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THE FUTURE OF INJURY (TORT LAW IN THE WAKE OF THE PANDEMIC)

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"Historically, pandemics have forced humans to break with the past and imagine their world anew. This one is no different. It is a portal, a gateway between one world and the next."[1]

"When 'I' is replaced with 'We' even illness becomes wellness."[2]

Introduction

This Article explores whether the era of Covid, and all that has come with it, ushers in a break with conventional understandings of legal injury. I will argue that it does or, at least, that I hope it does. My starting place is with the failure of conventional understandings of legal injury to adequately recognize and compensate the injuries of most people, especially those who are economically disempowered. Even before the pandemic, injuries to the wealthy and powerful were more readily recognized and compensated than injuries to those on the margins or even the middle class.[3] The pandemic exposed injury inequalities and highlighted the role of the tort system in protecting certain classes of people from liability for the injuries they cause. Ultimately, the implications of the pandemic may prove more lasting. I will argue that during the pandemic, the gap between the promise of injury law and what it actually delivers became so great that the continued legitimacy of traditional conceptions of legal injury in tort law are now at risk. I will then explore why current conceptions of legal

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1. Arundhati Roy, *The Pandemic is a Portal*, Fin. Times (Apr. 3, 2020), https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca.

2. Widely ascribed to Malcom X on social media during the pandemic but seemingly predating him. Maytha Alhassen & Zaheer Ali, *By Any Memes Necessary: A Case for Critical Media Literacy*, L.A. Rev. Books (May 19, 2021), https://lareviewofbooks.org/article/history-making-and-remembering-a-case-for-critical-media-literacy/; *see, e.g.*, @malcolmxfound, Twitter (Dec. 10, 2013, 1:52 PM), https://twitter.com/malcolmxfound/status/410497257021005825?lang=EN.

3. *See, e.g.*, Mary Ann Franks, *Injury Inequality*, *in* Injury and Injustice: The Cultural Politics of Harm and Redress 231–47 (Anne Bloom et al. eds., 2018).

injury may not be up to the task of closing that gap and conclude by considering what might be next.

Before tackling these points, I want to acknowledge that injury inequality is a topic that is somewhat outside mainstream torts scholarship. It is not that tort law has never considered these questions. But, in recent years, scholars have focused more on deterrence and efficient compensation of injuries rather than on asking questions about whose injuries are recognized by the tort system and why.[4] My hope is that this Article ignites a conversation and perhaps a debate about what tort scholars can and should be doing to address the many injury inequalities that tort law currently fails to address.

Throughout the pandemic, we have continued to see injury inequality almost everywhere we look. Although we have at times been shocked and even compelled to speak out against these injury inequalities, the inequalities we are seeing are not new. For example, it has long been known that racism causes traumatic injuries for which the tort system has failed to deter or compensate.[5] The many challenges include causation, statutes of limitations, and, more fundamentally, an apparent lack of political will to overcome these barriers, such as the political and judicial creativity that was exercised in other contexts. For example, to ensure compensation to veterans with alleged injuries from exposure to Agent Orange and to workers exposed to asbestos, Judge Weinstein from the Eastern District of New York employed novel legal theories such as "national consensus law" and an aggressive use of the class action device in the *Agent Orange* litigation.[6] Similarly, states adopted flexible injury "discovery" rules in the asbestos litigation to ensure that statutes of limitations would not bar access to

4. *See generally* DAVID ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE (2016); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010).

5. *See e.g.*, James Harmon Chadbourn, *Lynching and the Law*, 20 A.B.A. J. 71, 71 (1934), *cited in* Jennifer Wriggins, *Teaching Torts with a Focus on Race and Racism*, RACE & THE L. PROF BLOG (Feb. 19, 2020), https://lawprofessors.typepad.com/racelawprof/2020/02/teaching-torts-with-a-focus-on-race-and-racism-by-professor-jennifer-wriggins-sumner-t-bernstein-pro.html (noting the failure of the tort system to deter or compensate for lynching). *See generally* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (discussing the possibilities of an independent tort for racial slurs); Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279 (2006); Kaimipono David Wenger et al., *Civil Remedies for Racial Trauma*, CIV. JUST. RES. INITIATIVE (forthcoming 2022) (on file with author).

6. *See* Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 726–35 (2006) [hereinafter Bloom, *From Justice to Global Peace*] (discussing the *Agent Orange* litigation).

the courts.[7] But this type of creativity and flexibility from the courts and legislatures has so far been absent for those who bring injuries for the trauma associated with longstanding racism.

