

# HOLISTIC TORT THEORY

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## INTRODUCTION

Can something as complex as the tort system be reduced to a single concept or some set of coherent, irreducible ideals? If so, can that foundation be traced to human agency or the structures and institutions of society? Whatever torts' hidden essence might be, can we discover it through conceptual analysis or selective forms of qualitative empiricism?

Traditional tort theory answers “yes” to all three of these questions. Guided by analytic philosophy or social sciences like economics, history, or sociology, tort scholars have grounded torts in agency-based norms of corrective justice, civil recourse, and basic liberty, or in social values of utilitarianism, compensation and deterrence, and social justice.<sup>1</sup>

This Essay proposes a different view. While it sees a role for such reductivism, it offers a new, holistic approach to tort theory. It argues that torts is more than the sum of its foundational parts. Torts is a system of complex systems that not only produces results unexplainable by its parts, but also constantly modifies those parts to maintain its functionality. This system is not solely the product of human design on the one hand, or social influences on the other. Instead, it is a dynamic synergy of agency, society, *and* biology. This being true, we cannot hope to understand torts with any piecemeal epistemology. Instead, we must seek to integrate knowledge from the humanities, the social sciences, and the natural sciences.

I will elaborate this thesis in three steps. Part I uses insights from the natural and system sciences to explain how human nature leads to legal

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\*\* Professor Calnan wrote this article prior to his passing on April 20, 2020. The *Southwestern Law Review* is honored to be able to publish his work. He is a cherished member of the Southwestern community and will be deeply missed by all who knew him.

1. See generally John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (surveying the major tort theories of the twentieth century).

holism.<sup>2</sup> Part II extends this analysis to torts, identifying some of the system's most distinctive holistic features.<sup>3</sup> Finally, Part III reveals how holism can help expose anomalies in the law's current jurisprudence.<sup>4</sup>

## I. LAW'S HOLISM

The prevailing theories of torts are heavily influenced by an underlying conception of human nature—a view that can best be described as substance dualism. According to this belief, “the mind is a thinking thing that lacks the usual attributes of physical objects.”<sup>5</sup> Freed of material laws, the mind operates independently of the body, formulating ideas on the basis of reason and making choices from pure free will. Or, to use the words of tort theorist Scott Hershovitz, “The laws of physics are what they are independent of us;” “[b]ut our institutions are ours”— “[w]e can make of them what we will,” “[a]nd we can will them to be better than they are.”<sup>6</sup>

This dualistic premise *separates* law from human nature. If people can choose any sort of law they please, and that choice is not shaped by human drives, instincts, or emotions, then law truly has no objective causality. It can be a command, a convention, or some abstract ideal, depending on whether you are a positivist, a realist, or a natural law theorist.<sup>7</sup>

But this is *not* law's truth. Law is a *reflection* of human nature, not supernaturally immune to it. Human nature, in turn, is bound by physical laws that govern other material things. These laws link everything together in a single complex network, forcing nature, body, and mind to function as a cooperative system. Thus, if we are going to fathom manmade things like torts, we have to adopt a systemic way of thinking.

### A. Systems Theory

Complex adaptive systems theory—or systems theory for short—offers this perspective. It reveals that, like other natural organisms, people are not self-contained wholes. Rather, they are a system of interconnected systems—

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2. See *infra* notes 5-20 and accompanying text.

3. See *infra* notes 21-46 and accompanying text.

4. See *infra* notes 47-76 and accompanying text.

5. Scott Calef, *Dualism and Mind*, INTERNET ENCYC. PHIL., <https://www.iep.utm.edu/dualism/> (last visited Mar. 22, 2020).

6. Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 969 (2017).

7. See Alan Calnan, *Beyond Jurisprudence*, 27 S. CAL. INTERDISC. L.J. 1, 2-3, 70-71 (2017) [hereinafter *Beyond Jurisprudence*] (discussing these theories).

circulatory, muscular-skeletal, respiratory, nervous, reproductive, and so on—that work together to stabilize and sustain the whole.<sup>8</sup>

This systemic survival goal is implemented by an internal regulatory process called homeostasis. Homeostasis is a natural “law” for controlling system function.<sup>9</sup> It tells the body when its systems are running too fast or too slow, too hot or too cold, or too over- or under-pressurized to maintain health and safety. It then sends corrective signals to the brain and body to restore system balance.<sup>10</sup> In this sense, you might say homeostasis is the “constitutional” law of the body’s primitive legal system.

