THE WORK OF TORT LAW: WHY NONCONSENSUAL ACCESS TO THE WORKPLACE MATTERS?

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Tort law does many things—it determines substantive rights, decides what counts as violating these rights, recognizes rights of repair, and grants rights of redress. Two non-instrumentalist conceptions of tort law appear to dominate how we are supposed to understand and discharge these tasks. One conception takes tort law to be the law of wrongs, whereas the other conception identifies tort law with the law of victim recourse. I argue that both conceptions (including a combination of both) mischaracterize what tort law does and what it should be doing. By contrast, the conception I shall defend—viz., the conflict theory of tort law—takes the basic task of tort law to be identifying the value of the conflict to which it responds (or which it shapes). In fact, there are three types of conflicts: inherently valuable, tolerably valuable, and valueless. Each type of conflict calls for a qualitatively different response by the law of torts. The conflict theory, I argue, changes the way we understand and determine the rights, duties, liabilities, and remedies that arise in and around tort law. I demonstrate this claim in connection with the tort of battery and then extend the analysis to capture the tort law of workplace and, in particular, trespass law as it applies to nonconsensual access to the workplace by organizers and by workers.

Introduction

Tort law and the law of work share important aspects. Safety is perhaps the most important one: workplace safety implicates tort law's fundamental concern with our interest in physical integrity, emotional wellbeing, and dignity. Another quintessential point of intersection concerns the right to enter, and its inverse right to exclude from, the workplace, as these rights (as I argue presently) might be consequential to having a "say" on the design and agenda of the workplace. For tort law, trespass to land has always been viewed as a core tort cause of action and a point of endless fascination for tort students, practitioners, and scholars. At the same time, the question whether employers can deny their workers and union organizers access to the workplace (say, for organizing purposes) has figured prominently in the law of work. Moreover, on a doctrinal level, tort-law concepts are routinely invoked in

* Tel Aviv University Faculty of Law. This Article has benefited from responses received at the Private Law Theory Meets the Law of Work Conference at NYU. I would like to thank the participants and the organizers. I would also like to thank Hanoch Dagan, Cindy Estlund, Mark Geistfeld, Roy Kreitner, Brishen Rogers, Julia Tomassetti, Sabine Tsuruda, Katrina Wyman, Ben Zipursky for helpful comments. Finally, I would like to thank Mais Abdallah, Bruria Friedman, Jade Kosché, and the staff of Theoretical Inquiries in Law for their outstanding editorial assistance.

the context of work law.[1] Familiar instances are the "but-for cause" doctrine that figures prominently in employment discrimination law,[2] the tort of intentional infliction of emotional distress as often litigated in and around workplace settings,[3] and detention by employer in connection with the tort of false imprisonment.[4] On the other side of the legal aisle, tort law is not indifferent to changing conceptions of work and of employment when developing the vicarious liability doctrine of *respondeat superior* (according to which the employer can be held liable for the wrongs of his or her workers).[5]

These doctrinal interactions between the two bodies of law to the contrary notwithstanding, one would expect to see tort law—viewed not merely as a collection of posited rules but also as a repository of ideas about the rights, duties, and responsibilities of private persons—exerting some measure of influence on the organizing questions of the law of work, such as what terms of interaction make employment relations just. And *vice versa*: one would expect that insights developed from within work law inform, to some extent, tort law's own theory and practice of human safety and land control, including outside the workplace context.

However, these expectations are nowhere near being met. For instance, tort theory seems to have nothing valuable to say about the character and scope of trespass to land in connection with the right of union organizers to access the workplace. As a result, much of the discourse on this right centers on constitutional and other public-law provisions.[6] Perhaps the underlying assumption is that tort law (and private law, more generally) sets the basic *hurdle*—employers have a right to control their premises and trespass to land is tort law's way of protecting this right. Overcoming this hurdle therefore calls for resorting to public law (at the state and the federal levels). As will become clear below, I challenge this way of understanding tort law.

Work law's concern with employees' safety reveals a somewhat similar picture. The growth of workers' compensation schemes (and possibly also schemes of safety regulation such as those made by the Occupational Safety and Health Administration) is widely identified with the doing away of tort law.[7] On this picture, the modern law of tackling workplace accidents contrasts with tort law's traditional, and largely

1 *See generally* Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011) ("[W]hen Congress creates a federal tort [of unlawful discharge under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301] it adopts the background of general tort law.").

2 *See, e.g.*, Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 177 (2009) (holding that in a case alleging employee's age-based discrimination pursuant to Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a), "the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action").

3 *See, e.g.*, Livitsanos v. Superior Ct., 828 P.2d 1195 (Cal. 1992) (considering the availability of an IIED suit brought by employee against employer).

4 *See, e.g.*, Randall's Food Mkts, Inc. v. Johnson, 891 S.W.2d 640 (Tex. 1995).

5 For more on the changing conceptions of employment relationship and their implications for the torts doctrine of *respondeat superior*, see the analysis in Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995).

6 And the U.S. Supreme Court's decreasing interest in state property and tort law (when dealing with cases of takings) only reinforces this trend.

7 *See, e.g.*, Alan Brudner, The Unity of the Common Law 315 (2d ed. 2013); John C. P. Goldberg & Benjamin C. Zipursky, Torts 267, 394-95 (2010); John Fabian Witt, The Accidental Republic 202, 206 (2004); Ernest J. Weinrib, The Idea of Private Law 210 (1995).

inadequate, way of addressing workers' safety. The rise of the former necessarily means the fall of the latter.[8]

That said, the distance between tort law and the law of work ought to be revised. On this revision, these two bodies of law can be, and to some extent already are, closely related in the following two senses. First, insights drawn from work law can have lasting effect on the law of torts. As I have argued elsewhere, a key concern for work law—the challenge of tackling relational inequality—provides a powerful *internal* critique of tort law's traditional fixation with formal equality.[9] The core case I have employed in the course of making this argument is what can be called the assumption of risk revolution, according to which tort law has radically reformed its approach to *employees*' choice to submit themselves to an unsafe working environment.[10] The reform in question marks the beginning of a shift from formal to substantive equality as the underlying principle of workplace accidents and negligence law, more generally. I take up the substantive conception of equality in negligence law elsewhere.[11]

The second sense in which tort law and the law of work can be closely related occupies the latter half of this Article. It concerns tort law's impact on the employment relationship. It all starts, in Part I, with revising our conception of tort law: I argue that tort law should not be identified with the law of wrongs or of victim recourse; rather, it is the law of conflicts, valueless as well as valuable ones. With this revised understanding of why tort law matters, I argue that tort law can, and should, bring about a substantive revision in the way we determine rights, duties, and powers in and around the employment relationship. My core case for establishing this proposition is trespass to land as a legal framework for determining rights of access to, and exclusion from, the workplace.

The ambition of this Article is, therefore, twofold: First and at a more general level, I introduce in Part II the conflict theory of tort law, which provides a better reconstruction of why tort law matters than the familiar conceptions of tort law as the law of wrongs and/or victim recourse; and second and more specifically, Part III demonstrates the important connection between tort law and the law of work, with specific attention to the right of union organizers and workers to access the workplace. On the proposed account, tort law and the law of work are mutually reinforcing in the sense that that each informs the other's analysis of the rights, duties, and powers at issue.

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8 *See also* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 Vand. L. Rev. 1571 (2004).

9 Avihay Dorfman, *Assumption of Risk, After All*, 15 Theoretical Inquiries L. 293 (2014); Avihay Dorfman, *Relational Justice and Torts*, *in* Research Handbook on Private Law Theory 321, 326-28 (Hanoch Dagan & Benjamin Zipursky eds., 2020); on substantive equality as a form of relational equality in private law, see Avihay Dorfman, *Private Law Exceptionalism? Part II: A Basic Difficulty with the Argument from Formal Equality*, 31 Can. J.L. & Juris. 5 (2018).