Similarly, while African-Americans brought and even won tort cases stemming from slavery, the compensation they received was much less than the compensation whites received for similar injuries at the time.[8] Likewise, trans and gender-nonbinary people found it difficult to obtain full compensation for their injuries in the breast implant litigation and continue to struggle to bring claims for many other injuries, such as wrongful death claims for spouses who share the same gender on their birth certificates and medical malpractice claims for binary gender conforming surgery performed on them as infants.[9]

These injury inequalities haunt tort law in contemporary cases – in the devaluation of injuries in tort cases involving people of color, women, people with non-binary gender and other marginalized individuals – and, all too frequently, through the failure to recognize the injuries at all. The pandemic simply highlighted these inequities that long existed. It was not at all surprising to learn, for example, that Black people are significantly more likely to die from Covid.[10] And certainly no one working in the civil rights field was surprised by the many news stories about well-documented police brutality that ran parallel to our daily news feed on the pandemic. What has perhaps changed is that, thanks to Black Lives Matter, which flourished during the pandemic, many of us finally realized that maybe we have a responsibility to do something about these realities.

Although there is now a public reckoning with many of these issues in other domains, tort law has not yet begun to grapple with some of the structural biases that contribute to the failure to recognize and remedy injuries for relatively disempowered people. For example, legal barriers like statutes of limitations and the qualified immunity doctrine continue to stand in the way of legal remedies for many injuries.[11] Covid brought some of these issues to the fore as well. Dur-

7. *See* Gene Locks, *Asbestos-Related Disease Litigation: Can the Beast Be Tamed*, 28 VILL. L. REV. 1184, 1187 n.14 (1982) (discussing the applications of the so-called "discovery" rule and the various, special exceptions adopted for asbestos).

8. *See* Chadbourn, *supra* note 5, at 72.

9. *See generally* Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357 (2010).

10. *See generally* William Mude et al., *Racial Disparities in COVID-19 Pandemic Cases, Hospitalisations, and Deaths: A Systematic Review and Meta-Analysis*, 11 J. GLOBAL HEALTH (June 26, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8248751/.

11. For a discussion of the role of the "manufactured" doctrine of qualified immunity in barring legal remedies for police misconduct, see *Jamison v. McClendon*, 476 F. Supp. 3d 386, 392 (S.D. Miss. 2020).

ing the pandemic, we saw how shuttered courthouses forced courts to think about new ways of ensuring continued access to justice to those who already had it, including equitable extensions of filing deadlines, pretrial conferences via Zoom, and the like.[12] Meanwhile, other legal doctrines and the extreme delays in civil trials continued to exclude those for whom access to the tort system had always been challenging.[13] At the same time, the rush to immunize employers from liability for injuries to "essential workers" reminded us that the injuries of the relatively powerless may be recognized only when doing so does not interfere with unfettered access to labor.[14]

It is my firm belief that tort law must begin to grapple with these injury inequalities if it is to retain its political legitimacy. Moreover, I believe that our experience with injuries during Covid provides us with an important opportunity to do so. As Arundhati Roy has suggested, the pandemic is like a "portal" – "a gateway between one world and the next."[15] Thus, even as the relentless parade of inequities during the pandemic threatened to grind us down completely, there were also moments when a sizeable percentage of us began to speak and think in terms of, as Malcolm X might have said, "substituting I for We."[16] These moments give me hope.

In this Article, I argue that these moments have important implications not just for society at large but also for tort law. After decades of cultural narratives about individual responsibility infecting not only welfare policy in the United States but also driving tort reform,[17] a more collective sensibility seems to have at least momentarily taken hold during Covid. Like it or not, we were all in it together. This more collective sensibility will likely have implications for tort law that we do not yet fully understand. Similarly, the public reckoning with inequality in other spheres is likely to have implications for tort law as

12. *See generally* Nicholas M. Pace et al., *Covid-19 and the Courts: Lessons from the Pandemic*, RAND CORP., https://www.rand.org/pubs/conf_proceedings/CFA1299-1.html (last visited Oct. 11, 2021).

13. *See* RICHARD L. JOLLY ET AL., CIV. JUST. RESEARCH INITIATIVE, THE CIVIL JURY: REVIVING AN AMERICAN INSTITUTION 20 (Sept. 2021), https://civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf (discussing some of the implications of the pandemic for access to justice); *see also* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L. J. 1531, 1536–37 n.23 (2016).

14. For an overview of the various laws passed to shield employers from liability for injuries caused by exposure to Covid, see generally Anthony Sebok, *The Deep Architecture of American COVID-19 Tort Reform 2020-21*, 71 DEPAUL L. REV. (forthcoming 2022).

15. Roy, *supra* note 1.

16. *See* Alhassen & Ali, *supra* note 2.

17. *See* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS 22 (2004).

well. Indeed, as some litigators have already begun to note, these new realities are likely to drive new ways of understanding injuries and new approaches to remedies as well.[18] Although this break from the past ways of conceptualizing injury is not really occurring in the ways that I hope, it is imperative upon tort scholars to think about how the structures and practices of tort law contribute to injury inequality, in much the same way that the nation is now thinking about how structural racism and systemic bias contribute to inequitable processes and outcomes in other political and social spheres.

