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### Anti-Subordination Torts

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# Anti-Subordination Torts

SCOTT SKINNER-THOMPSON\*

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## I. INTRODUCTION

In law school curriculum, the first-year tort law course is often caricatured as the class with the funky, sometimes amusing, fact patterns where people get injured—occasionally in bizarre ways—and attempt to recover from the party purportedly responsible.<sup>1</sup> In legal scholarship, tort law has historically been dominated by two approaches: the law and economic approach focused on efficiently distributing the costs of injuries and on preventing/deterring them,<sup>2</sup> and the civil recourse or corrective justice approach that underscores tort law’s role in providing individual redress for victims who have been injured by a wrongdoer.<sup>3</sup>

But thanks to innovative scholars attentive to power disparities in the law and society, an ever-growing body of scholarship analyzes, critiques, and

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\* Associate Professor, University of Colorado Law School; Affiliate Faculty Member, LGBTQ Studies Program, University of Colorado Boulder. Thanks to the editors of the *Ohio State Law Journal* for tremendous editorial guidance. And, most of all, thanks to Professor Martha Chamallas for charting a course for us—it’s an honor to be able to celebrate your work making the world a more just place. Thanks, as well, for the personal mentorship and support you’ve provided me over the years.

<sup>1</sup> *E.g.*, *Summers v. Tice*, 199 P.2d 1, 2 (Cal. 1948) (analyzing who is liable when it was unclear which of two friends shot a third while quail hunting); *Garratt v. Dailey*, 279 P.2d 1091, 1092–93 (Wash. 1955) (evaluating liability of five-year-old child who pulled out chair from elderly person just as they were about to sit down).

<sup>2</sup> *E.g.*, William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 851, 857 (1981).

<sup>3</sup> *E.g.*, Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 273 (2011).

suggests reforms to tort law based on the racial,<sup>4</sup> gender,<sup>5</sup> ableist,<sup>6</sup> socio-economic,<sup>7</sup> and sexuality-based<sup>8</sup> disparities or stereotyping assumptions that exist within the doctrine and its application. Professor Martha Chamallas's scholarship has been at the vanguard of this important trend and it's a joy to celebrate her groundbreaking work in this *festschrift*, although a tall order to do it justice.

Her intellectual and moral leadership have helped us realize that tort law—no less than constitutional law, civil rights, or criminal law—is a context where power and identities play a critical role in determining whose lives will be valued, whose injuries will be remedied, and what injustices will be rectified. Or not. This work has implications not just for how tort law is interpreted and applied in courts, but also how it is taught in school. In fact, several of Professor

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<sup>4</sup> E.g., Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 173 (1982) (arguing that racist speech should give rise to a civil cause of action and that such a tort would not violate the First Amendment given the stake of the government interests); cf. Lolita Buckner Inniss, *A 'Ho New World: Raced and Gendered Insult as Ersatz Carnival and the Corruption of Freedom of Expression Norms*, 33 N.Y.U. REV. L. & SOC. CHANGE 43, 45 (2009) (explaining why racist speech is incompatible with free expression norms).

<sup>5</sup> E.g., Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1439, 1443 (2005) (foregrounding gender and racial disparities in tort awards) [hereinafter Chamallas, *Civil Rights in Ordinary Tort Cases*]; Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 575 (1993) (advocating for greater application of feminist critique of tort law); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 42 (1989) (critiquing traditional tort law curriculum for ignoring issues of gender).

<sup>6</sup> E.g., Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 709, 711 (2011) (underscoring that the incentives of tort litigation reinforce the perception of people with disabilities as tragic perpetuating harmful stereotypes); SCOTT SKINNER-THOMPSON, *AIDS AND THE LAW* § 8.03 (6th ed. 2020) (explaining that tort claims that award emotional damages to those who feared contracting HIV from another person legitimize stigma against people living with HIV and perpetuate misunderstanding regarding the disease, particularly when the risk of transmission is low or nonexistent).

<sup>7</sup> E.g., Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 4 (1988) (lamenting the lack of tort law accountability for employer's who abuse their employees).

<sup>8</sup> E.g., Anita Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1711 (2010) (explaining how privacy torts have, at times, not fully vindicated claims based on outing of sexual minorities); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2177–78 (2007) (discussing tort law's potential to protect sexual minorities not formally protected by civil rights statutes); and, if I may, Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2055 (2018) [hereinafter Skinner-Thompson, *Privacy's Double Standards*] (seeking to revitalize the privacy tort rights of queer people through the application of constitutional equality principles).

