursky and Goldberg argue that tortious wrongdoing results in a *private* injury and thus gives rise to what they term as "civil recourse," a term which refers to a private right of action to seek recourse "through official channels against the wrongdoer."[233] The civil recourse theory rests upon the principle that tort law aims to protect primary rights by way of providing an essential remedy to respond to violations of those rights. Zipursky wrote in his path-breaking article *Rights, Wrongs, and Recourse in the Law of Torts* that the "real question is why it *matters* whether there is a primary rights violation, why it matters whether plaintiff herself was wronged."[234] Zipursky sets out to answer this inquiry and explains:

> Tort law articulates rules telling citizens how they may and may not treat one another and how they may expect to be treated by others. In deciding and announcing these rules, *appellate courts are imposing duties on individuals not to treat others in certain ways and creating rights in individuals not to be treated in certain ways* . . . Rights of action should be understood against the backdrop of these rights, wrongs, and duties.[235]

Zipursky's explanation reflects the same principles as human rights law when he argues that the State must protect basic primary rights and, in the event that these rights are violated, provide a remedy to vindicate these rights, as discussed in Part II. Judges, according to Zipursky, are, therefore, not *per se* "creating" new rights but rather enforcing human rights that exist independently and predate this litigation.

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231 *Id.*

232 *Id.* at 135 ("When the defendant thus breaches a duty correlative to the plaintiffs right, the plaintiff is entitled to reparation. The remedy reflects the fact that even after the commission of the tort the defendant remains subject to the duty with respect to the plaintiffs right.").

233 John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918 [hereinafter *Torts as Wrongs*]; *see also Rights, Wrongs, and Recourse in the Law of Torts*, *supra* note 177, at 5 (What they term writing that the "principle of civil recourse" refers to an individual's entitlement "to an avenue of civil recourse—or redress—against one who has committed a legal wrong against her.").

234 *Rights, Wrongs, and Recourse in the Law of Torts*, *supra* note 177, at 70.

235 *Id.* at 5 (emphasis added).

B. *Prioritizing Primary Rights over Secondary Rights*

I differ, however, from this scholarship, insofar that I claim that it is essential to place greater emphasis on the existence of primary rights and their violations in assessing tort claims. As mentioned, both corrective justice and civil recourse refer to the two-step approach to tort adjudication and take as implicit the concept of primary rights. However, a survey of the scholarship addressing the theme of rights reveals that the topic of primary rights draws far less attention than that of secondary rights.[236] For example, although Zipursky clearly posits primary rights as the foundation for the *civil recourse* theory, much of the discussion focuses on the concept of "substantive standing" which gives a plaintiff a right to bring a claim—the secondary right.[237] The relation-dependent nature of torts tends to subsume primary rights into the general category of secondary rights, making it lose its own identity.

Keating, one of the few scholars to have expressed similar concerns as mine with regard to role of primary rights in torts, argues that the unbalanced "remedial account" of tort law puts the cart before the horse and "makes tort an institution whose *raison d'etre* is repair."[238] Professor

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[236] Notably, Zipursky's more recent co-authored piece, *Torts as Wrongs*, only mentions primary rights once while discussing the right of remedial action. *See Torts as Wrongs*, *supra* note 233, at 946 ("It is not hard to see that relational and injury-inclusive wrongs, so understood, simultaneously confer both primary duties and primary rights."). For example, offering a technical definition of wrong, Goldberg and Zipursky tend to skip the primary right consideration that would give the revised terminology its full meaning: "[t]ort, we explain, instantiates a distinctively legal conception of wrongdoing and responsibility as opposed to a purely moral one. And it does so for a very particular purpose, namely, to empower victims of certain legal wrongs to respond to their wrongdoers through legal action." John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1127 (2006) [hereinafter *Tort Law and Moral Luck*].

[237] *Rights, Wrongs, and Recourse in the Law of Torts*, *supra* note 177, at 9–10. He quotes Cardozo's line that "[w]hat is crucial is that a plaintiff has no right of action unless she can show 'a wrong to herself; i.e., a violation of her own right' . . . . [T]he criterion for standing offered by this rule is in this sense substantive." *Id.* For example, Zipursky analyzes Cardozo's *Palsgraf* opinion to dissect the dyadic nature of the torts equation but then focuses primarily on the second half of the equation. *Id.* at 9. Zipurksy notes the confusing use of the terms right and wrong and concludes that they are meant as synonymous. He then lays out the dyadic formula but in the negative form by incorporating Cardozo's "reasonably foreseeable" limitation: "(1) If the plaintiff's injury was not reasonably foreseeable, the defendant's act was not negligent relative to her; and (2) a plaintiff has a right of action in negligence only if the defendant's conduct was negligent relative to her." *Id.*

> The criterion offered for standing, according to the analysis in *Palsgraf,* is that the plaintiff herself must have been legally wronged (her right must have been violated) under the substantive legal norm in question—in this case, negligence. Because the criterion for standing offered by this rule is in this sense substantive, I shall refer to it as the "substantive standing rule."

Id. at 10.

[238] Gregory C. Keating, *Is Tort a Remedial Institution?* 2 (Univ. S. Cal Law Sch. Law and Econ. Working Paper Series, Working Paper No. 117, 2010), http://law.bepress.com/cgi/viewcontent. cgi?article=1169&context=usclwps-lewps. Keating writes mostly about corrective

Keating recently observed that "even though remedies are partially constitutive of rights—remedies are properly the servants of rights."[239] Keating highlights this point writing "[t]orts are wrongs—violations of rights important enough to be made coercively enforceable by law."[240] He proposes that a more coherent account of tort law puts "primary rights and responsibilities at the center of tort law" and thus has the virtue of putting the horse back in front of the cart.[241] In his reformulation, he proposes that "[t]he first task of tort is the articulation of primary obligations."[242] Thus he would expect "the first question of tort law is just what it is that we owe to others in the way of respect for their persons, their property, and a diverse set of their intangible interests."[243] Alternatively, I propose that even before identifying the primary obligations and responsibilities of defendants and the duties they owe, we must first identify the primary rights of the victim-plaintiffs.