Ultimately, to fully address the inequities of the tort system, it may be necessary to rethink how we conceptualize injury itself. I will argue that this reconceptualization must occur at both the doctrinal level and in terms of our day-to-day legal practices. Just as the pandemic reminded us of our collective vulnerability to injury, injury in the future will be understood in less individualized terms. Thus, the future of injury law will depend on a more flexible understanding of injury that takes evidence of collective harm into account, even when direct evidence of individual harm may be lacking in a particular case. And just as Zoom courts unexpectedly opened up legal proceedings to greater participation from those who are often excluded from legal processes, tort law in the future will allow for a more pluralistic and open-source approach to injury, where economic, medical, and scientific elites receive somewhat less deference. Finally, in the future, tort law will understand that injury is not objective and outside of culture but in fact determined by where one stands in relation to power in a given cultural moment.

18. For an example of new approaches to understanding injuries and remedies, see the Reply Brief in Support of Motion for Preliminary Approval of Proposed Class Settlement in the RoundUp Class Action at 5–7, 32–33, 34, *In re* RoundUp Prods. Liab. Litig., MDL No. 2741, No. 3:16-md-02741-VC (N.D. Cal. Feb. 3, 2021), https://www.classaction.org/media/roundup-motion-for-preliminary-approval.pdf. The class counsel noted in its arguments during the Fairness Hearing on May 12, 2021, the benefit of distributing "information" about potential exposure to a toxin as a substantial benefit to the class, particularly in light of the pandemic, and the need for remedies through settlement due to the inability to get trial dates, a problem that preceded the pandemic and was also exacerbated by it. *Id.*

I. During the Pandemic, It Has Been Easier to See the Role of the Tort System in Both Producing Injury Inequality and Protecting the Powerful from Responsibility for the Injuries They Cause

It is not an exaggeration to say that the tort system plays an important role in how we respond to public health crises.[19] In countless instances, civil litigation has helped to prevent unnecessary injuries from consumer products by creating an incentive for industry to design safer products or engage in safer distribution practices. Similarly, voluntary actions by industry in response to the threat of civil litigation also make it easier for regulatory actions to take place that protect public health. When this happens, tort law acts as a powerful tool for improving public health and safety because the threat of liability incentivizes manufacturers and regulatory officials to take mores steps to protect public health.

At the same time, it must also be acknowledged that tort law has either been completely absent or too slow to respond to other public health crises, particularly those involving harm to women and people of color.[20] In recent years, examples of this include: the public health crises created by environmental contamination, structural racism, police brutality, and gun violence. The reasons for tort law's failure to respond to public health crises are varied, but typically the failure to recognize a particular harm as a legally cognizable injury in tort is tied to economic assessments of the value of the activities or individuals involved. Perhaps not surprisingly, these assessments generally operated, and continue to operate, to protect the interests and assets of the powerful.

For example, we have come to accept that our economy requires certain abnormally dangerous activities, such as transporting dangerous chemicals through communities by train or truck or poorly designed office chairs, that result in certain so-called "unavoidable" harms, even though the harms are clearly avoidable, and the real question is who is being injured and who has to pay.[21] Strict liability arose as a means to deal with this, but implicit in its development was a recognition that certain bodies were expendable. This is because

19. *See generally* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 Stan. L. Rev. 285 (2021).

20. *See generally* Chamallas & Wriggins, *supra* note 4.

21. *See* Lochlann Jain, Injury: The Politics of Product Design and Safety Law in the United States 34–39 (2006); *see generally* David M. Engel, *Chairs, Stairs, and Automobiles: The Cultural Construction of Injuries and the Failed Promise of Law*, *in* Injury and Injustice: The Cultural Politics of Harm and Redress (Anne Bloom et al. eds., 2018).

strict liability doctrine operates to provide compensation to the injured but does nothing to prevent the injuries from occurring.[22] Moreover, because the focus in tort cases is on economic compensation, the recognition of injury and related recovery have been closely tied to perceptions of the economic value of the injured person's labor.[23] These perceptions, in turn, are influenced by structural and cultural biases, with predictable effects. Historically, young, able-bodied white men who were already at the top of the food chain recovered the most. The effects of the structural biases remain with us today in the calculations for lost incomes in damage awards and the general devaluation of the injuries of women and people of color.[24]

The Covid pandemic and the concomitant rise of the Black Lives Matter movement drew our attention to these realities. We saw clearly that, while the virus did not discriminate, we did. At first, we were tempted to say that this meant that before the virus we were all equal, except that did not turn out to be true either. Instead, just like in tort law, during Covid, we accepted some deaths – some risks as "essential." And we cheered (if only quietly to ourselves), the deals our government made to corner the global market on vaccines, ensuring ongoing injury inequality in our approach to containing the pandemic as well.