Chamallas's scholarly endeavors focus specifically on bringing these insights to bear on law school curriculum.<sup>9</sup>

As detailed herein, her substantive contributions to tort scholarship and theory are manifold but include at the top of the list (my list, anyway): (1) critiquing the degree to which harms often (but not exclusively) associated with women are unrecognized or devalued in tort law,<sup>10</sup> (2) unearthing the ways in which the injuries of racism have been ignored,<sup>11</sup> and (3) articulating how constitutional equality principles might be used to reform some of the discriminatory practices of tort law.<sup>12</sup>

All told, recently synthesizing her work and those of her compatriots in this field, Professor Chamallas explained that there is today a robust "social justice" theory of tort law.<sup>13</sup> This theory "starts from the premise that tort law reflects and sometimes reinforces systemic forms of injustice in the larger society" and "asserts that one important goal of tort law must be to identify, address, and ameliorate the effects of these systemic inequalities and disparities."<sup>14</sup>

Here, taking a complementary approach to describing these interventions, but focusing in on a narrower aspect given the breadth of what rightly can be encompassed by the term "social justice,"<sup>15</sup> I suggest that Professor Chamallas has helped engender an anti-subordination approach to tort law. As characterized here, this anti-subordination approach to tort law does not just

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<sup>9</sup> For example, Professor Chamallas has coedited a volume dedicated to a feminist rewriting of many of the canonical cases taught in first year tort classes as a helpful instructional tool. *See generally* FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS (Martha Chamallas & Lucinda M. Finley eds., 2020).

<sup>10</sup> *E.g.*, MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 78, 160 (2010) (critiquing, among other things, decisions rejecting workplace harassment as cognizable in tort and the use of gender-based tables to value certain injuries); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 468 (1998) (explaining how facially neutral tort principles that put physical injury and pecuniary loss on a pedestal devalue injuries that may socially be understood as disproportionately associated with women including emotional or nonpecuniary harm).

<sup>11</sup> *E.g.*, Martha Chamallas, *Race and Tort Law*, in OXFORD HANDBOOK ON RACE AND THE LAW IN THE UNITED STATES (Khiara Bridges, Devon Carbado & Emily Houh eds., forthcoming 2022) (manuscript at 1), <https://ssrn.com/abstract=3661537> (on file with the *Ohio State Law Journal*) [hereinafter Chamallas, *Race and Tort Law*]; Chamallas, *Civil Rights in Ordinary Tort Cases*, *supra* note 5, at 1436.

<sup>12</sup> *See generally* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994) [hereinafter Chamallas, *Questioning the Use*].

<sup>13</sup> Martha Chamallas, *Social Justice Tort Theory*, 14 J. TORT L. (forthcoming) (manuscript at 2), <https://ssrn.com/abstract=3933027> (on file with the *Ohio State Law Journal*).

<sup>14</sup> *Id.* (manuscript at 6).

<sup>15</sup> As Professor Leslie Bender has powerfully argued, a social justice approach to tort law would broadly recognize that injuries to dignity and equality were personal injuries compensable under tort law. Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 256–57 (1998).

simply attempt to redress formal inequalities in doctrine or its application, putting people on formally equal footing in the eyes of the law. Indeed, as Professor Chamallas recognized, “[w]ith the end of slavery and the formal abandonment of coverture,”<sup>16</sup> which horrifically denied the humanity of Black people and women and only recognized their injuries to the extent they were wrongly deemed the property of others, the face of tort law in most (but not all) contexts is neutral, with facial classifications rarely drawn among groups.<sup>17</sup> But, as critical race, feminist, and queer theory scholars have underscored in many different doctrinal contexts, subordination can and does exist even without narrowly constructed discriminatory classifications.<sup>18</sup> Chamallas brings these insights to bear in her approach to examining tort law.

Moving us beyond the important (and still incomplete) eradication of facial discrimination, Chamallas has instantiated an anti-subordination approach to tort. This approach moves the law in favor of prioritizing (with special solicitude) the injuries disproportionately inflicted on marginalized communities and, potentially, being mindful of (instead of ignoring) identity differences to create contextually sensitive rules that may level up those that have historically been subjugated or ignored.<sup>19</sup> In the pages that follow, my hope

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<sup>16</sup> Martha Chamallas & Lucinda M. Finley, *Introduction to FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS*, *supra* note 9, at 3, 5.

<sup>17</sup> CHAMALLAS & WRIGGINS, *supra* note 10, at 1 (“At a time when formal doctrine is neutral on its face and rights and liabilities are stated in universal terms, considerations of race and gender most often work their way into tort law in complex, subtle ways.”).

<sup>18</sup> *E.g.*, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2–5 (2008) (lamenting the limited definition of “equality” in American law and advocating a substantive, contextual approach that considers how vulnerability is a product of more than the rigid identity-based categories of equal protection law); Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 681–84 (calling for an anti-subordination approach to equal protection jurisprudence that invalidates laws that subjugate minorities while empowering the government to legislatively combat such subjugation without facing heightened constitutional scrutiny); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1454 (1991) (arguing that achieving equality requires examining the substantive conditions of people’s lives and combatting any policy that entrenches subjugation).

