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The Subjects of Tort Law

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Abstract

To the extent they consider the matter, tort theorists sometimes assume that the subjects of authority in tort law are the citizens of the state whose tort law applies. This assumption underlies democratic and social contractarian accounts of how to justify the authority of tort law. But as the doctrine of private international law—particularly choice of law—reveals, the subject of tort law is not the citizen, but the generic person; and authority in tort law is not grounded in the state-citizen relationship. Instead, choice of law rules reveal a more complex picture of how tort structures authority. Here, I offer a sketch of an approach that can justify tort law's authority over persons, not citizens. And I discuss how this analysis may require us to rethink not just the subjects of tort law but also the subject of tort law: the nature of its primary rights and duties.

Keywords: *tort; authority; private international law; choice of law*

1. Introduction

Who are the legal subjects of tort law? That is, to whom does a state's tort law apply? This question is important to answer if we want to offer a justification for exercises of state authority in the context of tort law. To determine whether the grounds on which a state claims to have authority are legitimate, we must know over *whom* a state claims to have authority and whether those grounds for justification persuasively apply to those legal subjects.

This is not a question that many (if any) tort theorists have addressed explicitly. But implicit in some contemporary writing about tort law theory is an assumption about how to answer this question. Certain leading scholars assume that a given state's tort law applies to its citizens, and so a state's own citizens are the subjects of its tort law. From this commonplace assumption flow several intuitive accounts of how tort law's authority might be justified. If a state's tort law applies to its citizens, then tort law's coercive force can be justified to those citizens on the grounds that they implicitly consented to the law's application through the democratic process, or as members of an imagined social contract between state and citizen.

Although this common picture has a certain intuitive appeal, I want to argue that it is wrong. And I want to do so in a somewhat unusual way: by appealing to private international law—and in particular, to choice of law. Choice of law rules determine when a state's tort law is authoritative with respect to a particular

dispute. These principles reveal that the legal subjects of a state's tort law are not its citizens, nor even the members of the political community more broadly. As such, the state-citizen relation is not the basis on which authority is exercised in tort law. Instead, the subjects of tort law's authority are *persons* understood in their generic or universal capacity.

Indeed, a close analysis of choice of law rules reveals a much more complex picture of authority in tort than the simple state-citizen picture posits. This picture has three dimensions. The first dimension is the potential *universality* of authority in tort law. As I will show, any person in the world can potentially be the subject of the tort law of any state, and the scope of tort law's authority is not pegged to—or limited by—citizenship.

The second dimension is the *normative pluralism* of tort law: each state can rightfully establish the substantive content of its tort law according to its own conception of justice. So even though each state's tort law could potentially apply to any person—and is not limited in application to a state's own citizens—each state may still establish its own rules of tort law by the lights of its own account of justice. So individuals can readily be subject to tort law that is rooted in a foreign state's conception of justice.

The third dimension of tort's authority is that it is *individuated*. Even though any person could potentially come under the authority of any state's law, this does not mean that every state's tort law is, in fact, authoritative with respect to all tort law disputes. Instead, choice of law rules individuate authority and determine which state's law has the most authoritative claim to govern each tort law dispute. This is done, for example, by applying the law of the state where the wrong took place. Crucially, however, the citizenship of the parties does not ground this individuated authority relationship. In the common law (and to a large extent beyond), citizenship plays no role in particularizing state authority in tort law. Instead, features such as the territorial location of the wrong often determine whose tort law governs.

This analysis shows that justifications for tort law's authority grounded in the state-citizen relation are flawed, since they cannot integrate these three features and thus ignore the law's own conception of subjecthood. If we accept that our theories of legitimate authority should track how the law itself structures relationships of authority, then a new account that moves beyond the simplistic state-citizen picture is necessary.

Here, I offer a sketch of an approach to justifying tort law's authority that is better able to accommodate tort law's universality, its normative pluralism, and its individuation. In so doing, I develop the beginnings of an account of tort law's authority over persons, rather than citizens. Developing an account of tort law's authority that accurately reflects the *subjects* of tort may also teach us something about the *subject* of tort—i.e., the substantive normative content of its primary rights and obligations. If tort law rights are not something we obtain because of our status as members of a particular political community, but rather are owed to us because of our shared status as persons, we are directed to a certain understanding of what tort law is trying to protect. Finally, this approach may also have

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implications for accounts of legal and political authority beyond the domain of tort law. The assumption that the subjects of legal authority are citizens is common in much of the political theory literature on authority and legitimacy. By challenging that assumption in the instance of tort law, I open up an important and broader line of critique.

The approach I take here is loosely interpretive.[1] Prevailing tort theorists purport to explain, at least roughly, the immanent structure of the law.[2] But contemporary tort theory relies on an assumption about how tort law structures relationships of authority that does not correspond with how choice of law works. We therefore need a new account of authority in tort that better fits with and justifies how the law generates and individuates those relationships. This interpretive method is common and well-developed, particularly within private law theory.[3]

By contrast, the move I make here to draw from the doctrine of private international law is unorthodox within private law theory.[4] Private international law has long been neglected as a source for rethinking debates in private law theory, such as the grounds of authority in tort law. Private law's duties have never been limited to one state in practice or in theory, and the cross-border, structural aspects of private law obligations are addressed by private international law. As such, theorists may have squandered an important source of insight into the nature of private law obligations.

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1. In so doing, I will draw from the interpretive tradition developed by Ronald Dworkin over the course of his career and refined by others, including Steve Smith. See e.g. Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1978); Ronald Dworkin, *Law's Empire* (Belknap Press, 1986); Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011); Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) at ch 1. There is an extensive debate over how exactly interpretivism is meant to work and how it relates to debates in general jurisprudence, which is not relevant here.
2. This interpretive approach is explicit in the work of civil recourse theorists such as John Goldberg and Ben Zipursky. See John CP Goldberg & Benjamin C Zipursky, *Recognizing Wrongs* (Harvard University Press, 2020) at 10 (placing their work in the interpretive tradition). It is explicit in the work of social contractarian theorists such as Greg Keating: see Gregory C Keating, "A Social Contract Conception of the Tort Law of Accidents" in Gerald J Postema, ed, *Philosophy and the Law of Torts* (Cambridge University Press, 2001) 22 [Keating, "Social Contract Conception"]; Gregory C Keating, "The idea of fairness in the law of enterprise liability" (1997) 95:5 Mich L Rev 1266 [Keating, "Idea of Fairness"]; Gregory C Keating, "The Priority of Respect over Repair" (2012) 18:3 Leg Theory 293 [Keating, "Priority of Respect"]. It is implicit, but equally apparent, in the work of corrective justice scholars such as Ernest Weinrib, who start from the law's immanent normative structure and see whether an adequate justification can be given for that structure. See e.g. Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012). And to the extent that law and economics scholars seek to offer a coherent account of tort law's doctrine, they too engage in this approach, as scholars such as Jack Balkin have argued. See JM Balkin, "Too Good to Be True: The Positive Economic Theory of Law", Book Review of *The Economic Structure of Tort Law* by William M Landes & Richard A Posner (1987) 87:7 Colum L Rev 1447.
3. See e.g. Smith, *supra* note 1; Allan Beever & Charles Rickett, "Interpretive Legal Theory and the Academic Lawyer" (2005) 68:2 Mod L Rev 320.
4. There are important exceptions to this trend. See e.g. Sinéad Agnew & Ben McFarlane, "The Nature of Trusts and the Conflict of Laws" (2021) 137 Law Q Rev 405; Hanoch Dagan & Sagi Peari, "Choice of Law Meets Private Law Theory" (2023) 43:3 Oxford J Leg Stud 520.

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However, taking an interpretive approach to private international law does present some novel challenges. Private international law rules in general, and choice of law rules in particular, are notoriously complex, and vary substantially from place to place. For example, as I shall discuss in Section 3 below, the dominant paradigm for individuating authority relationships in choice of law for tort in states such as Canada, Australia, the United Kingdom (UK), and the European Union (EU) is territorial: courts often apply the law of the place of the wrong.[5] But this generalization masks complexity within these rules, which often contain exceptions. For example, the EU does not apply the law where the wrong took place when the parties have the same residence.[6] And other jurisdictions, such as the United States, employ alternative approaches that differ, sometimes substantially, from the traditional territorial approach. These include applying the law that has "the most significant relationship to the occurrence and the parties,"[7] and using a technique called 'interest analysis' to identify the state with the greatest policy-based interest in regulating the dispute.[8] Therefore, it is difficult to make generalizations about choice of law rules. Yet in order to offer an interpretive theory that can also justify the law on normative grounds, some simplification to these rules is necessary. In the face of this challenge, I try to strike an appropriate balance, offering a justification for the dominant paradigm, while acknowledging the need to justify alternative approaches as well.

My analysis also does not exhaust the ways in which private international law could shed light on the structure of authority in tort law. I focus here on choice of law, but virtually identical questions could be asked in relation to the two other branches of private international law: jurisdiction, which determines when particular courts are authoritative in relation to particular tort law disputes; and the recognition and enforcement of foreign judgments, which determines when a tort law judgment from one jurisdiction is internationally authoritative. In both areas

5. In Canada, the classic proposition in support of this claim is *Tolofson v Jensen*, [1994] 3 SCR 1022 [*Tolofson*]. In Australia, it is *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, 203 CLR 503 [*John Pfeiffer*]; see also *Régie Nationale des Usines Renault SA v Zhang*, [2002] HCA 10, 210 CLR 491. In the EU and the UK, the rule is statutory: see *Private International Law (Miscellaneous Provisions) Act 1995* (UK) s 11 [*PILA*]; EC, *Commission Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)* [2007] OJ, L199/40 at art 4.1 [*Rome II*].