For tort lawyers, these sorts of calculations were not surprising. For the most part, the tort system focuses its assessment of harm in terms of lost wages rather than on, for example, the dignitary harm of having been determined to be a life not especially worth saving. So, from the perspective of tort law, it was not particularly unusual to see during the pandemic that an "essential" employee really meant someone whose work was essential, not their actual existence.

We may have watched, horrified, as seniors were trapped in nursing homes with substandard care,[25] but it was not a complete disconnect for tort lawyers who have long struggled to make nursing home litigation more financially viable due in part to the relative lack of economic value attributed to retirees. Similarly, for people who were imprisoned and subjected to terrifying infection rates and poor sanitation conditions while unable to get a bail hearing for unconstitution-

22. *See* JAIN, *supra* note 21, at 34, 36.

23. *See* Anne Bloom, *Irresponsible Matter: Sublunar Dreams of Injury and Identity*, *in* INSIDERS, OUTSIDERS, INJURIES AND LAW: REVISITING 'THE OVEN BIRD'S SONG' 181–98 (Mary Nell Trautner ed., 2019).

24. *See generally* CHAMALLAS & WRIGGINS, *supra* note 4.

25. *See* Jesse Bedayn, *No Way Out: How the Poor Get Stranded in California Nursing Homes*, THE MERCURY NEWS (Feb. 6, 2022, 5:45 AM), https://www.mercurynews.com/2022/02/06/no-way-out-how-the-poor-get-stranded-in-california-nursing-homes/.

ally permissible periods of time,[26] tort law offered little hope because the lives of many prisoners, like the lives of seniors, are accorded little economic value. Meanwhile, legislatures moved quickly to consider protective legislation that would bar lawsuits for Covid-related claims.[27] In other words, even before we immunized ourselves, our legislatures first moved to immunize companies, employers, and others whose perceived economic value outweighed that of essential workers and consumers.

In all of these ways, the pandemic exposed the ugly underbelly of both tort law and American conceptions of injury. When harm matters, and when it does not, are deeply influenced by where you stand in the economic hierarchy, and also by age, gender, and race. Just as there are structural inequalities that give rise to inequalities in other aspects of life, these are structural inequalities in tort law which deny access to justice and devalue the injuries of large segments of the population.[28] These structural inequalities are linked, in part, to the emphasis on assessments of economic value in the recognition and measure of injury.

In U.S. tort law, we measure and compensate for injuries and seek to deter them on the basis of the injured individual's perceived economic value.[29] Because of this, tort law is slow to recognize, and reluctant to compensate, for injuries to aging bodies, the bodies of women, and people of lesser economic means. Similarly, individuals with bodies categorized as "disabled" before injury can find it difficult to obtain compensation for any losses associated with new injuries. People who are newly disabled, in contrast, typically have a very strong claim. This is because the plaintiffs' injuries are associated with losses to the bodies' economic value, which tort law has historically considered a compensable loss.[30]

This focus on economic value and monetary recovery marks torts as different than other types of law (e.g., civil rights law), where the focus, at least in the early days, was more on declaratory and injunctive

26. *See* Ariane de Vogue, *Covid-19 Cases Concerning Prisoners' Rights Hit the Supreme Court*, CNN (May 21, 2020, 7:01 AM), https://www.cnn.com/2020/05/21/politics/covid-19-supreme-court-prisoners-rights/index.html; Joshua Matz, *The Coronavirus Is Testing America's Commitment to People's Constitutional Rights*, THE ATLANTIC (Apr. 20, 2020), https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-jails-constitutional-rights/610216/.

27. *See generally* Sebok, *supra* note 14.

28. *See generally* Martha Chamallas, Architecture of Bias: Deep Structures in Tort Law, 146 U. PA. L. REV. 463 (1998).

29. *See generally* CHAMALLAS & WRIGGINS, *supra* note 4, 52–54, 155–82.

30. For a discussion of how tort law compensates disabling injuries, see generally Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709 (2011).

relief. Perhaps because of this, while plaintiff-driven litigation in civil rights cases is associated with collective relief and social justice movements, political coordination with social movements is less common in tort cases. And, notably, the individualized nature of the injuries continues to be emphasized in tort law, even as class actions and multidistrict litigation now constitute increasingly large segments of the tort law docket.[31]

That tort law is widely viewed as a vehicle for redressing individual wrongs can also be seen in the distinction between public and private wrongs. When we say tort law is meant to address private wrongs, we mean that the injury affects an individual but not the community generally.[32] But, in recent years, this distinction seems less and less true, particularly in the context of mass torts, which look a great deal like public law litigation.[33] One of the most remarkable and early examples of this was the *Agent Orange* litigation, where Judge Weinstein used the litigation to hold what were, in effect, public hearings on the experiences of Vietnam veterans during the war.[34]

More recently, we can see how mass tort litigation operates like public law litigation in the context of the tobacco, B.P. oil spill, and opioids litigation. In these cases, tort lawyers worked with regulators, public officials, and tribal leaders to craft private claims processing systems that resemble legislation. Perhaps not surprisingly, as litigation like this takes on the attributes of public law litigation, it has also drawn more attention from social activists.[35] It is also remarkable that the rise of mass tort litigation as public law litigation has also been accompanied by developments that have made it increasingly difficult for individuals to sue not only as individuals, but also collectively.[36] The history of class actions illustrates how ostensibly purely procedu-

31. Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, A.B.A (Feb. 19, 2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket/.