C. *Prioritizing Primary Rights over Duties*

Proposing more focus on primary rights responds to the observation that the merging of the primary and secondary rights can lead to an unbalanced focus on the duties of defendants. Both in practice and scholarship, great emphasis is placed on first defining the duty of defendants and thus the wrongfulness of conduct. Certainly, in contemporary tort law, the legal concept of duty is an organizing principle.[244] Any cause of action in tort law, whether it be intentional torts, negligence, or strict liability, requires a plaintiff to demonstrate that the defendant owed a duty to the injured party.[245]

One consequence of focusing on the duty analysis suggests that it is the breach of a duty that creates individual rights instead of the other way around.[246] Certainly, a defendant's wrongful conduct gives rise to a

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just theorist but implies his critique applies to Goldberg and Zipursky. *Id.* at 2 n.3.

239 *Id.* at 7.

240 *Id.* at 24.

241 *Id.* at 41, 46.

242 *Id.* at 29–30 ("The structure of primary obligations therefore has a better claim to be the core of tort than the structure of remedial responsibilities does. And that structure is quite different from the . . . bilateral structure of tort lawsuits.").

243 *Id.* at 29 (internal quotation marks omitted).

244 JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 39 (3d ed. 2012) ("Tort law . . . is all about the articulation of the responsibilities that persons (and entities) owe to others . . . .").

245 *Id.* at 50–51.

246 *Torts as Wrongs*, *supra* note 233 at 973 ("By recognizing relational duties of noninjury, tort law identifies and enjoins actions that constitute mistreatments of others. In turn, it identifies and confers on each of us a set of rights not to be mistreated."). Zipursky's substantive standing principle assumes that Appellate courts *first declare duties* of defendants to conduct themselves in certain ways, which then by default *creates the rights* of victim-plaintiff's

secondary right to redress; but it does not create the primary right which preexists the defendant's conduct. On the contrary, the existence, scope, and content of a victim-plaintiff's primary rights help determine whether the conduct of a defendant is in fact a legal *wrong*. If a plaintiff has the right to bodily integrity, then an interference on the part of a defendant would be a *wrong*. Person B has a duty to refrain from harming Person A because Person A has a right to physical integrity. A breach is a violation of the right which is the eventuality that a duty seeks to prohibit. Again, this may seem like a mere technicality in describing the same tortious event, but the choice of characterization and emphasis matters for importing the horizontal effect and the framing of human rights violations.

I anticipate that some will argue that duties and rights are relational with a "wrong" and thus correlative, interchangeable terms. This principle reflects the relational aspect of tort law.[247] This reading is in synch with Cardozo's instruction that it is not enough to have "negligence in the air" but rather to focus on realized injuries against foreseeable plaintiffs.[248] This interpretation invokes Wesley Newcomb Hohfeld's account that a duty and a right are correlative terms, so that when a "right is invaded, a duty is violated."[249] In this way, the two terms reflect "the same state of facts viewed from opposite sides."[250] He recognizes "a duty or a legal obligation is that which one ought or ought not to do" but this conduct dictate can only be understood in relation to the right.[251]

Even if rights and duties are correlative, the modern emphasis on wrongs being equated with a defendant's breach of duty effectively eclipses the notion of primary rights entirely from tort law. Indeed, today, there is never the use of the terminology of "violation of a right" and "violating a right." Instead, the more common term used to convey

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to be protected from this conduct. Private litigants must establish breaches of "duties of noninjury" to "entitle her to a court's assistance in obtaining a remedy and the remedies that will be made available to her." *Id.* at 919.

247 WEINRIB, *supra* note 230, at 10, 133–34, 142 ("[T]he direct connection between the particular plaintiff and the particular defendant" is "the master feature characterizing private law."); *see* Jules Coleman, *Theories of Tort Law*, STAN. ENCYCLOPEDIA PHIL. (Oct. 20, 2003), http://www.science.uva.nl/~seop/archives/fall2008/entries/tort-theories ("From the normative point of view, the most basic relationship in torts is that between the injurer and the victim whom he has wronged.").

248 Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (1928) ("Proof of negligence in the air, so to speak, will not do.").

249 Hohfeld, *supra* note 191, at 29–30, 32. He also took issue with the "broad and indiscriminate use of the term 'right'" beyond its meaning in "the strictest sense." He argues "the term "rights" tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense" This strict-sense right most closely resembles primary right as opposed to the power to bring a law suit (a secondary right). *Id.* at 30.

250 *Id.* at 34.

251 *Id.* at 32.

an active *wrong* is the idea of a "wronging" against someone else and not just against a free-standing norm of conduct.[252] My concern is that this slow erosion of the concept of rights might suggest that primary right plays second fiddle to the question of duty. My proposal thus requires that in analyzing a claim, the question of an existing primary right would come before the question of a duty.[253]

Beginning with a clear articulation of primary rights helps determine not only duty but also whether a legal wrong has occurred (e.g., a rights violation) which gives rise to the right of a secondary right to recourse—the remedy to vindicate the human rights violation. In this, I am consistent with Blackstone, who declared that "[t]he primary objects of the law are the establishment of rights, and the prohibition of wrongs," the former being "necessarily prior" to the latter.[254]

V. HUMAN TORTS: A PRACTICAL APPROACH

Surely it is helpful to my argument that tort scholars already bear in mind the primary rights account of tort law. Yet, at a practical level, the true realization of my proposal for a framework of human rights protections can only occur in courtrooms. Thus, in the following section, I propose an approach that could be adopted to reinsert the rights analysis in the tort equation. It may take one simple step: plaintiffs need to include a human torts claim in their initial pleadings to trigger a primary rights analysis.[255] The next Section proposes a simple approach to this type of pleading.

