**Beyond Anti-Discrimination Laws:**

**Realizing Equality Through Other Laws, Such as Tort Law**

1. ***Introduction***

Many scholars who work at the intersection of philosophy and discrimination law now regard legal prohibitions on disparate impact not merely as a way “to counteract unconscious prejudice and disguised animus” but also as a way to do something more ambitious, to realize a broader goal of social justice.[[1]](#footnote-1) For some, this broader goal is to give marginalized social groups –for example, racial or ethnic minorities, Indigenous peoples, women, members of LGBTQ2S+ communities, and persons with disabilities– access to important opportunities in the face of “bottlenecks.”[[2]](#footnote-2) For others, the relevant goal is to increase the power, authority, and visibility of marginalized social groups across a wide array of social contexts.[[3]](#footnote-3) For still others, what matters is to raise the level of welfare or autonomy of these social groups to some sufficient level.[[4]](#footnote-4) These goals are important in and of themselves. But to many discrimination theorists, these goals matter also because they are among the background conditions necessary for realizing a society of equals. By a “society of equals,” they do not mean a society with no *economic* inequalities. Rather, they mean a society with no pervasive and abiding *status* inequalities, no social groups that are subordinated to others across many different social contexts, such as employment, education, housing, and politics.[[5]](#footnote-5)

Given that many discrimination theorists are now concerned with putting in place the background conditions for a society without status inequalities, it is curious that this discipline[[6]](#footnote-6) has retained its relatively narrow focus on anti-discrimination laws rather than broadening out to consider other areas of law that could help or hinder our search for status equality. Most scholars working in discrimination theory still write almost exclusively about the various legal instruments that are specifically designed to prohibit discrimination, such as anti-discrimination laws in the private sector, constitutional equality rights, and relevant international human rights instruments.[[7]](#footnote-7) It is of course understandable that discrimination theory would initially have focussed on anti-discrimination laws. Wrongful discrimination and pervasive status inequalities arise from complex social circumstances in which people perceive themselves and others to be divided into different social groups, some of which command greater deference and have greater power than others across many different social contexts.[[8]](#footnote-8) Our anti-discrimination laws have evolved precisely as a shared public response to these circumstances and the differences in social status to which they have given rise. So, it seems eminently reasonable, when trying to think philosophically about how discrimination or subordination could be morally objectionable, to start by looking at anti-discrimination laws.

But, as John Gardner wrote shortly before he died, “Discrimination theory has come of age.”[[9]](#footnote-9) Although even twenty years ago there was little sustained philosophical attention devoted to discrimination, we now have an array of philosophical theories that attempt to explain why discrimination is morally objectionable[[10]](#footnote-10) and a similar array of philosophical theories discussing how best to understand the purpose of discrimination laws in such a way as to see them as coherent and justified bodies of law.[[11]](#footnote-11) It is time for discrimination theorists to give more extensive consideration to the role that *other areas of law* play in sustaining the social subordination of groups such as racial or ethnic minorities, Indigenous peoples, members of LGBTQ+ communities, people with disabilities, and women.

Of course, some of the reasons why discrimination theorists ought now to move away from a central focus on discrimination laws are local and political. Within the United States, for instance, disparate impact law has not proven a very effective vehicle for redressing social subordination. Its applicability has been narrowed by the courts.[[12]](#footnote-12) Judicial interpretations of the *Administrative Procedure Act* have created obstacles to claims for racial, ethnic or gendered disparate impact.[[13]](#footnote-13) Moreover, in the absence of constitutional protection for affirmative action programs, any attempt to address disparate impact by singling out certain subordinated social groups for special, ameliorative treatment risks being challenged as disparate treatment of the more privileged individuals whom such programs exclude.[[14]](#footnote-14) Finally, one of the most important enduring causes of social subordination is poverty, understood not just as a lack of income but as a complex condition involving social exclusion and “chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living.”[[15]](#footnote-15) Scholars have recognized that poverty intersects with prohibited grounds of discrimination in many ways, often making it difficult for courts and administrative tribunals to recognize instances of discrimination on the basis of prohibited grounds *as* discrimination.[[16]](#footnote-16) Yet poverty is itself unlikely ever to be recognized as a protected trait within the anti-discrimination laws of most jurisdictions.[[17]](#footnote-17)

But even in countries such as Canada, which does give constitutional protection to government-initiated affirmative action programs,[[18]](#footnote-18) which has quite sweeping anti-discrimination laws that prohibit policies with a disparate impact across a broad range of private contexts,[[19]](#footnote-19) and which has certain provinces that do recognize “la condition sociale” or “source of income” or “receipt of social assistance” as protected traits,[[20]](#footnote-20) it is nevertheless clear that anti-discrimination laws cannot do all of the work that needs to be done if we are to create a society of equals. That is because many other areas of law inadvertently contribute to social subordination, leaving members of some social groups without significant opportunities, resources and powers had by others. Of course, when broad prohibitions on discrimination in the private sector were developed in Canada and the United States during the civil rights era, debates about their merits often presupposed that other areas of law did *not* similarly restrict anyone’s freedom, and that anti-discrimination laws would impose new and particularly intrusive restrictions. Certain scholars were quite vocal in expressing their reservations about anti-discrimination laws: such laws, they argued, would be an undue fetter on people’s freedom of association and freedom of contract.[[21]](#footnote-21) But there are countless ways in which laws other than anti-discrimination laws set up our choice situations to begin with, silently and invisibly making it possible for empowered groups easily to do certain things while placing significant costs on other groups’ attempts to do those same things.[[22]](#footnote-22) Anti-discrimination laws are not unique among our laws in limiting some people’s freedom for the sake of other people, or in making a difference to the social status of various groups. Most laws have the effect of conferring freedoms on some while taking away freedoms from others; and, depending on how they are structured, most laws can work either to perpetuate social subordination or, instead, to give subordinated groups a greater share of important powers and opportunities and a measure of appropriate social recognition.

We know, for instance, that the ways in which we imagine and construct public spaces such as parks, schools, community centres, and government buildings –whether with ramps or with steps, with good lighting or poor lighting, with spaces around the table for wheelchairs or no such spaces– have a large impact on whether those with physical disabilities are able to participate in the social and political institutions that use these spaces.[[23]](#footnote-23) The same is true of public transit, the accessibility and affordability of which is a condition for so many people’s participation in the workforce and in almost all social activities.[[24]](#footnote-24) We know that paid parental leave programs can be designed in ways that disadvantage women or that instead also incentivize men to take parental leave, with the result that men become more involved in childrearing throughout their children’s youth and women stay in the workforce in greater numbers.[[25]](#footnote-25) Similarly, the ways in which we design our labour laws and the conception of “the worker” that these laws presuppose can either facilitate marginalized groups’ participation in the workforce or frustrate it.[[26]](#footnote-26) These are only a few examples. But it is clear from them that if our goal is to think about how to create a society without pervasive and abiding status inequalities, we cannot accomplish this by focussing only on laws that, like anti-discrimination laws, work by *prohibiting* discriminatory policies by private entities or by governments. We need to think, more broadly, about the impact of many different areas of law on subordinated social groups. We need to consider how to develop legal rules in a variety of different areas of law that will not devalue subordinated social groups, unfairly deny them opportunities available to others, or perpetuate harmful stereotypes about them.

This paper explores the impact of one area of law on socially subordinated groups: namely, tort law. I shall lay out some of the different types of rules within tort law that have worked, and in many cases, still do work, to perpetuate the subordination of groups such as racial and ethnic minorities, Indigenous peoples, women, members of LGBTQ+ communities, and people with disabilities. I shall then, borrowing ideas from discrimination theorists, offer a new general characterizationof the different ways in which these types of legal rules work to subordinate such socialgroups and thereby perpetuate troubling inequalities of status. In doing this, my aim is both to elucidate tort law and to offer a model that could be applied to other areas of law as well. As we shall see, these different types of legal rules can be found in any area of law, and the different ways in which these rules work to unfairly subordinate certain social groups are also ways in which the rules of other areas of law, too, can work to subordinate such groups. I hope this discussion will therefore be of interest even to those who do not work on tort law but are considering how other areas of law perpetuate social subordination and how legal rules in these other areas might be altered so as to combat pervasive forms of social subordination.

What is novel about this project is, firstly, its focus on *status inequality* rather than *income inequality*, and second, its use of ideas from discrimination theory to develop a *general characterization* of the different ways in which the rules of tort law can perpetuate status inequalities. There is already a considerable literature on income inequality and the law, some of it now arguing that we should redistribute income (or wealth) through legal rules other than the rules of tax law.[[27]](#footnote-27) Much of this literature has developed in response to Kaplow and Shavell’s arguments in the mid 1990s that any redistribution of income would be more efficient if accomplished through the tax system than through the revision of legal rules in other areas of law, such as tort law.[[28]](#footnote-28) Kaplow and Shavell argued that if the rules of tort law were altered so as to impose a tort tax on high-income defendants that low income defendants would not have to pay, this would create a “double distortion,” whereby high-income potential tortfeasors would both reduce their work effort and take excessive care. By contrast, under an alternative tax regime that was properly designed, they argued, there would only be the single distortion of reducing their work effort. Their argument cast considerable doubt on the wisdom of using tort law to attempt to rectify inequalities in income or wealth. However, Kaplow and Shavell’s work has since spawned a large literature, much of which has argued on the contrary that it is unclear that the tax system really would be more efficient at redistributing income or wealth.[[29]](#footnote-29) So there is now no firm consensus in the economic literature on whether it is a good idea, from an economic standpoint, to attempt to redistribute wealth through legal rules other than the rules of tax law. I shall briefly discuss this question in Section 5 of the paper. But for now, what is important to note is that this economic literature is somewhat orthogonal to the topic of this paper. That is because my proposal is not about *income* inequality but about *status* inequality –in particular, pervasive and persistent inequalities in the social status of different groups of people, groups marked out by the kinds of traits that are often recognized as protected traits within anti-discrimination law. My suggestion is not that we ought to craft rules of tort law that take money from high-income earners who come before the court and redistribute it to those with lower incomes. Rather, the suggestion is that we need to attend to the ways in which tort law often inadvertently and invisibly works to perpetuate the lower social status of these particular social groups *because* these groups possess certain traits –for instance, a certain race, or gender, or gender identity, or disability. Whether legal rules subordinate groups marked out by such traits is not a question that could be answered only by looking into whether, on balance, these rules increase the wealth of those with low incomes. For legal rules perpetuate social subordination in a variety of ways, such as by entrenching biases against certain social groups, by giving credence to false stereotypes about them, and by compounding past injustices against them. Of course, the level of wealth of a certain group is not unrelated to its social status relative to other groups, and a legal rule can certainly work to subordinate a certain social group if its use over time disproportionately disadvantages members of that group economically --for instance, by lessening their chances of recovery because of their gender or their gender identity, or by lessening the damages they can receive for certain injuries because of their race or the particular kind of disability they have. But it is important to my analysis that this happens because of biases, stereotypes, or false assumptions about the traits that these groups possess, and it is important that we explore how legal rules presuppose and in turn perpetuate these biases, stereotypes and assumptions. As we will see, biases can devalue the lives of members of these groups or cast doubt on the reasonableness of their responses in particular situations. Similarly, false stereotypes about such groups can lead us to mischaracterize their injuries and misunderstand what is required for compensation. If we are to understand the ways in which the rules of tort law subordinate, these are the kinds of mechanisms on which we must focus. So the questions this paper will ask are different from straightforward questions of wealth redistribution of the kind that economists have asked in debates about tort law and income inequalities or wealth inequalities.