32. *See* John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1503–04 (2002) (emphasizing the role of tort law in addressing individual, private wrongs rather than public wrongs).

33. *See* Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 434–36 (2011) (describing how even individual tort cases may vindicate public wrongs).

34. PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 3–5 (1988).

35. *See, e.g.*, Michael McCann et al., *Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States*, 38 LAW & SOC. INQUIRY 288, 292, 295–96 (2013).

36. *See generally* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 2–3 (2017) (arguing that the Reagan administration devised a response to the "outpouring of [legal] rights," aimed at "undermin[ing] the infrastructure for enforcing them").

ral rules can impact the ability to sue with significant implications for collective approaches in injury litigation, but we have seen similar restrictions imposed on individual lawsuits as well.[37] Meanwhile, an active debate is underway over what sorts of injury are sufficiently serious to merit collective treatment through the class action device.[38]

As in other instances of structural inequality, economic and cultural elites play an outsized role in tort law in determining when injuries should be recognized and compensated.[39] Nowadays, medical, scientific, and economic elites are ubiquitous in tort litigation. And, by their standards, some injuries experienced as real are not recognized even when, from the perspective of the claimant, they clearly occurred.[40]

With the rise of mass tort litigation and the increased emphasis on the management of claims rather than the injuries themselves, we also now see the role of legal elites in determining when an injury is or is not ascertainable for purposes of eligibility to make a legal claim. Whereas this was once a role for juries of our peers, it is now an analysis largely undertaken by judges. Increasingly, these analyses often turn on a cost-benefit analysis of the utility of the legal system itself.[41]

The implications of all this go far beyond the failed lawsuits and unbrought claims. Narratives in American personal injury cases tend to emphasize the importance of self-sufficiency.[42] This emphasis on self-sufficiency is particularly problematic for people with disabilities, women, and others who value their interdependence. And it also positions people who seek legal remedies for their injuries as "victims" who are politically or otherwise disempowered in ways that are perceived as culturally undesirable.

At bottom, American injury law creates "insiders" and "outsiders."[43] In this way, legal injury becomes a mechanism for "othering,"

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37. *See generally* Erwin Chemerinsky, Closing the Courthouse Doors: How Your Constitutional Rights Became Unenforceable (2017).

38. *See* Transunion, LLC v. Ramirez, 141 S. Ct. 2190, 2210–11 (U.S. 2021).

39. *See, e.g.*, Burbank & Farhang, *supra* note 36 (discussing the corporate and pro-defendant bias on the Federal Rules Committee). This can also be seen in the make-up and operation of entities like the American Law Institute, which largely involves discussions and the development of proposals by elite (and often pro-defendant) practitioners and scholars.

40. For a discussion of the role of medical and other experts in tort litigation, see Bloom & Miller, *supra* note 30, 710–11, 714.

41. For a discussion of arguments like these, see generally Bloom, *From Justice to Global Peace*, supra note 6.

42. *See* David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 Law & Soc'y Rev. 551, 558–59, 577 (1984); *see generally* Haltom & McCann, *supra* note 17.

43. Engel, *supra* note 42, at 551.

in which those who injure are powerful and those who are injured are not. These perceptions inform tort law but also emanate from it, providing legitimacy for existing forms of social and economic stratification. The pandemic intensified and magnified these tendencies that already existed. While there will be likely implications from this across the legal spectrum, from a doctrinal perspective, tort law seems especially likely to face pressure to change.

II. The Gap Between the Promise of Injury Law and What It Actually Delivers Is Becoming So Great that the Continued Legitimacy of the Tort System Is at Stake

While our legal system gives a great deal of lip service to the idea that for every wrong, there should be a remedy, in practice, there is not. As Lochlann Jain has explained, in the American tort system, every product, every activity, is encoded with a certain amount of acceptable injury, for which a legal remedy will be denied.[44] In tort law, these lines are often drawn in analyses of the extent of duty and with references to what is "reasonable" – inherently subjective determinations that rely heavily on implicit and structural biases. To make matters worse, growing limitations on the right to sue appear to be having particularly significant implications for injury law in the United States, making it even more difficult for people with injuries to bring legal claims.[45] The upshot is that the gap between the promise of tort law and what it delivers keeps growing.

As scholars have explained in other contexts, these gaps between the promises of the legal system and what the legal system actually delivers pose a threat to the continued legitimacy of legal processes and the rule of law.[46] And, importantly, what we believe about our legal institutions is related directly to the continued legitimacy of our other political institutions.[47] In other words, the threat posed by questions about the legitimacy of tort law extends to the democratic system as a whole.