6. See *Rome II*, *supra* note 5 at art 4.2.

7. *Restatement (Second) Conflict of Laws* (1969) at § 145 [*Restatement (Second)*]. Here, the American Law Institute modifies the traditional territorial approach to incorporate other forms of contacts and state policies. We also see a similar approach incorporated in the EU's regulation as well. See *Rome II*, *supra* note 5 at art 4.3 (the "manifestly more closely connected" exception).

8. This approach was developed by American scholar Brainerd Currie in the mid-twentieth century, building on the American legal realist critique of 'classical' choice of law approaches. Currie argued that when deciding which law should apply, the choice of law process should focus on what Currie called the 'interests' of the different governments in having their law applied to a particular dispute—the social and economic objectives of the particular private laws in question, rather than the traditional connecting factors that focus on the facts of the dispute. See generally Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press, 1963). This approach has been adopted, at least to some extent, in many US states. See e.g. Symeon C Symeonides, "The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning" (2015) 5 U Ill L Rev 1847.

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of law, citizenship likewise does not typically constitute relationships of authority; however, for simplicity's sake, I focus here on choice of law.

I proceed in four parts. In Section 2, I offer a reconstruction of a purely domestic account of tort law which assumes that the subjects of legal authority in tort law are the citizens of the state whose law applies. In Section 3, I draw from private international law to show that this image is mistaken. In Section 4, I consider two possible objections. In Section 5, I sketch a new approach to justifying tort law's authority, and discuss what this approach tells us about the nature of tort law's rights and duties.

2. Tort Law for Citizens

A central question in contemporary tort law theory is how to justify tort law's coercive force. Tort law establishes legal duties that we owe to one another and a standard of conduct with which we must comply. In so doing, it constrains the freedom of persons by prohibiting certain forms of conduct, on pain of economic sanctions and, in certain instances, injunctions, bringing the coercive force of the state to bear.

Tort law's coerciveness raises a question of legitimate authority.[9] Why is it that the state can exercise coercive power through law to enforce tort law's obligations, and how are we to distinguish between legitimate and illegitimate uses of state power in this context? We do not normally think it is acceptable for people to use sanctions or force to compel others to behave in a certain way. We assume people have a right to be free from coercive interference on the basis of their inherent freedom and dignity, and so we typically understand such acts of compulsion to be exercises of arbitrary power or even violence. But we also assume that the law is different—that it is sometimes appropriate and indeed legitimate for public legal authorities to wield coercive power over persons through law. How—and when—can this be so?

This question is not limited to the tort law context, and scholars have offered a range of general justifications for legal authority that cut across domains of law.[10] But leading tort law scholars have assumed that a successful theory of tort law must directly address the question of legitimate authority in a domain-specific way.[11] That is, we need an account of why it is that tort law *in particular* can

9. In describing the problem in this way, mirroring the approach of many contemporary tort theorists, I do not wish to take any position on contemporary debates on the meaning of authority, which is beyond the scope of this paper. Note, though, that a prominent contemporary strand of thinking about authority, pioneered by Joseph Raz, decouples the idea of authority from legitimacy and the exercise of coercive force. See Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986); Joseph Raz, "Authority, Law and Morality" (1985) 68:3 The Monist 295.

10. From Hobbes, Kant, and Locke, to Rawls, Raz, and Dworkin.

11. Scholars from all four schools of contemporary tort law theory—civil recourse, contractarianism, corrective justice, and law and economics—offer accounts of its legitimate authority that are tailored to the tort law context. (That is, they are not general theories of why legal authority is legitimate but instead only seek to justify exercises of authority in relation to tort law.) This assumption that we can and should consider the question of legitimate authority in relation to

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limit the freedom of persons and why it can be enforced through state coercion.[12] Each of the major contemporary philosophical approaches to tort law have responded to this challenge, offering an account of why tort law's obligations are authoritative and enforceable.[13]

Yet as theorists of authority have pointed out, a successful account of legitimate authority must offer a justification to the particular persons against whom coercive force is exercised.[14] A justification in the ether, or to people in general, is insufficient.[15] And so in order to offer reasons of this sort for tort law, we first need to correctly identify the structure of authority in tort law. Who is the authority that generates the rules of tort law, and over whom are those rules authoritatively enforced? We know it is the state that designs tort law rules—but to whom does the law apply, and who is therefore entitled to a justification?[16]

This is not a question to which tort law theorists have explicitly directed their attention. However, implicit in the writing of some contemporary tort theorists is an assumption that the subjects of tort law are the citizens of the state whose tort law applies.[17]

Take, for example, John Goldberg and Ben Zipursky's influential civil recourse theory.[18] In articulating their account, Goldberg and Zipursky sometimes describe the subjects of tort law as "citizens," "members of a liberal

tort law in particular, as opposed to in relation to the legal order as a whole, is not explicitly justified. However, in my view, this assumption is a good one because of what this paper ultimately illuminates: that the structure of authority in law is domain-specific, and relationships of authority are not structured the same way in all domains of law. What I say here about tort law does not apply *tout court* to other domains of private law. Thus the intuition that we can and should justify tort law's authority in a way that is attendant to its particular demands and structure seems highly persuasive.

12. Jules Coleman has argued tort law requires such a justification for its coercive enforcement because it "constrains the scope of individual liberty." Jules L Coleman, "Tort Law and the Demands of Corrective Justice" (1992) 67:2 Ind LJ 349 at 349. As Peter Cane has argued, while tort law's rights and duties may sometimes sound in the moral language of interpersonal rights and duties, its obligations are ultimately enforced through an exercise of state power. Consequently, tort law requires us to offer a political theory of "how to justify the state's claim to a monopoly of legitimate coercion" in the context of tort. Peter Cane, "Tort Law and Public Functions" in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 148 at 149.
13. From the civil recourse school, see especially Goldberg & Zipursky, *supra* note 2. From the contractarian tradition, see e.g. Keating, "Social Contract Conception", *supra* note 2. From the corrective justice school, see Weinrib, *The Idea of Private Law*, *supra* note 2; Weinrib, *Corrective Justice*, *supra* note 2; Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016). From a law and economics perspective, see e.g. Richard A Posner, *The Economics of Justice* (Harvard University Press, 1981).
14. See e.g. Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press, 2013) at 26.
15. For a discussion of Nagel's idea of justification 'to a subject' versus to the world at large, see John Oberdiek, "Structure and Justification in Contractualist Tort Theory" in Oberdiek, *supra* note 12, 103 at 114ff.
16. See Lea Brilmayer, "Jurisdictional Due Process and Political Theory" (1987) 39:2 Fla L Rev 293.
17. My interest here is not in arguing against any of these theorists in particular, but instead to show that there is a tendency among scholars who confront the question to assume that the legal subjects of tort law are citizens.
18. Goldberg and Zipursky have an extensive body of co-written work setting out the civil recourse approach. Here I take their most recent work, *Recognizing Wrongs*, to be representative of their perspective. See Goldberg & Zipursky, *supra* note 2.

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democracy," or "members of a polity."[19] This is not simply a linguistic slip. Central to their justification for tort law's authority is an imagined social contract between the state and the citizen in the Lockean tradition, in which citizens give up their pre-political right to private vengeance in return for a right to "civil recourse" (a right to sue tortfeasors) from the state.[20] They claim that the right to civil recourse is a political right, available to members of the political community, like the right to vote.[21] Both the right to vote and the right to civil recourse are means of empowering the democratic public, and both make it reasonable for democratic citizens who are free, equal, and rational to accept the authority of their government (and so help render that authority legitimate).[22]

We can observe similar assumptions in Greg Keating's work.[23] Keating explicitly focuses on how tort law can be justified to democratic citizens who are long-term members of the political community.[24] His "fundamental task" is "to find terms of cooperation [in tort law] that express the freedom and equality of democratic citizens."[25] Following Rawls, he suggests that the way to do this is to imagine the tort law rules that citizens would give themselves "if they were to reach agreement under ideal conditions," and thus to which we can imagine them consenting.[26] In adopting this approach, Keating accepts Rawls' famous assumption that we should restrict the question of how to justify domestic legal and political institutions to the purely domestic context, concerned only with the state-citizen relationship.[27] In this way, Keating assumes that the subjects of tort law's authority are citizens.[28]

Other tort theorists who explicitly make this assumption include Steve Smith, who refers to the subjects of tort law as 'citizens';[29] Verónica Rodríguez-Blanco,

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19. *Ibid* at ch 4ff. These three phrases are used repeatedly throughout the book.
20. *Ibid*.
21. See *ibid* at chs 4, 9.
22. See *ibid* at 25. Both are also part of what the US Constitution seeks to protect when it guarantees "to all citizens the 'equal protection' of the laws" (*ibid* at 139). Goldberg and Zipursky regularly highlight the connection between civil recourse and the Constitution, including state constitutions, and discuss the sorry American tradition of using citizenship to deny legal personality.
23. See e.g. Keating, "Social Contract Conception", *supra* note 2; Gregory C Keating, "Reasonableness and Rationality in Negligence Theory" (1996) 48:2 Stan L Rev 311 [Keating, "Reasonableness and Rationality"]; Keating, "Idea of Fairness", *supra* note 2. See also Gregory C Keating, "Distributive and Corrective Justice in the Tort Law of Accidents" (2000) 74:1 S Cal L Rev 193; Keating, "Priority of Respect", *supra* note 2; Gregory C Keating, "Strict Liability Wrongs" in Oberdiek, *supra* note 12, 292.
24. As John Oberdiek helpfully summarizes, "Keating interprets the normative conception of the person as having a political cast: persons are conceived of as free and equal democratic citizens." Oberdiek, *supra* note 15 at 107.
25. Keating, "Social Contract Conception", *supra* note 2 at 27.
26. *Ibid*.
27. "I shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies." John Rawls, *A Theory of Justice*, revised ed (Harvard University Press, 1999) at 7.
28. It is also worth noting that Keating's assumptions here follow those of George Fletcher, whose approach is a forerunner to Keating's. See Keating, "Social Contract Conception", *supra* note 2; Keating, "Reasonableness and Rationality", *supra* note 23.
29. See e.g. Stephen A Smith, "The Normativity of Private Law" (2011) 31:2 Oxford J Leg Stud 215; Stephen A Smith, "The Law of Damages: Rules for Citizens or Rules for Courts?" in