Furthermore, as noted above, this paper tries to offer a helpful *general* characterization of the ways in which various legal rules perpetuate status inequalities. Although tort scholars have explored particular instances in which legal rules have contributed to status inequalities, they have not yet developed a general characterization of the ways in which this can occur. Using ideas borrowed from discrimination theory, I shall try to begin a conversation between discrimination theorists and tort theorists about these different forms of subordination and the rules of tort law that sustain them.

One important caveat is in order concerning the paper’s focus on social subordination. It would be a considerable oversimplification to suggest that whenever a legal rule perpetuates a certain form of social subordination, this fact gives us an overriding reason to advocate for the rule’s replacement. It is not the function of every area of law to address every type of injustice. There are many different factors to be considered when advocating for a change in the law, including the mandate of the institution charged with making the relevant rules, the feasibility of their changing a given rule, and of course the harms that alternative rules might cause. Moreover, status-based inequalities are not the only harms that a legal rule can bring about. In considering whether and how to change a given legal rule, we need to think not only about social subordination but also about other types of harms. This paper does not, then, conclude that we ought to change all rules that can be shown to contribute to social subordination. Nor does the paper offer a comprehensive decision procedure for determining when it would be beneficial or legally permissible to change a given rule. It seems highly unlikely that any attempt to outline a single such decision procedure would be successful. Instead, the paper simply urges that we attend more closely to the different ways in which legal rules outside of anti-discrimination law have an impact on status inequalities. In order to do this, discrimination theorists need to begin thinking about the effects of other areas of law on subordinated social groups, such as tort law; and tort theorists, for their part, need to begin engaging with the work of discrimination theorists.

This paper will also urge that those tort theorists who are concerned with social subordination should investigate how their work dovetails with established theories of tort law, such as those provided by formalists, civil recourse theorists, and economists. I shall argue that these theories in fact offer more support than one might think for efforts to use tort law to lessen pervasive social subordination. Martha Chamallas, one of the leading tort scholars focussing on social justice, often presents her and others’ work in this area as though it stands in sharp opposition to the goals of “mainstream” theories of tort law, such as formalist theories and economic theories.[[30]](#footnote-30) But I shall argue in the penultimate section of the paper that in fact, many mainstream theories of tort law leave much more room than one might initially suppose for efforts to alter the rules of tort law so as to reduce status inequalities.

1. ***Why Tort Law?***

Tort law may seem an odd choice for a place to begin, in expanding our concern for the elimination of status inequalities beyond anti-discrimination laws. According to some prominent theories of tort law, this area of the law no business looking into pre-existing inequalities between the groups to which the plaintiff and the defendant belong. For example, corrective justice theories maintain that it is the purpose of tort law to correct a wrong done by the defendant to the plaintiff.[[31]](#footnote-31) If certain rules of tort law happen to exacerbate status inequalities, then that may seem, for the corrective justice theorist, to be completely irrelevant and not something a judge could intervene to rectify –for pre-existing status inequalities are, on this theory, irrelevant from the standpoint of tort law’s own aims and ambitions. As for instrumental theories of tort law, although they are not in principle against using tort law as a tool to eliminate status inequalities, some of the most prominent instrumental theories --economic approaches to tort law-- valorize certain forms of economic efficiency.[[32]](#footnote-32) It is unclear whether the legal rules that promote economically efficient behaviour, on any conception of what it involves, will always or even often work to the benefit of subordinated social groups.

I shall be arguing in the penultimate section of the paper, however, that we need to distinguish between different waysin which a given legal rule can contribute to the subordination of certain social groups. I shall try to show that once we make these distinctions, we can see that whether tort law should care about status inequalities is not an all-or-nothing question with an all-or-nothing answer. Rather, it depends both on the way in which a given rule contributes to the subordination of a certain social group and on the particular theory of tort law in light of which we are interpreting tort law. Different theories of tort law have different implications about which of these ways of contributing to the subordination of a given social group are problematic, and about which sorts of public officials can legitimately work to rectify them. But importantly, *no* theory of tort law implies that such status inequalities are *never* tort law’s business.

There is also a further reason why tort law is a helpful area on which to focus, when branching out from anti-discrimination laws. Many tort scholars are already in the process of investigating, in quite sophisticated ways, what might under a broad umbrella be called “ways in which the rules of tort law perpetuate status inequalities.” But, although such torts scholars have often engaged deeply with critical race theory, feminist theory, queer theory, and disability theory, [[33]](#footnote-33) they have not engaged with the philosophical work on equality done by discrimination theorists and have not yet developed a shared set of classifications that all could use to discuss the various kinds of impact on equality that particular rules of tort law have. For example, torts scholars in Canada, the US and the UK have focussed on the standard of the reasonable person in negligence law and have revealed ways in which common interpretations of this standard exclude the perspectives and the needs of various social groups. But they have tended to see their work as contributions to feminist theory, queer theory, and disability theory, respectively, rather than as instantiating a broadly shared understanding of the kinds of equality that we ought to aim for.[[34]](#footnote-34) To take another example, American tort scholars have critiqued the practice of calculating wrongful death damage awards using race- and gender-based statistics about wages and work-life expectancy, and have given quite nuanced analyses of the many ways in which such this practice both devalues the lives and work of women and racial minorities and also provides a perverse incentive for defendants to locate risky or toxic activities in low-income neighbourhoods, thereby increasing the disadvantages faced by such social groups.[[35]](#footnote-35) Relatedly, in Canada, scholars have criticized Canadian courts for their assessment of damages in residential schools litigation, arguing that their assessments “revictimize the plaintiff for being an Aboriginal person.”[[36]](#footnote-36) But these Canadians and these Americans have not engaged with each other, nor has either group looked to philosophical work on discrimination for a general conception of the particular kinds of unequal treatment that they are concerned with. Precisely because some very important work in these areas has already been done by torts theorists, but has not yet been brought together or analyzed in light of recent philosophical work on equality and discrimination, tort law seems a helpful place to start.[[37]](#footnote-37) Examining the recent work of tort theorists and trying to develop a general classification of the ways in which some rules of tort law perpetuate status inequalities might enable us to see the apparently disparate problems faced by different interest groups as versions of a single set of problems.

So let us turn now to the different types of legal rules in tort law that torts scholars have found to perpetuate social subordination and the different ways in which they have done this. In the next section of the paper, Section 3, I shall present a number of these rules of tort law, grouping them into several types. In Section 4, using ideas borrowed from philosophical work in discrimination theory, I shall offer what I think is a helpful general classification of the ways in which such legal rules perpetuate the abiding and pervasive social subordination of groups such as racial minorities, women, members of LGBTQ+ communities, and people with disabilities. As I emphasized earlier, my paper does not presuppose the simplistic view that whenever a legal rule has the effect of perpetuating subordination, this provides an overriding reason to alter the rule. On the contrary, different theories of tort law have different implications about when we should worry about such effects and when courts and legislatures can legitimately alter the relevant rules of tort law in the face of such effects. I shall begin to explore some of these implications in Section 5 of the paper. I shall suggest there that many theories of tort law leave more room than one might at first suppose for using tort law as an instrument to rectify at least some unjust social inequalities. Finally, in Section 6, I shall discuss what else we can gain from a general classification of the ways in which the rules of tort law perpetuate social inequalities.

1. ***Types of Legal Rules that Subordinate***

We can divide the legal rules within tort law that have perpetuated the subordination of certain social groups into several broad types. In this section of the paper, I shall offer a few examples of each type of rule. My aim here is not to be comprehensive: this is not a catalogue of every rule within tort law that has a subordinating effect. Rather, my aim is to present a few noteworthy examples of rules of each type. Once we have these examples in hand we can proceed, in Section 4, to a discussion of the general ways in which such rules work to subordinate different social groups.

1. **Gate-keeping rules**

 We can start with gate-keeping rules --doctrines that determine, within a given jurisdiction, who has standing to bring a tort claim of a certain sort, who they can in principle sue, and which jurisdiction’s laws apply to them. For instance, within nuisance law one must, in most jurisdictions, have a certain kind of proprietary interest in the property affected by the nuisance in order to bring a claim. Hence, the owner of that property can sue in nuisance law, and so can a lessee, but homeless friends or family who are temporarily staying with them generally cannot, because they lack the relevant proprietary interest.[[38]](#footnote-38) This is a gate-keeping rule for plaintiffs which, though not deliberately designed to leave those without ownership or rental rights dependent on those who do have these rights, nevertheless functions to do this. It leaves those whose housing is precarious dependent on those who have secure housing, for only the latter can bring this kind of legal claim.

The doctrine of qualified immunity in the United States is another example of a gate-keeping rule that perpetuates status inequalities.[[39]](#footnote-39) It applies to prospective defendants, and it too disadvantages an already subordinated social group, Black persons. Under this doctrine, public officials, including police officers who have responded with excessive force, cannot be sued unless a court in some previous case involving nearly identical circumstances has ruled that this behaviour was unconstitutional.[[40]](#footnote-40) Given the difficulty of finding a case with nearly identical circumstances, this doctrine makes it much more difficult, if not impossible, for Black persons to succeed in lawsuits against police officers for excessive violence. The doctrine came under considerable scrutiny after the killing of George Floyd, as one of a number of doctrines that hinder the accountability of public officials for violence against Black persons and that thereby not only leave Black persons without monetary compensation but also fail to deter police from responding with excessive violence towards Black persons and indeed normalize such violence, perpetuating damaging stereotypes about Black persons as warranting an aggressive response.[[41]](#footnote-41) But although some jurisdictions, such as New York city, have since created new local civil causes of action against excessive police force and have banned the use of qualified immunity as a defence in these lawsuits, the federal government’s attempt to abolish the defence of qualified immunity through the *George Floyd Justice in Policing Act* stalled at the Senate.[[42]](#footnote-42)

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

Another set of rules that are helpfully regarded as “gate-keeping” rules are the rules that govern which country’s laws must be applied in transnational torts cases. Sometimes these rules, too, can exacerbate status inequalities. In a recent negligence case, an appellate court in Canada directly considered whether the fact that the laws in the place where a tort occurred would discriminate against female plaintiffs was relevant to whether a Canadian court should apply the local laws or substitute Canadian law.[[43]](#footnote-43) The case concerned the collapse of a factory in Bangladesh operated by a Canadian company, which killed 1,130 people. The plaintiffs argued that Canadian tort law should be applied rather than Bangladeshi law, because Bangladeshi law includes Sharia law and Sharia law does not distribute damages equally between male and female heirs of the deceased. The Ontario Court of Appeal upheld the decision of the Superior Court judge that, because the unequal provisions of Sharia law were relevant only at the stage of assessing damages, because they would affect only a very small number of plaintiffs, and because a court could opt to sever these provisions when calculating damages for these plaintiffs, there was no sufficiently weighty public policy reason to make an exception to the general principle that the law to be applied is the *lex loci delecti,* the law of the place where the tort occurred. But the court did not rule out the possibility that in a future case, a rule that perpetuated an inequality between men and women *at the stage of assessing the merits of the plaintiff’s case* and that could *not* be severed might give a court reason to apply Canadian tort law instead.

1. **Framing rules**

A second broad class of legal rules that contribute to the subordination of certain social groups are what we can call “framing rules.” Framing rules determine what, in a given jurisdiction, counts as a legally cognizable cause of action –for instance, in tort law, which harms count as torts in a given jurisdiction.