10 Dorfman, *Assumption of Risk*, *supra* note 9.

11 Avihay Dorfman, Conflict between Equals: A Vindication of Tort Law (unpublished manuscript) (on file with author).

I. Against the Wrongs and the Recourse Conceptions of Tort Law

Why does tort law matter and how are questions that animate much of tort theory and, moreover, underlie the practical task of determining tort duties, liabilities, and remedies. I focus on three basic answers: tort law as the law of wrongs, redress, and conflicts.[12] The purpose of this Part is to criticize the first two, which are far more familiar and influential than the latter. The next Part will defend the latter. The basis on which I reject the first two is a two-pronged test of justification and fit. I argue that the idea of tort law becomes more appealing, normatively speaking, and truer to its actual practice if viewed through the lens of the conflict theory of torts.

A. The Inadequacy of Torts as Wrongs and/or Recourse: An Illustration

To solidify these ideas, consider the celebrated case of *Vosburg v. Putney*, a respectable member in the torts canon for at least two propositions—what counts as battery and what the scope of the batterer's liability should be.[13] The case features a twelve-year-old schoolboy who playfully kicked his classmate in the shin; arguably, the kick was a friendly gesture akin to a tap on a friend's shoulder. The victim ultimately suffered a permanent substantial disability due not merely to the kick, which was slight, but also to an underlying condition he had. The Wisconsin Supreme Court held that the kick counts as battery even though the batterer did not intend to harm the victim; it further decided that liability should extend to cover the entire harm to the victim, even though his underlying condition was unbeknownst to the batterer.[14]

Torts as wrongs. If tort law is the law of wrongs or, more precisely, private wrongs, it is only natural to read *Vosburg* as addressing the question of what might constitute the tort of battery in such a case. On the torts-as-wrongs conception, the point of the decision is to answer the question, can there be wrongfulness in touching a person in the absence of any intent to harm him or her.[15] *Vosburg* answers in the

12 There are other answers, to be sure. For example, the view that takes tort law to be the continuation of contract by other means should be rejected on normative grounds. It is shared by Ronald Dworkin (*see* Ronald Dworkin, Law's Empire 276-312 (1986); he later revised his view) and by lawyer economists. On this view, tort law is ancillary to contracting: In a Coasean world of zero transaction costs, tort law becomes redundant, as we can all contract for our basic entitlements. It is only when we find ourselves in our imperfect world that tort law gets its traction (by either replacing, supplementing, or perfecting Coasean bargaining). This picture is indefensible insofar as it suggests that our very basic rights—to bodily integrity, emotional wellbeing, good name, *et alia*—are up for (contractual) grabs. These rights figure as constraints on, rather than the upshots of, choice because they are necessary *pre*conditions for human agency (not to mention dignity, equality, and autonomy). And although some, though not all, aspects of these rights are alienable, their alienability does not turn them into a market commodity whose allocation is determined by the preferences of the contracting parties. *See* Dorfman, *supra* note 11, at ch. 8.

13 For discussion and elaboration of this and other reasons, see James A. Henderson, Jr., *Why* Vosburg *Comes First*, 1992 Wis. L. Rev. 853, 853. For a comprehensive study of *Vosburg* in its context, see Zigurds L. Zile, *Vosburg v. Putney: A Centennial Story*, 1992 Wis. L. Rev. 877, 979-89 (1992).

14 Vosburg v. Putney, 50 N.W. 403 (Wis. 1891).

15 *See* John C. P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 190 (2019).

affirmative. The court seems to suggest that the kicking was wrongful because it violated the school's internal rules of proper conduct. Some tort scholars might provide a different grounding: kicking is wrong because it lacks the consent of the victim.[16] Whatever the answer is, if tort law is the law of wrongs, it follows that the basic task of the court is to determine which actions constitute substandard behavior of a certain kind.[17]

Torts as recourse. If it is also, or even primarily, the law of recourse and, in particular, the law of victim's recourse, *Vosburg* becomes a definitive expression of what tort law is about. There, a victim is afforded a right to pursue his batterer to react against his wrongdoing. Corrective justice theorists explain the meaning of victim's reaction by reference to rectification, which is the setting right of a wrong;[18] whereas civil recourse theorists cast victim reaction in terms of redressing the wrong done to him.[19] Either way, *Vosburg* can be read as a powerful champion of tort law as the law of victim recourse. It holds the wrongdoer liable not merely for the predictable injury caused by lightly kicking the victim, but rather for the full extent of the injury even though it is largely the upshot of an idiosyncratic underlying condition.[20]

Certainly, tort law is to some extent the law of wrongs and of recourse. That said, saddling tort law with either conception (or both) fails, doubly. It fails to describe the actual practice of tort law, namely, what the real place of wrongs or of recourse is in the grand scheme of tort law. It also fails to capture the normativity of tort law, namely, why it matters. The source of the problem is that there is a preliminary question whose answer determines not merely the questions of wrongfulness and recourse, but also the question of what substantive rights the parties to a physical-contact encounter have *in the first place*. The conflict conception sets out to identify and answer that question.

Let's begin with actual practice. *Vosburg* reaches the points of wrongfulness and recourse only after it takes up the prior question of what rights and duties attach to parties engaged in a physical-contact encounter such as the one at issue. To do so, the court considers the conflict between bodily integrity and sociability in the context of children-at-play. The basic interest not to be contacted could give way to competing interests. Indeed, the court contrasts the actual case with a playful kick

16 Arthur Ripstein, Private Wrongs 43 (2016).

17 I say *of a certain kind* because some theories of tort law understand the wrongs in question as a violation of norms that link the tortfeasor and the victim to each other. Both relational justice and corrective justice take this view to be a fundamental normative principle. Support for the approach that tort law is the law of wrongs can be found in John Gardner, Torts and Other Wrongs 334 (2019) ("In the law of torts, wrongdoing is of the essence."); Scott Hershovits, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. Tort L. 405 (2017) (arguing that tort law, and especially tort liability, is tasked with communicating that the defendant wronged the plaintiff); Ripstein, *supra* note 16, at 104 ("tort liability is always predicated on wrongdoing."); Robert Stevens, Torts and Rights 2 (2007) ("the infringement of rights is the gist of the law of torts.").

18 *See, e.g.*, Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 Fla. St. U. L. Rev. 273 (2011).

19 Goldberg & Zipursky, *supra* note 15, at 3.

20 *See* Ripstein, *supra* note 16, at 267; John C.P. Goldberg & Benjamin C. Zipursky, *Vosburg v. Baxendale: Recourse in Tort and Contract*, *in* Civil Wrongs and Justice in Private Law 463, 471-72 (Paul B. Miller & John Oberdiek eds., 2020).

delivered on the playground of the school. It also, perhaps more implicitly, contrasts the actual case with an in-class kick occurring before class has been called to order. A third contrast is with respect to the absence of school rules concerning pupils tapping each other on the leg to get each other's attention. Finally, the court could (arguably) consider the difference between middle school children and law school students engaging in similar physical contact. These contrasts provide a richer sense of what is at stake—the court is acutely aware that certain forms of touching, including nonconsensual touching, can be valuable and, therefore, permissible. Hence, the questions it asks are not merely what constitutes a violation of the right to bodily integrity and what recourse should be afforded in reaction to this violation. Rather, it also considers how sociability, properly conceived, implicates the interest in bodily integrity in order to decide the scope of the legal right to bodily integrity—namely, does the victim hold such a right against the kicking classmate? Only then can the court decide whether the kick constitutes a wrong—a violation of a right—and whether the victim's recourse includes compensation for the full extent of the injury.