<sup>19</sup> As I have defined elsewhere,

“Anti-subordination” refers to the idea that legal equality principles ought not merely prohibit the classification of people based on various demographic criteria (race, sex, disability, etc.), but that lived equality – that is, substantive, material day-to-day equality as opposed to formal, “on-the-books” equality – necessitates dismantling facially neutral (non-classifying) laws that nevertheless oppress particular groups. An anti-subordination theory of equality supports, at times, being conscious of different classifications (rather than ignoring them) and, perhaps, using those classifications to level up those that are being subordinated, including through reform of facially neutral legal regimes that, as rendered, are anything but.

is to highlight the importance of the three insights of Professor Chamallas that I have selected (critiques of (1) gender disparities and (2) racial disparities, coupled with (3) the role of constitutional law in correcting those disparities) and theorize how they move us closer to an anti-subordination approach to tort law that can be used as one tool—among many that we need across legal contexts—to deconstruct hierarchy in its myriad forms.<sup>20</sup>

## II. RECOGNIZING WOMEN’S WORTH

Spanning several different doctrinal contexts, Professor Chamallas has unearthed ways in which tort law has traditionally subordinated the interests of women while also charting how the law could be made more responsive to women’s interests.<sup>21</sup> For example, with coauthor Professor Jennifer Wriggins, Chamallas has noted the degree to which tort doctrine views emotional injuries with skepticism by historically requiring a connection to physical injury and suggesting that emotional injury is more difficult to verify.<sup>22</sup> As they explain, “The dichotomy between physical and emotional harm (or between damage to property and damage to relationships) . . . constructs an implicit hierarchy of value.”<sup>23</sup> And this hierarchy “tends to place women at a disadvantage because important and recurring injuries in women’s lives are more often classified as lower-ranked emotional or relational harm,”<sup>24</sup> including harms that arise from non-consensual pornography or harms that arise in the context of reproduction.<sup>25</sup>

In terms of devaluation once a claim or injury is established, Chamallas has also called out the use of gender-based tables in order to calculate lost income for future earnings.<sup>26</sup> Such tables may award women less money perpetuating and giving life to the discrimination women face in the workplace.<sup>27</sup> Explaining that this is a retrograde form of facial discrimination, Chamallas and Wriggins note the expressive or normative ability of tort law to influence society: “Compensating men and women on the same basis in tort law thus makes a statement about the type of equality the culture embraces. In turn, the example set by tort law might well generate additional pressure for pay equity in the workplace.”<sup>28</sup> As they rightfully note, “When courts award damages for loss of earning capacity in tort litigation, they do more than passively pass on the

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<sup>20</sup> Cf. BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 25 (1989) (underscoring the need to dismantle “interlocking systems of domination”).

<sup>21</sup> CHAMALLAS & WRIGGINS, *supra* note 10, at 92–93.

<sup>22</sup> *Id.* at 90.

<sup>23</sup> *Id.* at 92.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 97–104.

<sup>26</sup> *Id.* at 160.

<sup>27</sup> CHAMALLAS & WRIGGINS, *supra* note 10, at 159.

<sup>28</sup> *Id.* at 168.

market price of plaintiff's labor; they express a view about the future and should not be oblivious to their own role in constructing that future."<sup>29</sup>

### III. HIGHLIGHTING THAT RACE MATTERS

For the same reasons, Chamallas and others have rightfully condemned the use of race-based tables in the calculation of damages. She has underscored that the practice is inaccurate, based on faulty assumptions about the existence of rigid racial categories, and ultimately unconstitutional as a facially discriminatory form of state-based discrimination.<sup>30</sup> Chamallas's work in this regard played an important role in first influencing and then amplifying the landmark rulings of the late, great Judge Jack Weinstein who issued rulings declaring the use of such race-based actuarial tables to value damages unconstitutional.<sup>31</sup> In each of those decisions, Judge Weinstein cited to multiple pieces of the Chamallas oeuvre to declare consideration of race in calculation of future economic loss unconstitutional under the Equal Protection Clause.<sup>32</sup>

In terms of the substance of claims that could potentially be brought to vindicate injuries caused by racism, Chamallas has observed that tort law's reticence at times to vindicate claims that cause purely economic loss (such as being discriminated against in employment), render tort law an ineffective remedy for such societal discrimination.<sup>33</sup> Moreover, she's underscored that the intentional infliction of emotional distress tort could serve as a potential means for rectifying racial harassment.<sup>34</sup> Yet, some courts have concluded that such harassment is not cognizable, taking a narrow view of what counts as "outrageous" conduct by the defendant and "severe" emotional distress by the plaintiff.<sup>35</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 156, 158–63; see also Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325, 325 (2018) (arguing that the use of race-based tables violates the Equal Protection Clause of the Fourteenth Amendment).