A. *Inserting the Primary Rights Analysis in the Tort Equation*

The legal analysis of a tort claim should require first recognizing the primary right violated by the tortious act and then analyzing the duty that was breached. With intentional torts, this may be as simple as

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252 *See Torts as Wrongs*, *supra* note 233, at 943 (recognizing the human agency aspect of tort which can be "understood as another's doing"); *id.* at 944 ("Torts are not wrongful acts that happen to cause certain kinds of injuries. They are wrongings. For every tort, there is an inquiry into the nature of the tortfeasor's actions (whether intentional in some sense or careless), the nature of the setback suffered by the victim, and the connection between the two.").

253 The idea that duty is a construct that reflects the unlawful violation of a plaintiff's rights was recognized in *Dillon v. Legg*, where the California Supreme Court recognized a *prima facie* case of negligence arising out of witnessing the death of a child. 441 P.2d 912, 916 (Cal. 1968) ("[I]t should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.").

254 BLACKSTONE, *supra* note 186, at 1–2 (1766).

255 In a quick survey of Westlaw in July 2017, there are 656 state and federal cases citing to the International Covenant on Civil and Political Rights, which relate more often to prisoner's rights.

recognizing the right to personal and mental integrity. With negligence, it may require more reformulation of the traditional tort analysis which has evolved to virtually erase the rights of victims. One can see this process through the development of the Restatements.

For example, Restatement (First) of Torts § 281, elaborated in 1934, defined the elements of negligence as: "(a) the interest invaded is protected against unintentional invasion"; "(b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected against unintentional invasion"; "(c) the actor's conduct is a legal cause of the invasion."[256]

Despite using the substitute term of "interests" instead of rights, the earlier Restatement offers a more central focus on the victim-plaintiff in each step of the analysis compared to the Second and draft Third Restatement. By the time the Restatement (Second) of Torts (1965) came about, one sees more focus on the defendant's conduct, even if still integrating the notion of invading an interest of the plaintiff.[257] Moreover, in its comments, the Restatement (Second) equates interest with the specific legal theories of tort law and does not offer any type of broader principle of how these interests equate with primary rights.[258] While ostensibly the same language, the revised wording has consistently become a duty analysis which can be deduced to a cost-benefit analysis. The more recent draft Restatement (Third) of Torts completely eliminates the interests of plaintiffs, thus putting the focus entirely on the conduct of the defendant.[259]

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256 RESTATEMENT (FIRST) OF TORTS § 281 (AM. LAW INST. 1934). This definition also included "(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion" which would no longer be relevant given the more moderate comparative negligence regime, which does not bar recovery upon evidence of any fault of the plaintiff. *Id.*

257 Specifically, the first elements in section § 281 declares that in negligence: "[t]he actor is liable for an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion," but the next two elements focus on evaluating the behavior of the defendant. *See id.* "(b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and (c) the actor's conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion." *Id.*

258 In its comment on Clause (a), the Restatement explains:

> the requirement that the interest which is invaded must be one which is protected, not only against acts intended to invade it, but also against unintentional invasions. The extent to which particular interests are protected are considered in those Chapters which deal with the various interests, and no catalogue is here given of the interests which are protected against unintentional invasions and those which are not so protected.

Id. at cmt. B.

259 RESTATEMENT (THIRD) OF TORTS § 3 defines negligence as:

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the

Inserting the primary rights step in the calculation brings to the legal analysis an outer parameter of behavior and also retains a focus on the plaintiff-victim in tort adjudication. Renewed recognition of a plaintiff's primary rights would entail a modification of the Restatement (First) approach with the textual addition of "primary rights." The altered text would read as follows: (a) plaintiff has a *primary right* that is protected against unintentional invasion; (b) defendant engages in conduct that is negligent with respect to that *primary right and related interests*; (c) the conduct legally causes an invasion of plaintiff's *primary right and related interests*.

In the Hohfeldian spirit, I revisit the reliance on substitute terms for the concept of "right" and "right violation" in tort law to propose that the original term needs to be reinvigorated within legal doctrine.[260] The absence of precise language makes it not only easier for the continued marginalization of primary rights from the law of torts but also for the argument that torts are merely instrumental and not about protecting primary rights. If the concept of rights violation remerges as an element of a tort analysis, then tort law defenders will not be merely proposing normative wishes but rather interpretative accounts of what tort law is actually doing.[261]

Also, the change of language seeks to remedy the fact that where courts once used the term "right" to refer to the primary entitlements to be free from harmful interference to the body and possessions, they are now far more likely to use the word "interest" or "interests."[262] For example, where judges once articulated the "invasion of the right to privacy" they are now more likely to state simply "the invasion of privacy."[263] Admittedly, Judge Cardozo recognized the relationship between the terms "interests" and violations of rights: "[n]egligence is not actionable unless it involves the invasion of a legally protected

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burden of precautions to eliminate or reduce the risk of harm.

RESTATEMENT (THIRD) OF TORTS § 3 (AM. LAW INST. 2010).

260 For example, note the absence of rights language in the standard tort concepts employed by scholars, in particular corrective justice scholars: "The central concepts of tort law—harm, cause, repair, fault, and the like—hang together in a set of inferential relations that reflect a principle of corrective justice." The principle of corrective justice "states that individuals who are responsible for the wrongful losses of others have a duty to repair th[ose] losses." JULES COLEMAN, THE PRACTICE OF PRINCIPLE 9–10, 15 (2001).

261 ROSS HARRISON, BENTHAM 100–03 (1983) ("[W]hat look like descriptions of how the law is are really expressed wishes, desires, ideas, about how the law ought to be.").

262 McCollum v. Friendly Hills Travel Ctr., 217 Cal. Rptr. 919, 923 (Cal. Ct. App. 1985) (noting that "whether a duty is owed is simply a shorthand way of phrasing what is the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct" (citations omitted)).

263 In discussing Warren and Brandeis's view of privacy in their article *The Right to Privacy,* 4 HARV. L. REV. 193 (1890), Paul A. LeBel notes that the focus on rights "has subsequently been abandoned in the development and the operation of tort law . . . ." Paul A. LeBel, *Rights-Talk and Torts-Talk: A Commentary on the Road Not Taken in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 811, 812 (1991).

interest, the violation of a right."[264] Yet, over time, courts used these two terms interchangeably, often omitting the term "right" altogether. The substitution term "interest" even appears in the various Restatements.[265] Even if interests are inherent to rights they are not the same things as rights.[266] Rights and interests are not precise synonyms. Instead, interests capture the more specific facts which go towards proving a theory of liability, which in effect arises out of a primary right.