The conditional character of deciding the wrong and the recourse questions is not only conceptual, but rather also normative. The substantive-right question partially dictates how stringent the standard of care and respect should be—strict liability with respect to undermining our bodily integrity in the case of battery does not imply a similarly stringent standard when making defamatory statements in the tort of defamation or causing emotional harm in the tort of intentional infliction of emotional distress. Indeed, the value of the legal right at issue and the value of the conflict between this right and the competing interest inform many legal decisions made by appellate courts.[21] Similarly, the doctrine of eggshell skull plaintiff that is in full display in *Vosburg* turns, almost completely, on the value of the plaintiff's substantive right and the value of the conflict between this right and the competing interest.[22] This is why tort law extends the doctrine to the case of a thin emotional skull, but denies similar extension to a thin proprietary skull (as property does not figure as prominently as do our interests in bodily and emotional integrity).[23] Hence, the case for victim recourse varies with the normative considerations, namely, the value of the victim's substantive right and the value of the conflict between this right and competing interests; it is *not* a self-standing principle of rectification or of the setting right of the wrong.[24]

21 See the discussion on facilitating uncompromising journalism (among others) in Dorfman, *supra* note 11, at ch. 5.5, as an illustration of the ways in which courts integrate questions of value into the legal analysis of rights, liabilities, and remedies in the law of torts.

22 *See* Hanoch Dagan & Avihay Dorfman, *Substantive Remedies*, 96 Notre Dame L. Rev. 513, 558 (2020).

23 The need to decide whether unusually fragile property entitles its owner to recover the entire property damage arises when the unusual magnitude of the damage could not have been reasonably foreseen.

24 The argument in the main text shows why corrective justice may not account for the thin skull doctrine. By contrast, civil recourse theory—and especially its commitment to fair and reasonable compensation as opposed to make-whole compensation—may have the normative resources to explain the variance between the different parts of the doctrine.

B. Objection: Much Ado about Nothing?

Before introducing the conflict theory of torts, I wish to address an objection, namely, that tort law has very little to do with substantive rights, let alone with the conflicts underlying such rights. The claim is that determining substantive rights and duties in tort law is not an issue. People have basic rights to bodily integrity, property, reputation, and so on. Others have the correlative duties not to batter, steal, and defame them. Calling these rights and duties into tort law is a straightforward exercise of reproduction akin to the computer function of "copy and paste." The pasted rights and duties reflect immemorial customs or some other extralegal norms. Alternatively, they can reflect judgments made elsewhere in the law—say, the law of property—before being reproduced in the law of torts. Either way, tort law is a transmission belt for implementing *fully specified*, or *easily specifiable*, rights and duties.[25] Tort law is therefore a wholly distinct body of law when it comes to allegations that a reproduced right has been breached, which returns us to torts as wrongs, and that the breach resulted in injury, which returns us to torts as recourse. Or so the objection might go.

This objection, however, rests on two mistaken assumptions. Criticizing them reinforces the crucial role of tort law in determining substantive rights and duties. Further, doing so makes it more appealing to consider the value of the conflicts that underlie the determination of these rights and duties.

The first assumption is that substantive rights and duties are fully specified or easily specifiable extralegal norms of reciprocal respect. This observation is false. It is one thing to specify basic rights at a highly abstract level; quite another to say that their content can be discerned apart from legal analysis. Tort law often fills out the content of rights. Consider the right to privacy. Even given that we have such a right, precisely what does it mean to have it? That is, what is "it"? And what duties arise as a result? I doubt whether answers to these normative questions can (not to mention should) be gleaned from extralegal norms or expectations.[26] At other times, tort law delineates the scope of substantive rights, as when in *Vosburg* the court considered under what circumstances bodily integrity gives way to sociability. Thus, even when the content of the right to bodily integrity is, let's assume, *a-priori* fixed, it is still necessary to determine the outer limits of its claim. Certainly, the right to bodily integrity comes to an end, as it were, in the face of certain forms of consensual

25 Traces of this idea can be found in Blackstone's distinction between laws that govern the rights of persons and of things, on the one hand, and the laws of private and public wrongs, on the other. *See also* G. Edward White, Tort Law in America: An Intellectual History 4 n.10 (2003). Weinrib has offered a distinction between the private laws that decide "what the parties own" and tort law's role of determining "the norms that govern their interaction." Weinrib, *supra* note 7, at 2.

26 It is true that extralegal expectations and social mores can sometimes help us answer narrowly defined questions concerning the meaning of concrete rights. See, in the case of privacy, Goldberg & Zipursky, *supra* note 15, at 240-46. That said, it is not clear whether successful instances of drawing on existing social conventions and mores can have a recursive structure so as to turn ad hocery into a more systematic, and appealing, method of filling out the content of rights by resorting to such conventions. Furthermore, I doubt whether this method can incorporate the critical stance that is so crucial to the task of determining rights. After all, this is a normative, rather than a descriptive, task.

and even nonconsensual contact. Here, too, I doubt whether any satisfying answer to this normative, and contextual, inquiry can be found in our extralegal norms.

The second assumption may concede the previous point but insist that the task of filling out the content, and determining the scope, of abstract rights is performed somewhere else in the law. Tort law merely operates on preexisting legal determinations made, say, by property, contract, and unjust enrichment law (*et alia*). This assumption is mistaken, too. Consider three familiar instances from the lived experience of tort law—establishing rights, rendering them determinate, and defining their scope. To begin with, tort law engages in the business of establishing substantive rights. For instance, the torts of privacy, inducement of breach of contract, and intentional infliction of emotional distress are three tort frameworks whose most fundamental normative contribution to the legal order lies in *establishing* substantive rights, namely, to privacy, contractual security, and emotional tranquility, respectively. Questions concerning wrongdoing and victim recourse can have a point in the first place only because, and only insofar as, these rights have been established by tort law. Next, tort law is especially important not only to establishing legal rights, but rather also to rendering determinate established legal rights. For instance, even if the right to bodily integrity is (for the sake of the argument) granted by some other body of law, tort law engages in the crucial task of filling out its content—thus, what aspects of the body's integrity should be protected and how rigorous it should be are two key missions extensively pursued by appellate opinions, Restatements' reporters, and torts scholars (among others). Finally, establishing rights and rendering them determinate may often leave open the further task of defining their scope in the face of competing rights and countervailing considerations (as in the *Vosburg* decision). For instance, after establishing that there is a legal right not to be caused to apprehend an imminent attack on one's own person, and upon rendering this right determinate by subjecting "apprehension" to a standard of reasonable apprehension, tort law must also settle the scope of this entitlement. The tort of assault limits the right in several ways, including by excluding conditional and future-looking threats, however debilitating, from the scope of the right's protection.[27]

Whereas the preceding discussion addressed the much-ado-about-nothing objection, the next Part introduces the conflict theory of torts.

II. The Conflict Theory of Tort Law in a Nutshell

The discussion of *Vosburg* gives reason to believe that tort law is not adequately reducible to the victim recourse conception; nor is it easily reducible to the wrongs conception. Hence, the affirmative question is what conception might explain and justify tort law's occupation with the organizing question of what substantive rights and correlative duties we have. The answer comes down to a certain idea of tort law as the law of conflict.

27 Brooker v. Silverthorne, 99 S.E. 530 (S.C. 1919).

I argue that *the most fundamental distinction in tort law* derives from three different ways of conceiving human conflict: some interpersonal conflicts are inherently valuable, others are tolerably valuable, and yet others are valueless. Tort law establishes, determines, and sets the boundaries of substantive rights by reference to this distinction. Before I take up this lead, I wish to explain what is meant by conflict.

I argue that a certain *theory of conflict* among primarily private persons underlies the acts and consequences falling under the purview of tort law.[28] Conflict, to be sure, need not mean a Hobbesian condition of war of all against all (although it could involve small-scale versions such as a brutal attack on an innocent patron in a bar). Rather, it affects the less extravagant, everyday encounters among private persons: My plan to cross the street and your plan to drive your car might come into conflict; so too may your plan to offer a job to a talented risk-analyst who happens to provide me, by contract, exclusive consulting services; my wish to enjoy peaceful weekends on my porch conflicts with the practice of muezzins summoning Muslims to prayer; and, likewise, my indignation may be aroused by the writing of a newspaper article containing some controversial allegations against an aspiring labor-union leader.