These rules can perpetuate significant status inequalities between different social groups. Sometimes, harms that are much more likely to befall members of certain social groups do not fit neatly inside the box of a legally cognizable tort, because members of this group have not had the political or legal influence to be able to get this type of harm recognized as a tort. Where there is no other source of redress for this type of harm, members of this group must suffer silently, without compensation, and often under the stigma of the assumption that no wrong has been done to them and that they are responsible for the resulting hardships that they face. Domestic violence is a good example of a harm that falls through the cracks in many jurisdictions and that is disproportionately suffered by women, by members of LGBTQ+ communities, and particularly by racialized women and racialized members of LGBTQ+ communities. Many jurisdictions do not have a specific tort of domestic or family violence.[[44]](#footnote-44) Although some of the harms sustained by victims of domestic violence fit into the recognized torts of assault and battery, the harm done by domestic violence extends far beyond isolated incidents of assault and battery: it is a cumulative harm, stemming from complex patterns of coercion and control, and it involves deep and prolonged psychological abuse as well as ongoing physical harm.[[45]](#footnote-45) Moreover, in many jurisdictions, the relevant divorce laws provide no avenue for compensation. No Canadian province, and very few US states, consider family violence when calculating awards of spousal support.[[46]](#footnote-46) And although victims of family violence can seek recourse through the criminal law, this avenue leaves them without a civil remedy. For all these reasons, a lower court judge in Ontario just this year recognized a new tort of “family violence.”[[47]](#footnote-47)

A related problem of framing rules leaving out harms that are more often sustained by subordinated social groups can occur when a court explicitlyrefuses to recognize a certain harm as a tort, deciding that this harm is best remedied elsewhere in the law. Sometimes, the remedies offered elsewhere in the law do not adequately compensate victims or do not carry with them the social message that victims of such harms have personally been wronged. For instance, in Canada, attempts to create a tort of discrimination have been blocked by the Supreme Court. In *Seneca College v Bhadauria,* the Canadian Supreme Court held that the existence of a provincial human rights code that addressed complaints of discrimination “excludes any common law action based on an invocation of the public policy expressed in the code.”[[48]](#footnote-48) That human rights code, however, did not in fact guarantee plaintiffs a hearing. Complaints were brought forward to be heard by a tribunal only if these complaints were deemed to have a sufficient “public interest” dimension to them, and the purpose of bringing forward the complaint was in large part to address the public interest issue, rather than to acknowledge a personal wrong done to the plaintiff.[[49]](#footnote-49) So in spite of the Court’s assertions in *Bhadauria* that there was an alternative means to tort law available to the plaintiff to have her claim heard and redressed, the reality in practice was that there was no equivalent means.[[50]](#footnote-50) Moreover, although the refusal to recognize discrimination as a tort applies to everyone –nobody in Canada can now bring a tort claim for discrimination—it affects subordinated social groups most keenly, because these are the groups that most often face discrimination.[[51]](#footnote-51)

1. **Building block rules**

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

One quite basic building block rule within negligence law is the objective standard, which is applied both to defendants and to plaintiffs. The defendant is deemed to have acted negligently only if she did not do what “the reasonable person” in their position would have done.[[52]](#footnote-52) Under the doctrine of contributory negligence (or its more plaintiff-friendly version, the doctrine of comparative negligence), a plaintiff can have their damages reduced if the defendant shows that the plaintiff did not take sufficient care for her own safety.[[53]](#footnote-53) Although the objective standard is presented within negligence law as neutral and impartial --a standard that we would all deem reasonable, regardless of our particular values or circumstances, and that we can all fairly be held to-- nevertheless, tort law scholars have criticized the application of the standard in many cases as reflecting only the perspectives and interests of empowered social groups.[[54]](#footnote-54)

For instance, early feminist work on the objective standard argued that judges more often assessed what a reasonable defendant would do in light of “male” ideas about efficiency, rather than “female” ideas about caring and consideration.[[55]](#footnote-55) Most scholars have now moved away from this particular critique on the grounds that it relies on problematic, gendered assumptions about how men and women reason. But there is still a concern that, in spite of the standard appearing impartial, courts may deem certain risky behaviour “reasonable” in boys or men but not in girls or women who behave in those same ways.[[56]](#footnote-56) In a similar vein, scholars writing about whether victims of conversion therapy can successfully sue their therapists in negligence law have noted that whether a judge rules that a given therapist acted “reasonably” in recommending conversion therapy will likely depend on whether the judge accepts the “status-based judgement of contempt or disdain for non-heterosexual identities” that underlies such therapy.[[57]](#footnote-57) Moreover, they note that those therapists who hold themselves out not as medical professionals but as faith-based healers will be held to a lower standard of care, one that reflects what is viewed as reasonable within their own community of faith-based healers. Given that such communities normally view non-heterosexual identities as a sign of illness or immorality, this interpretation of the reasonable person standard turns it into a very partial standard, and one that reinforces negative stereotypes about LTBGQ+ identities. Finally, disability theorists have charted the ways in which, prior to the relatively recent enactment of statutes protecting people with disabilities, some American courts assumed that the reasonable plaintiff with a disability would always travel with an assistive device or companion –a guide dog, a sighted friend, a wheelchair. The result was that plaintiffs with disabilities who ventured out in public on their own without such assistance were sometimes held contributorily negligent.[[58]](#footnote-58) Indeed, one judge found a man who was blind to have been contributorily negligent even when he was using a guide dog, because he "failed to put forth a greaterdegree of effort than one not acting under any disabilities to attain due care for his safety.” Somewhat ironically, the same judge went on to refer to this as “a standard of care which the law has established for everybody.”[[59]](#footnote-59)

A different set of building block rules that torts scholars have critiqued as contributing to subordination are the rules that govern recovery for psychiatric harm in negligence law, when that harm is unaccompanied by a separate physical injury.[[60]](#footnote-60) Although the complete barriers to recovery for psychiatric harm that used to exist in tort law have been eliminated in most jurisdictions, there are still framing rules in place in many jurisdictions that make it more difficult for plaintiffs to recover for psychiatric injuries than for physical injuries. For instance, although the Canadian Supreme Court recently held that plaintiffs no longer need to prove that they suffer from a medically recognized type of psychiatric illness,[[61]](#footnote-61) and although the Court explicitly noted that “the distinction between physical and mental injury is elusive and arguably artificial,[[62]](#footnote-62) the Court nevertheless kept in place the requirement that psychiatric injuries must be “serious and prolonged and that they must be the kind of injury that would be sustained in “a person of ordinary fortitude.”[[63]](#footnote-63) Physical injuries do not have to clear either of these thresholds in order to be compensable. This both directly disadvantages plaintiffs with mental illnesses and also contributes to the marginalization of those with mental illness as a group, insofar as it lends official support to the stereotypical idea that mental illnesses are more easily fabricated and exaggerated than physical ones, and the stereotypical idea that if those with mental illness only had greater fortitude --more will power, or more virtue-- they would be able to fix their problems themselves.

A third set of building block rules that have been critiqued by torts scholars as contributing to social subordination are the rules surrounding the privacy tort of “public disclosure of private facts.” This tort has been used quite successfully in some jurisdictions to protect women from cyber-harassment, and thereby to combat the subordination of women through the internet.[[64]](#footnote-64) However, the tort has at the same time been developed in ways that make it difficult for members of LGBTQ+ communities to “selectively disclose” their sexual orientation or their gender identity –that is, to disclose it in certain contexts, while keeping it private in others. As Anita Allen has explained, courts tend to take a “once out, always out” point of view on LGBTQ+ identities.[[65]](#footnote-65) They often fail to recognize that one’s sexual orientation or gender identity can still count in some contexts as a “private fact” (for instance, in relation to one’s parents or co-workers) even if one has chosen to disclose it in other contexts (for instance, at an intimate gathering of friends or at a large anonymous social event). Courts have also denied in some cases that the publication of someone’s sexual orientation or identity is “highly offensive,” on the grounds that society as a whole now celebrates LGBTQ+ identities.[[66]](#footnote-66) So the building block rules that define this privacy tort –the rule that the defendant must have disclosed a “private fact” and the rule that the publication of this fact must be “highly offensive”– have been interpreted by judges in ways that do not accurately reflect the perspective of LGBTQ+ members and that feed into certain stereotypes about these groups, such as that they are now fully accepted within our societies and that they therefore really have nothing to complain about and are done no injury when others reveal their identities in contexts in which they do not want them revealed.

1. **Remedy-governing rules**

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

With respect to gender- and race- based statistics on wages and work-life expectancy, American tort scholars have given nuanced analyses of the ways in which the history of exclusion and devaluation of women and racial minorities in the workforce has resulted in lower wages for these groups, as well as lower work-life expectancies.[[67]](#footnote-67) As they have noted, the practice of estimating a plaintiff’s lost wages or lost years of work-life based on these lower figures then compounds the unfairness suffered by members of these groups, partly because it penalizes them for being victims of prior injustices, and partly because it creates perverse incentives for employers to locate particularly risky enterprises (for instance, oil refineries or facilities for storing or transporting toxic chemicals) in low-income neighbourhoods and thereby continuing to place these risks on the shoulders of those whom it will be cheaper for them to compensate should the risks materialize into harms.

A related set of concerns has arisen in Canada in cases involving abuse in government- and church-sponsored residential schools. In such cases, courts have often assessed the plaintiff’s damages for lost future earnings by considering the occupations of the plaintiffs’ siblings, on the assumption that if all or many of the plaintiffs’ siblings held only a particular low-paying, relatively unskilled job, it is unlikely that the plaintiff himself would have been able to hold down a better job, even if he had not been abused. For instance, in *Blackwater v. Plint,* the trial judge gave considerable weight to the fact that both of his brothers were loggers.[[68]](#footnote-68) But of course, this was the occupation of his brothers in large part because systemic discrimination against Indigenous peoples had left them both without an adequate education and living in a remote area with few employment opportunities.

Disability theorists have also looked at the ways in which remedy-regulating rules perpetuate stereotypes about disabilities. Bloom and Miller have argued that the standard “make whole” approach to remedies in tort law fuels the misconception that plaintiffs with disabilities are less than whole, and that their disabilities are inherent physical or mental defects, rather than being in large part a product of their social context and a reflection of the supports that are available or unavailable to them.[[69]](#footnote-69) Bloom and Miller have therefore urged that what plaintiffs who have been rendered disabled really need, by way of a remedy, is not an amount of money allegedly representing the damage that has been done to their bodies and their careers, but an amount of money corresponding to what they will need to adapt to their disability in their particular social context, which would demonstrate “respect” for who they are.[[70]](#footnote-70)

1. ***Ways in Which Such Legal Rules Perpetuate Social Subordination***

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

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

1. **Inherently biased rules**

Some of the legal rules that we considered in Section 3 perpetuate the social subordination of a certain social group because they are *inherently biased* against that group. A rule is inherently biased against a certain group in the sense that is relevant here *only if that rule directs officials to treat people from that group in a way that disadvantages them relative to others, and only if it thereby devalues these people or their responses.* [[71]](#footnote-71) So, to count as inherently biased, a legal rule must explicitly single out members of a certain subordinated social group for a certain disadvantageous treatment. It must also devalue members of that group, implying that this treatment is appropriate for them because their lives are in some sense worth less than those of others, or their responses, less reasonable, by virtue of being the life or the response of a member of this group.