Importantly, to talk of "interests," even if "legal interests," does not have the same power in language as talking about rights.[267] Interests convey a less absolute normative category which can be more easily compromised in a cost-benefit balancing test (as is seen in most reasonable person tests applied to determine if a breach of duty has occurred). A simple reference to the idea of "interests" does not guarantee an immediate, conscious association with the idea that a primary right—a human right—has been violated.[268] Of course, while some of these rights will appear more absolute, others are less straightforward and may require balancing on the part of the court, such as in the tension between the right to privacy and the right to public expression. Yet, the difference is that the court must balance rights and not costs. Pleading with specific reference to "rights" instead of "interests" also allows for more logical reference to the relevant human rights treaties and jurisprudence to bolster the plaintiff's claim and invites the judge to take this interpretative pathway of horizontality. Indeed, this proposal mirrors the approach taken in foreign jurisdictions which employ the horizontal effect.[269]

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264 Palsgraf v. Long Island R.R. Co. 162 N.E. 99, 99 (N.Y. 1928).

265 *See, e.g.*, M.H. v. Caritas Family Servs., 488 N.W.2d 282, 287 (Minn. 1992) ("No duty is owed, however, unless the plaintiff's interests are entitled to legal protection against the defendant's conduct . . . . Whether the plaintiff's interests are entitled to legal protection against the defendant's conduct is a matter of public policy.").

266 Keating, *supra* note 238, at 42 ("Tort law is a law of wrongs, but most of the wrongs that it is preoccupied with involve harm—to persons, their property, and their intangible interests.").

267 Even Goldberg and Zipursky resort to the use of "interests" more than primary rights. *Torts as Wrongs*, *supra* note 233, at 937 ("Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person's well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition.").

268 *Tort in Three Dimensions*, *supra* note 171, at 329. ("To commit a tort is to violate a norm that specifies how one must act in relation to others. More specifically, it is to violate a *relational norm of non-injury* recognized as binding in judicial decisions and/or statutes (even if only implicitly). Every tort involves conduct that is wrongful toward and injurious of another. *Each is a trespass in the particular sense of being a mistreatment of another*." (emphasis added)).

269 Alistair Price, *The Influence of Human Rights on Private Common Law*, 129 SALJ 330, 334 (2012) ("This broad term signifies, compendiously, (i) the human *rights* themselves, (ii) the *duties* they justify, which are owed to the right-holders by those 'bound' by the rights, and (iii) the *values* and *purposes* served by those rights and their corresponding duties.").

B. *Existing Practice Opportunities for Applying Primary Rights Tests*

Despite the general absence of primary rights in modern day tort law, there are a few exceptions that provide some practical guidance on what it might look like to use primary rights in torts pleadings.[270] For example, California courts currently apply the primary rights theory as a matter of procedure when deciding venue and questions of *res adjudicata*.

In 1943, the Supreme Court of California set out the elements for determining a cause of action while deciding *Panos v. Great Western Packing Co.* in which the plaintiff was injured in a meatpacking house when he was struck by a large piece of meat being conveyed on an overhead trolley.[271] After the plaintiff lost his first claim based on a theory of negligence because the packing house allowed third parties to operate the equipment, the court had to decide if a second claim based on a different factual theory of negligence, in that the defendant negligently operated the equipment, could proceed. The court reasoned:

> Where an action is brought to recover damages for injury to the person or property of the plaintiff caused by the defendant, and the plaintiff in his complaint alleges certain negligent acts of the defendant, and at the trial he is unable to prove these negligent acts and a verdict and judgment are given for the defendant, the plaintiff is precluded from maintaining a subsequent action based upon the same injury, although in that action he alleges other acts of negligence. *There is in such a case a single cause of action, based upon the primary right of the plaintiff to be free from injury to his person or property and a violation by the defendant of that right through his failure to use proper care.*[272]

A California appeals court further elaborated on the primary right test in *Sawyer v. First City Financial Corp.* while deciding an issue of *res judicata* as a ban to future litigation on the same set of alleged facts.[273]

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270 In 1932, the Supreme Court of Montana explained, "[f]or the purpose of venue, a cause of action is composed of, first, 'the primary right of plaintiff,' and, second, 'the act or omission on the part of defendant without which there would be no cause of action or right of recovery against him.'" Kalberg v. Greiner, 8 P.2d 799, 800 (Mont. 1932). The court determined that the plaintiff's primary right was invaded when the truck was stolen but that the complete accrual of the cause occurred where the defendant's wrongful act was done. *Id.*

271 134 P.2d 242 (Cal. 1943).

272 *Id.* at 244 (emphasis added). That same year the court expounded upon the primary right theory by relying on the Restatement of the Law of Judgments § 63, comm. b to justify its approach. *See* Slater v. Shell Oil Co., 137 P.2d 713, 715(Cal. Dist. Ct. Appl. 1943) ("There is in such a case a single cause of action, based upon the *primary right* of the plaintiff to be free from injury to his person or property . . . . The plaintiff is not permitted to maintain successive actions for the *same injury* by alleging different acts of negligence on the part of the defendant.").

273 177 Cal. Rptr. 398 (Cal. Ct. App. 1981) (regarding an action brought by sellers of land

The court clarified that the presence of more than one possible liability theory or remedy does not create additional primary rights nor does it give rise to a new cause of action.[274] Alternatively, one primary right if violated may give rise to multiple theories of liability, or conversely, different primary rights may be violated by the same wrongful conduct.[275] One primary right such as the right to be free from bodily harm (or stated in the positive the right to bodily integrity) might encompass various theories of liability.[276]

For example, malpractice and sexual battery may occur during a single transaction but give rise to a different "harm" in that the former involves bodily injury and thus violates the right to bodily integrity and the latter involves harm to a plaintiff's dignitary and privacy rights.[277] The only way to establish a new cause of action for future claims is to analyze the original set of facts to find a new primary right violation.[278] This approach places the focus on the legal injury of a rights violation before analyzing the particular theory of liability presented by the plaintiff.[279] Interestingly, "[t]he most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action."[280]

California employs the primary right test as a form of "code pleading"[281] based on principles of equity law.[282] Yet, by virtue of

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alleging a conspiracy to cause a default on development lender's note and first deed of trust and to hold a sham foreclosure sale for the purpose of eliminating the purchasers' obligation to sellers on nonrecourse note secured by a subordinated deed of trust).