Precisely what is meant by conflict, among whom, and over what? The conflict theory concerns conflicts of interests and, in particular, what can be called *fundamental* interests. They are fundamental in two senses. First, they are at their core pre-political in the sense that (unlike private ownership) their existence and traction are independent of political authority. Thus, we all have an interest in our good names, sociability, self-expression, knowledge, bodily and emotional integrity, to name a few straightforward interests.[29] We also have a fundamental, though inchoate interest in being treated with care and respect by our fellow creatures. Unlike our good name or physical integrity, inchoate (and fundamental) interests may need further elucidation and, most importantly, what can be called institutional instantiation. For instance, our fundamental interest in relating to others as equals is inchoate in any number of ways (such as in determining what it means to relate as equals and what counts as equality in general and in specific contexts). It therefore cannot be specified, not even roughly, apart from the particular social practices that govern our interactions with these others. Some of these social practices are not pre-political in any interesting way; instead, law may be formative of some practices—for instance, private property, incorporation, and employment are legal and social institutions

28 I say *primarily* in recognition that tort law may also take up conflicts involving public officials and state institutions (as risk-creators and, less frequently, as victims). Some tort theorists believe that this possibility, and reality, makes it implausible to develop a successful theory of tort law as the law of involuntary obligations among *private* persons. *See* Paul B. Miller & Jeff Pojanowski, *Torts Against the State*, *in* Civil Wrongs and Justice in Private Law 323 (Paul B. Miller & John Oberdiek eds., 2020). This claim seems to me indefensible because it turns on the questionable assumption that the best way to account for tort law is by invoking the *common denominator* methodology.

29 This framework is rooted in the liberal ideal of self-determination (or individual autonomy). It does not make the further step of grounding the interests at issue in human flourishing. Autonomous persons must have these interests secured (to some, nontrivial measure), but they do not have to utilize them according to the dictates of human flourishing or in some other virtuous way.

that construct (in the sense of bringing into existence) the normative landscape with which what counts as relating as equals is determined.

The second sense of "fundamental" is that the interests at issue are truly fundamental, normatively speaking. Indeed, what unites these interests is that they are important aspects of being in the world as free and equal persons.

Talk of interests should be contrasted with legal rights, on the one hand, and with preferences or tastes, on the other. Fundamental interests are prior to legal rights in the simple, pre-political sense just mentioned. And because they are fundamentally important to our status as free and equal persons, they are not only prior to legal rights, but rather also *survive* them, at least to some extent. The case for survival arises when the law assigns rights that deliberately or inadvertently undermine fundamental interests. For instance, the right of free speech often conflicts with the interest we all have in our good names. The fact that other people are legally entitled to harm one's good name does not annihilate one's interest; rather, it *limits* what one is entitled to do by way of restraining these other people, *ex ante*, and reacting against them, *ex post*. Thus, although one does not, and should not, engage in silencing people who are exercising their right of free speech, the interest in maintaining one's good name may still give one a perfectly legitimate *reason* to feel offended, to want to clear one's name, and to resent the speaker for the harm done. An interest survives not only in the obvious sense that one is not under any legal duty to abstain from doing all these; rather, having a legitimate reason to resent others and to feel deeply offended (*et alia*) means that there is no *moral* duty—not to mention overriding moral reason—to refrain from so doing or feeling. This is, once again, what it means to have a fundamental interest in our good name (or for that matter in bodily and emotional integrity, sociability, and so on).

Interests should also be contrasted with preferences. The latter are fundamentally subjective in the sense that acquiring them depends on our choices, tastes, and whims. Interests, by contrast, are objectively given—our bodily integrity, sociability, good name (*et alia*) are, in some measure, preference-resilient. This is not to say that these interests are necessarily inalienable. Rather, interests stand apart from preferences in the sense that their value is not determined by the willingness of their holders to trade them for material gains.[30]

One last question will be apt before I turn to elaborating the conflict theory of torts: How pervasive are conflicts in our world? I take it that conflict, properly conceived, is a *given* feature of practical life. In particular, it is the outgrowth of the combination of *human nature* with the *human condition*. Human nature may

30 Consider the distinction between an interest in and a preference for physical safety by way of illustration. Historically, workplace safety has been governed by contractual agreements between employers and employees, reflecting—at least ideally—the notion that the tradeoff between physical safety and wage-based compensation ought to be settled according to the preferences of the parties involved. This is most eloquently expressed in Lord Bramwell's dissent in Smith v. Baker & Sons, (1891) A.C. 325, 344 (H.L.). The difficulty with this *laissez-faire* conception of assumption of risk is that brute preferences as to the money/safety tradeoff should not override the employee's *interest* in his or her physical safety (at least when the expected injury is severe). *See generally* Dorfman, *Assumption of Risk*, *supra* note 9.

mean different things, but my focus is on the fact that we are both reasoning and fallible creatures. As a result, people hold divergent conceptions of the good life, which leads them to pursue divergent ends, including adopting divergent means to bring about those ends. At the same time, however, our fallibility means that people occasionally fail to live up to the demands of right reason, including the demand to respect, in some ways and to some extent, others.

The reason why human nature, as just described, gives rise to conflicts has to do with the human condition, especially the following two features: that we live in a *free* society, and that our lives are *interdependent* (as opposed to self-sufficient, socially and economically speaking). Thus, the combination of human nature with our human condition generates interpersonal conflicts at different levels and dimensions, as explored below.[31]

The most important implication of the preceding observation is that conflicts may occur between persons not only when they occupy the position of the proverbial Holmesian "bad man." Rather, the conflicts that figure most prominently in the conflict theory of torts implicate the "puzzled man"[32] and ultimately even perfectly good persons, namely, the ones who recognize the potential tension between their respective interests and therefore *want* to conduct themselves in light of this recognition. The morality of tort law makes its first step by responding to *these* conflicts, especially the involuntary ones. I argue there are three kinds of such conflicts in particular: inherently valuable, tolerably valuable, and valueless conflicts.

Inherently Valuable Conflicts. An inherently valuable conflict features a competition between interests that pull in opposite directions, and that "pulling" is integral to viewing the conflict as valuable. It is a conflict that we all have reason to want to exist. This reason may carry negative prescriptions, such as to avoid eliminating it. It also has affirmative ones, such as to embrace and facilitate such a conflict, at least to some, nontrivial extent.

To fix ideas, consider how the legal framework we call the tort of battery can approach the conflict between bodily sovereignty and sociability. It begins with a truism, namely, that bodily sovereignty is essential for leading an autonomous life. Even mere touching can be wrongful when done under certain circumstances and for offensive purposes—for instance, when it amounts to sexual harassment or other forms of unauthorized touching that take advantage of a person's vulnerability. But does it follow, and is it true for Ronald Dworkin to say, that "touching someone without his permission, however gently, violates a taboo."[33] The conflict theory

31 On my account, therefore, interpersonal conflict is one of the circumstances of justice (along with moderate scarcity and certain others). The concept of circumstances of justice has been made familiar by David Hume and, more recently, by John Rawls. *See* John Rawls, A Theory of Justice 109-12 (1971); John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. Phil. 515, 536 (1980); John Rawls, Political Liberalism xvii (1993).

32 H. L. A. Hart, The Concept of Law 40 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

33 Ronald Dworkin, Justice for Hedgehogs 288 (2011). Dworkin grounds this assertion in a certain principle of dignity which, in turn, calls for a non-delegable, personal responsibility for our lives. On this view, we should be "in sole charge of what happens to or in our bodies." *Id*. *See also* T. M. Scanlon, What We Owe to Each Other 204 (1998). Judge Cardozo has introduced another variation to similar

of tort law, however, doubts the quick move from the premise—that we have a fundamental interest in bodily sovereignty—to the conclusion, namely, that the legal right to bodily sovereignty warrants an absolute tort duty not to engage in nonconsensual touching of another.