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who roots her account of tort law's duties on the assumption that tort law applies to citizens acting within the political community;[30] Jane Stapleton, who states that tort law reflects the concerns of 'citizens';[31] Andrew Gold, who grounds private law in the fiduciary duty states must provide for their citizens;[32] and Nick McBride, who sometimes refers to tort law as governing 'citizens'.[33]

The assumption that these scholars make is facially plausible. Tort law is a field of domestic law. It is not a field of law regulated by treaty or custom at the supranational level, let alone by preemptive *jus cogens* rules.[34] As such, each state is entitled to establish its tort rules as it sees fit, according to its domestic legislative and judicial procedures. It seems plausible, then, that a state's tort law would apply to the members of the political community that established that law.

This assumption is also understandable from a political theory perspective, in which there is a long tradition of scholars assuming that the subjects of a particular legal authority are its citizens—what Lea Brilmayer calls the "boundary assumption[] in domestic political theory."[35] This assumption is perhaps best exemplified in contemporary political thought by Rawls, who, as mentioned, restricted the question of how to justify legal and political institutions to the purely domestic context, concerned only with the state-citizen relationship.[36]

The assumption that citizens are the subjects of tort law suggests some strategies for justifying exercises of authority in the context of tort law. Take first a democratic participation story.[37] Tort law is established by the legislative and judicial organs of the state. These branches are subject to varying degrees of democratic control by the polity. In a liberal democracy, citizens are given a voice in electing their legislators, and judges are either selected by the executive or elected directly by the citizenry. This means that, at least in an attenuated way, the branches of government that establish tort law are accountable to the democratic

Djakhongir Saidov & Ralph Cunnington, eds, *Contract Damages: Domestic and International Perspectives* (Hart, 2008) 33; Stephen A Smith, "Duties, Liabilities, and Damages" (2012) 125:7 Harv L Rev 1727.

30. See Verónica Rodríguez-Blanco, "Revising the Puzzle of Negligence: Transforming the Citizen towards Civic Maturity" (2023) 68:2 Am J Juris 105.

31. See e.g. Jane Stapleton, *Three Essays on Torts* (Oxford University Press, 2021).

32. See e.g. Andrew S Gold, *The Right of Redress* (Oxford University Press, 2020) at ch 6.

33. See e.g. Nicholas J McBride, "Duties of Care—Do They Really Exist?" (2004) 24:3 Oxford J Leg Stud 417.

34. There may be some arguable exceptions to this statement. Take, for example, *jus cogens* prohibitions on torture and slavery, which likely bound the necessary content of domestic tort law. As a general matter, however, tort law remains within the *domaine réservé* of states.

35. Lea Brilmayer, *Justifying International Acts* (Cornell University Press, 1989) at ch 3.

36. See Rawls, *supra* note 27 at 7. Others who have adopted the same assumption that citizens are the relevant legal subjects include Dworkin, Pettit, Fuller, and Raz.

37. Here I offer a gloss on a common strand of thinking about how democratic participation ensures tort law's legitimacy. The view I offer here is not that of any particular theorist but rather is a distillation of a common way of thinking about tort law and democracy. Note, though, that there are other ways in which scholars have argued that tort law is essential to democracy. See e.g. François du Bois, "Tort Law Recovered? From Alan Brudner's Revised Case for Tort Law to the Ethical Underpinnings of Liberal Democracy" (2014) 1:2 Critical Analysis of Law 285.

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citizenry.[38] Tort law is also roughly democratic, or accountable to the citizenry, in other ways. In certain common law jurisdictions, civil juries composed of citizens play an important role in applying tort law.[39] Likewise the substance of certain tort rules, such as the reasonable person standard and the test for whether someone has been defamed, also broadly reflect community norms.[40]

If tort law is created, at least in part, through the participation of the citizenry, which is given a voice in the substance of what tort law demands, this offers at least a partial justification for the authority of tort law. Citizens can be subject to the authority of tort law because they are, at least in some sense, the authors of the law. Tort law is created and applied through a public process that takes the demands and norms of the polity into consideration. This means that, in a Rousseauvian sense, the law is one that the citizenry prescribes for itself. It is not an arbitrary, foreign imposition of power that limits the freedom of citizens; rather, citizens remain subject to their own will.

In addition to this intuitively appealing democratic picture, the citizen-as-subject assumption also suggests a justification for the authority of tort law rooted in an implied social contract between state and citizen, as presaged by the discussion of Goldberg/Zipursky and Keating, above.[41] We can think of tort law as an implied bargain between the state and its citizens, along the following Lockean or Rawlsian lines. Tort law grants the state a monopoly on the use of force in certain contexts. This requires citizens to give up some of their natural freedom to, for example, respond in kind when their bodies or their properties are injured by others. They can no longer lash out in violence to achieve private retribution. But by giving up this freedom, citizens receive numerous benefits from the state. Their bodies and property are better protected from threats posed by other private persons;[42] and citizens are protected from risks of negligent infliction of harm to which they could not readily respond.[43] And instead of being able

38. See e.g. Matthew Steilen, "The Democratic Common Law" (2011) 10 J Juris 437; Melissa Schwartzberg, "Justifying the Jury: Reconciling Justice, Equality, and Democracy" (2008) 112:3 Am Pol Sci Rev 446 (and other writings); Christopher J Roederer, "Democracy and Tort Law in America: The Counter Revolution" (2008) 110:2 W Va L Rev 647; Melissa Mortazavi, "Tort as Democracy: Lessons from the Food Wars" (2015) 57:4 Ariz L Rev 929.

39. See e.g. Schwartzberg, *supra* note 38; Gregory Jay Hall, *The Democratic Standard of Care in Tort Law* (PhD Dissertation, University of Pennsylvania, 2017) [unpublished]; Christopher J Peters, "Adjudication as Representation" (1997) 97:2 Colum L Rev 312. For a critical survey of these arguments, see Jason M Solomon, "The Political Puzzle of the Civil Jury" (2012) 61:6 Emory LJ 1331. Service on civil juries is limited to citizens. See e.g. Government of Ontario, "Jury duty in Ontario", online: *Government of Ontario* www.ontario.ca/page/jury-duty-ontario; New York State Unified Court System, "Questions and Answers (FAQs)", online: *New York State Unified Court System* www.nyjuror.gov/juryQandA.shtml.

40. See e.g. Goldberg & Zipursky *supra* note 2 at ch 8. For a related point, see Cristina Carmody Tilley, "Tort Law Inside Out" (2017) 126:5 Yale LJ 1320.

41. What follows here is a gloss on the argument made by Goldberg/Zipursky and Keating, but note that their claims are not the same. Goldberg and Zipursky argue that the social contract is about enforcement of tort law, whereas Keating defines the social contract at the level of rules of conduct. So their claims about the nature of the bargain are rather different. Both, however, insist on a justification rooted in a version of social contract theory that focuses on an exchange of benefits and burdens.

42. See Goldberg & Zipursky *supra* note 2 at ch 4.

43. See Keating, "Social Contract Conception", *supra* note 2.

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to respond through interpersonal violence, citizens can hold others to account through the legal process.[44] Over the course of a citizen's lifetime, this bargain with the state can be understood to have been a reasonable one, and so the citizen can be presumed to have implicitly consented to state authority in the context of tort.[45] This makes the use of the coercive apparatus of the state to enforce tort law legitimate.

3. The Structure of Authority in Tort Law

The common assumption that the legal subjects of tort law are citizens is both intuitive and plausible, and lends itself to compelling accounts of how to justify the authority of tort law. But, as I shall argue in this Section, this is not how the law constructs legal subjecthood. When we carefully examine choice of law in tort, we see that citizenship does not determine who are the legal subjects of tort law, nor does citizenship play a role in individuating particular authority relationships between state and subject in tort law. As such, grounding the authority of states to enforce tort law in the citizenship of the legal subject cannot succeed, even on a roughly interpretive account of the grounds of justification of tort law's authority.[46]

To see that tort law and choice of law do not treat citizens as subjects, nor citizenship as the grounds for legal authority, we must analyze and reconstruct the structure of authority in tort law.[47] As I will argue, the structure of authority in tort law has both a horizontal and a vertical dimension, and both show that citizenship is not part of the field's authority structure.[48]

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44. See Goldberg & Zipursky *supra* note 2 at ch 4.

45. See Keating, "Social Contract Conception", *supra* note 2.

46. This doctrinal claim is important because (as mentioned above) the accounts of tort law discussed above are all, to a greater or lesser extent, interpretive—they seek to offer an account of tort law that is at least partly animated by the way the doctrine operates. See e.g. Goldberg & Zipursky, *supra* note 2 at 10; Keating, "Social Contract Conception", *supra* note 2; Keating, "Priority of Respect", *supra* note 2; Keating, "Idea of Fairness", *supra* note 2. It is of course open to these scholars to critique and reject the way in which choice of law constructs authority relationships. But on my reading, their presentation of the structure of authority in tort law seems less principled than simply a misunderstanding of the doctrine.