274 *See* Crowley v. Katleman, 881 P.2d 1083, 1090 (Cal. 1994) (explaining that the primary right is distinct both from the legal theory and from the remedy sought).

275 *See* Branson v. Sun-Diamond Growers of Cal., 29 Cal. Rptr. 2d 314, 321–22 (Cal. Ct. App. 1994).

276 *See Sawyer*, 177 Cal. Rptr. at 403 ("The theoretical discussion of what constitutes a 'primary right' is complicated by historical precedent in several well-litigated areas establishing the question of 'primary rights' in a manner perhaps contrary to the result that might be reached by a purely logical approach. For instance, the primary right to be free from personal injury has been construed as to embrace all theories of tort which might have given rise to the injury.").

277 *See* Friedman Prof'l Mgmt. Co., Inc. v. Norcal Mut. Ins. Co., 15 Cal. Rptr. 3d 359, 367 (Cal. Ct. App. 2004).

278 *See Sawyer*, 177 Cal. Rptr. at 403 ("A cause of action is conceived as the remedial right in favor of a plaintiff for the violation of one primary right. That several remedies may be available for violation of one primary right does not create additional causes of action. However, it is also true that a given set of facts may give rise to the violation of more than one primary right, thus giving a plaintiff the potential of two separate lawsuits against a single defendant." (internal quotation marks omitted)).

279 *See* Slater v. Blackwood, 543 P.2d 593, 594–95 (Cal. 1975).

280 Crowley v. Katleman, 881 P.2d 1083, 1090 (Cal. 1994).

281 *Id.*

282 *See* Int'l Evangelical Church of Soldiers of the Cross of Christ v. Church of the Soldiers of the Cross of Christ, 54 F.3d 587, 591 (9th Cir. 1995) (explaining that primary rights theory comes from JOHN NORTON POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941)). The justification rests on public policy considerations such as preserving the integrity of the judicial system and giving certainty to legal proceedings by protecting litigants from unfairly repetitive litigation and promoting judicial economy. *See, e.g.*, Johnson v. City of Loma Linda, 5 P.3d 874,

identifying and parsing out separate causes of action the court may also need to carve out substantive law as it identifies new causes of action based on broader primary rights arising from precedent as well as statute.[283] Certainly, even if the primary rights test is used by California courts for purely procedural matters, this approach is instructive for illuminating how a primary rights approach would proceed in tort adjudication. For example, the appropriate steps in determining a cause of action requires identifying and proving: "1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon the defendant, and 3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty."[284] Unlike a purely transactional approach that just looks at the facts of a case to determine overlapping theories of liability and the wrong conduct of a defendant, the primary rights theory fully conceptualizes the notion of the primary rights that define the defendant's duty.[285]

Significantly, beyond the pleading stage of litigation, the California courts already recognize that "the concept of 'duty' may actually focus upon the rights of the injured plaintiff rather than upon the obligations of the defendant . . . ."[286] Indeed, the California Supreme Court famously carved out a new theory of liability in a case based on the idea of protecting the rights of plaintiffs in *Dillon v. Legg*.[287] In justifying the expansion of protection, the court referred to Prosser's famous words:

> The assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff "begs the essential question—*whether the plaintiff's interests are entitled to legal protection against the defendant's conduct* . . . . [Duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself . . . . But it should be recognized that "duty" is not sacrosanct in itself, but only an expression of *the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection*.[288]

While the court uses "interests" instead of rights, it still is placing primacy on protecting the substantive primary rights of the plaintiff. Citing *Dillon*, the court in *San Francisco Unified School District* explains:

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884 (Cal. 2000); *Crowley*, 881 P.2d at 1100; Zapata v. Dep't of Motor Vehicles, 2 Cal. Rptr. 2d 855, 860 (Cal. Ct. App. 1991).

283 Sawyer v. First City Fin. Corp., 177 Cal. Rptr. 398, 403. (Cal. Ct. App. 1981).

284 Gamble v. Gen. Foods Corp., 280 Cal. Rptr. 457, 460 (Cal. Ct. App. 1991).

285 *Compare* Derish v. San Mateo-Burlingame Bd. of Realtors, 724 F.2d 1347, 1349 (9th Cir. 1983) (using a "transactional analysis" to decide if two suits constitute a single cause of action if they both arise from the same "transactional nucleus of facts"), *with* Shaver v. F. W. Woolworth Co. 840 F.2d 1361, 1365 (7th Cir. 1988) (using a single "core of operative facts").

286 *See, e.g.*, Peter v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 824 (Cal. Ct. App. 1976).

287 441 P.2d 912, 917 (1968) (recognizing the "spectator" shock of witnessing the death of a loved one).

288 *Id.* at 916 (quoting WILLIAM L. PROSSER, LAW OF TORTS 332–33 (3d ed., 1964) (emphasis added).

> "Protection" of the plaintiff is the initial element in the Restatement formula defining the requisites of a cause of action for negligence. The formula's essentials include negligence, causation, and injury (the "invasion of an interest" of the plaintiff) but, unlike the California formula, the first element is not a "duty of care" in the defendant: it is the condition that the "*interest invaded is protected*."[289]

Again, despite the terminology of "interest" employed by the state court, its focus on the plaintiff fits squarely within my proposed model of primary rights that reorients the purpose of tort law as having the horizontal effect.