Indeed, it can be permissible—and at times even valuable—for another person to be in charge of our body.[34] A conflict between bodily sovereignty and *sociability* can be valuable beyond the triviality of the tap-on-the-shoulder type of encounters. Sociability can mean many things, but I shall use it in the formal sense most famously associated with the work of Georg Simmel: the idea of interacting with others purely for the sake of being with them in the world.[35] To illustrate, whereas people often converse for the purpose of exchanging information and ideas, we may also find ourselves engaging in conversion simply out of an authentic desire to experience one another as connected persons—as Simmel puts it, "talking is an end in itself . . . the content is merely the indispensable carrier of the stimulation, which the lively exchange of talk as such unfolds."[36]

Now, sociability can manifest itself in the world in any number of ways (such as in having a conversation or by playing a game of hide and seek). One of them includes physical contact as an expressive act of what Simmel calls "togetherness."[37] Under the appropriate circumstances—and here we must be very careful about the scope of the claim—hugging, shoving, holding your hand, and some forms of horseplay among friends and relatives *could* be conceived as instantiations of sociability without, and even irrespective of, securing or assuming consent. For instance, the contrast made in *Vosburg* between playful kicking while in class and a similar act taking place on the school playground during recess can be explained by reference to the different value associated with either conflict—in particular, the latter can count as inherently valuable when made in the course of playing the game of tag or some other practice that manifests sociability too.[38]

Insistence on implied or express consent as a prerequisite is certainly warranted if bodily sovereignty categorically overrides sociability. That said, consent can undermine sociability because it erodes the authenticity and spontaneity that are necessary for experiencing a sense of togetherness.[39] Indeed, it is not about the burden of seeking consent or otherwise figuring out whether an implied consent is imputable. Rather,

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effect in Schloendorff v. Soc'y of New York Hosp., 105 N.E. 92, 93 (NY 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body.").

34 My analysis in the main text conflicts with the idea of freedom as independence only if independence is characterized in absolutist terms. However, a conflict need not arise if independence, as Joseph Raz has argued, "admit[s] of degree." Joseph Raz, The Morality of Freedom 373 (1986).

35 Georg Simmel & Everett C. Hughes (trans.), *The Sociology of Sociability*, 55 Am. J. Soc'y 254 (1949). Simmel attaches to his conception of sociability a liberal commitment to freedom and equality between the interacting parties. *Id*. at 256, 257.

36 *Id*. at 259.

37 *Id*. at 255.

38 For more on these points, see Dorfman, *supra* note 11, at ch. 5.

39 I suppose that pretending to be a friend is not the same as being a friend.

a consent requirement obligates us to *filter* authentic and spontaneous expressions of sociability, rendering them conditional ones.

To see why conditionality may be problematic, imagine seeing your friend in a state of deep sorrow and desperation. Suppose your empathic instincts compel you to hug him or her as an expression of solidarity and comfort. You can act in other ways, to be sure, but this course of action makes most sense to you. There is a loss, in terms of sociability, in having to take into consideration the consent requirement *before* you launch your show of empathy.[40] In short, considering consent on such occasions is one consideration too many.[41]

Against this backdrop, the conflict between bodily sovereignty and sociability is of value, and a noncontingent one at that. Cold, sanitized forms of human relation cannot substitute for an authentic hug. Under the right circumstances, therefore, touching without permission may not only be permissible but rather also valuable.

Tolerably Valuable Conflicts. If inherently valuable conflicts give us reason to embrace or want them, the following category of interpersonal conflicts picks out ones that we have reason to *tolerate*. This is because such conflicts are the adverse byproducts of otherwise desirable human activities. The value of these conflicts is not inherent: We would have gotten rid of them if only we could. For instance, we constantly use products (consider a car) to help us solve problems or advance our ends. Using these and other products is helpful, and at times even essential to leading a good life. However, they can also generate risk to other users, as well as to bystanders. Thus, using a car puts the liberty of action of the driver in potential conflict with the safety of other motorists and pedestrians. This conflict can be avoided simply by renouncing driving or refraining from manufacturing cars. A better way to eliminate it is to introduce technological innovations that make driving risk-free. However, the former is undesirable whereas the latter is, at this point, infeasible. Therefore, the conflict at issue should be allowed in one way or another, assuming, as I do, that driving is desirable. There is nothing inherently valuable in conflicts arising out of using cars or, for that matter, most other products. We can say that they are tolerable side effects of desirable activities. further, their tolerability is purely *contingent* on the absence of alternative means to engage in these activities without producing such conflicts.

Valueless Conflicts. The third and final category of interpersonal conflicts pertains to tensions we have no reason to tolerate, let alone embrace. These are cases of

40 A similar analysis may apply to practical jokes or horseplay, though with an important difference: these expressions of sociability might also pose danger to life and limb. For instance, Zgraggen v. Wilsey, 200 A.D.2d 818 (NY Sup. Ct. 1994) is a case in which the defendant, a guest at a pool party at the plaintiff's house, threw the plaintiff into the pool after the plaintiff had earlier thrown him. The court held that "Lack of consent on the part of the plaintiff is an element to consider in determining whether the contact was offensive, but it is not . . . conclusive." *Id*. at 819. The court decided that whether this horseplay counts as offensive is a jury question, namely, a factual one.

41 To borrow (with modifications) from the one-thought-too-many charge developed by Bernard Williams. *See* Bernard Williams, *Persons, Character and Morality*, *in* Moral Luck: Philosophical Papers 18 (1981).

valueless conflict, for which the warranted reaction should be prevention, alleviation, and so on.

A straightforward instance is punching an innocent person in the face. There, the assailant's desire to do harm and the bodily safety of the person standing within striking distance are in conflict, so that the satisfaction of one entails the frustration of the other, and vice versa. However, there is no reason—no value—in having such a conflict in the first place. It is an instance of human failing and *nothing* more.

* * *

Now, the three categories of conflict just presented track three distinct normative problems out of which tort law arises. They do *not* offer a reclassification of discrete torts, but rather show how even a single tort can be viewed as responding to different kinds of conflict. For instance, the tort of defamation responds to inherently valuable conflicts by distinguishing between factual statements and opinions, by applying different standards (such as negligence and at times actual malice) for matters of public concern, by (sometimes) placing the burden of proving the falsehood of defamatory statements on the plaintiff, by requiring a more exacting standard of proof for certain elements, or by acknowledging a defense of good-faith or responsible journalism. The same tort can also respond to valueless conflicts involving deliberately false accusations. Battery can also govern inherently valuable conflicts as well as valueless ones. And most importantly for my present purpose, the tort of trespass to land can address inherently valuable conflicts, as I argue in Part III, tolerable conflicts, such as good-faith land encroachments, and valueless conflicts, such as instances of criminal trespass.

III. A Torts Case for Nonconsensual Access to the Workplace

A. Trespass to Land and the Conflict Theory

Whether it is formally located in the law of property or of torts, trespass to land is a legal framework for dealing with conflicts concerning possession.[42] It answers the question of when a person's entrance to the property of another is illegal.[43] But as I have been arguing in the previous Parts, it is a mistake to think that this is all that this framework is designed to achieve. Anyone who reads appellate and

42 Thus, even if one (mistakenly, I will argue) believes that trespass to land "belongs" to property law, what is important to realize is that when courts, legislatures, and scholars (*et alia*) use this tort as a framework for legal analysis, they are not merely engaging with the questions of wrongs and recourse (although they may also do that). Rather, they take up the conflict question (as they do with respect to battery, negligence, defamation, and so on). Beyond this point, the label "property law" or "tort law" is just a label.

43 Unlike private nuisance's focus on reasonable enjoyment and use of one's land, the property interest protected by the trespass tort is possession, which is a special case of being in control over a piece of land. A trespasser setting back the latter interest does not necessarily threaten the owner's interest in using and enjoying the invaded land.

supreme court decisions dealing with legal questions knows that this framework is about determining rights—their form, content, and scope—as much as it is about recognizing and redressing their violation by imposing tort liability. That is, trespass to land governs conflicts concerning land control, rather than merely the wrongdoings and the recourse to which these conflicts may (or may not) give rise. It means that part of what the trespass-law framework offers is a way to think about, and determine, precisely what rights of possession people have.