There are two reasons why I believe the pandemic may be bringing things to a head and require tort law to undergo doctrinal change, to retain both its own legitimacy, and to avoid posing a threat to American legal and political systems more broadly. The first reason is that

44. Jain, *supra* note 21, at 3.

45. *See generally* Chemerinsky, *supra* note 37.

46. *See generally* Stuart Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change (1974).

47. *Id.*

during the pandemic, we became more aware, as a society, of our collective vulnerability to injury and also our interdependence. We experienced new kinds of injuries, and these injuries were sometimes widely distributed across economic and social classes in ways that unexpectedly connected our fates to each other. The second reason is that, during the pandemic, the nation as a whole has become more sensitized to the seriousness and complexities of the injuries that tort law has long neglected to address.

During the pandemic, experiences of injury were not only widespread but also collectively experienced. Together, across economic and social classes, we experienced isolation and fear. Those treating the sick also experienced trauma and those who became sick also experienced stigma and the failure of the healthcare system to serve them. A communal sense of grief was also felt due to significant loss of our prior activities and the loss of community members, plus the closure of community services, markets, and schools. Under the circumstances, it is not surprising that a book about how trauma affects the body and mind has been at the top of the bestseller list during the pandemic, alongside multiple books about structural racism.[48]

Importantly, the pandemic featured not simply disease but also multiple instances of widely publicized racial violence, gun massacres, a mass movement for racial justice,[49] and the storming of the capitol.[50] As a result, injury now seems closer than ever to even the most privileged among us. Thus, the pandemic highlighted our own fragility and engendered a shared sense of persistent trauma – two insights that may well be influential in the legal recognition of the new causes of actions and remedies.

On top of all this, the pandemic also seems to be influencing when we identify an experience as injurious in the first place. A recent story on National Public Radio, for example, focused on the many unrecognized or under-recognized injuries from gun violence.[51] The story

48. *See generally* BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (2015). At the time of writing, Van Der Kolk's book was number one under the nonfiction category of the *New York Times* Best Sellers. N.Y. TIMES, *The New York Times Best Sellers*, https://www.nytimes.com/books/best-sellers/2022/03/20/ (last visited Mar. 20, 2022).

49. Richard Tsong-Taatarii, *How George Floyd's Death Reignited a Movement*, CNN (May 21, 2021, 2:57 PM), https://www.cnn.com/2021/05/21/us/gallery/george-floyd-protests-2020-lookback/index.html.

50. Janie Boschma et al., *How a Pro-Trump Mob Besieged the Capitol*, CNN (Jan. 7, 2021), https://www.cnn.com/interactive/2021/01/politics/us-capitol-siege/.

51. *See* Eric Westervelt, *After 25 Years in the Dark, the CDC Wants to Study the True Toll of Guns in America*, NPR WBEZ CHI. (Sept. 29, 2021, 5:00 AM), https://www.npr.org/2021/09/29/1039907305/cdc-study-toll-guns-america.

pointed out that we have come to think about gun violence in terms of the number of people shot or killed.[52] This reduces the sense of injury because it seems like not that many people have experienced harm. But if you count the number of people who witnessed it and/or had to hide with terror, or who were exposed to an alleged shooter that may or may not have existed, then the sense of injury becomes much larger and also more collective in experience.

During the pandemic, the collective watching of stories of mass gun violence, police brutality,[53] the storming of the Capitol,[54] and the widespread everyday experiences of isolation during the pandemic helped many of us to develop a more complex understanding of injury as something more than a cost-benefit analysis of who could not go to work that day and a tallying of medical expenses. At the same time, in an odd way, the pandemic may have also trained us to accept, perhaps even to expect, even more injury, as the pandemic continues, despite attempts to contain it.

All this, in turn, seemingly calls for a more responsive legal system, as widespread injury is likely to be experienced as more politically palatable when the injuries are readily recognized by a legal system with some provision for remedy. We saw this with the moratoriums on evictions and the extensions of unemployment benefits. There is no reason these new understandings of injury should not make their way into the tort system as well.

As it happens, in *Transunion, LLC v. Ramirez*, decided during the pandemic, the U.S. Supreme Court actually considered the question of what constitutes an injury.[55] Notably, the Court emphasized the importance of a "concrete and particularized" injury "in fact" that is "actual or imminent."[56] A risk of harm is not sufficient, they concluded, unless there is also "actual harm."[57] But of course, this begs the question: Why does the Court think a risk of harm is not "actual harm"? And, perhaps more importantly, is this something that judges are uniquely qualified to decide?

For the justices, the question of injury was a question of "law" that only legal elites are qualified to answer, perhaps with input from med-

52. *Id.*

53. Sheryl Gay Stolberg, *'Pandemic Within a Pandemic': Coronavirus and Police Brutality Roil Black Communities*, N.Y. Times (June 7, 2020), https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html.