47. What follows is drawn in part from a similar discussion in Joanna Langille, "Persons, not Citizens," in Geneviève Cartier & Mark D Walters, eds, *The Promise of Legality: Critical Reflections on the Work of TRS Allan* (Hart, 2025) 213.

48. My argument here helps to spell out a point about the subjects of private law that has been made by others: see e.g. BA Wortley, "The Concept of Man in English Private International Law" (1947) 33 Transactions of the Grotius Society 147. What follows is a gloss on the way in which both tort law and choice of law structure authority in tort, which is necessary to set out in order to take an interpretive approach to the doctrine. But as I emphasize in the Introduction, I do not want to give the impression that this gloss is universally applicable, or a monolith. Both tort law and choice of law are not governed by supranational rules, and so each state has the right to establish its own account of how authority should operate in tort law. These rules vary from place to place, sometimes substantially, and so the applicable choice of law rules will thus turn on which court is able to take jurisdiction over a dispute. However, the characterization I offer below captures an approach common to many legal orders, particularly in the common law tradition. I make no claim, however, to fully capture

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A. Horizontal duties

Let us begin by discussing the horizontal dimension of how tort law is structured. Tort law establishes legal rights and duties that individuals have vis-à-vis other private persons. These duties in tort are bilateral—they hold between two private persons, in pairwise relation.[49] They define our mutual, interpersonal obligations to respect, *inter alia*, the bodily integrity and property of other private persons. These duties of mutual respect apply with equal force to both parties. In this way, tort law understands the parties to its duties as equals: both parties are under the same obligations for the same reasons, and neither party is superior to the other, or is an authority over another.[50] Their relationship is non-hierarchical, and in this sense, tort law operates on a horizontal plane—between parties who are equal in status or authority.

These horizontal obligations we have to one another under tort are not limited to our fellow citizens.[51] Instead, the duties we have in tort are duties that we owe to all persons that we encounter. You are not a defective subject of tort law if you are a non-citizen; your rights to bodily integrity and personal property[52] are not diminished.[53] Likewise, a putative tortfeasor cannot escape liability by arguing that the victim was a non-citizen. Rather, tort duties are owed to any people we encounter in our shared lives together, whatever their nationality. Being owed duties under tort law depends on being *a person*, not a particular kind of person or member of a particular political community.[54] So too with the right to sue.

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all of the complexity of choice of law rules, even within the common law; this would be well beyond the scope of this paper.

49. I draw from Chris Essert for this language and some of the thoughts on equality here and below in Section 5. See Christopher Essert, *Property Law in the Society of Equals* (Oxford University Press, 2024).

50. See discussions of this sort of equality in Essert, *ibid*; Weinrib, *The Idea of Private Law*, *supra* note 2; Weinrib, *Corrective Justice*, *supra* note 2.

51. As Savigny puts the point: "Modern law … has gradually tended towards the recognition of complete legal equality between natives and foreigners." Friedrich Carl von Savigny, *Private International Law: A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time*, 2d ed, translated by William Guthrie (T & T Clark, 1880) at 69 [footnote omitted]. Savigny establishes this point at length and relies on it in his theory of choice of law.

52. Of course, states can establish different rights, particularly to real property, for non-citizens; limits on foreign ownership are commonplace today. But that is not the same thing as the *private* obligations of the parties turning on the citizenship (or lack thereof) of other private persons. My obligations as a private person towards the real property of others does not vary depending on whether the owner is a fellow citizen or a foreigner. No private person can interfere with your property on grounds that you are a foreigner; this is not a defense in tort.

53. There are certain extremely problematic instances in modern history where this principle has not been respected as an empirical matter. For example, before the Thirteenth and Fourteenth Amendments were passed, American courts famously denied full legal personality in private law to enslaved persons and African Americans on the grounds that they were not citizens. See *Dred Scott v Sandford*, 60 US 393 (1856).

54. As Dagan and Dorfman have pointed out: see Hanoch Dagan & Avihay Dorfman, "Interpersonal Human Rights" (2018) 51:2 Cornell Intl LJ 361.

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Except for a few problematic historical exceptions,[55] the right to sue in common law courts has never been tied to citizenship.[56]

This is an important manifestation of tort law's commitment to equality. If the obligations we had to one another were limited to our fellow citizens, it would mean that if non-citizens were tortiously injured, they would have fewer rights, thus denying the horizontal equality between persons. As such, tort does not confine or limit the duties or entitlements we have vis-à-vis one another to members of our own political community. Instead, all people we encounter are owed duties in tort, and so tort duties and rights are generated simply on the grounds that someone is a person, not on the grounds that they are a person with membership in a particular political community.

Since tort law operates on a horizontal plane between generic persons, regardless of political membership, it readily crosses the boundaries of territory and membership established by public law, and so bilateral tort relationships are not confined to the boundaries of a particular state. This can be, for example, because the two 'poles' of the bilateral relationship are individuals from different places. Private persons who are citizens of one state regularly interact with private persons who are citizens of another state in ways that can either respect or violate the rights protected by tort law. A citizen of Canada, who is resident in Ontario,[57] could travel to the United States, and could tortiously interfere with the bodily integrity or property of a US citizen resident in New York.[58] A Canadian company could potentially infringe on the rights of workers in Bangladesh.[59] A resident of Israel could interfere with the reputation of an Ontarian by posting defamatory material online.[60] In this way, tort law's relationships do not necessarily map onto traditional political boundaries. Our tort rights are regularly respected and violated by those who are not our fellow citizens, and thus can be transnational—factually connected to multiple political jurisdictions—in nature. Likewise, tort disputes can be transnational even if both parties to a private law dispute are from the same political jurisdiction. For example, two Ontarians could drive together to New York, where the driver could tortiously injure the passenger on a New York highway,[61] or in the inverse scenario,

55. Again, we can think of slavery. The other historical context in which individuals were denied the right to sue on the basis of their public membership (rather than, say, their sex or race) was the historic prohibition on suits by enemy aliens. There is an extensive literature and case law on this matter: see e.g. EMB, "The Right of Alien Enemies to Sue in Our Courts" (1917) 27:1 Yale LJ 104. For our purposes, we see these historical cases as defective on the grounds that they are departures from the egalitarian ideal.

56. A point made helpfully by Tim Liau, though in a different context. See Timothy Liau, *Standing in Private Law: Powers of Enforcement in the Law of Obligations and Trusts* (Oxford University Press, 2023).

57. I use state and provincial examples here because those are the ones that are actually relevant when private law rights are established at the state or provincial level (as in the US and Canada).

58. See *Somers v Fournier*, [2002] OJ No 2543 (CA).

59. See *Das v George Weston Ltd*, 2018 ONCA 1053 [*Das*].

60. See *Haaretz.com v Goldhar*, 2018 SCC 28.

61. See *Wong v Lee*, [2002] OJ No 885 (CA) [*Wong*].

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two New Yorkers could drive to Ontario, where the driver can tortiously injure the passenger on an Ontario highway.[62]

In this way, citizenship does not limit the duties we owe to one another on a horizontal plane. Tort is a legal relationship between persons understood in their private or generic capacity, not their public capacity. The rights and duties we have towards other private persons are not mediated or limited by citizenship: we owe tort duties to all persons regardless of citizenship; we have the right to sue regardless of citizenship. Our pairwise private relations with other persons thus cross political boundaries, and indeed, depending on the facts, pairwise tort relationships can occur between persons of any nationality from anywhere in the world. In this sense, tort law's duties are concerned with universal relationships between generic persons.

B. Vertical authority

Yet even though tort law relationships cut across traditional political boundaries, the law of a particular state is still essential, as a doctrinal matter, to constituting each of these relationships.[63] The law does not understand us as having tort law duties in the abstract; it does not understand tort law duties as purely moral, untethered to the positive law of any state.[64] Rather, in order for particular persons to have an obligation in tort law, that obligation has to be instantiated in the positive law of a state.[65] So in each pairwise relationship between persons, the duties owed to one another with respect to a particular type of wrong are constituted by the law of a particular state.

In this way, there is also a *vertical* dimension to tort law: the vertical relationship of authority between a state's law and a pairwise relation between parties with respect to a particular type of wrong. Combining the two dimensions, tort law can be imagined as triangular: tort law obligations exist horizontally between two private persons, as mediated vertically by the positive law of a particular state.

But this vertical dimension presents its own challenge. In situations where the horizontal dimension of the dispute is factually connected to multiple political jurisdictions, how do we decide which state's law is vertically authoritative?[66]

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62. See *Babcock v Jackson*, 12 NY 2d 473 (1963).

63. At least under the traditional conception. The American legal realist school sharply criticized this conceptualization as a 'jurisdiction-selecting' approach that mistakenly believed it could use legal rules to identify the authoritative, governing law for each legal relationship. A better way was to recognize the policy and justice-based aims at play in the substance of the law, and that multiple laws could potentially govern. See David F Cavers, "A Critique of the Choice-of-Law Problem" (1933) 47:2 Harv L Rev 173.

64. Dagan and Dorfman make something like this claim, but it is doctrinally incorrect. See Dagan & Dorfman, *supra* note 54; Hanoch Dagan & Avihay Dorfman, "The Domain of Private Law" (2021) 71:2 UTLJ 207.