I argue that there can be rights to *exclusive* possession, in which case it is up to possessors of land to decide whether entering their premises is permissible. By contrast, possessory rights can also amount to *inclusive* possession. Inclusive possession deprives right-holders of full control over who can come (or remain) on the land at issue.[44] It means that it is *not*, or not entirely, up to them to decide who can enter (or remain on) their premises—for instance, places of public accommodation feature such possessory rights, and uncultivated private lands are, in some jurisdictions, associated with inclusive possession rights. By implication, a right to inclusive possession does not trigger a general tort duty against committing trespass.[45] Hence, the most basic question for anyone who engages with the trespass-law framework is the on/off question whether possessory rights are exclusive or inclusive. Treating tort law as either the law of wrongs or the law of victim recourse simply begs *this* question. Worse yet, it does not provide us—courts and scholars, in particular—the normative resources to identify and articulate the right questions, let alone provide adequate answers to them.

What standard should be used to determine whether possession is exclusive or inclusive of certain non-owners? My ambition is to show that it is the value underlying the conflict that counts. In particular, the trespass framework responds to land-control conflicts in the right way by engaging with the kind of value underlying the conflict at issue.

With some notable exceptions, common-law courts have identified possessory land rights with *exclusive* possession, as if inclusive possession is never an option.[46] The source of this difficulty lies in overlooking the distinction between inherently valuable, tolerably valuable, and valueless conflicts over the control of land. It is one thing to recognize possessors' exclusive control of land, say, with respect to valueless conflicts with thieves; quite another to extend rights of exclusive possession to preclude certain intrinsically valuable conflicts whose occurrence should therefore be embraced, rather than prevented. Save for a few historical exceptions, the doctrine of trespass-to-land tends to run together the different kinds of conflict, yielding

44 For instance, the possessory rights of owners of public accommodations better fit inclusive, rather than exclusive, possession.

45 In terms of tort law, inclusive possession (of land and of goods) should not be protected by the trespass-to-land modality. Instead, it can give rise to (the U.S. version) of the trespass-to-chattels modality, which is a private case of the more general category of harm-based protection of possession. *See* Avihay Dorfman, *When, and How, Does Property Matter?*, 71 U. Toronto L.J. 81, 112-19 (2022).

46 *See also id*.

a near-complete identification of possession with exclusive possession. That is a mistake, as the following discussion seeks to show.

B. Trespass to Land and Control Over the Employment Relationship

Entering another person's land might be valuable despite being nonconsensual. Consider the doctrine of private necessity by illustration.[47] The right to use another person's property to escape an imminent danger features a tolerably valuable conflict between the competing interests of the parties in question. Although not valuable in and of itself, this conflict is valuable because of the way it relates to other considerations. Indeed, it addresses the adverse side effects of pursuing valuable activities. We would want these effects to be eliminated altogether; for instance, we would want to have better technological solutions to reduce our vulnerabilities to imminent dangers. But until it can be done, tort law is tasked with governing the terms of the conflicts at issue. A successful way of engaging with tolerably valuable conflicts such as these calls for a strategy of containment—this is precisely what the doctrine of private necessity does.[48] On the one hand, non-owners are entitled to assert a measure of temporary control over a piece of land to which they would otherwise have no right.[49] On the other, their entitlement or privilege, as it is often called, is incomplete in the sense that they are not relieved of the remedial duty to make good on any damage they cause to the premises of the possessor.[50]

But here is the important point. Entering another person's land can sometimes be valuable *due to*, rather than despite, its being nonconsensual. Being entitled to do so changes the balance of power between the proprietor and the entrant in an important way, namely, it makes possible a social practice predicated on a liberal ideal of relational equality. There can be any number of instantiations of such a practice.[51] I will focus on a particularly important one—employment. The practice at issue can give effect to a certain intrinsically valuable conflict so that the right way of responding to it calls for embracing and facilitating it. In terms of trespass doctrine, I argue that intrinsically valuable conflicts between land possessors and entrants call for inclusive, rather than exclusive, possession so that these entrants

47 The leading cases are Ploof v. Putnam, 71 A. 188 (Vt. 1908) and Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

48 Private necessity is in fact one doctrine among others dealing with tolerably valuable conflicts. Obstruction of highways and retrieval of chattel fall into this category. *See* Wippert v. Burlington Northern Inc., 397 F. Supp. 73, 74, 77 (D. Mont. 1975).

49 Mark Geistfeld argues that the doctrine of private necessity turns non-owners into property right-holders (say, the boat owner becomes the dock's right-holder as well the boat's). As such, they face a tradeoff between saving their original property and damaging the property to which they now hold a privilege. *See* Mark A. Geistfeld, Tort Law: The Essentials 148 (2008). Our respective accounts emphasize the notion of non-owners' control. That said, I do not accept his view that private necessity really vests non-owners with ownership of some sort. Having control—an *ad hoc* right-claim to the possession of another's resource—falls far short of ownership, which is the standing to fix the normative situation of others with respect to a resource.

50 Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interest of Property and Personality*, 39 Harv. L. Rev. 307 (1926).

51 I discuss some of them in Dorfman, *supra* note 11, at ch. 4.

should enjoy some, nontrivial measure of nonconsensual access to the land in question as a matter of right.

The analysis going forward therefore extends the case for nonconsensual access rights to the employer's workplace beyond its usual understanding in the literature in three important ways. First, these rights should no longer be viewed as *external* limitations on the common law, say, in the form of Section 7 rights of the National Labor Relations Act or state constitutions' free speech clause.[52] Instead, they are part and parcel of what it means for the common law of tort law to respond to conflicts in the right way. For instance, I argue that rights of access to and use of an employer's premises for organizing and other labor-related purposes find their doctrinal home in a basic trespass-to-land inquiry, namely, what kind of possessory rights do employers have *to begin with*. To this extent, my tort-law analysis pulls the rug out from under the constitutional objection to state and federal attempts to allow union organizers onto the employer's workplace.[53] This objection presupposes, rather than argues for, the existence of exclusive possession rights on the part of employers. However, I argue that this presupposition is neither entailed nor warranted by tort law when viewed from the perspective of the conflict theory of torts. Second, nonconsensual access rights should no longer be cast in terms of an exception narrowly defined to apply if, and only if, employees and union organizers are unable effectively to engage in labor activities off the relevant workplace.[54] On my account, these access rights should form the rule, rather than the exception, because they are grounded in the inherently valuable conflict between labor and capital over the *character of the workplace*, which is a substantial aspect of employment relationships. That is, the conflict should be facilitated, rather than pacified or defused, because it is about giving employees more control and agency over the employment relationship. And third, although the rights in question may (arguably) remedy political inequality and, so, reinforce the civic footing of the working-class people in a democracy, their most fundamental moral basis concerns relational equality in the employment relationship *itself*.[55]

Although my argument applies to nonconsensual access by employees, I shall focus on the more challenging case, which is that of organizers' right to the same.[56] Consider non-employee union organizers seeking to discuss union organizing with

52 NLRA's Section 7 is codified as 29 U.S.C. § 157. The leading discussion of constitutional law limitations on employers' private property rights is Cynthia L. Estlund, *Labor, Property, and Sovereignty after* Lechmere, 46 Stan. L. Rev. 305, 338 (1994).

53 *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, slip op. at 13, 15 (2021) (Breyer, J., dissenting).

54 *Contra* Lechmere, Inc. v. NLRB, 502 U.S. 527, 539-40 (1992).

55 Compare with the political-equality grounding offered in Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 Yale L.J. 546 (2021). The relational equality case for employment relationships is further defended, in connection with minimum wage, in Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 Texas L. Rev. 1543 (2014); Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice (Apr. 21, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637034.