Within her work on social justice tort theory, Chamallas uses the term “bias” much more broadly, to denote not just the *deliberate devaluing* of a particular social group, but the adoption of any rule that has disadvantageous effects on that group, regardless of whether these effects are deliberately imposed and regardless of whether they devalue members of the group.[[72]](#footnote-72) Although Chamallas does not explicitly give a reason for extending the term so broadly, she seems to do so in order to highlight the fact that disadvantageous effects on a socially subordinate group can be *just as harmful* for that group as deliberate attempts to devalue them and their responses. But this broader use of the term “bias” goes against the grain of American anti-discrimination law, which recognizes what it takes to be a morally significant difference between deliberately treating members of one social group as though they are less valuable than others, on the one hand and inadvertently disadvantaging them on the other, with disparate treatment being understood as involving the former, and disparate impact, the latter. Moreover, as we shall later see, certain mainstream tort theories, too, consider this distinction to be of moral importance, and can more easily recognize the importance of preventing the deliberate devaluing of certain social groups. So I shall use the phrase “inherently biased” in its traditional sense, limiting its applicability to cases in which a particular social group is deliberately disadvantaged and devalued. As I shall argue, we can still recognize that there are other ways of contributing to social subordination without subsuming all of them into one category of bias.

One of the most obvious inherently biased legal practices within tort law is the use of race- and gender- based statistics on wages and work-life expectancy in assessing damages. [[73]](#footnote-73) This practice explicitly treats race and gender as reasons for thinking that certain plaintiffs would have earned less, or lived less longer, than others, if they had not been injured. Significantly, the reason this devalues women and racial minorities is *not* that a lower projected earning or a lower work-life expectancy is in and of itself demeaning: it is not always. Rather, the practice of assuming that such race- and gender- based statistics will be accurate even in the future *expresses a complacency* about the systemic discrimination that led to these statistics –a seeming acceptance of the traditional, discriminatory status quo and a reluctance to regard it as our collective responsibility to eliminate such discrimination in the future. In addition, the practice seems to assume that these groups are themselves incapable of rising above past circumstances, which perpetuates stereotypical assumptions about their alleged lack of initiative and lack of effort (and which in turn can make it seem, erroneously, as though their problems are their own fault).

Another set of rules that are arguably “inherently biased” are the building block rules that we examined earlier, requiring that plaintiffs claiming purely psychiatric harm meet a higher bar than plaintiffs alleging some physical injury. Insofar as these rules explicitly distinguish between plaintiffs suffering only from a psychiatric injury and plaintiffs suffering also or only from a physical injury, and require the former to prove that their illness was serious and prolonged and that it would have arisen in “a person of ordinary fortitude,” these legal rules seem to imply that those with psychiatric injuries or illnesses tend to exaggerate or fabricate their injuries and that their real problem is really a problem that is nobody else’s responsibility but theirs: a lack of sufficient will power or fortitude.[[74]](#footnote-74)

1. **Neutral rules, interpreted in a biased way**

Of course, many of the legal rules that marginalize social groups are not inherently biased: they do not, on their face, draw any distinction between these groups and others. Rather, they present themselves as neutral. But sometimes *they are interpreted by judges in ways that privilege the needs or the perspectives of certain empowered groups while mischaracterizing or ignoring the needs of a marginalized social group.* I shall call these “neutral standards, interpreted in a biased way.” Such biased interpretations are particularly problematic because, under the guise of neutrality, the legal rules then perpetuate false and negative stereotypes about a particular minority group. Like inherently biased rules, these biased interpretations make it more difficult for members of this group to succeed legally. But unlike inherently biased rules, the bias here is not overt or immediately apparent, on the face of the rule. This can make it even more difficult to identify. And this can lead to a further harmful effect: it can give the appearance that the difficulties that members of these groups encounter when facing such rules *are their own fault*, and hence not problematic. In other words, the hidden nature of the bias in such cases can have a legitimating effect: it can make what is actually a problematic disadvantage seem quite appropriate.[[75]](#footnote-75)

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

Another example of a set of rules that are themselves neutral but have been interpreted in a biased way are those that structure the privacy tort of “public disclosure of personal facts.” The rule that the defendant must have disclosed a “private fact” and the rule that the publication of this fact must be “highly offensive” are supposed to apply to anyone, regardless of their sexual orientation or their gender identity. But, as we saw earlier, some judges have deemed facts about non-heterosexual identities “private” only when they have never been disclosed in any social context and have ruled that the disclosure of these plaintiff’s identities in certain contexts is not “highly offensive” because society now celebrates LTBGTQ+ communities. As Anita Allen has argued, this privileges a certain heterosexual understanding of identity –namely, that one’s identity is always something one can comfortably disclose, in any context.[[76]](#footnote-76) It also perpetuates false stereotypes about members of LGBTQ+ communities, such as the assumption that they do not really face discrimination any longer and are just hypersensitive, complaining when they really have nothing to complain about.

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

1. **Rules that disproportionately disadvantage certain social groups, in ways that contribute to their unjust subordination**

Sometimes, even if a rule is neither biased on its face, nor interpreted by judges in a biased way, the application of that rule in a particular case can nevertheless end up disproportionately disadvantaging an already subordinate social group, in ways that further contribute to their subordination. That is because tort law operates in societies that already have deep underlying status inequalities. Racial minorities, people with disabilities, and members of LGBTQ+ communities are frequently in vulnerable social positions, across a variety of different social contexts: they own less property than others, they have less power and fewer opportunities than others, more often live in poorer neighbourhoods, and are more likely to be in abusive relationships than others. As a result, even neutral rules of tort law that are neutrally interpreted can end up disproportionately disadvantaging these social groups in ways that contribute to their unjust subordination. Discrimination theorists have argued that this is one of the reasons why policies that impose an unjustifiable disparate impact on certain groups can wrong those groups: they disadvantage these groups in such a way as unfairly to *subordinate* them to others.[[77]](#footnote-77) So the rules of tort law that fall into this third category have effects similar to policies that would be prohibited by disparate impact laws.

Some of the framing rules that we considered in Section 3 seem problematic for precisely the reason that they disproportionately disadvantage certain already subordinated social groups, in such a way as to exacerbate their subordination. Think back, for instance, to the rules that recognize assault and battery as legally cognizable torts but are silent on the matter of a general tort of domestic violence. Similarly, consider the rules that explicitly deny the status of a tort to discrimination. These legal rules are neutral on their face. They are not applied in a biased way: in jurisdictions that do not recognize domestic violence or discrimination as torts, *no* plaintiff can bring these tort claims. So these rules do not fit into either category (i) or category (ii). The problem with these rules is rather that domestic violence and discrimination are, in our societies, overwhelmingly harms suffered by already subordinated social groups, groups such as racial minorities, LGBTQ+ individuals, people with disabilities, and women. Hence, the rules that neutrally prevent everybody from bringing a torts claim of domestic violence or discrimination disproportionately disadvantage these already subordinated groups. And importantly, they do not only work to cause economic disadvantages for these groups. They disadvantage them in a way that perpetuates their subordinate *status.* For domestic violence and discrimination are among the important, abiding causes of the stigma and social exclusion faced by such groups, of their lack of social and political power, and of the lack of deference or consideration given to their perspectives.

Some of the gate-keeping rules of tort law that we considered earlier in Section 3 also disadvantage certain social groups in ways that perpetuate their lower social status in society at large. For instance, the rule that one must have a certain kind of property interest in order to bring a claim in nuisance law applies to everyone, and judges are not themselves biased in its application: they deny standing to everyone alike who lacks the relevant kind of property interest. But in societies with a history of “redlining” Black communities or Indigenous communities (that is, declaring the areas in which they predominate too risky for mortgage loans) and societies with a history of discrimination against these groups in rental housing, even this neutral interpretation of a neutral rule in nuisance law can perpetuate their social subordination. That is because it primarily affects members of thesesocial groups: they are overwhelmingly the people who lack a home, and so are overwhelmingly the people who are unable to bring nuisance claims on their own. This rule ensures that such people lack yet another power, and that there is yet another sense in which they remain reliant on those in whose homes they are staying.

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

Of course, it is not only neutral rules, neutrally interpreted that can disproportionately disadvantage marginalized social groups in ways that contribute to their subordination. Inherently biased rules can do this as well. Think back to the biased practice of using race- and gender- based statistics about wages and work-life expectancy in assessing damages. It results in lower damage awards for women and members of racial minorities, and torts scholars have documented the fact that it also creates perverse incentives for companies engaging in particularly risky activities (such as the movement or storage of toxic chemicals or manufacturing processes that are especially dangerous) to locate these activities in areas predominantly populated by racial minorities who are paid lower wages and who have a lower life expectancy, so as to minimize damage awards when these risks materialize.[[78]](#footnote-78) It then contributes to behaviour on the part of others in society that sustains the unjust subordination of these groups.

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

1. **Rules that invite or require officials to treat a fact that depends on a past injustice as a reason for further disadvantaging someone, compounding that prior injustice**

Sometimes, a legal rule invites or requires an official to take a fact that would not have been true of someone had that person not been a victim of a prior injustice, and then treat that fact as a reason for further disadvantaging them. When the official does this, *they allow that past injustice to generate a new form of disadvantage.* This arguably makes the justice system complicitous in the continuation of that injustice. To describe what happens in such cases, we can borrow an idea from the discrimination theorist Deborah Hellman: the legal system ends up “compounding a prior injustice.”[[79]](#footnote-79) I think this is an important further problem with use of race- and gender-based statistics in calculating damages, quite apart from the problems we have examined so far. As torts scholars have documented, the lower salaries and lower life expectancies that these tables are based upon are the product of a history of systemic discrimination against these groups –discrimination in the workplace, discrimination in medical care, and discrimination in society at large. So, when judges use such figures as the basis for lower damage awards to women and members of racial minorities, they are allowing a prior injustice to generate a new disadvantage –i.e. a lower damage award—and they thereby become complicitous in the continuation of that injustice.

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

Sometimes, it is not a single legal rule but multiple legal rules that work together in a given case to compound an injustice. *Blackwater v. Plint* provides an example of this.[[80]](#footnote-80)The plaintiff Frederick Barney’s claims for emotional and physical abuse at his residential school were found to be statute-barred: the limitation period for them had run out. Only his claim for sexual abuse at the school was allowed to proceed, because the relevant statute placed no time limitations on lawsuits for sexual abuse. The trial judge noted that, in calculating the damages for which the defendants were responsible, he was bound to apply the crumbling skull rule, according to which the defendant is not responsible for any damage that is done to the plaintiff independently of the defendant’s actions. The trial judge went on to find that the statute-barred physical and emotional abuse sustained at the school, along with the extreme poverty and deprivation in the plaintiff’s home prior to his attendance at the school, left him in an already damaged condition that was not the defendant’s responsibility and that needed to be deducted from his damage award.[[81]](#footnote-81) The Supreme Court, on appeal, upheld the trial judge’s ruling on these matters.

Many scholars have found this decision troubling.[[82]](#footnote-82) But they have struggled to explain why. The relevant legal rules --the limitation rules and the crumbling skull rule-- are neutral rules that the court applied in a neutral way. Kent Roach has claimed that the problem here was that the plaintiff was “revictimized for being Aboriginal.”[[83]](#footnote-83) There is something intuitively right about this characterization, but simply saying this does explain where the problem lies. Moreover, one might wonder: how could the plaintiff have been revictimized by neutral legal rules that were neutrally applied? One explanation is that, when these legal rules were applied against the backdrop of systemic discrimination against Indigenous peoples, the legal rules ended up *compounding the prior injustices* that the plaintiff had suffered. The crumbling skull rule required the judge to reduce the plaintiff’s damages by an amount that represented his past injuries. But those past injuries –the emotional and physical abuse at the school, and the deprivation at home-- were themselves the result of injustices: namely, the systemic discrimination that the plaintiff’s family suffered from because they were Indigenous and that the plaintiff himself suffered at the residential school. So the combination of the crumbling skull rule and the limitations rule required the judge to take facts that would not have been true of the plaintiff, had he not been a victim of prior injustices (facts about the poverty of his home, facts about his emotional and physical abuse, and the fact that this abuse was statute-barred, which it would likely not have been had he not been so traumatized that he was unable to file a claim in a timely manner), and required the judge to use these facts as a reason for reducing the plaintiff’s damages. These legal rules thus compounded the prior injustices that he and his family had suffered and made the court complicitous in the continuation of those injustices.