65. And it must be state law, not "non-state law." Ralf Michaels, "The Re-*State*-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism" (2005) 51:3 Wayne L Rev 1209.

66. See Brilmayer, *supra* note 35.

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And so, over what range of persons and relationships is each state's tort law authoritative?[67]

This problem of vertical authority—deciding which state's law is authoritative with respect to a particular tort dispute—is necessary to confront because of the existence of multiple states with varied content to their tort law. The world today is composed of many political units. And as a doctrinal matter, each state can develop its own conceptions of tort law according to its own domestic legal processes, community norms, and theories of justice. For this reason, the positive law of states varies significantly from place to place. Tort law is thus a normatively pluralist field, permitting significant variation in the substance of its rules across the globe. So for each private relationship, we need to know which state's tort law applies, because the rights and duties the parties have towards one another, and the outcome of any legal dispute, could readily turn on the different obligations imposed by different systems of tort law. As Justice LaForest, of the Supreme Court of Canada, writes:

> Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralized world legal order, there must also be a workable method of coordinating this diversity.[68]

This problem of competing sources of authority and normative pluralism is addressed by the area of private international law known as 'choice of law'. It is thus choice of law that can tell us how tort law ultimately individuates particular relationships of authority.

C. The grounds of authority in tort law

One possible way out of the problem of vertical authority in transnational torts would be to simply deny the issue, by having every court apply the law of the state in which it is sitting. But remarkably, this is not the assumption that choice of law doctrine makes. Indeed, a foundational plank of choice of law doctrine is that a court hearing a tort law dispute will not assume that its own tort law is the most authoritative;[69] the fact that a court can take personal jurisdiction over the parties to a dispute does not determine which substantive legal rules that court will apply. Unlike in public law contexts, courts hearing private law matters regularly apply *foreign* private law—the law of some other state—to decide a

67. Again, the critics of the jurisdiction-selecting approach would reject this conceptualization. See Cavers, *supra* note 63.

68. *Hunt v T&N plc,* [1993] 4 SCR 289 at 295.

69. This crucial assumption is interrogated in a fascinating way in Perry Dane, "The Natural Law Challenge to Choice of Law" in Donald Earl Childress III, ed, *The Role of Ethics in International Law* (Cambridge University Press, 2012) 142.

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dispute. So a particular state's private law can be applied and can authoritatively decide private law matters in disputes that take place far beyond its borders.

Indeed, each state's law can potentially be applied by any court that addresses tort disputes, anywhere in the world. This is because the choice of law process does not rule out the law of any state. It assumes that any sovereign state has an equal right, at least potentially, to have its law apply. It does not examine the content of the state's legal regime, or ask whether it is a democracy or an autocracy, when considering whether it has a claim to have its law apply in a particular context. Thus, when a court asks what law applies to a particular transnational tort dispute that is in front of them, they are (at least conceivably) considering the entire universe of possible legal orders. In this way, every state's legal order is *potentially* authoritative with respect to every particular dispute—and so to every legal subject.

If every state's law is potentially authoritative with respect to every tort law dispute, how, then, are *particular* relationships of authority between one state's law and a particular pairwise private relationship in tort law individuated? As I noted above in the Introduction, the answer is complex and varies (sometimes significantly) between jurisdictions. In many states, such as the UK, Canada, Australia, and the EU, the dominant paradigm is territorial, in which courts apply the law of the place of the legal wrong—the place where the tort occurred and one party became liable to another party to pay tortious damages.[70] So under this approach, the particular law that is authoritative in a tort law dispute is usually the law of the place of tort, or what is known as the *lex loci delicti*. In the case of two Ontarians who drive to New York and are in a car accident in which the passenger is injured due to driver negligence, a Canadian court would hold that New York state tort law would apply to define the rights and duties of the parties to one another.[71] Or, in the case of a Canadian company that is alleged to have violated the rights of workers in Bangladesh, the law of Bangladesh would apply to define the rights and duties of the parties vis-à-vis one another.[72]

In addition to the territorial approach, states have also adopted other ways of individuating obligations in tort law. These include the 'dual domicile' or 'dual residence' exception, in which the law of the place of the parties' domicile applies, when they have the same domicile or residence;[73] the 'most significant relationship' approach, in which courts analyze the weight of various connections to jurisdictions;[74] and interest analysis, in which courts analyze which state has the greatest interest in regulating the dispute and so having their law applied.[75]

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70. See e.g. *Tolofson*, *supra* note 5; *John Pfeiffer*, *supra* note 5; *PILA*, *supra* note 5; *Rome II*, *supra* note 5. As a formal matter, US states adopt a wide range of different approaches. But as Dan Klerman and Holger Spamann have argued, US courts overwhelmingly apply the law of the place of accident, even when they formally adopt other rules. See Daniel Klerman & Holger Spamann, "Law Matters—Less Than We Thought" (2024) 40:1 JL Econ & Org 108.

71. See *Wong*, *supra* note 61.

72. See *Das*, *supra* note 59

73. See e.g. *Rome II*, *supra* note 5 at art 4.1.

74. See e.g. *Restatement (Second)*, *supra* note 7 at § 145; *Rome II*, *supra* note 5 at art 4.3. Importantly, the Second Restatement also incorporates aspects of policy-based reasoning that we see in interest analysis.

75. See discussion in *supra* note 8.

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Yet despite this doctrinal variation across states in the way in which relationships of authority in tort law are individuated, they share a crucial feature: They generally do not use the citizenship of the parties to the dispute to individuate the authority relationship.[76] The dominant territorial approach looks at the location of the wrong to decide which state's law applies—not their public membership or citizenship. The dual domicile/residence rule looks at the domicile or residence of the parties—a private status that is unrelated to their citizenship.[77] The most significant relationship approach mentions nationality in passing on a long list of other factors, but does not centre citizenship as a ground for authority in tort law.[78] Interest analysis generally looks at domicile, not citizenship, in its analysis of the interest of states. So under all of these approaches, becoming a subject of a particular state's tort law does not turn on one's status as a citizen, and so legal subjecthood in tort law is divorced from citizenship.

Likewise, a connection to a particular state that falls short of citizenship is also not presumed by tort law. It is not necessary to have a long-term connection to a state or any other association or means of belonging to the community to be subject to the authority of a state's tort law. Indeed, one does not even have to have visited a state or been physically present there to have wronged someone there. For example, under the territorial approach, a glancing connection to a particular territory is perfectly sufficient to generate authority of that state's tort law over an individual. In one famous American case, a worker who negligently coupled a train in one state that subsequently decoupled in another state came under the authority of the second state—despite never having set foot there.[79] Likewise, a tort victim who is injured in a place they are just visiting, even very briefly, can be subject to that state's authority.[80] And plaintiffs can also be subject to the authority of a particular state's tort law even if they have never been there. For example, if a plaintiff's chattels are stolen from their home state and taken to a second state without their consent and then sold, the plaintiff is now subject to the authority of that second state's law in an action for conversion against a third-party purchaser.[81]

From this discussion, we can now identify the subjects of each state's tort law. The subjects of a state's tort law are not the citizens of that state, and tort law does not predicate authority on the public law of membership or on a political

76. In an important contrast, however, citizenship plays an important role in the civil law tradition in choice of law, including in the areas of international family law, succession, and status.

77. There are also some aspects of choice of law doctrine where one's status as a domiciliary or resident of a particular state is relevant. For example, certain aspects of one's capacity to marry are determined in some jurisdictions by the law of the state in which one is domiciled or resident. One might argue that residence-based approaches do focus on public, political membership. But this is not the case. Instead, they look at *private* factual connections to the state—the law of residence or domicile—which is unrelated to citizenship and its concomitant right to vote and thus participate in political life. See e.g. Karen Knop, "Citizenship, Public and Private" (2008) 71:3 Law & Contemp Probs 309.

78. See *Restatement (Second)*, *supra* note 7 at § 145.

79. See *Alabama Great Southern RR Co v Carroll*, 97 Ala 126, 11 So 803 (1893).

80. See e.g. *Tolofson*, *supra* note 5; *Wong*, *supra* note 61.

81. See *Winkworth v Christie Manson and Woods Ltd*, [1980] 1 Ch 496.

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relationship with a state. Instead, the subjects of tort law are generic persons, and any state's law could potentially be authoritative with respect to any pairwise set of persons. In this way, each state's authority is potentially universal. However, because there are many states in the world today, and each has a right to establish its own account of tort law's obligations, we need a way of individuating authority—of determining which state's law applies to which pairwise set of persons. As we have seen, these discrete relationships of authority are particularized through territory, or one of the other approaches to choice of law in tort. But these means of individuating authority relationships still reinforce the generic and universal authority of each state's law, because they do not limit a state's authority on grounds of personal membership (i.e., citizenship) and because each state's tort law can in practice be authoritative vis-à-vis any person in the world, depending on the structure of the facts at issue. For this reason, we can rightfully understand tort law's authority as potentially universal, over all persons considered in their generic capacity. As such, the legal subjects of tort law are persons, not citizens.

Putting this analysis together, we can draw out three features of the structure of authority in tort law. First, tort law adopts a conception of the legal subject as a generic person, without attention to citizenship-based membership in any particular polity, and assumes that every state's law could be potentially authoritative with respect to all persons (*universalism*). Second, it permits each state to determine the content of its own tort law, as it sees fit and according to its domestic norms and procedures (*normative pluralism*).[82] Third, given these substantive differences in the positive law of states, which require us to choose among competing sources of legal authority, it instantiates particular relationships of authority between a state and a pairwise tort law relationship, through methods like determining the place where the wrong occurred (*individuation*). But one's personal status as a citizen of a state does not figure at any stage of this inquiry, and is not central to any method of individuation, and so citizenship does not determine who the subjects of a particular state's law are.