54. Boschma et al., *supra* note 50.

55. *See* Transunion, LLC v. Ramirez, 141 S. Ct. 2190, 2209 (U.S. 2021).

56. *Id.* at 2203.

57. *Id.* at 2211.

ical and scientific experts.[58] I think the pandemic has taught us otherwise. During the pandemic, conceptions of injury and what sorts of risks are acceptable have been openly crowd-sourced. We decide when we are injured, including the significance of potential injuries, and what risks are worth taking. Scientific elites and medical professionals have played some role in this but so have other kinds of experts. Even those who might have originally felt some uncomplicated fealty to the pronouncements of the Centers for Disease Control and Prevention no longer take their pronouncements on faith. Instead, we do our own research and determine what is acceptable – when to mask, when to vax, when not – based on our own assessments of the science and, not infrequently, other less-scientific considerations.

Actually, we have been crowd-sourcing our understandings of injury for some time. Even before Covid, we looked for outside verification of our healthcare provider's judgments through our own reading, online reviews of the doctors and proposed treatments, advertising, and observing what happens to others. The pandemic simply took all of this to another level. It is really only tort doctrine that still trusts medical and scientific elites enough to take what they say on faith. And it is only in tort law where understandings of injury are dictated by law and medicine, rather than mediated through the media and conversations with others. In everyday life, our understanding of injuries has already become more pluralistic and complex.

Sooner or later, it seems likely these developments will make their way into tort law with important doctrinal implications. Because of the crowd-sourcing of how we understand injury, for example, it is already difficult to imagine a jury relying solely on expert testimony now. We are seeing this clearly in public responses to the pandemic. It will eventually need to be acknowledged in the courtroom as well. Tort law is going to have trouble putting this cat back in the bag.

For all of these reasons, tort doctrine will need to adopt procedures that permit a more pluralistic and open-source approach to injury, in which legal, economic, medical, and scientific elites receive somewhat less deference. Sooner or later, the new awareness of structural inequalities will find their way to tort law as well. The legal analyses that result will expose how race and gender and other social hierarchies influence the social construction and legal recognition of injury. And the inequalities that have resulted from this will no longer be tolerated. The continued legitimacy of tort law depends upon it.

58. *Id.* at 2203.

III. Tort Law in the Wake of the Pandemic

With all this in mind, what might the future of injury law look like? In 1997, Leslie Bender predicted that tort law's role for the twenty-first century would be as a tool for social justice.[59] We have yet to see that promise realized, although it is clear that many plaintiffs' lawyers increasingly identify in this way. Instead, the battle for access to justice over tort injuries continues. As overt cries for tort reform have died down a bit, the new battlegrounds are largely procedural – forced arbitration, "ascertainability," restrictions on class actions, etc. – and people with injuries have largely been on the losing side.[60] Despite all this, I am optimistic that Bender's prediction may be realized post-Covid. In part, this is because the pandemic triggered new ways of assessing injuries in the general public.

Injury claims based on fear of developing disease, for example, now seem more likely to be more readily accepted by courts and jurors. The pandemic may have also changed perceptions of an acceptable standard of care by employers, medical professionals, and others. Certainly, the standards for what is now considered reasonable in terms of sanitation and crowd management at malls and other shopping venues have become stricter. The public may now feel differently about what is considered an acceptable risk in other contexts as well.

The pandemic may also prompt a reconsideration of the distinction between general and specific causation. Covid has been like a public lesson in causality as it is impossible to trace where you got it, certainly in the United States. Does that mean there should be no recovery? In tort cases, courts typically divide the causal inquiry into two questions: (1) general causation (whether the chemical, device, or drug is capable of causing the injury); and (2) specific causation (whether the agent caused the injury to the individual plaintiff). The pandemic exposed the problem with this analysis. Even when there is clearly wrongful conduct, like a failure to take appropriate mitigation measures (wearing masks and social distancing), which increase the likelihood of exposure (general causation), it is perhaps impossible to trace a given infection to a particular bad actor. Is it appropriate for the tort system to then conclude that there are no remedies for these injuries? The pandemic may prompt us to rethink that conclusion.

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59. Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 Washburn L.J. 249, 249 (1998).

60. *See generally* Burbank & Farhang, *supra* note 36; *see* Chemerinsky, *supra* note 37, at x.