I have now outlined four ways in which tort law can perpetuate social subordination: through (i) inherently biased rules, (ii) neutral rules that are interpreted in a biased way, (iii) rules that disproportionately disadvantage certain groups in ways that contribute to their unjust subordination, and (iv) rules that compound a prior injustice. Those familiar with discrimination law and discrimination theory will notice that these four categories form a kind of continuum or spectrum, moving from rules that look and function rather like those that laws against *disparate treatment* prohibit, all the way to rules that look and function rather like those that laws against *disparate impact* prohibit. The inherently biased rules in category (i) look like the kinds of policies that might fall afoul of prohibitions on disparate treatment: they directly distinguish between one person and others, on the basis of a protected trait or prohibited ground of discrimination, in a way that disadvantages and devalues that person and the group to which they belong.[[84]](#footnote-84) The rules in category (ii) are unlike policies that impose a disparate treatment, insofar as they are neutral on their face: rules like the reasonableness standard and the building blocks of torts like “public disclosure of personal facts” apply to everyone alike and do not single out any one group for differential treatment. But, once they are interpreted in biased ways, they *do* treat certain groups differently from others, in ways that directly disadvantage members of these groups, often on the basis of false stereotypes about them. So the rules in this category function *like* policies that impose a disparate treatment, even though they are on their face neutral. We might therefore say that category (ii) straddles the line between disparate treatment and disparate impact, with rules that look initially neutral but ultimately function the way policies that impose a disparate treatment do, through explicit distinctions designed to exclude a certain group or treat them differently from others. That there could be such an in-between category is unsurprising: both discrimination theorists and courts in certain jurisdictions have suggested that the line between disparate treatment and disparate impact is not a firm one, and there can be cases that seem categorizable in both ways.[[85]](#footnote-85) Finally, the rules in both the third category and the fourth category look rather like cases of unjustifiable disparate impact. The rules in these third and fourth categories do not distinguish, either on their face or even once interpreted, between the subordinated group and other groups. But they have a disproportionately disadvantageous impact on a subordinated social group marked out by a protected trait. Moreau has argued that part of the point of disparate impact laws is precisely to protect against disadvantages of a kind that contribute to the unfair social subordination of such groups. This is why the rules in category (iii) seem objectionable –it is not only the disproportionate disadvantage heaped upon such groups, but the fact that such disadvantage further entrenches their inequality of status in society at large. The rules in category (iv) have a disproportionate impact that compounds a prior injustice. Deborah Hellman has argued that part of the point of disparate impact laws is precisely to prevent courts and governments from compounding prior injustices and thereby becoming complicit in those injustices.[[86]](#footnote-86) The rules in these last two categories, then, are objectionable for the some of the same reasons for which policies with an unjustifiable disparate impact policies are objectionable, according to discrimination theorists.

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

In the next section of the paper, I shall try to show that, in addition to being illuminating on its own terms, this classification is also instrumentally helpful. It is instrumentally helpful, I shall argue, in enabling us to see just how many theories of tort law might be comfortable with our revising legal rules that perpetuate social inequalities in one or more of these four ways. Before I turn to these theories, however, I should address an objection that one might raise in relation to this discussion. If, as I have suggested, the rules in categories (i) and (ii) seem to work in the same ways that policies prohibited by disparate treatment laws work, and if the rules in categories (iii) and (iv) have effects similar to those had by the kinds of policies that are prohibited by disparate impact laws, then why not look to anti-discrimination laws to eliminate them? Why try to alter tort law from within? Why not simply challenge objectionable rules under our existing anti-discrimination laws?

This objection seems both to presuppose an overly optimistic view of what is possible under existing anti-discrimination laws and also to misunderstand the thrust of my suggestion. In suggesting that we move beyond anti-discrimination laws and investigate the ways in which other areas of law perpetuate or could alleviate social subordination, I am not proposing that we stop making use of anti-discrimination laws. The idea is rather that we do both. Anti-discrimination laws are no doubt still helpful in certain cases, as a means of challenging policies that perpetuate social subordination. But a multi-pronged approach, in which we alsoinvestigate many other areas of law and try to work *from within* these other areas of law to determine whether and how particular legal rules ought to be changed, could accomplish even more. Moreover, as I argued in Section 1 of the paper, anti-discrimination laws have been less than fully efficacious in eliminating status-based inequalities. One reason for this is that, as was mentioned earlier, American disparate impact doctrine has been strictly cabined: for instance, although disparate impact claims can be brought under federal civil rights statutes, the Supreme Court has largely prevented courts from adjudicating disparate impact claims under the Fourteenth Amendment.[[87]](#footnote-87) Hence, the legal rules in my categories (iii) and (iv) could likely not be successfully challenged under the Fourteenth Amendment. Relatedly, in some jurisdictions, the underfunding of the kinds of tribunals that administer anti-discrimination laws presents an additional barrier to successfully challenging legal rules through anti-discrimination laws. It means that it is simply not practicable or expeditious for many people to bring such challenges. Using existing tort law scholarship to advocate for internal changes to tort law –either through legislative change or through judicial re-interpretations of common law doctrines—may be a better strategy than relying on claimants to come forward under anti-discrimination laws.

1. ***Mainstream Theories of Tort Law and Status Inequalities***

The fact that many of the rules of tort law perpetuate social subordination and so entrench status inequalities in the ways that I have described is troubling from a moral standpoint. Moreover, there is something particularly troubling about the fact that it is the law –which is supposed to be an instrument of justice— that is perpetuating such status inequalities. But it is surely not the job of every part of our legal system to be concerned with every type of injustice. Which, if any, of these rules of tort law is it really tort law’s responsibility to fix? And which sorts of public officials can legitimately fix them? One’s answers to these questions will depend very much on one’s view of the purpose and aims of tort law as a whole. The aim of this section of the paper is to demonstrate, using the fourfold classification developed in the previous section, that mainstream tort theory is in fact less hostile than might at first appear to the aim of altering the rules of tort law in order to lessen social subordination.

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

Martha Chamallas has recently argued that what sets “social justice torts theory” apart from other theories and makes it a cohesive theory on its own terms is the fact that it assumes “that an important goal of tort law must be to identify, address, and ameliorate the effects of . . . systemic inequalities and disparities.” [[88]](#footnote-88) But the goal of eliminating certain social inequalities, however important, is only a goal. And a goal is not the same thing as a theory. A theory requires a systematic account of the features of tort law that can explain *why* this particular goal is properly thought of as tort law’s own goal*.* Chamallas seems to suggest at one point that this goal follows from the compensatory aim of tort law, because “to attain justice for the individual, systemic forms of injustice must be taken into account.”[[89]](#footnote-89) But this moves too quickly. We need an explanation of why justice for the individual, in whatever sense is relevant to tort law, can only be achieved through legal rules that do not perpetuate certain kinds of systemic inequalities. In asking for this explanation, I am not in any way contesting the moral importance of not perpetuating such inequalities. I am simply noting that we need a more systematic account of why this is tort law’s responsibility.

What do mainstream theories of tort law have to say about this? Which of the four categories of legal rules that I laid out above would mainstream theories of tort law imply that tort law ought to rectify? Let us first consider theories that treat tort law as a body of rules distinct from public law, aiming to restore the equal status of a plaintiff and a defendant in the face of a wrong done to the plaintiff by the defendant. These are all theories that have their origins in Kantian “corrective justice,” which is concerned purely with the formal equality of the plaintiff and the defendant and not with the broader social effects of the legal rules involved.[[90]](#footnote-90) So they may seem to be particularly unpromising candidates for an attempt to justify eliminating the kinds of rules that perpetuate social inequalities.

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

Hanoch Dagan and Avihay Dorfman’s “just relationships” theory of tort law is in some respects similar to corrective justice theories, holding that the rules of tort law make it possible for us to interact fairly with each other. [[91]](#footnote-91) But, in place of formal equality, they import into tort law certain liberal ideals of self-determination and an ideal of “substantive equality,” concerned not just with people’s formal or abstract status as persons but also with their real circumstances --the resources, opportunities and powers that are actually at their disposal. Dagan and Dorfman argue that tort law must set fair terms of interaction between plaintiffs and defendants, seen as substantively equal, self-determining individuals. This means, they argue, that the rules of tort law must enable the parties “to respect each other for the persons they actually are,” which requires not giving priority to one individual’s aims or perspectives over the other.”[[92]](#footnote-92) Clearly, a legal rule cannot respect the defendant and the plaintiff as the people they actually are if it devalues one of them because of their race or gender, or if it favours the perspective or the needs of one, or subjects the other to negative stereotypes. So Dagan and Dorfman’s just relationships theory, too, would hold that tort law can and must be concerned with revising both biased rules and neutral rules that have been interpreted in biased ways.

A third theory related to corrective justice is John Goldberg and Benjamin Zipursky’s “civil recourse theory.” It conceives of tort law as a means of ensuring that someone who has been wronged can “hold a wrongdoer answerable to her.”[[93]](#footnote-93) Goldberg and Zipursky propose that what underlies tort theory is fundamentally “an idea of equal rights.”[[94]](#footnote-94) Like Dagan and Dorfman, they seem to have a conception of substantive equality in mind, rather than a purely formal conception. So their view, too, would not only permit but also encourage revising legal rules that are biased or that have been given biased interpretations.

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

These worries may be well-founded. But even Kantian corrective justice theories recognize that *legislatures* are quite properly concerned with questions of distributive justice. So even if the more formalist of corrective justice theories imply that judges cannot consider these problems in their development of the common law, the theories nevertheless seem consistent with legislatures making efforts to alter such rules by statute. Moreover, as I have noted, both Dagan and Dorfman, on the one hand, and Goldberg and Zipursky, on the other, have deliberately tried to build substantive equality into their theories, in ways that I think give their theories even greater potential to advocate for changes made by judges to common law rules of these third and fourth types. As mentioned above, Dagan and Dorfman explicitly depart from the traditional corrective justice ideal of purely formal equality. For them, the type of equality that tort law rules must respect is avowedly substantive: the parties must be treated as equals “as the persons they actually are.”[[95]](#footnote-95) So the fact that a certain legal rule disproportionately disadvantages one party and the group to which they belong, and the fact that a certain legal rule compounds a prior distributive injustice done to one of the parties would, on their view, give even judges at least some reason to revise it (to be weighed, of course, against other reasons for retaining it). For Goldberg and Zipursky, private law as a whole needs to be understood within the overall context of public law. Tort law is for them one of the ways through which a government discharges an important duty towards its citizens. This is its duty to provide a means through which civil wrongs can be redressed.[[96]](#footnote-96) Precisely because private law, on this view, is developed by the state in fulfillment of one of its public duties, it follows that public officials –whether legislators or judges– are bound to develop private law doctrines in ways that are consistent with public law values, such as equal respect for the needs and the dignity of all. Permitting laws to remain in place that perpetuate pervasive status inequalities and permitting judges to rule in ways that compound prior injustices is arguably not consistent with these public law values.