Homeostasis is reinforced by our feelings and emotions.<sup>11</sup> When we are dehydrated, we feel thirsty, dizzy, and nauseous. If we overexert our muscles, we perspire profusely or experience extreme pain or fatigue. Conversely, life-enhancing behaviors tend to have the opposite effect. For example, eating well, drinking lots of water, and regular exercise often give us energy and a sense of well-being, and can even induce feelings of euphoria.

These homeostatic feelings also infiltrate our social interactions. Cooperating, caring for others, avoiding harmful encounters, treating others fairly and reciprocally, showing loyalty to friends, and respecting authority, all help us peaceably coexist with our neighbors.<sup>12</sup> These prosocial behaviors reduce social stress, which in turn promotes the prosperity and longevity of the group.<sup>13</sup> Because being sociable feels good, we naturally gravitate toward conformity. By the same token, we become angry and resentful when people lie, cheat, or harm others.<sup>14</sup> Since these behaviors weaken social stability, we feel the urge to correct the imbalance by punishing the culprits.

### B. *The Systemic Origins of Law*

Over millennia, these homeostatic feelings become embedded in our DNA, where they emerge as innate values and immutable instincts. In fact, all of the “feel-good” behaviors mentioned above are rooted in moral

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8. See Alan Calnan, *Torts as Systems*, 28 S. CAL. INTERDISC. L.J. 301, 317-18 (2019) [hereinafter *Torts as Systems*] (explaining mankind’s systemic nature).

9. See generally ANTONIO DAMASIO, *THE STRANGE ORDER OF THINGS: LIFE, FEELING, AND THE MAKING OF CULTURES* (2018) (arguing that homeostasis informs the evolution of all life).

10. See *Torts as Systems*, *supra* note 8, at 318-19.

11. See DAMASIO, *supra* note 9, at 102, 104-07.

12. See *id.* at 26-27.

13. See *id.* at 13.

14. See *Beyond Jurisprudence*, *supra* note 7, at 34.

appetites that are shared the world over.<sup>15</sup> As societies form, these individual traits influence interpersonal behaviors, and these behaviors become normalized within the group. Eventually, these norms turn into social conventions like ownership of property, reciprocal trading, and group punishments for cheaters and rule-breakers.<sup>16</sup> When societies get large enough, they often form cultures with belief systems that turn conventions into fixed, enduring, and often sacred institutions.<sup>17</sup>

Law is such an institution. It takes the body's internal survival instincts and transforms them into an external system of sociocultural homeostasis.<sup>18</sup> Like unhealthy conduct, antisocial behavior is both dangerous and destabilizing. It turns members of the social system against each other, thereby threatening the integrity of the whole. Law serves to inhibit this disequilibrium by setting the parameters of acceptable behavior and imposing corrective measures when those parameters are breached.<sup>19</sup>

Though law's regulatory schemes can be unique and diverse, they are still a predictable product of system dynamics. Rules scale up from lower to higher levels, leaving their imprint on each system while continually informing and altering the systems above and below.<sup>20</sup> So just as our homeostatic laws shape our legal institutions, our legal institutions affect our cultural values, our social norms, and even our biological instinct for legality.

## II. TORTS' HOLISTIC FOUNDATIONS

Not surprisingly, many aspects of the tort system reflect its holistic nature. Though these features pervade torts, their breadth in no way limits their depth. In fact, torts' holism reaches all the way down to its foundations. For the sake of brevity, we will focus on just three of these core properties: torts' functions as a legal system, the form or structure of the system itself, and the concepts animating the system's operation.

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15. See JONATHAN HAITT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 133 (2012).

16. See Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 465-75 (2005) (describing socio-cultural universals).

17. See *Torts as Systems*, *supra* note 8, at 325 (citing GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* 32-34, 69-70 (2017)).