Significantly, in 2015, California's legislature passed a law to extend the statute of limitations for tort claims from three to ten years when the pleadings are based on facts which rise to the level of serious human rights violations.[290] A similar bill is being considered by the Massachusetts legislature. While this law does not create a new cause of action, it will nevertheless require state judges to analyze claims filed as tort claims through a human rights lens. While the ultimate adjudication may not include a human rights analysis, the first step could prove to be important for not only asking state judges to think about primary rights, but also to ask how they amount to human rights. This law would be the step towards a fuller application of the horizontal effect.

VI. HUMAN TORTS: ITS NORMATIVE JUSTIFICATIONS

My proposal to better articulate the primary rights step in tort adjudication may lead readers to accuse me of mere linguistical nitpicking. However, I would counter that the precision of terms is an important initial step to recognizing the horizontal effect of human rights law in ordinary tort law.[291] As mentioned in Part I, one of the conceptual hurdles to imagining the application of human rights to private actors is the presumed unavailability of adequate procedural remedies to enforce these entitlements.[292] A remedy thus becomes the lynchpin to actualizing the framework of non-State actor accountability for human rights violations.[293]

Yet, in recognizing this hurdle, scholars seem to assume that it

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289 S.F. Unified Sch. Dist., 131 Cal. Rptr. at 860 n.3 (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS § 281 (AM. LAW INST. 1965)).

290 Assemb. 474, 2015–16 Reg. Sess. (Cal. 2015).

291 Hohfeld, *supra* note 191, at 24.

292 Reinisch, *supra* note 33, at 71.

293 *Id.* at 85. ("[A]s long as states do not want non-state actors to be directly accountable for human rights violations, they will not become accountable. When states want them to become accountable, they can achieve this by establishing the required institutions and procedures.").

requires new procedures or laws, or that it requires resorting to an international body of some sort.[294] Rather, the model I present demonstrates that such a remedy exists in ordinary tort law. Conceptualizing torts as a form of human rights litigation will also result in:

> [a] host of new reasons, rules, principles and values are thereby injected into the law, giving litigants a toolkit of new arguments that may militate in favour of legal change. Judges, exercising their traditional power to develop the common law, are then obliged to consider these novel arguments, some of which they may, others of which they must, accept. As a result, the content of the private common law and the outcome of cases will be altered. Some changes will be required, while others will merely be permitted.[295]

As more plaintiffs plead torts claims with reference to human rights law, more judges will become aware of these norms. The radiation of these norms in their reasoning will assure greater protection of the primary rights of individuals and thus human rights. The State would normify the principle that all members of society must take care not to violate the rights of others.[296] As I will explain next, other important policy and legal principles will be satisfied, namely empowerment of victims and meeting their justice needs; assuring the rule of law and individual accountability; assuring the State meets its international obligations to assure an adequate civil remedy in the case of rights violations; and ultimately preserving the civil justice system in the United States.

A. *Focus on Victims: Empowerment and Justice*

The linguistic exercise of reinserting the rights language in tort law pleadings has important implications for reinforcing the justice goals of plaintiffs, especially those who may fall on the side of the disempowered.[297] First, drawing out the primary right in the tort equation helps to avoid being exclusively focused on the (potential) defendants at the cost of being insufficiently mindful of (potential) victim-plaintiffs. Indeed, as discussed in Part V, an unbalanced focus on duties and wrongs has led tort doctrine to lose sight of rights—and thus the victims. In reading torts scholarship, one is left with the question: where is the victim?[298] A simple adjustment in language challenges us to

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294 *Id.* at 87.

295 Price, *supra* note 269, at 348.

296 Reinisch, *supra* note 33, at 74.

297 David M. Engel, *Vertical and Horizontal Perspectives on Rights Consciousness*, 19 IND. J. GLOBAL LEGAL STUD. 423 (2012).

298 *See Tort Law and Moral Luck*, *supra* note 236, at 1123 (posing as an example of this phenomena, the following assertion by Goldberg and Zipursky and the complete absence of the centrality of victim-plaintiffs: "On its face, tort law is a law of wrongs. The word 'tort' means

see more clearly a world of victims and their rights.

Second, the invocation of rights in tort claims offers an expressive value and communicates that a victim has legal entitlement to not only a remedy to vindicate a violated right but also the expectation that this right should have been protected in the first place. In other words, the system is about civil *justice* and not just the allocation of costs. Some advocates of a human rights perspective for claims that are pled as ordinary torts, recognize that these claims will be taken more seriously if reframed as a human rights violation.[299]

As rights language becomes more common, victims will feel empowered to vindicate wrongs they have suffered. Rights language conceptualizes a different power and intonates the question of justice. It satisfies the less tangible justice needs of victims beyond monetary compensation. Tort litigation can never restore equilibrium in the sense of reinstating the *status quo ante* in material terms in many cases that inflict harm against a person's dignity. However, it can empower victim-plaintiffs and thus address power imbalances.[300] Most importantly, empowering victims also serves the larger goals of social justice especially if they are pursuing claims that set normative standards that protect other individuals and communities.[301] Framing tort law as vindicating human rights also highlights that each individual in effect is promoting an important social reform to make society more safe, fair, and equal.

B. *The Rule of Law and Accountability*

Reinserting the rights portion of the legal analysis helps to

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wrong. Before tort was identified as a legal category in its own right, torts were known as 'private wrongs.' Judicial opinions in modern tort cases speak of defendants who owe duties to refrain from wrongful conduct").

299 Michael B. Greene, *Bullying in Schools: A Plea for Measure of Human Rights*, 62 J. SOC. ISSUES 63, 74 (2006).

300 *Twentieth-Century Tort Theory*, *supra* note 173, at 576.

> More fundamentally, the picture of tort law as restoring a balance rings false. Tort suits cannot in fact cancel out wrongs, nor do they typically make the plaintiff whole in any meaningful sense. In short, they do not return the world to a pre-existing equilibrium. Instead, they provide satisfaction, a term that carries connotations of vengeance on the part of the victim. A personal injury complaint, for example, does not simply ask of the defendant that he fix what he has broken or replace what he has taken. The commission of the tort has unalterably changed the world by creating a person who is now, and will forever be, the victim of a wrong. The complaint seeks not to undo or restore but to satisfy the victim not only for her losses, but also for the victimization itself.