4. Attempts to Modify Citizenship-Based Approaches

This analysis calls into question theories of tort law that both claim to be interpretive and to justify tort law on the basis of a relationship between a state and its citizens. As a doctrinal matter, citizenship or public membership in a political community generally plays no role in determining when a particular state's

82. I use the phrase 'normative pluralism' to emphasize the different theories of justice that underlie different states' substantive tort rules. I do not mean 'pluralist' in the sense of reconciling different competing values, nor do I mean 'legal pluralism', which emphasizes sources of law beyond the state. In using this phrase, I wish to invoke some of my other work in which I have argued that international economic law facilitates states' developing their own conceptions of justice at the domestic level. See e.g. Robert Howse & Joanna Langille, "Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future" (2023) 117:1 Am J Intl L 1.

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law is authoritative with respect to a particular tort dispute or in justifying the law's application.[83] This means that theories of authority that ground tort law's authority in the state-citizen relationship, such as the democratic or social contractarian accounts outlined above, do not appear to offer a compelling justification.

Yet perhaps we need not take this analysis as fatal to democratic or social contractarian theories. Surely, one might argue, we can modify these compelling accounts to generate authority over non-citizens—either by extending those accounts to cover non-citizens, or by developing a separate and distinct account to cover non-citizens.[84]

A. Extending justifications to non-citizens

The first move we might make would be to extend the intuitive democratic and social contractarian pictures to non-citizens who are subjects of a state's tort law. Let us consider how that might work, starting with the democratic account. Right off the bat, we would have to concede that non-citizens are not authors of a state's tort law, since they do not participate in the electoral process, nor can they sit on juries. There is no direct sense in which we can say that they are the authors of the law that applies to them.

But perhaps this democratic argument could be modified to account for non-citizens. Perhaps a successful democratic process can (and perhaps even should) take the interests of non-citizens into account.[85] A legitimate democracy might consider how its laws might apply to non-citizens, and seek to ensure that the interests or rights of those non-citizens be protected and that they be treated fairly, as a substantive matter, by a state's tort law. If a state's tort law does this, we might think that that law can apply legitimately to non-citizens.

This argument is promising, and in fact I will endorse a version of this claim below, when offering a justification for tort law's authority over all persons. But notice this argument is different from the democratic procedure argument articulated above. The fact that the substance of the law successfully protects the interests or rights of persons does not mean that it is justified on democratic grounds, in which a person's democratic participation or authorship of the law is what gives the law its normative justification and its authority over them. And so, when we switch from democratic procedure to the protection of interests or rights, we

83. With the possible exception of the approach articulated in the Second Restatement, which references the 'nationality' of the parties as a connecting factor. See *Restatement (Second)*, *supra* note 7 at § 145.

84. Writers in the social contractarian tradition have long recognized this problem. Locke, for example, offered an account of why visiting aliens have an obligation to obey the law. See e.g. A John Simmons, "'Denisons' and 'Aliens': Locke's Problem of Political Consent" (1998) 24:2 Soc Theory & Practice 161. My arguments below echo some of what Simmons says here.

85. This is an argument made by those in the fiduciary tradition, such as Evan Fox-Decent, Evan Criddle, and Eyal Benvenisti. See also Sarah Song, "The boundary problem in democratic theory: why the demos should be bounded by the state" (2012) 4:1 Intl Theory 39.

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are no longer making the same kind of argument for tort law's legitimacy. There may be a potentially successful argument here, but it is not a democratic one, at least in the traditional, procedural sense.[86]

A more promising route may be to modify the social contractarian approach. Recall that, on this view, tort law's authority is justified as the result of an imagined long-term bargain between states and citizens. Citizens give up certain rights (e.g., to private vengeance) in exchange for security and the right to sue in tort. Over the course of an individual's lifetime, this is a fair bargain, and thus law's authority is legitimate.

We could try to imagine extending this bargain to non-citizens. However, it is unclear why non-citizens should accept. Non-citizens (and especially non-residents) do not obtain the benefits of giving up their right to private vengeance, because they might not live in the state long-term. Indeed, since even a glancing connection to a state can be sufficient to bring someone under its tort law authority, a person can be subject to a state's tort law without ever having received any benefit from that state at all—be it security, the right to sue, or otherwise. To put the point another way, benefits from a particular state's tort law do not necessarily accrue to the law's subjects over the course of their lives, because tort law is totally indifferent to the existence of a long-term relationship between the state exercising authority and the legal subjects of tort law. The bargain that could obtain between state and citizen therefore does not seem transferable to all of the law's subjects.

However, perhaps we could include non-citizens in a social contract approach by arguing that non-citizens have *actually* consented to the authority of a state's tort law. We can analyze whether this argument is successful in the context of the dominant territorial approach, but of course a comprehensive analysis would have to explore other approaches to choice of law in tort as well (such as the most significant relationship and interest analysis approaches discussed above). As we have learned, one important approach for individuating state authority in the context of tort law is the territorial approach, in which a state's law is authoritative with respect to a particular pairwise relationship if the tort took place on the state's territory. Arguably the state is authoritative in this context because by undertaking voluntary acts on a particular territory, the parties consented to that state's law applying to them. The parties were on notice that if they behaved a certain way in relation to the territory of a particular state, that state would be granted the right to exercise its legal authority over them. This argument applies just as easily to visitors as it does to citizens. "When in Rome," it is reasonable to expect one to comply with the laws of Rome, and for Roman law to be authoritative over the individual in the case of any ensuing tort dispute.

86. Whether this argument is a democratic one turns on the question of what constitutes democracy—whether it is about procedures or substantive protections. This is an important scholarly debate, outside the scope of this paper.

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A version of this argument has been somewhat popular with conflicts scholars,[87] and judges have argued that 'party expectations' can help legitimate the territorial approach to the authority of tort law over visitors.[88] Indeed, there is some intuitive appeal to the idea that a party should be on notice of the law of the land if they visit another state.

Yet there are both doctrinal and theoretical problems with this modification to the contractarian account. Let us start on the doctrinal side. There are innumerable cases where an individual's connection with the territory of a state is too attenuated to claim that they ever consented to its authority over them, and yet the law of that state is nonetheless held to govern them in tort. Take, for example, airplane crashes. When there is an airplane crash, the law of the place of the crash has frequently been applied to govern any ensuing tort claims.[89] However, for obvious reasons, the location of an airplane crash is often in a state that passengers did not choose to enter, let alone consent to be governed by. Indeed, courts have held that the law of the place of the crash applies even if that place was neither the origin nor destination of the flight.[90] In such an instance it is difficult to say that the passengers consented to having the law of the place of the crash apply to them.

We can also think of other examples where the parties did not consent to being physically present on the territory of a state, and yet the law of that state applies to them. Recall the case of the stolen chattels discussed above. Or think of a crossborder kidnapping. If an individual is kidnapped in one jurisdiction and transported elsewhere, where he is then assaulted, the false imprisonment that took place in the first jurisdiction would be governed by the first jurisdiction and the assault would be governed by the second jurisdiction.[91] But there is no way we could say that the plaintiff consented to be governed by the law of the second jurisdiction, since he was brought there against his will.

There may also be theoretical or conceptual problems with the claim that presence is sufficient to establish consent. Let us assume that a party chooses voluntarily to be present on the territory of a particular state. It is unclear, however, why

87. See e.g. Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018).

88. "[O]rdinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly." *Tolofson*, *supra* note 5 at 1025.

89. See e.g. *In re Air Crash at Dubrovnik, Croatia on April 3, 1996*, 2001 WL 777433 (Conn Dist Ct); *Emory v McDonnell Douglas Corp*, 148 F (3d) 347 (4th Cir 1998); *Clawans v United States*, 75 F Supp (2d) 368, (NJ Dist Ct 1999); *In re Air Crash Disaster near Roselawn*, 948 F Supp 747 (Ill Dist Ct 1996). However, not all courts have used the *lex loci*, particularly in the US. See e.g. *Kilberg v Northeast Airlines*, 9 NY (2d) 34 (App Ct 1961) and its progeny. Note also that sometimes choice of law in airline crashes is governed by treaty—either the Warsaw Convention or the Montreal Convention.

90. See e.g. *Thorne v Hudson Estate*, 2017 ONCA 208.

91. See *Belhaj v Straw* [2013] EWHC 4111 (QB), [2014] EWCA Civ 1394, [2017] UKSC 3; *Rahmatullah v The Ministry of Defence and The Foreign and Commonwealth Office* [2019] EWHC 3172 (QB). But see *Zubaydah v Foreign, Commonwealth and Development Office*, [2023] UKSC 50. Note, though, that any ongoing false imprisonment that took place in the second state would be governed by the law of that state.

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this choice amounts to meaningful consent *to the authority of the law*. It may not have occurred to me that being present on a state's territory means that I am granting that state authority over me, and the choice to be present somewhere is clearly not equivalent to the choice to be subjected to a particular authority. If we want to establish actual consent, something more is necessary—perhaps a transaction between the legal authority and the legal subject that would ensure the presence of consent.