18. See *id.* at 324-26.

19. See *id.*

20. See *id.* at 323-24.

### A. Functions

As noted above, the human drive for homeostasis ascends mankind's nested survival systems, moving biologically from genes to brains, then socially from behaviors to cooperative practices, and culminating in cultural institutions like law. Tort law plays a big part in this process. Indeed, torts serves two systemic functions that other forms of law either do not perform or do not perform nearly as well.

One purpose is to operate as society's homeostatic alarm. In the human body, homeostasis sends signals to the brain that a critical life system is out of balance. Those signals are sufficiently striking to catch the attention of our consciousness, which then begins planning its corrective response. The tort system fulfills the same role for the body politic.<sup>21</sup> It empowers people who have been wronged to report the antisocial conduct to the state. That complaint identifies a potential disturbance in society's moral equilibrium. The state alerts society to the problem by addressing the matter in a public forum. Because the imbalance threatens social stability, the state further empowers the grievant to seek a corrective remedy.

The criminal justice system may seem to serve the same function. Like the tort system, it allows alleged victims to report apparent misdeeds to the state. Yet the criminal system's signaling feature is not nearly as robust. Because many crimes do not require individual victims, there often is no private reporter. Even when people *are* victimized by crime, they usually do not go to the police. Some refrain out of fear of retribution, while others fear blame or prosecution, and still others simply dislike the hassle. Those victims that *do* report their crimes do not necessarily sound the public alert. Rather, their complaints are vetted by law enforcement officials and lawyers for the state, who make the ultimate decision to publicize and prosecute the alleged wrong. By contrast, torts incentivizes citizen reports by granting grievants control of the process and offering them financial rewards when those reports prove true.

Torts' second role also sets it apart from the criminal justice system. Criminal law strengthens the relationship between society and each of its members because criminal duties are owed to the public at large.<sup>22</sup> They are not owed to any person in particular. Torts, by contrast, strengthens the relationship among citizens, who constitute the individual parts of a political system.<sup>23</sup> Because tort duties are personal, they are owed to other members

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21. *See id.* at 329.

22. *See id.* at 328.

23. *See id.*

of society. These duties tell people both how they are supposed to behave towards each other and what they can do when these rules are broken. So while criminal law connects citizens to society, tort law bonds citizens together to pursue the overarching goals of survival and flourishing.

All this suggests that torts' *operation* is holistic, but it does not necessarily speak to the law's *origin*. After all, a dualist might argue that the tort system is so self-evidently important that rational human beings would have devised a way to develop and implement it. Still, if mankind's homeostatic values played no role in that choice, one might expect to find a considerable degree of difference across cultures. Yet that difference does not exist. Transcultural studies show that legal systems are remarkably consistent around the globe, containing what Westerners would describe as laws of property, contracts, crimes, domestic affairs, and yes, even torts.<sup>24</sup> While this consonance cannot prove causality, torts' universality does provide strong evidence of its holistic emergence.

### *B. Form*

Torts' systemic functions are not the only evidence of its holism. Holism inheres in torts' form. When we think of the tort system, we often lump everything together, including its doctrines, procedures, and participants. But this conception is deceptively overbroad. The tort system is not a single system at all. Rather, it consists of three nested and interdependent systems working together as one.<sup>25</sup>

To understand the holistic inner workings of these systems, we first must know more about the human condition. Human systems at both the micro- and macro-level tend to have three characteristics. First, they contain competitive and antagonistic tendencies that place them in tension.<sup>26</sup> Second, the resulting binary pits selfish individual concerns against concerns for other people and society.<sup>27</sup> And third, the systems possess a coordinating mechanism to maintain their functional stability and establish enduring operating principles.<sup>28</sup>

Here are two quick examples, beginning at the base level of neurobiology. The human brain evolved in three stages to solve three

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24. See Jones & Goldsmith, *supra* note 16, at 467-68, 474-75.

25. *Torts as Systems*, *supra* note 8, at 328-31.

26. See NEIL JOHNSON, SIMPLY COMPLEXITY: A CLEAR GUIDE TO COMPLEXITY THEORY 15-16 (2009) (describing this tension).

27. See *Torts as Systems*, *supra* note 8, at 318-19.

28. See *id.* at 324-26.

different types of survival problems. An ancient hindbrain emerged first to secure the individual's longevity, imbuing its host with selfish drives for food, protection, and mates.<sup>29</sup> In the paleo-mammalian period, the brain developed a social midbrain with capacities for caring, cooperation, and empathy.<sup>30</sup> Finally, a rational forebrain emerged to coordinate the contradictory impulses of its competing lower modules.<sup>31</sup> Though these modules have become extensively interconnected, their triadic struggle continues to affect human decision-making.