<sup>31</sup> *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 152–59 (E.D.N.Y. 2015) (holding that "ethnic characteristics of an injured person cannot be used to reduce damages" in a tort case); *McMillan v. City of New York*, 253 F.R.D. 247, 248 (E.D.N.Y. 2008) (holding that "[r]acially' based life expectancy and related data may not be utilized to find a reduced life expectancy for a claimant in computing damages based on predictions of life expectancy").

<sup>32</sup> *Hernandez-Adams*, 116 F. Supp. 3d at 141–43, 151–52; *McMillan*, 253 F.R.D. at 255–56.

<sup>33</sup> Chamallas, *Race and Tort Law*, *supra* note 11 (manuscript at 5).

<sup>34</sup> *Id.* (manuscript at 6).

<sup>35</sup> *Id.*

#### IV. BRINGING THE CONSTITUTION TO BEAR

Not content with critiquing the pervasive inequalities (as important of a contribution as that alone is), Professor Chamallas has also moved toward solutions.<sup>36</sup> She forcefully argued that when a court in a civil action relies on race-based evidence to calculate damages, there is sufficient state action such that the Constitution's prohibitions on discrimination apply to such racist data.<sup>37</sup> As Professor Chamallas explained, the court gives its imprimatur to such evidence by deeming it admissible and gives life to that data should the court enforce a judgment that relied on it.<sup>38</sup> This nuanced take on the state action doctrine is a notable departure from the formalist approach that has increasingly taken hold at the Supreme Court<sup>39</sup> and recognizes that state power operates in subtle but evident ways to entrench inequality.<sup>40</sup> And when it does, the Constitution has something to say about it—or at least it should.

#### V. BUILDING TOWARD ANTI-SUBORDINATION

In addition to helping inject tort law with constitutional equality norms,<sup>41</sup> Chamallas's proffered solutions include moving us toward an anti-subordination approach to tort law.<sup>42</sup> In particular, she has argued that "courts in tort cases should be sensitive to context and should place a high priority on protecting plaintiffs' sexual, reproductive, and intimate familial relationships against negligent injury, analogous to their protection as fundamental interests under the U.S. Constitution."<sup>43</sup> Though she does not use this term, this call for special solicitude to the injuries of marginalized groups is in many ways an anti-subordination approach to tort law. Specifically, Chamallas demands that doctrines be attuned to and specifically seek to remedy the harms disproportionately inflicted on gender and racial minorities.<sup>44</sup> That is, throughout her scholarship, Professor Chamallas has urged us to look deeper, to examine how seemingly neutral rules exacerbate historical inequalities, and called on us to consider how social context could be used to modify the substance of tort law so as to better serve those most in need of civil recourse, economic empowerment, and, ultimately, anti-subordination.

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<sup>36</sup> *E.g.*, Chamallas, *Questioning the Use*, *supra* note 12, at 109.

<sup>37</sup> *Id.* at 106–11.

<sup>38</sup> *Id.* at 108.

<sup>39</sup> *See id.* at 104, 106.

<sup>40</sup> *See* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 182–83 (1972) (Douglas, J., dissenting) (emphasizing that the Court should be attentive to the subtle ways in which power operates when determining whether or not there is sufficient state action to trigger constitutional equality protections).

<sup>41</sup> *See supra* Part IV.

<sup>42</sup> *See* CHAMALLAS & WRIGGINS, *supra* note 10, at 10.

<sup>43</sup> *Id.*

<sup>44</sup> *See* discussion *supra* Parts II, III.



## VI. CONCLUSION

Beyond her scholarship (important as it is), it is worth noting in conclusion that Professor Chamallas lives the values she preaches. As in many occupations, mentors willing to take time out of their busy schedules to help substantively support newcomers are few and far between. But mentoring was a role that Professor Chamallas seemed to relish. To me personally, she has been more than just an intellectual inspiration, but a sage guide who through her investment in my career as an interlocutor, reviewer, and champion, has helped to lift up a junior scholar. For instance, she read and provided helpful comments on my piece attempting to apply some of her insights in the privacy tort context.<sup>45</sup> Once published, she reviewed the article, amplifying my work.<sup>46</sup> And her positive attitude and welcoming spirit are what facilitated our discussions in the first instance. I suspect I'm not alone in this regard, and am so grateful to you, Martha, for all that you continue to do.

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<sup>45</sup> See generally Skinner-Thompson, *Privacy's Double Standards*, *supra* note 8, at 2051.

<sup>46</sup> Martha Chamallas, *Privacy for the Privileged Few*, JOTWELL (July 3, 2018), <https://torts.jotwell.com/privacy-for-the-privileged-few/> [<https://perma.cc/JCE9-BWQL>] (reviewing Skinner-Thompson, *Privacy's Double Standards*, *supra* note 8).