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

But what about economic approaches to tort law, which care primarily about locating the legal rules that will maximize economic efficiency? There is surely no guarantee that the rules that result in the most economically efficient outcomes (however one defines this) will not be inherently biased or susceptible to biased interpretations, nor that they will never unfairly subordinate minority groups or compound past injustices. Scholars of law and economics have argued in some special cases that the most efficient outcome is sometimes the one that works to eliminate social subordination. For instance, Catherine Sharkey has argued that it is bothmore economically efficient and more just to replace gender- and race- based damage assessments in tort law with a “value of statistical life” methodology that incorporates a more individualized assessment and does not replicate systemic inequalities.[[97]](#footnote-97) But this seems to be a happy coincidence in this particular case, rather than an enduring commitment of economic theory.

More worryingly, other economists have pointed out that when certainstatistically efficient rules are repeatedly applied over time, this can lead to outcomes that are increasingly adverse to poor and marginalized social groups.[[98]](#footnote-98) So efficient policy-making can sometimes over time end up exacerbating social inequalities. Daniel Giraldo Paez and Zachary Liscow have called this effect “policy snowballing.”

They have argued, for instance, that certain disamenities such as pollution are disproportionately allocated to poor neighbourhoods because the poor can pay less than the rich to avoid it, and that this disproportionate allocation then further reduces the ability of the poor to pay for the disamenity. This sets up the feedback loop that they call “policy snowballing,” whereby disproportionate reductions in the earnings of the poor lead to more pollution, which in turn leads to an even greater reduction in the earnings of the poor. We should not, therefore, understate the potential tension between economic approaches to tort law and the goals of social justice tort theory. However, the initial lesson of policy snowballing seems to be, not that tort law is an inappropriate means of attempting to avoid such snowballing, but simply that, when evaluating the rules of tort law, we need to evaluate them in their dynamic form rather than in their static form.

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

1. ***Conclusion: Benefits of a General Classification***

I have tried to show that one benefit of the kind of general classification that I provided in Section 4 is that it better enables us to see which status-based inequalities it is tort law’s responsibility to rectify on particular theories of tort law. It also enables us to notice that many established theories of tort law are in fact friendlier to the enterprise of working to eliminate such inequalities than might at first appear. But there are also other benefits to having such a general classification of the ways in which particular rules of tort law perpetuate status inequalities.

First, because this general classification identifies certain commonalities among the rules within each category, it may encourage scholars working from the standpoint of different interest groups to collaborate, whether on research projects, or in litigation, or in forums such as the Tort Law & Social Equality Project.[[99]](#footnote-99) It may enable them to see the problems that their particular social group is confronting as instances of a broader problem faced also by other groups, and to learn from those other groups both about the nature of the particular problem they face and about possible solutions to it. Tort scholars working on race- and gender-based damages tables have already worked together in such ways. And those working on issues relating to disability and queer theory are beginning to collaborate. As Doron Dorfman has recently noted, there are many concepts in tort litigation “that cross over from discourse related to queer individuals to discussions about the disability community,” such as the importance of pride and questions about when one comes out.[[100]](#footnote-100) Doron also notes that these two communities are often caught in a similar dilemma, between presenting their identity as they really experience it, as a source of joy and fulfillment, and needing to hide it or needing to present it as a source of injury in order to succeed in tort litigation.

Second, there is a danger that, if each subordinated social group focuses only on the very particular problems that seem to affect them without seeing their efforts as parts of a broader struggle for status-based equality, then some groups may end up advocating for legal rules that actually work to the detriment of *other* subordinated social groups.[[101]](#footnote-101) A coordinated approach that is attentive to the impact of a given legal rule upon many subordinated social groups would often be helpful, in order to avoid undermining the efforts of other groups. One example of an area of tort law where conflict between social groups is a very real possibility is the area of wrongful birth torts. Should a mother owe a duty of care in negligence law to her born alive child for damage done to that child as a result of the mother’s negligent driving when it was still a foetus?[[102]](#footnote-102) The interests of women in protecting their autonomy and not being subject to unique duties of care while pregnant may count against recognizing such a duty; whereas the interests of people with disabilities in being protected, and in recovering sufficient money from auto insurance to be able to pay for a lifetime of care, may push in favour of recognizing this duty. Should a doctor owe a duty of care to a potential future child of his female patient of reproductive age, not to prescribe any drugs to the female patient that might potentially harm the future child? [[103]](#footnote-103) If not, would the interests of children with disabilities, a socially subordinate group, be adequately protected? But if doctors were held by courts to owe such a duty, would they then be incentivized to avoid prescribing or even mentioning certain much more beneficial forms of treatment to their female patients –potentially depriving these patients both of excellent care and of autonomy, and further contributing to the subordination of women? It would help, in resolving such issues, for there to be conversations between advocates for women’s rights and advocates for people with disabilities. They could profitably come together to explore the various ways in which various possible legal rules might perpetuate the unjust subordination of either group or might compound prior injustices against them, and ultimately to work towards a solution that both groups might find acceptable.

Our general classification of the ways in which different rules of tort law subordinate certain social groups can also help us think more systematically about what exactly is morally troubling about the perpetuation of inequality in each of these different cases; about whether they are all of equal moral urgency; and about what to do in cases where alternative possible legal rules might each contribute to the social subordination of different groups, but in different ways. This is where a dialogue between torts scholars and discrimination theorists would be especially helpful. Discrimination theorists disagree on why social subordination that is brought about in each of these four ways is morally objectionable: though they agree that it is, they offer different explanations of why. It would be helpful to begin a conversation between such theorists and torts theorists that explores this question further.

Finally, I hope that the general classification I have given of ways in which tort law rules perpetuate stats inequalities may be helpful to legal scholars working in areas other than tort law. For there are likely analogous problems with many other legal rules, both within private law and within public law. If we are truly to work at eliminating pervasive status inequalities between different groups in our societies, we need to think more deeply and more systematically, not just about how to craft anti-discrimination laws, but also about how to modify our other laws. Only then will we be able to lay down the necessary conditions for a true society of equals, one in which no group of people occupies an inferior status to others across many different social contexts.