The other illustration takes us upward to the level of social living, where we find the same coordinative pattern. As I have noted elsewhere, "[t]he first hunter-gatherer societies were essentially egoistic and atomistic, with members placing their own personal interests before the group, which lacked any clear roles, norms, or structures."<sup>32</sup> Groups facing food, resource allocation, and protection problems typically developed into chiefdoms or pan-tribal sodalities which used community authority to enforce a growing list of social responsibilities.<sup>33</sup> As these societies expanded and diversified, they often morphed into nation-states with general laws, higher principles, and inalienable rights.<sup>34</sup> But these stages were never separate and distinct. Even as cultures developed in complexity, they retained vestiges of coercion and social control. These conflicting impulses were not simply absorbed and forgotten. Instead, they were constantly coordinated within the regime's new legal framework.

Torts displays this same human dynamic. Though it exists atop humanity's system chain, it bears the distinctive triadic structure of the systems below. At its base, torts is an egoistic system of dispute resolution.<sup>35</sup> The plaintiff attacks the defendant with accusations of wrongdoing and demands payment for her losses. The defendant fights back in self-defense, often pointing the finger of blame at the plaintiff. Since each party protects her own selfish interests, neither can see a path to compromise.

Fortunately, this combative system sits within a larger lawmaking system operated by the courts.<sup>36</sup> Courts apply the rules for litigating these

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29. See GERALD A. CORY, JR., *THE CONSILIENT BRAIN: THE BIONEUROLOGICAL BASIS OF ECONOMICS, SOCIETY, AND POLITICS* 9-11 (2004).

30. *Id.* at 11.

31. *See id.* at 15-18, 15 n.3.

32. *Torts as Systems*, *supra* note 8, at 324 (citing C.R. HALLPIKE, *THE EVOLUTION OF MORAL UNDERSTANDING* 10, 152-53, 183, 185 (2004)).

33. *See id.*

34. *See id.*

35. *See id.* at 329 (explaining the dispute resolution system).

36. *See id.* at 329-30 (describing the integration of the judicial lawmaking system).

contentious disputes. But this is not their most important function. Through the common law, they also create the rules for determining how people should behave. These rules not only help to resolve the cases before the bench, they also establish general behavioral principles for all members of society. In this sense, the judicial system serves as the higher mind of the law, using its rationality to forge an enduring set of moral imperatives.

Even this system is not autonomous, but is embedded within the still larger normative system of society.<sup>37</sup> That system helps to mediate and coordinate the antagonistic tendencies of its counterparts. Most directly, juries introduce a social perspective into the law, filtering both the parties' claims and the law's directives through the lens of community values and experiences. Judges also seek social insights, though their access is less direct. Charged with promoting public policy, judges typically must determine the social desirability or efficacy of a given decision before making or applying the law.

One might equate these systems to existing theories of torts. The dispute resolution system seems to seek civil recourse for grievants, while the lawmaking system strives for moral goals like fairness, equality, or corrective justice. The social normative system is more variable, but could easily accommodate the welfare maximization concerns of economists and the social justice ideals of critical legal theorists.

But none of these accounts can be entirely correct. Because torts' subsystems are interconnected, they are constantly interacting. And, because their goals and priorities are different, they must continuously work toward reconciliation. When the parties want blood, the law wants justice, and society wants prosperity and harmony, the trick is to find some precious common ground. *That* is the essence of torts. By its trilateral form, the tort system serves a coordinative function.

### C. Concepts

Torts' form and function do not just influence each other; they also shape the law's key concepts. Tort *theories* reflect mankind's conflicted yet complementary normativity. When juxtaposed against torts' *defenses*, the system's adversarial posture stimulates a dynamic reconciliation process. Though that process often falls to juries, it also can be embedded in the law's key *doctrines*.

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37. See *id.* at 330 (discussing the integration of the social value system).