The pandemic may also herald a new era where assessments of lost economic value become simply one means of recognizing injury, rather than the dominant measure. During the pandemic, the most obviously injured were not high wage workers, many of whom actually got richer during the pandemic thanks to a booming stock market, but rather the lower wage, "essential workers" who faced and continue to face a much greater risk of illness with predictable results.[61] It defies logic to say that the injuries of these individuals should receive less compensation than the identical injuries of their employers whose remote working exposed them to much less risk. While something similar was true before the pandemic for many lower wage workers engaged in economically essential employment, the pandemic seems to have triggered a conversation about the additional "moral injury" to which these workers have been, and continue to be, subjected.[62] The pandemic also exposed that injuries to lower wage "essential" workers power a greater risk to the overall economy, raising questions about reliance on income as a useful proxy for the extent of the harm. At the very least, the pandemic highlighted the injury inequality that many lower wage workers experience, in ways that are not likely to be easily forgotten. Tort law must respond to this injury inequality with more meaningful remedies if it is to retain its legitimacy as a vehicle for delivering justice to those who are injured.

More broadly, the pandemic seems to be bringing greater awareness of how a wrong against an individual can also be a wrong against society.[63] And also that certain wrongs that occur on a recurring basis – such as police misconduct and brutality toward Black people – are the product of structural biases as well as individual bad actors. Thoughts like these drove the rise of strict liability in the products context, and, in light of this history, it is perhaps not surprising that we are now hearing arguments for the application of strict liability to police brutality and other instances of structural racism.

Finally, there is greater awareness of how the pandemic exacerbated an already existing access to justice crisis. As just one example of this, in a remarkable development, the attorneys for the class in the proposed *RoundUp* class action settlement argued in their briefs, and again in open (Zoom) court, that a class action settlement in which future victims forfeited their legal rights was fair and acceptable because the tort system was so broken that victims have no other mean-

61. *See generally* Joanna Gaitens et al., *COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Injury*, 18 INT'L. J. ENVTL. RES. & PUB. HEALTH 1446 (2021).

62. *Id.* at 1454.

63. *See* Rustad, *supra* note 33, at 442, 453–54.

ingful right of access to the courts.[64] As they noted, this was particularly true during Covid, when the inequities in both access to justice and healthcare became much more apparent.

Indeed, the pandemic raises important questions about the future of trials and, relatedly, the important role of lay people in this aspect of our democracy.[65] On the one hand, the already endangered civil trial became even more endangered, as the pandemic delayed thousands of civil litigation trials and made the simple filing of a complaint much more challenging, from client intake to fact gathering to filing. As we saw with the *RoundUp* class action, these developments are transforming practice in a multitude of ways, including triggering the settlement of aggregate cases for terms that previously might not have been considered acceptable. But courts have also been moving quickly to adjust, and, ultimately, with the option of Zoom trials, there is a chance that trials may become more common with many more people Zooming in to watch and otherwise participate.[66] The implications of this for tort law could be quite significant and further accelerate the move to a more pluralistic and open-sourced approach to evaluating injuries.

Conclusion

The pandemic presents an opportunity to rethink our approach to tort law and to assessments of injury, in particular. Over the last several decades, tort law has focused less on ensuring access to justice for the injured and more on questions of economic efficiency and so-called global peace.[67] These developments have, in turn, resulted in judges and other elites playing a much greater role in determining outcomes in tort litigation, as compared to the past. The pandemic presents an opportunity for tort law to reclaim its historic role as a venue for discussions among people from all walks of life about what constitutes an injury, what is acceptable risk, and what should or should not be considered reasonable in their communities.

When you delegate to a particular institution the authority to delineate when an injury has occurred, you are setting the terms for justice in broader society.[68] Ordinary Americans must be given a greater

64. *See* Reply Brief in Support of Motion for Preliminary Approval of Proposed Class Settlement in the RoundUp Class Action at 5–7, 32–33, 34, *In re* RoundUp Prods. Liab. Litig., MDL No. 2741, No. 3:16-md-02741-VC (N.D. Cal. Feb. 3, 2021), https://www.classaction.org/media/roundup-motion-for-preliminary-approval.pdf.

65. *See* Jolly et al., *supra* note 13, at 5.

66. Pace et al., *supra* note 12.

67. Bloom, *From Justice to Global Peace*, *supra* note 6, at 754.

68. *See* Marshall S. Shapo, Tort Law and Culture 5 (2003).

voice in setting these terms in tort cases. We can reimagine tort law as more pluralistic in outlook, less hierarchical, and more participatory. Tort law can also be recognized for the role it plays in shaping our experiences of injury, what counts and what does not, and the inequalities that result from these different recognitions.

In all of these ways, the pandemic, and all that has come with it, offers an opportunity to break with conventional understandings of injury. The new understandings that emerge will, among other things, likely view the risk of harm differently than we did pre-Covid and will rely less on medical and scientific experts to determine whether a wrong has occurred. The role that structural biases play in tort law is also likely to be scrutinized. These developments, in turn, may prompt new approaches to causation, fear of risk claims, and the valuation of claims along lines that rely less heavily on lost income. Ultimately, the pandemic offers a chance to imagine a world in which injury inequality might be minimized and in which interdependence is more readily acknowledged. This is perhaps the pandemic's real legacy for tort law.