56 The case for organizers' nonconsensual access also supervenes on another, more general challenge, which is the principal-agent problem (as when the interests of the union and the interests of workers diverge). I take this problem to be orthogonal to my argument. I will therefore proceed under the

workers in a factory. If all that matters is the ability to convey information, then the precise location where the discussion takes place is only contingently important. The question becomes one of securing effective communication between union organizers and employees. This could be done through advertising in local newspapers, social media, targeted text messages, emails, and calls, or by drawing on strategic public spaces (e.g., local festivals, the green, main street, or something of this kind).[57]

However, the case for providing organizers access to the workplace does not turn on the question of effective communication. I argue that the issue is not about *knowing*, but rather about *being*—the conflict theory makes the case for the proverbial (labor) boots on the ground. Indeed, an entitlement to be non-consensually in the employer's space in order to engage in organizing is appealing because of its role in advancing an ideal *modus vivendi* in which an employer and its employees could relate as equals.

The move from nonconsensual access rights to relational equality has a negative and a positive dimension. Negatively, entitling non-employee union organizers to enter the workplace without leave of the employer changes the balance of power between an employer and its employees.[58] It does that by limiting the employer's control of the activities, conversations, and will-formation processes that take place at the workplace, on the one hand, and increasing the control of employees over the workplace and ultimately the terms of the employment relationship, on the other.

Why should we care about equalizing, or reducing, a power imbalance in connection with, the control over the workplace? This is where the positive dimension suggests itself. I argue that weakening the employer's control strengthens the unionized and nonunionized employees' control, and that doing so sustains an inherently valuable conflict between labor and capital. In particular, it creates the conditions necessary for the construction of a community of *rights-claiming workers*.[59] Rights-claiming communities, in turn, protect the individual worker from the inegalitarian excesses of the employment relationship. Ultimately, I argue that the construction of these communities, in part by way of establishing nonconsensual access entitlements,

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assumption that unions could and, in fact, would advance the interests of workers. More generally, I assume that the conflict that matters—normatively speaking—is between labor and capital only.

57 Digital communications are certainly a game changer in many cases, but some workers still lack the material means to engage in them. *See* Jess Bravin, *Cesar Chavez's Labor Organizing Legacy at Stake in Supreme Court Case*, Wall St. J. (Mar. 21, 2021), https://www.wsj.com/articles/cesar-chavezs-labor-organizing-legacy-at-stake-in-supreme-court-case-11616335201 (detailing the many difficulties of organizers in effectively communicating with agricultural workers, especially those working in isolated, rural locations).

58 *See also* Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 Tex. L. Rev. 351, 375 (2017).

59 Another necessary condition could be co-determination, by which I mean granting employees' equal voice in the supervisory boards of the corporation. The discussion of co-determination typically emphasizes workers' agency in connection with the *business management* of a corporation. It asks whether workers should be represented on the supervisory boards of a corporation. I argue for another aspect of agency on the part of workers, that is, having a substantial measure of control over the terms of the employment relationship and, in particular, the allocation of the surplus (on which more below).

reflects the right way to respond to the inherently valuable conflict between capital and labor.

Nonconsensual access rights to the workplace bring together the practical expertise of organizers and some measure of control over the physical location of the workplace so as to transform the condition of the worker in a potentially profound way.[60] To see that, begin with the case of union organizers lacking access rights to the workplace. Having the practical expertise to support the cause of the workers without access rights almost certainly denies union organizers a real opportunity to meet with workers, *taken together*. By implication, union organizers would have to convey all the necessary information to the employees, *taken severally*. Epistemically speaking, engaging workers jointly and doing so on an individual basis might not matter. In principle, the content of what is said need not vary with the audience, be it the entire class of a firm's workers or just one worker at a time.

However, the value of union organizers engaging an entire class of workers, taken together, is not reducible to propositional content concerning employment law. Rather, it facilitates both *class* and *rights* consciousness on the part of the workers. Let's begin with class consciousness. By addressing an entire cohort of workers, the advice and support provided by union organizers become common knowledge among them all so that each worker knows that his or her fellow workers know that he or she knows that they know, and so on.[61] Being out in the open and, so, publicly shared by an entire body of a firm's workers, knowledge concerning their condition and ways to address it is no longer limited to one worker at a time. Nor is it limited to a plurality of workers, taken severally. Instead, it sustains all-inclusive forms of processing information and contemplating collective action. So understood, nonconsensual access rights are key to shaping the consciousness of workers as a class—viz., *labor class*—that stands apart from, and indeed contrasts with, capital.[62]

Next, class consciousness gives rise to *rights* consciousness, which is a moral framework for articulating claims that take the form of rights. Such claims are not limited to the rights workers currently have as a matter of positive law—that is, union organizers do not merely enter the workplace to inform workers what the posited law happens to say and how it bears on their working conditions (although they also do that as well). Rather, the claims at issue articulate demands that reflect what should be the workers' as a matter of right—that is, union organizers help workers engage in reimagining, challenging, and ultimately altering the legal status quo in ways that better reflect the workers' convictions regarding justice in the workplace

60 What are we to make of countries, such as the U.S., in which unions are struggling (for any number of reasons)? To begin with, recall that my argument focuses, for the sake of exposition, on the harder case of organizers' rights to nonconsensual access, but it also (and much more straightforwardly) applies to employees' rights to the same. Moreover, my focus on the former can positively affect the status quo precisely because it offers a reconstruction of the rights, duties, and powers in and around the employment relationship.

61 *See* David Lewis, Convention: A Philosophical Study 52 (1969).

62 The scope of the class may, but need not, extend beyond a particular workplace to capture an entire sector or even economy. However, the argument in the main text focuses on the narrower case of constructing a labor class in one workplace at a time.

and, indeed, in employment relations.[63] It contrasts the assumption that employers decide, because they can, "the ultimate direction, philosophy, and managerial policies" of their workplaces.[64]

It is important to note that nonconsensual access rights are required on an ongoing, rather than one-off, basis. This is because the facilitation of workers' rights consciousness cannot be fully satisfied at the get-go stage, that is, once and for all. Two reinforcing reasons support this observation: that workers' claims should reflect the bargain between employer and employees over the allocation of the surplus, and that the underlying conflict between labor and capital out of which workers' claims arise is structural, rather than transitory.

Let's begin with the first reason. It concerns the object of workers' claims. Such claims surely involve what every employee is entitled to as a matter of law, which is to say a mandatory floor of rules, say, concerning the provision of minimum wage, adequate workplace safety, and nondiscriminatory hiring and promotion policies. They may also involve rights that arise from their employment contracts and the above-the-floor provisions they may include. Ideally, a decent employer would want to respect both kinds of right—legal and contractual—anyway; accordingly, nonconsensual access rights may have no role to play when it comes to any law-abiding and promise-keeping employer. However, consciousness of rights can, and should, give rise to claims that go *beyond* the legal floor and the existing contract to reflect the bargain between the parties over the allocation of the surplus, namely, benefits to which the employees are not already entitled. Talk of surplus allocation is not restricted to sharing in the employer's profit by raising wages beyond the statutory minimum. Rather, it also covers any claim to having more control and agency over the design and the agenda of the workplace—it ranges, to give a very partial list, from above-the-floor standards of workplace health and safety, to a more generous accommodation of familial obligations, including at the expense of work hours, to enhanced policies of diversity and inclusion in the workplace, to climate-friendly initiatives, and to on-site childcare. Hence, nonconsensual access rights and their role in facilitating rights-consciousness are required *even when* employers are willing to respect their outstanding, legal and contractual obligations.

Relatedly, the second reason takes up the character of the conflict between labor and capital. It suggests that the claims just mentioned are the surface manifestations of a structural, rather than transitory, conflict. As a result, pursuing them is an ongoing effort. Indeed, raising rights-consciousness on the part of workers and acting on it is fundamentally dynamic: it is constantly evolving in response to changing circumstances as well as changing perceptions of the workplace and of work itself. The practice of articulating claims may therefore defy any attempt to settle such claims once and for all, at the get-go stage. Instead, it embraces the need

63 On the reformative potential of rights-consciousness, see E. P. Thompson, Whigs and Hunters: The Origin of the Black Act (1975). On the normalizing effect built into the arrangement of work, including in liberal legal orders, see Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 413 (1996).