Finally, even if we could identify the existence of actual consent in each and every choice of law case, we can also question whether actual consent is sufficient to justify the authority of a particular state's tort law. The fact that I consent to be enslaved, murdered, or maimed does not mean that another person is permitted to enslave, murder, or maim me.[92] Conversely, the absence of actual consent does not necessarily mean that authority cannot be legitimate. Think, for example, of a person in a political minority within a society who always votes for the opposition party; or a parent's right to make authoritative decisions on behalf of their child even though the child did not consent to be born and has no choice in the matter of the parent's authority. For these reasons, it is unclear whether actual consent can suffice to justify the authority of a particular state's tort law, and thus whether this modification to the social contract approach can succeed.

B. A different justification for non-citizens

A second possible move is to concede that citizenship-based accounts do not justify tort's authority to non-citizens. However, this does not mean that they are not helpful, because at least they get us part of the way there. They can successfully justify authority to citizens, and then we can develop a separate and distinct theory for non-citizens. That is, they get us a theory of authority for the 'regular' case—when a state's law is applying to its own citizens—and then we just need a different theory for the more marginal cases where a state's law applies to non-citizens. So my analysis in Section 3 above does not entirely denude these citizenship-based accounts of their normative force. There is no need to reject them entirely, when we simply need to add a codicil or an amendment to take care of the more unusual case.

But even if a different justification for non-citizens could be developed, this bifurcated approach would still be inconsistent with tort law's structure. A bifurcated approach relies on the idea that a state's tort law has authority in the core case simply on the grounds of the law's subjects being citizens. However, as I have shown, the common law does not offer this kind of plenary authority. The authority of a state's tort law is not generated by an individual's public citizenship. There is no default applicability of a state's law to its public members.

92. Criminal law, for example, contains well-recognized limits to consent along these lines, as does the public policy exception in the law of contract.

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Instead, there is an analysis of (for example) the location of the wrong, rather than the public political membership of the parties.

The bifurcated approach is also problematic because many approaches to choice of law, such as the dominant territorial approach, do not offer a justification for its authority on a person-by-person (or more accurately, a party-by-party) basis.[93] According to the territorial theory, when determining what law applies to persons in a tort law dispute, the law does not give one set of reasons for why a particular state's tort law applies to one party and a different set of reasons to the other party. Instead, the law examines the parties' relationship and the nature of the wrong. In this way, the law's understanding of its authoritativeness is not divided by person but is instead connected to the transactional wrong that unites the parties, and its territorial location.[94]

5. Tort Law for Persons

In addition to calling into question citizenship-based accounts of authority in tort law, my analysis of its three distinctive features (universality, normative pluralism, and individuation) also generates a new challenge: We must now offer an account of tort law's authority that can both account for and integrate these three features. At first blush, this seems difficult. For example, there appears to be an important tension between tort law's universalism, on the one hand, and its particularity and individuation on the other. How can each state's tort law be both potentially legitimately applicable to every person in the world and simultaneously established by the particular legal processes of each state, according to its own conception of justice in tort law, and individuated by (for example) acts on the state's territory?

In this final Section, I want to start to develop an account of authority in tort law that accounts for these three features. I will not offer a complete account of how to integrate these features here, nor will I fully defend all the premises that I rely on. However, I want to offer a rough-and-ready approach as to how it might be possible to integrate the three features of how authority is structured and mediated in tort law, and thus how we might offer an account of tort law's authority over persons, not citizens.

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93. Interest analysis differs in an important way here, because it considers the law's authority over each subject in turn.

94. Indeed, this bifurcated approach may be problematic because it seems to violate the horizontal equality of the parties that is so foundational to tort law. It requires rooting law's authority over one party in reasons that do not necessarily apply to the other party, and in this way treats the parties differently. This issue has been much discussed in the literature on interest analysis. Some scholars have argued that interest analysis violates constitutional restrictions on discrimination by treating the parties differently in this way: see John Hart Ely, "Choice of Law and the State's Interest in Protecting its Own" (1981) 23:2 Wm & Mary L Rev 173; Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law" (1992) 92:2 Colum L Rev 249. Meanwhile, others have argued that interest analysis does not impermissibly discriminate between the parties: see Larry Kramer, "The Myth of the 'Unprovided-For' Case" (1989) 75:5 Va L Rev 1045 at 1067-68.

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For simplicity's sake, this account will only speak to the dominant, territorial paradigm that individuates authority in tort law by using the law of the place of the wrong. I concede readily that if we accept a different approach to choice of law in tort, this will not offer a compelling justification; nor will it speak to exceptions in certain territorial accounts, such as the dual domicile/residence exception. My claims are therefore somewhat limited. But the hope is that I can begin to offer a justification that can speak to how relationships of authority are constituted in tort law, at least under one of the most popular doctrinal approaches.

A. The universal problem of interpersonal domination

To begin to develop an account of the authority of tort law for persons, we can return to the premise that we started with in Section 2: the idea that each person has an inherent right to control their own body and that no one else has a right to do so, at least without justification. Scholars have cashed out this idea in a variety of ways, such as the inherent freedom, dignity, independence, or non-domination of persons,[95] but the basic idea is that each person has a right to be in charge of themselves. And this is a right that each person has *equally*—we do not think that some people are entitled to 'more' freedom than others.[96]

Political theorists typically worry about threats to the equal freedom of persons from the state—we worry that persons will be dominated by the state or subjected to its arbitrary power.[97] However, as numerous scholars have highlighted, other private persons also pose a threat of domination.[98] Private persons can readily interfere with our equal freedom through the use of force or coercion, and can thus compromise our ability to be in charge of ourselves. In addition to violating the *freedom* of persons, the threat or use of force from other private persons is a violation of the fundamental *equality* of persons. In such contexts one person has arrogated themself the power to make decisions about how things should go for another person, and wrongfully assumed that they were in charge of that other person.

This potential threat of interpersonal domination comes from all other private persons. It is not just citizens or members of our own political communities who can potentially violate our equal freedom or independence. Any private person (and indeed, any legal person, including corporate actors) with whom we interact can pose this threat.[99] In this way, the problem of interpersonal domination is a

95. In work by scholars such as Philip Pettit, TRS Allan, Arthur Ripstein, and Ernest Weinrib.

96. A point made helpfully by Kantian accounts of equal freedom. See e.g. Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009).

97. See e.g. Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013).

98. A point made by both Pettit and Allan. See e.g. TRS Allan, "The Rule of Law as the Rule of Private Law" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford University Press, 2014) 67; Pettit, *supra* note 97.

99. I do not directly consider corporate actors in this paper; however, one advantage of the non-citizenship-based view that I develop here is that it can be more easily applied to non-human legal persons than can prior accounts.

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universal or global problem, one that potentially inheres in any of the billions of pairwise relations of private persons around the world.

The threat of interpersonal domination therefore transcends political boundaries. Even if there exist territorial states with authority over a particular part of the earth's surface, this problem does not map onto those boundaries. It also transcends citizenship. The threat that someone poses to me as a private person is not related to their citizenship, but merely to their status as a person who could violate my freedom and our equality by deciding how things should go for me through threat or use of force. So the threat of interpersonal domination is universal and divorced both from territorial states and persons' public membership in those states.

B. The solution: universal potential authority in tort

How are we to solve the problem of interpersonal domination? One solution might be to establish rules of tort law that can carve up our respective domains of freedom, in which I have the right to decide how things go for me in my domain, and you have a right to decide how things go for you in your domain. And if you interfere with my domain, you must make good the deficiency (i.e., you must repair the violation) through tort law's damages.

But creating tort rules is not a task that any of us could achieve alone in our pairwise private relationships. Why? Because the notion of equal freedom—or independence, or non-domination—is extremely abstract, and it is inevitable that there will be disputes about where the boundaries of our respective domains are. In the inevitable case of such a dispute, who between the two of us can rightfully decide where the boundaries are? If the answer is that either one of us gets to set the rule, then this returns us to the problematic domination or unilateralism or inequality that the tort rules are meant to guard against: one person is still claiming to be in charge of the other in our pairwise private relations.

So what is the solution to this problem of unilateralism? To set out, interpret, and enforce tort rules that define the scope of our respective domains, we need an independent public authority that is authorized to act on behalf of both of us and yet is not partial to either of us. We might think that a state could potentially play this role. Yet what would it mean, in this context, for the state to be authorized by both of us and yet not partial to either of us? And shouldn't we continue to worry that the *state itself* can be an impermissible form of unilateralism or domination?

Here the concept of non-domination can come in to justify state authority. Our concern with an entity like the state having the power to use coercive force in relation to persons is that the entity will violate the equal freedom or independence of persons. Yet without tort law, our freedom or independence is always at the mercy of other private parties.[100] If the state can protect us from the threat of interpersonal domination by establishing and enforcing appropriate and equal

100. And, of course, without other domains of law as well.

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domains of freedom for each person, then that authority does not violate our freedom, it vindicates it. The use of a state's power to enforce tort law does not permit interpersonal domination but instead ensures that neither of us is in charge of the other. The authority of the state to use coercive force can be justified to maintain these domains, because the initial concern about coercion—that it violates the freedom of persons—does not apply in this context, since state authority is the necessary means of protecting that freedom for each of us.

But remember that the problem of interpersonal domination is universal. The other persons who could dominate us, or whom we could dominate, could be from anywhere in the world, and they could be public members of any state. To be authoritative in relation to any particular person, tort law must be authoritative in relation to *all persons*, because tort is a pairwise problem and any person could be in a pairwise relationship with any other person. So, if a state's law is to be authoritative in tort law with respect to any set of persons, it must be at least potentially authoritative with respect to every possible pairwise relation between persons. This means that each state's tort law must be authorized by and justified to, again at least potentially, all persons. In this sense, tort law's authority must be potentially universal.[101]

C. Positivity and pluralism

Part of solving the problem of interpersonal domination requires tort law to have another feature: that it be posited by public authorities. There are several reasons tort law must be posited to be authoritative. It must be public to be respected by the persons to whom it applies. It must be posited because, as mentioned above, notions of equal freedom, or independence, or non-domination, are very abstract, and so to define our respective domains of freedom in concrete terms, they must be made concrete through legislation or common law case law. There must be a way for tort law to be interpreted in contexts of disputes about the meaning of these public, established rules. And there must be a way for it to be enforced in contexts of violation. Without these features of positive law, tort law could not do its job of establishing domains of freedom of persons that allow us to escape the threat of interpersonal domination, and we would be back to having one person deciding how things should go for another.