1. The quoted phrase is from Justice Kennedy’s majority opinion in Texas Dep’t of Housing and Community Affairs v. Inclusive Communities Project*,* 135 S. Ct. 2507, 2522 (2015). [↑](#footnote-ref-1)
2. JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUALITY OF OPPORTUNITY(2013) (on the importance of loosening “bottlenecks” or select areas in which certain groups have restricted opportunities); SHLOMI SEGALL, EQUALITY AND OPPORTUNITY (2013) (defending a version of luck egalitarianism). [↑](#footnote-ref-2)
3. For recent discussions of discrimination as a problem of social subordination, see SOPHIA MOREAU, FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION (2020) (arguing that discrimination is wrongful because subordinating); NIKO KOLODNY, THE PECKING ORDER: SOCIAL HIERARCHY AS A PHILOSOPHICAL PROBLEM (2023) (exploring social hierarchy as the root of many political ills). [↑](#footnote-ref-3)
4. KASPER LIPPERT-RASMUSSEN, BORN FREE AND EQUAL (2014) (focussing on harmful effects, esp. on welfare); TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW (2016) (defending a sufficientarian account of discrimination law). [↑](#footnote-ref-4)
5. For more detailed discussions of status inequalities, see MOREAU, *supra* note 3, Ch. 2 and KOLODNY, *supra* note 3, Ch. 5 and Ch. 6. Both understand status inequalities to consist in differences in the amounts of *de facto* authority and power held by members of certain social groups and differences in the amount of deference or “consideration” they receive from others. [↑](#footnote-ref-5)
6. By “this discipline,” I mean the relatively young discipline of discrimination theory, understood as a branch of legal philosophy focussing on why discrimination is morally troubling and what can be done to rectify it. See the works cited in notes 2-4 and 7-11 for key texts in this literature. [↑](#footnote-ref-6)
7. See KHAITAN, *supra* note 4, as well as DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG?(2008) and BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT (2015). But for an exception, see Sandra Fredman, *Challenging the Frontiers of Gender Equality: Women at Work*, FRONTIERS OF GENDER EQUALITY(Rebecca Cook ed., forthcoming in 2023). [↑](#footnote-ref-7)
8. For more detailed discussions of the differences in power, authority and deference involved in social subordination, see MOREAU and KOLODNY, *supra n*ote 3. [↑](#footnote-ref-8)
9. From an early draft of *Discrimination: The Good, the Bad and the Wrongful*, presented at the University of Toronto Faculty of Law, 2018; a subsequent draft was published in 118.1 PROC. ARISTOTELIAN SOC.,55-81 (2018). [↑](#footnote-ref-9)
10. See, in addition to those cited above, the articles in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION (Kasper Lippert-Rasmussen ed., 2018). [↑](#footnote-ref-10)
11. See, for example, the articles in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW(Deborah Hellman & Sophia Moreau eds., 2013); Owen Fiss, *Groups and the Equal Protection Clause*, 5.2 PHIL. & PUBLIC AFFAIRS (1976): 107-177; Cass Sunstein, *The Anti-Caste Principle,* 92 MICH. L. REV*.* (1994): 2410-2455; and KHAITAN, *supra* note 4. [↑](#footnote-ref-11)
12. Riva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status Enforcing State Action,* 49 STAN. L. REV. 1111 (1997); Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law,* 38 HARV. C.R.-C.L. L. REV. 479 (2003); Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53.3 UCLA LAW REV., 701 (2006); Michael Selmi, *Indirect Discrimination and the Anti-discrimination Mandate,* *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 250 (Deborah Hellman & Sophia Moreau, eds., 2018). [↑](#footnote-ref-12)
13. Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination,* 131.2 YALE L.J. 371 (2021) [↑](#footnote-ref-13)
14. As it was inRicci v. DeStefano, 557 U.S. 557, 129 S. Ct. 2658 (2009). See Richard Primus, *Equal Protection and Disparate Impact: Round Three,* 117 HARV. L. REV. 493, 494-508 (2003); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law,* 94 CAL. L. REV. 1 (2006), and Richard Primus, *The Future of Disparate Impact*, 108.8 MICH. L. REV. 1341 (2010). [↑](#footnote-ref-14)
15. Report of Magdalena Sepúlveda Carmona, Special Rapporteur on extreme poverty and human rights to the General Assembly, A/66/265 para 5 (2011). [↑](#footnote-ref-15)
16. Shreya Atrey, *The Intersectional Case of Poverty in Discrimination Law*, 18.3 HUM. RIGHTS LAW REV 411–440 (2018). See also KEVIN LANG, POVERTY AND DISCRIMINATION (2011) and Sarah Ganty, *Poverty as Misrecognition: What Role for Antidiscrimination Law in Europe?* 21.4 HUM. RIGHTS LAW REV 962-1007 (2021). [↑](#footnote-ref-16)
17. See Martha Jackman, *Constitutional Contact with the Disparities of the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law* 2.1 REV. CONSTIT. STUD. 76 (1994); Murray Wesson, *Social Condition and Social Rights*, 69 SASK. L. Rev. 101 (2006); Sandra Fredman, *The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty* 22 STELLENBOSCH L. REV. 566 (2011). [↑](#footnote-ref-17)
18. For Canada’s constitutional protection of affirmative action, see the *Canadian Charter of Rights and Freedoms*, s.15(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. [↑](#footnote-ref-18)
19. For prohibitions on disparate impact between private actors, see the Canadian provincial human rights codes, such as the *Ontario Human Rights Code,* R.S.O. 1990, c. H.19, s.11. [↑](#footnote-ref-19)
20. For recognition of “la condition sociale” as a protected trait, see the Quebec *Charte des droits et libertés de la personne,* *CQLR, c C-12*. Source of income has been recognized as a protected trait in the Canadian province of Nova Scotia: *Sparks v Dartmouth/Halifax County Regional Housing Authority* (1993) 119 NSR (2d) 91 (Nova Scotia Court of Appeal). Social assistance is treated as a protected trait in the province of Ontario: see *Falkiner v Ontario* [2002] OJ No 1771 (Court of Appeal for Ontario). [↑](#footnote-ref-20)
21. For example, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS(1992); Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1 (1994). [↑](#footnote-ref-21)
22. See, for instance, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987), Ch. 13 (on the impact on women of constitutional protections for freedom of speech); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection* 44:2 STAN. L. REV. 261 at 336-347 (1992) (on the impact on women of employment law and child welfare laws); Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits* 49:4 MCGILL L.J. 1143 at 1148-1173 (2004) (on the impact on same-sex couples of criminal law, employment law, and family law). [↑](#footnote-ref-22)
23. For example, TOBIN SIEBERS, DISABILITY THEORY(2008); see also the articles in IMPLEMENTING THE SOCIAL MODEL OF DISABILITY: THEORY AND RESEARCH (Colin Barnes & G. Mercer, eds. 2004). [↑](#footnote-ref-23)
24. See Stefan Gossling, *Urban Transport Justice* 54 J. TRANSP. GEOGR. 1 (2016); Saeid N. Adli & Subeh Chowdhury, *A Critical Review of Social Justice Theories in Public Transit Planning* 13:8 SUSTAINABILITY 4289 (2021). [↑](#footnote-ref-24)
25. For example, Negar Omidakhsh, Aleta Sprague, & Jody Heymann, *Dismantling Restrictive Gender Norms: Can Better Designed Paternal Leave Policies Help?* 20:1 ANAL. SOC. ISSUES PUBLIC POLICY 382 (2020); Jenny Alsarve, Katarina Boye, & Christine Roman, *Realized Plans or Revised Dreams? Swedish Parents' Experiences of Care, Parental Leave and Paid Work after Childbirth, in* NEW PARENTS IN EUROPE: WORK-CARE PRACTICES, GENDER NORMS AND FAMILY POLICIES68 (Daniela Grunow & Marie Evertsson, eds, 2019); Statistics Canada, “Family Matters: Parental Leave in Canada” in THE DAILY, Catalogue No. 11-001-X (Ottawa: Statistics Canada, 2021). [↑](#footnote-ref-25)
26. Fredman, *supra* note 7; GINA SCHOUTEN, LIBERALISM, NEUTRALITY, AND THE GENDERED DIVISION OF LABOR (2019). [↑](#footnote-ref-26)
27. Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1658-73 (1998); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 802-07 (2000); Ronen Avraham, David Fortus & Kyle Logue, *Revisiting the Role of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1144 (2004); Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1696-98 (2018); Zachary Liscow, *Redistribution for Realists*, 107.2 IOWA L. REV. 107 495-562 (2022); Hemel, Daniel, *Regulation and Redistribution With Lives in the Balance,* 89.3 U. CHI. L. REV. 649-734 (2022). [↑](#footnote-ref-27)
28. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income,* 23 J. LEGAL STUD. 667, 674-75 (1994); and subsequently, Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 827-32 (2000). [↑](#footnote-ref-28)
29. See the articles cited in note 27. [↑](#footnote-ref-29)
30. Martha Chamallas, *Social Justice Tort Theory*, 14.2 JRNL OF TORT LAW 309-332(2021); see also MARTHA CHAMALLAS & JENNIFER WRIGGINS, THE MEASURE OF INJURY 13-34 (2010). [↑](#footnote-ref-30)
31. For foundational work on corrective justice, see ERNEST WEINRIB, CORRECTIVE JUSTICE (2012); ARTHUR RIPSTEIN, PRIVATE WRONGS (2016);John Gardner, *What is Tort Law For? Part I. The Place of Corrective Justice,* 30 LAW AND PHIL. 1 (2011). [↑](#footnote-ref-31)
32. For foundational work on economic theories of tort law, see R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON 1-44 (1960); WILLIAM A. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973) AND GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). [↑](#footnote-ref-32)
33. See, for instance, Chamallas, *supra* note 30; CHAMALLAS & WRIGGINS*, supra* note 30, and Anita Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98.6 CAL. L. REV. 1711 (2010). [↑](#footnote-ref-33)
34. MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD(2003); Craig Purshouse and Ilias Trispiotis, *Is Conversion Therapy Tortious?* 42 LEGAL STUD. 23-41, 35 (2022); Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48.2 CATHOLIC UNIV. L. REV.323 at 341-6(1999). [↑](#footnote-ref-34)
35. For example, Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL into Tort Damages,* 96 NOTRE DAME LAW REV. 1479(2021); Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages,* 106 CAL. LAW REV. 325 (2018). [↑](#footnote-ref-35)
36. Kent Roach, *Blaming the Victim: Canadian Law, Causation, and Residential Schools*, 64.4 UTLJ 566-95(2014). [↑](#footnote-ref-36)
37. Some exceptional groundwork has been done by Martha Chamallas and Jennifer Wriggins, *supra* note 30, to bring together social justice-focussed analyses of tort law. But as I argue later in Section 5 of this paper, social justice tort theory still lacks a theoretical foundation, so is not itself a “theory” yet –though its important insights certainly deserve one. Similarly, although Avraham and Yuracko have argued that tort law’s approach to remedial damages is discriminatory based on race and gender, they do not appeal to discrimination theory or try to analyze this as part of a more general problem with tort law. See Kimberly A. Yuracko & Ronen Avraham, *Torts and Discrimination,* 78.3 OHIO ST. L. J. 661-731 (2017). [↑](#footnote-ref-37)
38. See, for instance, Ivory v International Bus. Machines Corp., 37 Misc. 3d 1221(A) (N.Y. Sup. Ct. November 15, 2012); Abbo-Bradley v. City of Niagara Falls, 2013 U.S. Dist. LEXIS 119413 (W.D.N.Y. August 21, 2013). [↑](#footnote-ref-38)
39. First introduced by the Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967). [↑](#footnote-ref-39)
40. For the most recent Supreme Court pronouncement on the doctrine, see Pearson v Callaghan, 555 U.S. 223 (2009). [↑](#footnote-ref-40)
41. For a good overview of media criticism of the doctrine at the time, see Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests,* N.Y. TIMES, <https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html> [https://perma.cc/SXL4-AMNY] (last updated Oct 18, 2021) (originally published June 23, 2020). For academic commentary, see Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 DUKE L.J. 1701 (2022); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1457-60 (2019). Qualified immunity had been questioned even before the shooting of Floyd: see, for example, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 8-12 (2017). Though for attempts to defend the doctrine, see Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1854 (2018) and William Baude, *Is Qualified Immunity Unlawful*?, 106 CALIF. L. REV. 45, 82 (2018). [↑](#footnote-ref-41)
42. See NY Bill Int 2220-2021, enacted 4/25/2021; Felicia Sonmez & Mike DeBonis, *Republicans, Democrats unable to reach deal on bill to overhaul policing tactics in the aftermath of protests over killing of Black Americans,* Washington Post (September 22, 2021). [↑](#footnote-ref-42)
43. Das v. George Weston Limited, 2018 ONCA 1053. [↑](#footnote-ref-43)
44. Though for one exception, see California’s Civil Code, which has since 2003 recognized a tort of domestic violence: Civil Code § 1708.6. [↑](#footnote-ref-44)
45. See Fiona Kelly, *Private Law Responses to Domestic Violence: The Intersection of Family Law and Tort*, 44 SUP. COURT L. REV. 321-41 (2009). [↑](#footnote-ref-45)
46. Though for two exceptions, see the recent amendments passed in New York and California, requiring courts to consider domestic violence when dividing assets and awarding spousal support: New York Domestic Relations Law §236B(5)(d)(14) and California Fam Code § 4320(i). [↑](#footnote-ref-46)
47. See Justice Renu Mandhane’s judgment in *Ahluwalia v. Ahluwalia*, 2022 ONSC 1303. Prior to her judicial appointment, Justice Mandhane was the Chief Commissioner of the Ontario Human Rights Commission – and so she was very much aware of the social inequalities that underlie both the circumstances of domestic violence and the absence of this tort in tort law. [↑](#footnote-ref-47)