64 Good Samaritan Hosp., 265 N.L.R.B. 618, 626 (1982).

to adjust and readjust the employment relationship, by way of better allocating the surplus of the employment contract, so as to render it more egalitarian and, indeed, relationally just.

C. Trespass to Land and the Intrinsically Valuable Conflict between Labor and Capital

I have argued that nonconsensual access rights of union organizers help to construct workers' class- and rights-consciousness. I now wish to argue that the conflict between labor and capital to which such rights give effect is inherently valuable. The role of trespass to land, and of the nonconsensual access rights to which it should give effect, is to facilitate this conflict and, moreover, to facilitate it in a certain way: as a conflict in which parties in an employment relationship relate as, more or less, equal.

Conflictual control over the workplace is intrinsically, rather than contingently, valuable in the sense that it should be embraced, rather than either resolved or defused. To render this point more vivid, consider two other familiar approaches to the potential tension between labor and capital. The first approach is famously associated with a *laissez faire* vision of free markets and private property which, in turn, tends to support (as in the *Lochner* era) capital's domination;[65] by contrast, the second reflects the Marxist end of labor's domination and, more generally, the public control of the means of production. Despite their contrasting visions, the two approaches are of a piece insofar as they aim at quashing, or at least substantially reducing, the conflict between labor and capital. In either case, control of the workplace should (ideally) be vested in one particular party, rather than in (some combination of) both. Accordingly, the question of how to allocate the (broadly defined) surplus of productive activities does not turn on the bargain between equally situated employers and employees.

Contrary to both of these approaches, a liberal-egalitarian approach does not seek the elimination of either labor or capital. Both should have a consequential role to play in the production of goods in a market economy: Some measure of private ownership over the means of production, on the one hand, and a genuine freedom to make work-related choices, on the other, are key pillars of a liberal society.[66] The only live question for the liberal-egalitarian approach is whether the conflict between labor and capital will arise on equal or subordinating terms. Conflictual control of the workplace is required precisely because it facilitates the former alternative. Louis Brandeis, a champion of egalitarian employment relationships, made this point very

65 *See* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357, 1389 (1983) (arguing against "cut[ting] back upon the absolute power [of employers] to exclude that is the hallmark of any system of private property").

66 These two observations are *widely* supported by many influential liberal accounts of justice. *Cf.* Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 Law & Phil. 171 (2018). It does not mean that ownership over the means of production could not be made more available to workers (say, by generous state subsidies or worker-friendly credit markets). Rather, it means that private ownership (by capitalists) is a legitimate, and a legitimately pervasive, arrangement for a liberal legal order.

eloquently more than a century ago.[67] He begins by observing that inadequate floors and even the unequal division of profits are mere symptoms of the basic concern arising out of employment relationships, namely, "a condition of inequality between the two contending forces."[68] Hence, an adequate solution involves the creation of conditions under which employer and employees could engage in "contending" on, more or less, an equal footing. The key is one of building conflict into the employment relationship so that "the problems" that arise in connection with running productive activities are "not any longer, or to be any longer, the problems of the employer . . . [as] they are the problems of the employer and the employee."[69]

One necessary condition for securing egalitarian employment relationships returns the argument to conflictual control of the workplace. I argued above that union organizers should have nonconsensual access rights to an employer's premises for the purpose of increasing the control and agency of employees over the workplace and, ultimately, the employment relationship itself. Such rights institutionalize a conflictual *modus vivendi* for the workplace. According to the conflict theory, embracing this much is not extrinsic to the torts analysis of what rights we have to the control of land, but rather integral to it. This is, in other words, not just a *mere* modus vivendi, but rather an *ideal* one. It is not something that we would aspire to settle, if we could, once and for all; rather, a conflictual reconstruction of the workplace reflects a desirable state of affairs.

The preceding analysis provides a sense of how the distinction between exclusive and inclusive possession should play out in determining rights and duties within the torts framework of trespass to land.[70] Responding in the right way to the land-control conflict between labor and capital begins with identifying it for what it is, namely, an inherently valuable one. It then proceeds with recognizing an employer's entitlement to inclusive possession and its corresponding circumscribed entitlement of employees and union organizers to enter and use the employer's premises. Doing so would also require a further delineation of the scope of inclusive possession and the corresponding scope of employees' and organizers' land-control rights: Precisely what areas of the workplace should be subject to labor-related activities,

67 Brandeis used "democracy" as the basic ideal informing his claims, but it seems that what he really had in mind was relational equality in the workplace. The latter may help to promote the former, but on my account the employment relationship is a source of concern and of value in and of itself, that is, quite apart from its impact on democracy. To this extent, the value of an egalitarian workplace does not turn on the national or civic affiliation of the participants, as it can, and should, capture interactions between *persons* simply as such.

68 Testimony of Louis D. Brandeis quoted in Final Report of the United States Commission on Industrial Relations. S. Doc. no. 415, 64th Cong. 1st sess., at 63 (1916).

69 *Id*. at 63-64.

70 The celebrated *State v. Shack*, 277 A.2d 369 (N.J. 1971) decision concerns a trespass case in a context of labor/capital conflict. Note, however, that it concerns the protection of workers' mandatory floor of rights. My current discussion, by contrast, focuses on the labor/capital conflict in connection with the allocation of the surplus (properly conceived). Moreover, I discuss *Shack* at some length elsewhere, arguing that it is not a conflict over the control of the physical *workplace* (the venue on which the "trespassory" entry occurred was the employees' seasonal place of residence). On my analysis, the possessory rights in *Shack* are purely incidental to the employer's authority over its seasonal workers. *See* Dorfman, *supra* note 45, at 94-97.

by whom, and under what circumstances (say, during lunchbreak, after hours, and so on). These latter questions depend heavily on contextual analysis—concerning the nature of the work at issue, the number of workers, and so on—that lies beyond the scope of the current stage of the argument. More important at this stage are the broader implications of the conflict theory of tort law for trespass to land. Indeed, because tort law cannot remain indifferent to the values underlying the conflicts falling within its purview, the trespass framework must identify and determine land-control rights accordingly. Contrary to the traditional, near-automatic identification of possession with exclusive possession, the existence of inherently valuable conflicts should inform the trespass-to-land analysis so as to define possessory rights in terms of inclusive possession.

Conclusion

When courts (and legislatures or tort scholars, for that matter) address conflicts analyzed in terms of trespass to land, they engage, as they should, in deciding what property rights we have. They do so by determining their nature, filling out their content, and defining their scope of application. Either way, tort law is not a mere transmission belt for implementing the general rules of property law in concrete cases. The same is true with respect to other basic rights such as bodily integrity and reputation: Tort law does not represent the straightforward implementation of preexisting rules. It follows that identifying tort law with the law of wrongs or of victim recourse fails as a description of what tort law is and a defense of why it matters.

The argument in these pages has defended the conflict theory of torts in their stead. This theory provides a better account of the function of tort law and of trespass to land, in particular—to wit, a legal framework for thinking about, and determining, entitlements based on the kind of value that underlies human conflicts. I have argued that the question whether union organizers should have nonconsensual rights of access to the workplace is a particularly interesting proving ground for the conflict theory. Whereas the reduction of tort law to the law of wrongs and victim recourse excludes this question from the purview of tort law, rendering it an issue of statutory or constitutional limitations on the law of trespass, the conflict theory establishes the tort-law case for such rights. The latter has several obvious doctrinal advantages over the former approaches, including non-susceptibility to constitutional and legislative hostility to such rights. Most importantly, it responds to, rather than overlooks, the conflict between labor and capital; and it does so in the right way, namely, by embracing, rather than pacifying it.