Tort law recognizes three theories of liability: intentional torts, strict liability, and negligence. These theories did not appear all at once, but developed in the accretive pattern displayed by humanity itself.<sup>38</sup> At torts' inception, intentional torts addressed the most selfish, impulsive, and life-threatening forms of human conflict. As society became more stable, torts added a number of strict social responsibilities, like repairing dykes, tending to fires, and maintaining sanitary conditions. Eventually, the range of human disputes became too vast for these rudimentary rules, so torts created a flexible and general standard of reasonable care to adapt to any problem. This standard not only coordinated the law's existing doctrines, it searched for higher principles to regulate future conduct.

Today, intentional torts, strict liability, and negligence continue to mirror mankind's most basic norms. Global research reveals that people everywhere essentially value the same things, though cultures tend to rank these values in different ways. We favor autonomy, caring, loyalty, fairness, respect for authority, and integrity; and disfavor oppression, harm, betrayal, cheating, subversiveness, and degradation.<sup>39</sup> These norms did not come about by chance, but instead correspond to the selfish (autonomy, no harm), social (loyalty, fairness, respect for authority), and ratio-coordinative (integrity) strands of the human condition.

Torts' theoretical trilogy adheres to the same framework. Intentional torts protect us from harmful invasions of our autonomy interests.<sup>40</sup> Meanwhile, strict liability reinforces social values like loyalty, fairness, and authority through doctrines like strict products liability (protecting and reciprocating consumer loyalty), abnormally dangerous activities (regulating activities that pose abnormal and thus unfair risks to society), and vicarious liability (enforcing the responsibilities of dominant parties in agency relationships).<sup>41</sup> Rounding out the trilogy, negligence serves as torts' integrity minder, using reasonableness to foster holistic judgments of liability by synthesizing rational rules and emotional facts.<sup>42</sup>

Torts facilitates this coordinative process in other ways as well. Most importantly, it brackets the law's theories with a host of reactive or affirmative defenses. This adversarial posture evokes the antagonistic nature of all complex systems. In systems speak, these extremes set the homeostatic parameters of the system's operation and trigger a search for middle-ground

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38. *See id.* at 337-39 (explaining this process of accretion).

39. *See* HAIDT, *supra* note 15, at 149, 178-79.

40. *See Torts as Systems, supra* note 8, at 333-34.

41. *See id.* at 335.

42. *See id.* at 334-35.

solutions to avoid imbalance and destabilization. Torts' theory-defense framework serves the same coordinative purpose.<sup>43</sup> While tort theories represent only the plaintiff's position, tort defenses encompass only the defendant's view. By presenting both sides simultaneously, torts forces the fact finder to seek grounds for reconciliation.

Though this coordination process is often unbounded, certain tort doctrines actually strive to facilitate it. One example is the multifactor analysis of duty.<sup>44</sup> When a duty's existence is in doubt, the law routinely weighs principles and public policies to find an appropriate answer. The same holds true for the concept of reasonableness, which normally entails a balancing analysis of its own.<sup>45</sup> But perhaps the best example is the doctrine of comparative fault. It evaluates theories and defenses but does not choose absolute winners and losers. Instead, comparative fault deftly reconciles the competing positions by splitting responsibility between the competitors.<sup>46</sup>

### III. ANOMALIES IN TORTS' HOLISM

Torts' foundational holism offers some support for its holism overall. Yet, like all preceding and prevailing tort theories, the holistic theory of torts is not a perfect fit for all of torts' particulars. Of the apparent anomalies, three deserve special attention. First, the concept of reasonableness does not conform to human reason. Second, torts' notion of wrongdoing as a mental construct does not match our moral intuitions. Third, the law's atomistic approach to liability runs counter to people's holistic views of guilt and responsibility. The question in each case is what to make of the difference.

#### A. Reasonableness

Because reasonableness is torts' premiere concept, its validity is especially significant. Reasonableness in torts is a decidedly rational notion. It requires cognitive faculties of intelligence, perception, memory, and knowledge.<sup>47</sup> It also involves a distinctly ratiocinative process. Whether

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43. *See id.* at 333, 343.