In our current world, public international law and supranational actors do not claim the power to determine the boundaries of interpersonal freedom or

101. For the private law theorist, the claim that each state's law is (at least potentially) authoritative with respect to each person may sound extremely odd. But new literature from international lawyers has sought to vindicate precisely this claim. Work by Evan Fox-Decent, Evan Criddle, Ruti Tetel, and Eyal Benvenisti has sought to establish that all states are potentially authoritative with respect to all persons and thus have particular responsibilities in the way that they exercise that authority. In other words, states have this potentially universal authority today, under public international law, so long as it is exercised with due regard to its fiduciary character (i.e., it is power that must be exercised for the benefit of those subject to it). While these scholars have not established this claim with respect to tort law, it is not so far-fetched to assume that it may exist in that context as well.

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adjudicate interpersonal claims of domination.[102] Rather, the power to posit tort law is held by individual states. And states are permitted to instantiate the positive norms of tort law as they see fit, with local inflection and through local processes. As I put it above, tort law is pluralist in its positive instantiation, and so varies substantially from place to place, according to different conceptions of justice.

This positive pluralism initially seems to be in tension with tort law's universality. How can law that is made according to the processes of one state, in a way that reflects local norms and concerns, also be potentially authoritative vis-à-vis all private persons?

The way through this tension is to return to the problem of interpersonal domination. Tort law is authoritative when it solves the problem of interpersonal domination by constituting the equal freedom of persons. In order to do this, tort law must be posited. It is perfectly fine, however, for tort law to be instantiated in different ways in different places, because it can still (through its positive character) solve the problem of interpersonal domination. No person can complain that tort law varies from place to place if it still solves this issue.

However, there are outer limits on state authority to posit tort law that flow from this authorization. If the primary and secondary duties of tort *deny* the equal freedom of persons, then they are *not* authoritative. In such an instance, they cannot have been authorized with respect to all persons, because they were not made in such a way that respects the equal freedom of all persons. For example, tort law cannot discriminate on the basis of nationality, gender, or race; such laws would fail to be authoritative. Indeed, as I have argued elsewhere, they would fail to be law at all.[103]

This may seem a strange idea for the tort theorist. How can we understand there to be substantive limits on what counts as tort law?[104] For a private international lawyer, however, this is not a strange idea. The doctrine of public policy in choice of law places outer limits on what can be recognized as tort law by other states. If the substance of the law violates these limits, it cannot be applied "as a law at all."[105] And as I have previously argued, the common law tradition accepts that the outer boundaries of what can count as tort law are laws that violate the equal freedom of persons.[106] So the positive law incorporates quite readily a limit to the normative pluralism of transnational tort law. This also means that while contemporary tort theorists are right to stress that community norms can be relevant to how tort law's rights and duties are instantiated,[107] there remains an outer limit on the content of those norms, imposed by its universal character.

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102. It is conceptually possible that they could! The existence of a plurality of states is in some ways a historical accident, and is not conceptually necessary. But given that domestic states are the locus of authority in tort law, their exercise of that authority must be justified.

103. See Joanna Langille, "Frontiers of Legality: Understanding the Public Policy Exception in Choice of Law" (2023) 73:2 UTLJ 216.

104. This is a question with which scholars such as Ernest Weinrib have grappled: see Ernest J Weinrib, *Reciprocal Freedom* (Oxford University Press, 2022).

105. *Oppenheimer v Cattermole* (1975), [1976] AC 249 (HL (Eng)) at 278. See also *Kuwait Airways Corporation v Iraqi Airways Company*, [2002] UKHL 19.

106. See Langille, *supra* note 103.

107. As Goldberg and Zipursky do, for example. See Goldberg & Zipursky, *supra* note 2.

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D. Individuating authority

Thus far we have discussed how law is made positive by the particular legal orders of states but is potentially universally authoritative. One question remains: How are specific authority relationships mediated, in the context of particular pairwise interpersonal relationships? The answer, as discussed above, is often (though of course not always) through territory. But how can this method of mediating particular authority relationships in tort law be legitimate from the perspective of the universal legal subject?

In the political and legal theory literature, there is a fairly extensive discussion as to why it may be legitimate for political authority to be divided among territorial states.[108] But little discussed is the problem faced here, which is why it is legitimate *from the perspective of all private persons* to have their tort law rights and duties mediated by the territorial location of the wrong.

Much is needed to fully justify a territorial account of choice of law; this has been the central preoccupation of the field of choice of law for more than a century. But here I want to suggest that from the perspective of tort law, the mediation of authority through territory is generated by the conception of equal freedom or non-domination that underlies the other aspects of how its authority is structured. Choosing territory to mediate authority uses a feature of a tort law dispute that is applicable to both parties—not in the sense that both parties are or ever were on the territory of a particular place, but in the sense that it is a feature of a change in the rights of the parties that is entirely neutral between the parties. The territorial place of the wrong is not something that applies only to one party, or that turns on a characteristic of either of the parties. Rather, it applies to both parties in their pairwise relation. Territory is, in a sense, a characteristic of the transactional wrong, rather than a characteristic of the parties. In this way, using territory to mediate authority in tort law respects the fundamental equality of persons, and so is a continuation of the norm of preventing interpersonal domination that animates the other elements of authority in the field.[109]

E. The subject of tort law

This discussion of how to justify tort law's authority may also have implications for how we think about the *subject* of tort law—its underlying normative structure and justification, and its primary and remedial rights and duties. To the extent

108. See e.g. Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford University Press, 2019); Margaret Moore, *A Political Theory of Territory* (Oxford University Press, 2015); A John Simmons, "On the Territorial Rights of States" (2001) 11:1 Philosophical Issues: A Supplement to NOÛS 300; David Miller, "Territorial Rights: Concept and Justification" (2012) 60:2 Political Studies 252.

109. This does not mean, of course, that other approaches to choice of law do not also respect the equality of persons; for example, we could readily argue that the most significant relationship approach is also neutral between the parties and therefore respects their equality. I therefore do not wish to exclude the possibility that other approaches may also be able to be justified on this basis, without further analysis.

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we accept what I have suggested here, there are several features of tort law that we can draw out of this analysis.

First, on the view I articulate here, tort law is an attempt to solve a problem of potential interpersonal domination. If this is true, we now know something about the field's primary obligations: They should be those that articulate domains of freedom for persons that solve this problem. Second, I have also argued that tort law must be posited to be authoritative, and in this sense, have taken a position on the relationship between law and morality (although it is unclear whether anyone has actually ever denied that law must be posited to be authoritative, and thus this may be the only available position).[110] That is, tort law's duties may be normatively grounded, but they must be instantiated by the rigours of positive law to be enforceable against persons. Third, and relatedly, tort law can be rendered positive by the legal processes of different communities, according to the norms and customs of those communities and their different conceptions of justice, and thus can vary from place to place. Fourth, there are substantive limits on what tort law can legitimately enforce: if a particular tort law does not actually solve the problem of interpersonal domination by protecting the equal freedom or independence or non-domination of persons, that law is not authoritative. Tort law must not discriminate, for example, between members of different political communities in protecting and constituting the freedom of persons. It must always be justified to all persons.

6. Conclusion

One might assume that the subjects of authority in tort law are the citizens of the state whose tort law applies. But as choice of law doctrine shows, the subject of tort law is the generic person, and each state's tort law is potentially authoritative vis-à-vis any person in the world. Democratic or social contractarian theories of tort law's authority, rooted as they are in the state-citizen relationship, cannot easily be adapted to account for this.

This opens up a new puzzle: We must explain three structural features of how tort law actually mediates authority to the generic legal subject—its universality, its pluralism, and its individuation. Here, I have developed an approach that may be able to integrate these three features (at least on the territorial approach), and so justify tort law's authority towards persons, not citizens. And I have also offered some suggestions as to how this analysis may help us better understand not just the subjects of tort law but also the subject of tort law.

I have developed my analysis here in the context of tort law. But this critique of theories of authority that rely on the state-citizen relationship may be more broadly applicable. As I have argued elsewhere, it is very common for theorists

110. Stone questions whether this is a feature of natural law theories: see Martin Stone, "Legal Positivism as an Idea About Morality" (2011) 61:2 UTLJ 313.

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to justify law's authority using citizenship.[111] But the structure of many domains of law—including other areas of private law, criminal law, and even some aspects of constitutional law—does not ground authority in citizenship.[112] Instead, these other domains often also rely on connections to factors unrelated to citizenship, such as the territorial location of a criminal wrong or a constitutional rights violation. For this reason, we may need to rethink our accounts of law's authority in these areas of law as well.

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111. See Langille, *supra* note 47.

112. Other domains have begun to grapple with this issue. For example, in relation to criminal law, see Lindsay Farmer, "Territorial Jurisdiction and Criminalization" (2013) 63:2 UTLJ 225. In relation to constitutional law, see Linda Bosniak, "Status Non-Citizens" in Ayelet Shachar et al, eds, *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 314.

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