Id.

301 Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433 (2011) (providing an explanation of how torts brought by individuals help to shape social policy for the betterment of all).

highlight that tort law is about protecting individuals and holding private wrongdoers accountable. Refocusing tort law away from an amoral language of harm towards a language of morality can have important implications for understanding the critical role of the civil justice system in a democratic society that values the rule of law and a culture of rights. The primary rights approach reminds us that tort law is not only about protecting individuals, but also assuring accountability of those who violate these rights.

Ultimately, recognizing the civil justice system as a means of enforcing rights creates an official channel for accountability.[302] This approach helps to educate a victim-plaintiff that they were not merely "unlucky" to be injured such as due to a natural disaster but rather to understand the human agency behind the injury and to label that person a "rights violator."[303] Reinserting the primary rights and framing them as human rights violations in negligence cases helps to signal that the acts are not acceptable and that human rights cannot just be calculated away in a cost-benefit analysis. Instead, the rights analysis provides more of a bright line rule of inviolability.[304] This system raises awareness and respect for rights in a way that will induce compliance with its dictates, and thus hopefully lead to prevention. In this way, tort law contributes to an overall protection of individuals in a society just as criminal law does by providing an essential remedy for assuring the enforcement of a right to bodily and mental integrity.

C. *Assuring State Compliance with International Obligations*

Viewing ordinary tort law can also provide benefits for State actors. For instance, establishing a doctrine of human torts can prove that the U.S. government (through the court system of local state-level governments) is in fact fulfilling its duty to provide an adequate and effective remedy to individuals seeking redress for violations of their

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302 *See* Jason M. Solomon, *Equal Accountability Through Tort Law,* 103 NW. U. L. REV. 1765 (2009).

303 *Tort Law and Moral Luck*, *supra* note 236, at 1157.

> Our society teaches and institutionalizes norms of responsible conduct. When people violate these norms in a way that injures others, victims are resentful and respond to their wrongdoers. Society is prepared to stand behind these victims, to issue various kinds of responses to and judgments upon the violator, to let the violation and the injury affect the wrongdoer's reputation, and to treat that person as a rights violator and a person who has wronged another. And the violator faces these consequences notwithstanding that it is often a matter of bad luck, not bad character or bad choice, that leads to the wrong being done.

Id.

304 Jonathan M. Graham, Comment, *HIV, High School, and Human Rights: Putting Faces on the Failure to Protect HIV+ Youth from Bullying and Discrimination at School*, 35 U. LA VERNE L. REV. 267, 297 (2014).

human rights.[305] Importantly, reframing the civil justice system as a domestic mechanism for enforcing human rights helps refocus our approach to evaluating the tort system. First, we need to understand that in providing a tort claim as a remedy for rights violations, the State is fulfilling its international obligation to provide an adequate and effective remedy for a violation of a human rights as required by treaty law.[306] Likewise, the State is also protecting an individual's substantive right to reparations ("damages" in tort law lingo) for unlawful acts that constitute human rights violations.[307] Most national jurisdictions contemplate some form of civil remedy, such as in contract and tort law, to "right" wrongs between private parties.[308] Significantly, these same remedies are the ones that the international system expects States to provide in order to fulfill their international obligations.[309] For this

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305 Although the United States has not ratified many of these treaties, it is nonetheless bound by the customary norms they embody, which include the right to a remedy. On December 10, 1998 (the fiftieth anniversary of the Universal Declaration), President Bill Clinton released Executive Order 13107. This order mandates that the United States fully respect and implement its obligation under the human rights treaties that have been ratified. Exec. Order No. 13,107, 3 C.F.R. § 13107 (Dec. 10, 1998). Many of the rights enshrined in the Universal Declaration may be considered a part of international customary law. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 17 (1982) ("The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations.").

306 For example, the UDHR provides "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." *See, e.g.*, G.A. Res. 44/25, *supra* note 91, at art. 39; G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14 (Dec. 10, 1984); G.A. Res. 2200, *supra* note 24, at art. 3; G.A. Res. 2106 *supra* note 95, at annex, art. 6; G.A. Res. 217 (III) A, *supra* note 20, at art. 8; . Similarly, Article 25(1) of the Inter-American Convention on Human Rights confers on individuals

> the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

OAS, *Inter-American Convention on Human Rights* art. 25 (June 6, 2013), http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm. This article also requires state parties to provide a legal system that possesses authority to enforce remedies for victims. *Id.* For further discussion see, Antonio Augusto Cancado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. L. 5, 11–12 (2000).

307 *See* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 837–38; *see also* Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 160 (2002).

308 *See* DONALD HARRIS ET AL., REMEDIES IN CONTRACT AND TORT 21–24, 338–42 (2002) (providing an overview of contract and tort law, as well as the remedies that a party may receive in each type of case).

309 *See* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 58–59 (2d ed. 2005) (characterizing the last 200 years of state jurisprudence on remedies as the precursor to the current body of international human rights law because those cases involved a state's duty to protect an individual's rights).

reason, plaintiffs filing petitions with international bodies must first demonstrate that they exhausted their domestic remedies, which could include a tort suit to recover damages.[310]

Indeed, institutionalizing mechanisms for remedying harm is not discretionary.[311] The Inter-American Human Rights System has developed clear jurisprudence on this issue. Specifically, the Inter-American Court in 1989 clarified this point in its advisory opinion in which it declared "the absence of an effective remedy to violations of the rights recognized by the Convention *is itself a violation of the Convention* by the State Party in which the remedy is lacking."[312] The lack of a remedy is actually a new human rights violation given that a victim of a human rights abuse *should* be able to vindicate their rights by accessing a remedy in order hold a non-State perpetrator accountable.[313]

D. *Assuring the Vitality of the Civil Justice System in the United States*

Refocusing tort adjudication on primary rights and human rights helps to emphasize that the civil justice system serves an essential and indispensable role in our legal system. The instrumentalization of tort law theory has reduced tort law's substantive concepts to the point where we now hear a loud chorus calling into question whether tort law need even exist.[314] The "elasticity" of tort law, as reflected by the lack of clear consensus and definition over the last century, has led some courts and scholars to infer that tort law has no content or substance other

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310 Riccardo Pisillo Mazzeschi, *Exhaustion of Domestic Remedies and State Responsibility for Violation of Human Rights*, 10 ITALIAN Y.B. INT'L L. 17 (2000).