44. *See* ALAN CALNAN, DUTY AND INTEGRITY IN TORT LAW 83, 83 nn. 30–31 (2009) (collecting and discussing such multifactor duty analyses).

45. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 3 (AM. LAW INST. 2010) [hereinafter RESTATEMENT (THIRD) OF TORTS] (setting forth a multifactor analysis for determining negligence).

46. *See Torts as Systems*, *supra* note 8, at 343.

47. *See* DAN B. DOBBS ET AL., HORNBOOK ON TORTS 222 (2d ed. 2016).

structured rigidly as an algebraic formula,<sup>48</sup> or more loosely as a balancing analysis,<sup>49</sup> reasonableness consistently weighs the costs, benefits, burdens, risks, utilities, and potential losses of a particular decision.

The problem is, human reasonableness is not rational, at least not in the legal sense mentioned above. Instead,

The ostensibly one-dimensional term—*reason-able*—is really the functional integration of two human faculties: reason *and* feelings. As neuroscientist Antonio Damasio has observed, “Feelings and reason are involved in an inseparable, looping, reflective embrace” in which “mind and brain influence the body proper just as much as the body proper can influence the brain and the mind.” In fact, says Damasio, body and brain are not really separate life systems but rather “two aspects of the very same being”—in effect, “an organismic single unit.”<sup>50</sup>

In short, you cannot have a sense of reasonableness without the sensory input of feelings.

Feelings have been ostracized from torts for fear that they will corrupt or subvert the law’s cognition and discernment. But this fear is equally wrong-headed. As I have mentioned in a prior article:

Like reason, feelings are a type of cognition. They process and evaluate information obtained internally from a person’s body and memory and externally from the surrounding environment. Informed by homeostasis, which sets the parameters for an organism’s survival and flourishing, feelings provide “a moment-to-moment report on the state of life” inside the body. That report includes a normative judgment about its findings, signaling that the body’s condition is either good or bad. Conditions conducive to well-being produce a range of positive or pleasant feelings, while bodily states detrimental to survival evoke feelings that are negative or unpleasant. Over the course of evolution, these valenced feelings get etched into mankind’s long-term memory bank—DNA—where they emerge as heritable intuitions.<sup>51</sup>

Reasonable people do not, and indeed cannot, make calculated cost-benefit judgments about each and every act they perform. Instead, they learn to trust their instincts. Instincts beget, direct, and ground our “sense” of reasonableness—

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48. This is the famous B<PxL formula proposed by Judge Learned Hand in the case of *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

49. Such a balancing approach has been adopted by the Restatement (Third) of Torts. See RESTATEMENT (THIRD) OF TORTS, *supra* note 45.

50. Alan Calnan, *The Nature of Reasonableness*, 105 CORNELL L. REV. ONLINE 81, 83-84 (2020) (footnotes omitted).

51. *Id.* at 84 (footnotes omitted); see also HAIDT, *supra* note 15, at 144.

When the body's sensory apparatus is stimulated by new information, our feelings spontaneously appraise the situation and sound an immediate call to either accept or reject the precipitating cause. This impulse often is accompanied by powerful emotions—like anger, fear, joy, or comfort—which heighten the initial reaction. These tumultuous feelings finally stir our reason, but not to act as the final arbiter or sole decider. Rather, reason intervenes to *serve* our intuitions by updating their old wisdom with new plans, strategies, and arguments suited to the prevailing circumstances. In short, feelings propose general rules of behavior, while reason searches for exceptions. If none can be found or fashioned, our rational faculty readily justifies, defends, and approves the proposal.<sup>52</sup>

There may be other reasons why torts still treats reasonableness as rationality. Perhaps it reinforces our cultural identity or promotes law's aspirational goals. Maybe it's just easy to explain. But if torts' rendition of reasonableness means ignoring important aspects of human nature, there is reason enough to wonder: How reasonable can it be?