48. Seneca College v. Bhadauria, [1981] 2 S.C.R. 181 at 195 (hereinafter *Bhadauria*). Subsequently, in the Canadian Supreme Court case of Honda Canada Inc. v. Keays, [2008] 2 SCR 362, Justices LeBel and Fish held in dissent that *Bhadauria* “went further than was strictly necessary” and that “the development of tort law ought not to be frozen forever on the basis of this *obiter dictum*” (para 119). At the time, scholars hoped this might open the door to future recognition of a tort of discrimination: see Soloman Lam, *Honda v. Keays: A Landmark Case For Employment Rights,* [thecourt.ca](http://www.thecourt.ca/honda-v-keays-a-landmark-case-for-employment-rights/), (July 4, 2008) (suggesting that the case was “inviting future challenges to the *Bhadauria* ruling”). But to date, no such litigation has been successful. [↑](#footnote-ref-48)
49. John I. Laskin, *Proceedings under the Ontario Human Rights Code* (1980) 2:3 ADVOC. Q. 280, 299; R. Brian Howe & David Johnson, RESTRAINING EQUALITY: HUMAN RIGHTS COMMISSIONS IN CANADA 54-55 (2000). [↑](#footnote-ref-49)
50. For discussion of whether there should be a tort of discrimination, see Jeffrey Radnoff & Pamela Foy, *The Tort of Discrimination*, 26 ADVOC. Q. 309 (2002-2003) (arguing that there should be such a tort because human rights statutes are an inadequate solution); Rakhi Ruparelia, *I Didn’t Mean It That Way: Racial Discrimination as Negligence*, 44: 2d SUP. COURT L. REV. 81 (2009) (defending a tort of negligent *racial* discrimination); Elizabeth Adjin-Tettey, *Picking Up Where Justice Wilson Left Off: The Tort of Discrimination Revisited*, *in* ONE WOMAN’S DIFFERENCE: THE CONTRIBUTIONS OF JUSTICE BERTHA WILSON 113-30 (Kim Brooks, ed., 2009) (analyzing the decision of the Court of Appeal in *Bhadauria* and its potential); Sophia Moreau, *Discrimination as Negligence*, (2012) CAN. J. PHIL., SUPP. VOL. 36: JUSTICE AND EQUALITY 123-50 (Colin MacLeod, ed., 2012) (suggesting that discrimination is tort-like). [↑](#footnote-ref-50)
51. For discussion of the relationship between discrimination and subordination, see MOREAU, *supra* note 3, Ch. 2 and KOLODNY, *supra* note 3, Ch. 13. [↑](#footnote-ref-51)
52. As first outlined in the English cases of Vaughan v. Menlove, (1837) 132 Eng. Rep. 490 and Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224 (U.K.). In the latter case, the court refers to the reasonable person as the everyman, the "man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves" (224). [↑](#footnote-ref-52)
53. See THE RESTATEMENT (SECOND) OF TORTS § 463 (1965). [↑](#footnote-ref-53)
54. See the works cited in notes 55-58. [↑](#footnote-ref-54)
55. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38.3 J. LEGAL EDUC. 32 (1988); Wendy Parker, *The Reasonable Person: a Gendered Concept*, 23:2 VIC. UNIV. WELLINGT. LAW REV. 105 (1993); and Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury*, 23 ANGLO-AMER L. REV. 334 at 342–345 (1994). [↑](#footnote-ref-55)
56. See the discussion of *McHale v Watson* [1966] HCA 13 in MORAN, *supra* note 34 at 60-83; see also Joanne Conaghan, *Tort Law and the Feminist Critique of Reason, in* FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 57 (Anne Bottomley, ed., 1996); and Joanne Conaghan, *Tort Law and Feminist Critique*, 56.1 CURRENT LEGAL PROBLEMS 175 (2003) (both arguing for an expansive view of feminist concerns and modes of reasoning). [↑](#footnote-ref-56)
57. Craig Purshouse and Ilias Trispiotis, *Is Conversion Therapy Tortious?* 42.1LEGAL STUDIES23, 35 (2022). [↑](#footnote-ref-57)
58. Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, *supra* note 34 at 341-6. [↑](#footnote-ref-58)
59. *Cook v. City of Winston-Salem* 85 S.E.2d 696 (N.C. 1955) at 702. [↑](#footnote-ref-59)
60. See John Murphy, *Negligently Inflicted Psychiatric Harm: A Re-Appraisal,* 15.3 LEGAL STUD. 415 (1995) (discussing tort law’s history of marginalizing psychiatric harm); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts,* 88 VA. L. REV. 1625 (2002) (focussing on the law of emotional distress); Anne Bloom, *Zen and the Art of Tort Litigation*, 44 LOY. L.A. L. REV. 11, 19 (2011) (arguing that tort law places too much emphasis on bodily harm); Anne Schuurman & Zoe Sinel, *Matter over Mind: Tort Law’s Treatment of Emotional Injury*, *in* PRIVATE LAW IN THE 21ST CENTURY (Kit Barker, Karen Fairweather, & Ross Grantham eds., 2017); Louise Bélanger-Hardy, *Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis*, 36 DALHOUSIE L. J. 103 (2013) (arguing that it is a mistake to require proof of a recognizable psychiatric illness); H. Teff, *Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries*, CAMBRIDGE L. J. 57. 1 91 (1998) (proposing liability for pure psychiatric harm); Ian Freckelton & Tina Popa, *Recognisable Psychiatric Injury and Tortious Compensability for Pure Mental Harm Claims in Negligence*, 25.5 PSYCHIATRY, PSYCHOLOGY & LAW 641 (2018) (expressing skepticism of *Saadati’s potential to extend liability).* [↑](#footnote-ref-60)
61. Saadati v. Moorhead, 2017 SCC 28 [↑](#footnote-ref-61)
62. Mustapha v. Culligan of Canada Ltd, 2008 SCC 27 at para 8. [↑](#footnote-ref-62)
63. *Id.* at para 9 and para 15. [↑](#footnote-ref-63)
64. Jane Doe 72511 v. M. (N.), 2018 ONSC 6607 (recognizing the tort for the first time in Ontario); followed in VMY v. SHG, 2019 ONSC; cited in E.S. v Shillongton, 2021 ABQB 739 (recognizing the tort in Alberta). [↑](#footnote-ref-64)
65. Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98.6 CAL. L. Rev. 1711 (2010). [↑](#footnote-ref-65)
66. Allen, *Id.;* see also Clay Calvert, Ashton Hampton & Austin Vining, *Defamation Per Se and Transgender Status: When Macro-Level Value Judgments About Equality Trump Micro-Level Reputational Injury*, 85 TENN. L. Rev. 1029 (2018). [↑](#footnote-ref-66)
67. See Sharkey, *supra* note 35, as well as Yurako & Avraham, *supra* notes 35 and 37. See also Goran Dominioni, *Biased Damages Awards: Gender and Race Discrimination in Tort Trials*, 1.2 INT'L COMP., POLICY & ETHICS L. REV. 269 (2018); Loren Goodman, *For What It’s Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 VAND. L. REV. 1353 (2017); Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies,* 49 MCGILL L.J. 309, 311 (2004); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 81-82 (1994). [↑](#footnote-ref-67)
68. Blackwater v. Plint, 2001 BCSC 997 at para 525. [↑](#footnote-ref-68)
69. Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV*.* 709 (2011); see also Chamallas, *supra* note 30 at 5-6; Jason M. Solomon, *Equal Accountability Through Tort Law,* 103 NW. U. L. REV. 1765, 1775-79 (2009) (arguing against the “make whole” theory and in favour of damages representing respect and accountability). [↑](#footnote-ref-69)
70. Bloom & Miller, *id.* at 745. [↑](#footnote-ref-70)
71. For important recent philosophical work on what it is for a discriminatory rule to devalue someone, see HELLMAN, *supra* note 7 and EIDELSON, *supra* note 7. [↑](#footnote-ref-71)
72. Chamallas, *The Architecture of Bias: Deep Structures in Tort Law,* 146 U. PA. L. REV*.* 463 (1998). [↑](#footnote-ref-72)
73. See the literature cited in notes 35, 37 and 67. [↑](#footnote-ref-73)
74. Some might argue that the law’s different treatment of psychiatric harm need not reflect any bias against psychiatric injuries or the agents that suffer them. Rather, one always has a choice over to how to respond to a particular psychiatric injury, whereas in the case of merely physical injuries, there is no room for choice or agency; hence, there is a legitimate basis for distinguishing between psychiatric and physical injuries and holding the former to a higher bar. But this argument seems untenable. Many mental illnesses leave little room for choice; and many physical injuries *do* vary in their duration and severity in part *because of* choices that the agent makes. So although there might be reason to distinguish between illnesses exacerbated by our chosen actions and those not, there is no reason to think this division will neatly line up with the division between psychiatric harms and physical ones. [↑](#footnote-ref-74)
75. This legitimating effect gives us a further reason to separate these rules, which are neutral on their face but interpreted in a biased way, from rules that are inherently biased, rather than grouping them all together in a single category of “bias” in the way that Chamallas does, *supra* note 72. If the rules are all grouped together into a single category, it may be difficult to see which are invisibly legitimated and which are not. [↑](#footnote-ref-75)
76. Allen, *supra* note 65. [↑](#footnote-ref-76)
77. See MOREAU, *supra* note 3 and KHAITAN, *supra* note 4. [↑](#footnote-ref-77)
78. Avraham & Yuracko, *supra* note 37 and *supra* note 35. [↑](#footnote-ref-78)
79. Deborah Hellman, *Indirect Discrimination and the Duty to Avoid Compounding Injustice,* *in* FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 105-22 (Hugh Collins & Tarunabh Khaitan, eds., 2018); see also Benjamin Eidelson, *Patterned Inequality, Compounding Injustice and Algorithmic Prediction*, 1 AMERICAN JRNL LAW AND EQUALITY 252 (2021). [↑](#footnote-ref-79)
80. See the trial judgment, *supra* note 68; the British Columbia Court of Appealjudgment, *Blackwater v. Plint* (2003), 21 B.C.L.R. (4th) 1, and the judgment of the Canadian Supreme Court: *Blackwater v. Plint,* [2005] 3 SCR 3. [↑](#footnote-ref-80)
81. *Blackwater v Plint, supra* note 68, at paras 362-63 and paras 517-24. [↑](#footnote-ref-81)
82. See Carole Blackburn, *Culture Loss and Crumbling Skulls: The Problematic of Injury in Residential School Litigation*, 35.2 POL AND LEGAL ANTHROP. REV. 289 (2012); Leslie Thielen-Wilson, Stacy Douglas & Suzanne Lenon, *Troubling the Path to Decolonization: Indian Residential School Case Law, Genocide and Settler Illegitimacy,*29.2 CAN. JRNL. L. & SOC. 181 (2014). [↑](#footnote-ref-82)
83. Roach, *supra* note 36; Sheila McIntyre, *The Supreme Court of Canada’s Betrayal of Residential School Survivors: Ignorance is No Excuse*, in SEXUAL ASSAULT IN CANADA 151 (Elizabeth A. Sheehy, ed., 2012). [↑](#footnote-ref-83)
84. For helpful analyses of disparate treatment by discrimination theorists, see EIDELSON, *supra* note 7 at 16-26 and Frej Klem Thomsen, *Direct Discrimination* in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 19 (Kasper Lippert-Rasmussen, ed., 2018). [↑](#footnote-ref-84)
85. See Hugh Collins & Tarunabh Khaitan, *Indirect Discrimination Law: Controversies and Critical Questions*, *in* FOUNDATIONS OF INDIRECT DISCRIMINATION LAW(Hugh Collins & Tarunabh Khaitan, eds., 2018); see also MOREAU, *supra* note 3, Ch. 2; and the Canadian Supreme Court’s decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 SCR 3 (discussing cases that could be characterized either as direct discrimination (disparate treatment) or as indirect discrimination (disparate impact)). [↑](#footnote-ref-85)
86. MOREAU, *supra* note 3; HELLMAN, *supra* note 7. [↑](#footnote-ref-86)
87. See Washington v. Davis, 426 U.S. 229, 248-49 (1976) and Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (establishing that disparate impact claims can succeed under the Fourteenth Amendment only if some proof is given of a discriminatory intent or mixed motive). [↑](#footnote-ref-87)
88. Chamallas, *supra* note 30. [↑](#footnote-ref-88)
89. *Id*. at 315. [↑](#footnote-ref-89)
90. For Kantian corrective justice theories, see WEINRIB, *supra* note 31, RIPSTEIN, *supra* note 31 and Gardner, *supra* note 31. For more modern versions of such theories, which are less formalist in character, see Dagan & Dorfman, *op. cit* note 91 and GOLDBERG & ZIPURSKY, *op cit* note 93. [↑](#footnote-ref-90)
91. Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016); Hanoch Dagan & Avihay Dorfman, *Substantive Remedies,* 95 NOTRE DAME L. REV. 513 (2020).   [↑](#footnote-ref-91)
92. Dagan and Dorfman, *Just Relationships*, *supra* note 91 at 1398. [↑](#footnote-ref-92)
93. JOHN C.P. GOLDBERG AND BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS69 (2020). [↑](#footnote-ref-93)
94. *Id*. at 73. [↑](#footnote-ref-94)
95. Dagan & Dorfman, *Just Relationships*, *supra* note 91 at 1424. [↑](#footnote-ref-95)
96. See GOLDBERG & ZIPURSKY, *supra* note 93, esp. Chapter 4, “The Principle of Civil Recourse.” [↑](#footnote-ref-96)
97. Sharkey, *supra* note 35. [↑](#footnote-ref-97)
98. Daniel Giraldo Paez and Zachary Liscow, *Inequality Snowballing,* version of 8 July 2022, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4157437>. [↑](#footnote-ref-98)
99. See The Tort Law & Social Equality Project: [www.tortlawandsocialequality.ca](http://www.tortlawandsocialequality.ca). [↑](#footnote-ref-99)
100. Doron Dorfman, “Post” in “April Discussion Forum: Hurdles for LGBTQ+ Plaintiffs and Plaintiffs with Disabilities,” Tort Law & Social Equality Project: <https://forum.tortlawandsocialequality.ca/t/april-discussion-forum-hurdles-for-lgbtq2-plaintiffs-and-plaintiffs-with-disabilities/45> [↑](#footnote-ref-100)
101. For instance, Kimberlé Crenshaw has pointed out some of the ways in which mainstream feminist causes and arguments tacitly presuppose that all women’s circumstances are like privileged white women’s circumstances, and this thereby renders invisible many of the social realities that Black women confront. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1 U. CHI. LEGAL F.139 (1989). See also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color,* 43.6 STAN L. Rev. 1241 (1991); and *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59.6 UCLA L. Rev. 1418. (2012). [↑](#footnote-ref-101)
102. See Dobson v. Dobson, [1999] 2 SCR 753. [↑](#footnote-ref-102)
103. See Paxton v Ramji,2008 ONCA 697, 92 OR (3d) 401. [↑](#footnote-ref-103)