311 The Basic Principles represent the principle that the right to a remedy does not exist at the prerogative of nations but instead is a fundamental obligation under treaty and customary law, and thus a state breaches this obligation by failing to provide an adequate remedy. *Id.* The Inter-American Court established this fact in its first contentious case on reparations. *See* Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, Judgment, ¶ 25 (July 29, 1988); Reparations for Injuries Suffered in the Service of the U.N., 1949 I.C.J. 184, Advisory Opinion (Apr. 11, 1949). For further discussion, see Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 592 (1998); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 LAW & CONTEMP. PROBS. 93, 93 (1996). *See, e.g.*, Ivcher-Bronstein v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 74, Judgment, ¶ 3–4 (Feb. 6, 2001) (emphasizing the importance of an individual's right to legal recourse under the Inter-American system and within democratic society, generally).

312 Judicial Guarantees in States of Emergency, Inter-Am. Ct. H.R. (Ser. A) No. 9, Advisory Opinion (Oct. 6, 1987) (emphasis added).

313 NICOLA JAGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY 38 (2002) (pointing out that "[t]he absence of direct enforcement for private parties at the international level does not necessarily bar horizontal effect; it merely means that the enforcement of the obligations for non-State entities is indirect, *i.e.* through the obligations that States have under the provisions concerned").

314 Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605–17 (1992).

than serving the social ends of "compensating victims and deterring risk-producers."[315] As a consequence, one hears the challenge: if tort is only a scheme to distribute payment for accidents, then why not replace it with a private or social insurance scheme like those found in Europe and New Zealand?[316] Some argue that a no-fault, liability insurance scheme could use rational, statistically-based systems of schedules to reimburse for the costs of corporate accidents.[317] Others argue for democratically elected legislatures and expert regulators to "adjust the burdens and benefits of economic life," instead of relying on the quasi-public administration system of tort law.[318]

The push for tort reform, and even abolishment, enjoys great public support due to the existence of a perceived "tort crisis," an arguably manufactured situation resulting from years of corporate interests manipulating public perception of the dark side of tort law.[319] Tort law carries a ruffian bad image of an out-of-control system, plagued by greedy plaintiffs, and run by ambulance-chasing personal injury lawyers. All these shady characters allegedly hamper innovations and the economy with "crushing liability" and "sky-high damage awards."[320] The recriminations against tort law capture the public

315 *Tort Law and Moral Luck*, *supra* note 236, at 1169.

316 *See* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCE (1990); WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1992); Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1, 12–17, 23 (1987) (asking whether tort law makes sense and concluding "[w]e should abolish the tort system"); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 YALE L. & POL'Y REV. 187, 191–92 (2008) (describing favorably the no-fault insurance system in New Zealand); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 664 (1985) (arguing that modern tort law should be altered so that "[d]eterence would be the domain of administrative agencies"); W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1467 (1994) (discussing the failure of tort law as a regulatory mechanism for pharmaceuticals).

317 John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAN. L. REV 1501, 105 n.5 (2002); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of The Great Society*, 64 MD. L. REV. 364, 364 (2005).

318 John C.P. Goldberg, *What Are We Reforming? Tort Theory's Place in Debates over Malpractice Reform*, 59 VAND. L. REV. 1075, 1080 (2006); *see* John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 290 (2007) (concluding that the private tort bar has "created a massive private administrative system with many of the same attributes" as a public administration system).

319 THOMAS KOENIG & MICHAEL RUSTAD, IN DEFENSE OF TORT LAW 67 (2003). *Compare* Lawrence Chimerine & Ross Eisenbrey, *The Frivolous Case for Tort Law Change: Opponents of the Legal System Exaggerate Its Costs, Ignore Its Benefits*, ECON. POL'Y INST. (May 16, 2005), http://www.epi.org/publication/bp157 (rejecting the idea of tort law being in a crisis), *with* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 524 (2006) (arguing that various societal factors contribute to the currently lamentable state of tort law).

320 Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431 (2011).

imagination in a way that leaves the general population either in favor or at least ambivalent to aggressive reform that shackles the reach of tort law.[321] Arguably, by raising awareness that the civil justice system is an essential mechanism that protects fundamental human rights, it becomes more difficult to simply propose that the system disappear. Instead, it increases its value and permanence.

CONCLUSION

Tort law should be understood as a civil justice system that serves an essential vindicatory function of protecting the most essential human rights no matter who the perpetrator may be—a government agent or a private individual. I am not arguing that tort law *should start* to serve this purpose; rather I am arguing that tort law *already* does so. We only need to start recognizing this fact and build upon it to better articulate the overlap between human rights claims and ordinary tort claims. Indeed, this is the approach taken by many nations around the world. Through a more explicit incorporation of the language of primary rights into tort adjudication we will better protect innocent, less powerful victims, assure the vitality of the rule of law in the United States, and bring the country into better alignment with a global trend towards recognizing horizontality of applying human rights to non-State actors. Ultimately, the human tort approach aims to put a human face back onto the individuals who suffer personal injuries and must resort to the civil justice system to finally get the justice they deserve.

321 COLEMAN, *supra* note 260, at 62 ("The patterns of inference that give the key concepts of tort law their content are not haphazard, but can be seen to hang together in a coherent and mutually supportive structure. Corrective justice describes that structure; or, to put it differently, it expresses the principle that holds together and makes sense of the central concepts of tort law. At the same time the practices of tort law serve to realize or articulate corrective justice in concrete institutional forms . . . . [T]ort law embodies corrective justice, and corrective justice explains tort law."); *Torts as Wrongs*, *supra* note 233, at 918.