### B. *Wrongs*

The reasonableness standard is one medium for establishing a tortious wrong. Tortious intent is the other. What the two tests have in common is a concern for the actor's mental state. The most culpable mindset is a desire or purpose to harm another person. But blame can also be found in the presence or absence of knowledge. Knowing an act is substantially certain to cause harm is intentionally tortious,<sup>53</sup> while recklessness consists of the knowing disregard of a harm's high probability.<sup>54</sup> Negligence is further down the knowledge scale, though no less focused on mental states. It can entail knowledge of a foreseeable risk, or the failure to possess or use knowledge expected of a reasonable person.<sup>55</sup>

This mentality fixation has deep roots in human nature. Almost from birth, human beings distinguish between harming and helpful behavior.<sup>56</sup> They also ascribe bad or good motivations to those engaged in such acts.

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52. *Id.* (footnotes omitted).

53. *See* DOBBS ET AL., *supra* note 47, at 55-56.

54. *See id.* at 240-42.

55. These mental states are called actual or constructive knowledge of the danger. *See, e.g.,* Am. Multi-Cinema, Inc. v. Brown, 679 S.E.2d 25 (Ga. 2009). This means the defendant either knew or should have known of the danger. *See, e.g.,* Thoma v. Cracker Barrel Old Country Store, Inc., 649 So. 2d 277 (Fla. Dist. Ct. App. 1995); Jones v. Imperial Palace of Mississippi, LLC, 147 So.3d 318 (Miss. 2014).

56. *See Beyond Jurisprudence, supra* note 7, at 47.

People instinctively see intentional wrongs as immoral and serious, but judge the neglect of foreseeable risks on a case-by-case basis.<sup>57</sup>

Yet a culpable mental state is not the sole determinant of wrongfulness. That normative intuition is equally dependent on the “personalness” of a victim’s harm.<sup>58</sup> Using the facts of philosophy’s famous “Trolley Problem,” one study found that moral outrage is stronger when harms are inflicted directly and in person than when they result from more indirect and impersonal conduct.<sup>59</sup> This is true even where the stakes are exactly the same, with a single victim being sacrificed to protect five other people. As it turns out, pushing someone into the path of an oncoming trolley just *feels* morally worse than flipping a switch from a distance to reroute the trolley into the same person.

Why the difference? It’s the brain’s holistic circuitry at work. Impersonal wrongs do not activate our feelings, emotions, or moral intuitions. Lacking any sort of normative guidance, our minds judge such behavior with the cold utilitarian calculus of costs and benefits.<sup>60</sup> Personal wrongs are different. The intimacy of the invasion inflames our passions, stirs our emotions, and elicits a strong and immediate message of reproof.<sup>61</sup> Reason may offer counsel of its own, but more often than not, our rational faculty is conscripted to serve as instinct’s chief advocate.

This “personalness” factor may seem of modest importance, since it arises mostly in intentional tort contexts where the act’s intimacy is already self-evident. But that is not always the case. A driver negligently texting on a cell phone might activate this emotional trigger by crashing directly into an unsuspecting pedestrian. Or, a doctor carelessly treating a patient might evoke the patient’s moral outrage if that procedure directly results in the patient’s harm. Even a restaurant serving contaminated food might commit a “personal” wrong to its customer if the customer is directly poisoned by the dish. In these and other situations, torts may be better off by acknowledging this influential factor than by keeping it hidden from view.

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57. See John Mikhail, *Any Animal Whatever? Harmful Battery and Its Elements as Building Blocks of Moral Cognition*, 124 ETHICS 750, 776 (2014).

58. See *Beyond Jurisprudence*, *supra* note 7, at 49-50.

59. See JOSHUA GREENE, MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN THEM 113-28 (2013).

60. See *Beyond Jurisprudence*, *supra* note 7, at 49.

61. See *id.* at 50.

### C. Atomism

Adding a “personalness” element to our tort theories may improve the law’s moral sensitivity, but it does not ensure the law’s holism. This is because torts still takes an atomistic approach to liability. In fact, such atomism affects not only the elements of proof within each liability theory, but also the structure of the theories themselves.

Elements are the atoms of tort theory. Every tort is composed of elements of proof. Because these elements are separate and distinct, each element must be considered individually. Success in satisfying one element does not affect the others. Conversely, because each element is an essential component of the tort, the failure to establish any element obviates the need to address the rest.

Unfortunately, jurors do not make moral judgments atomistically. Rather, they approach torts as a “complex and contradictory” struggle in dynamic tension,<sup>62</sup> ‘containing conflicting impulses and intuitions that can be differently activated depending on the situation.’<sup>63</sup> Guided by this perspective, jury members view the parties’ dispute as a unified moral problem, such that findings of goodness or badness on one side produce an equal and opposite evaluation of the other.<sup>64</sup> To solve the problem, jurors do not split the moral quandary into bits. Instead, they instinctively employ a “multidimensional” process<sup>65</sup> to do “total justice” to the litigants by settling all scores and squaring or balancing all accounts between them.<sup>66</sup>

Indeed, jurors routinely ignore instructions to concentrate on the elements of proof, effectively merging them into global responsibility judgments.<sup>67</sup> This fusion occurs at several levels. Juries combine the elements of fault and causation, allowing the strength of one element to diminish doubts about the other.<sup>68</sup> They also meld liability and damage issues by using the gravity of the plaintiff’s injury to shape their impression of the defendant’s culpability.<sup>69</sup> Because jurors view disputes as melodramas,<sup>70</sup>

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62. See *Torts as Systems*, *supra* note 8, at 342.

63. *Id.*

64. *Id.*

65. *Id.*

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

they want their final judgments to “feel right” even if they do not follow the law’s pure reason.<sup>71</sup>

Torts’ atomism fares no better at the theoretical level. As noted earlier, there are three theories of tort liability. Intentional torts establish clear *rules* against selfish interpersonal behavior. By contrast, negligence imposes a *standard* of care to assess socially undesirable conduct. Finally, strict liability regulates permissible activities on grounds of *principle or policy*. Since each theory is facially distinct from the others, none should overlap. Instead, all theories should use different concepts to address different types of problems. Moreover, each theories’ constituents should remain relatively stable. A shifting theory stands to lose its identity, its integrity, and eventually even its autonomy.

Generally speaking, tort theories do a good job of distinguishing intentional from unintentional or accidental behavior. Intentional torts cover the first category of cases, while negligence and strict liability cover the second. Within the second group, torts also separates the faulty conduct of negligence from the fault-free activities of strict liability.

But as I have described in prior work,<sup>72</sup> those lines are gradually blurring. Intentional torts often revolve around the negligence concept of reasonableness, and can impose strict liability against mistaken or misguided actors.<sup>73</sup> Likewise, negligence frequently confronts intentionally harmful corporate conduct<sup>74</sup> while also subjecting children, the mentally infirm, and statutory rule-breakers to forms of strict liability.<sup>75</sup>

Strict liability, for its part, has always been something of a freakish hybrid. It targets socially disfavored activities along with activities with high social utility.<sup>76</sup> It also borrows from every liability regime, employing rigid proscriptive rules in some situations, flexible multifactor standards in others, and global principles and polices in still others.<sup>77</sup>

Such transtheoretical blending has enormous importance. It suggests that torts is more than a stagnant set of a rules, doctrines, and policies. It is an interactive collection of elastic boundary conditions for a dynamic coordination system. When torts faces novel problems, it improvises new

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71. *Id.* at 342-43.

72. *See id.* at 339-46.

73. *See id.* at 339-41.

74. This occurs when companies produce goods or services knowing they will harm some portion of the population.

75. *See Torts as Systems, supra* note 8, at 343-44.

76. *See id.* at 345-46.

77. *See id.*

types of solutions. Granted, these variations occur within the confines of a stratified theoretical framework. But at each and every turn, torts continually transforms its intricate inner workings. Though we may depict torts as a fixed regime of liability *theories*, it actually is an adaptive liability *system* that keeps the law diverse, dynamic, vibrant, and yes, holistic. In the end, the only unchanging feature of torts is its perpetual propensity for change.

#### CONCLUSION

So what can be learned from a holistic theory of torts? Torts is connected to the natural world and thus is informed by human nature. Like humanity, many of torts' foundational features display the properties of holism and systemicity. This resonance strengthens the theory's descriptive power. However, other tort features defy holistic explanation. The question is whether these misfit concepts are anomalies in the tort system or whether holistic tort theory is fundamentally flawed. As with all general theories, only time will tell. But two things can be said with relative confidence. The theory's naturalism will continue to uncover deeper layers of truth; and as it does, its holism will give it a dynamism and flexibility that current entrenched theories of torts will always lack.