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PRIVATE LAW, PUBLIC LAW, AND THE PRODUCTION OF AMERICAN VIRTUE

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INTRODUCTION

In a remarkable moment of the 2016 presidential campaign, members of the Black Lives Matter (BLM) movement confronted presidential candidate Hillary Clinton about her support for the 1994 federal crime bill and its disastrous implications for a generation of Black Americans.[1] She admitted the bill "went too far," but activists were not appeased.[2] BLM spokesperson Julius Jones pointed out that the resulting mass incarceration and fissures in family life were ultimately a product of "anti-blackness."[3] He intimated that Clinton's capacity to lead the nation was inextricably tied to her willingness to reflect on her own anti-blackness and to participate in "chang[ing] white hearts."[4] "I don't believe you change hearts," Clinton replied. "I believe you change laws, . . . you change the way systems operate."[5]

In rejecting the premise of Jones's question, Clinton was speaking not just for herself, but for a generation of attorneys educated in the 1960s and 70s. The Baby Boomer bar was raised to believe that public law—the sphere of law that governs the relationship between citizen and sovereign as provided for by the Constitution and relevant statutes[6]—was where

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[1] Russell Berman, *Hillary Clinton's Blunt View of Social Progress*, ATLANTIC (Aug. 22, 2015), https://www.theatlantic.com/politics/archive/2015/08/hillary-clintons-blunt-view-of-social-progress/402020/ [https://perma.cc/V4ME-R5MB]; Jessica Lussenhop, *Clinton Crime Bill: Why Is It So Controversial?*, BBC NEWS (Apr. 18, 2016), https://www.bbc.com/news/world-us-canada-36020717 [https://perma.cc/A8YL-QNZZ].

[2] Lussenhop, *supra* note 1; *see Watch: Full Video of Hillary Clinton's Meeting with Black Lives Matter Activists*, DEMOCRACY NOW! (Aug. 19, 2015), https://www.democracynow.org/2015/8/19/watch_full_video_of_hillary_clintons [https://perma.cc/PA8T-R6NC] [hereinafter *Clinton's Meeting*] (transcript).

[3] *Clinton's Meeting*, *supra* note 2.

[4] *See id.*

[5] *Id.*

[6] Randy E. Barnett provided a succinct definition of public law in his 1986 article:

> We might call laws that are meant to regulate the internal conduct of governmental authorities and that define their relationship or duties to private individuals 'public law.' In contrast, we may call laws that define the rights and duties that private individuals and groups owe *to each other* 'private law.'
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> . . . .
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> . . . Public law subjects would include constitutional law, criminal procedure, taxation, administrative law, and at least part of criminal law—each of which seeks to regulate the internal workings of government or the relationship between government and citizens. Private law subjects would include contract, torts, property, corporations, agency and partnership, trusts and estates, and remedies—subjects defining the enforceable duties that all individuals owe to one another.

Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267, 270–71 (1986).

Americans created civic virtue.[7] It was here, they learned, that the polity identified constitutional rights, declared egalitarian values, and diversified workplaces and social spaces.[8] Private law, the sphere governing the relationship between citizen and citizen as provided for by judge-made tort, contract, and property doctrines, was where individual wealth was distributed and transferred.[9] It was, as a result, seen as public law's pedestrian and complacent counterpart.

So, when Jones asked Clinton about her stance on eradicating anti-blackness, it is no surprise that she saw public law as the appropriate, indeed, the only, lever to produce the virtue he sought. But as Jones observed in 2015, and as a cascade of Americans are acknowledging today, public law has so far failed to produce deep reckoning or shared civic virtue on the issue of race.[10]

This Essay suggests that the time has come to revitalize private law—tort law, in particular—as an engine of national virtue. The groundswell of activism in the summer of 2020 lends itself to particularizing this argument to the virtue of racial justice, but it is equally applicable to gender justice, economic justice, and innumerable other areas where social fracture burdens human flourishing. Part I summarizes the intellectual history that has led legal academics to treat public law as the only legal intervention applicable

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[7] *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 1, 3–4 (1984) (tracing the "era of the public lawsuit" to *Brown v. Board of Education*, 347 U.S. 483 (1954), and explaining that many public law litigants have not personally experienced the breach of a legal duty owed to them, but instead "represent shared interests in enforcing lawful conduct by large institutions [and therefore] initiate legal action to redress legal wrongs that offend their moral or ideological sense of right").

[8] *Cf. id.* at 2 n.3.

[9] *See, e.g.*, Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HAST. L.J. 105, 112 (2008) (contending that the economists whose views were ascendant during this period, *see infra* notes 35–37, saw the goal of private law as "aggregate wealth maximization" rather than "the pursuit of social justice").

[10] The uneven success of public law is evident across a range of racially disparate public and private systems, including public education, policing, geographic segregation, and home ownership. *See, e.g.*, RICHARD ROTHSTEIN, *BROWN V. BOARD* AT 60: WHY HAVE WE BEEN SO DISAPPOINTED? WHAT HAVE WE LEARNED?, ECON. POL'Y INST. 1 (2014), https://files.epi.org/2014/EPI-Brown-v-Board-04-17-2014.pdf [https://perma.cc/9S5S-JJMF] (explaining that "*Brown* was unsuccessful in its purported mission—to undo the school segregation that persists as a central feature of American public education today"); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3192–93, 3207 (2014) (observing that although Congress passed a federal statute giving the Attorney General power to initiate structural reforms of local police departments in the wake of the Rodney King beating, the power has not been "effectively used"); Brian Patrick Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1618–19, 1618 n.4, 1640–47 (2007) (explaining that although Congress passed the Fair Housing Act to bring about "truly integrated and balanced living patterns" by, among other things, proscribing "many of the discriminatory practices that contribute to the contemporary perpetuation of segregated communities," distinct racial enclaves remain, thanks in part to judicial reluctance to treat realtor race-based "steering" as violations of the Act).

to social ills like racism. Part II surveys how disciplines outside law understand the component parts of racism and the most effective responses to them, including mechanisms that position Black people as storytellers and white people as listeners. It then demonstrates that tort litigation facilitates these processes and thus produces a distinct kind of virtue that is a crucial complement to the systemic reforms at the heart of public law. Part III shows these processes at work in the iconic battery case of *Fisher v. Carrousel Motor Hotel, Inc*.[11] Finally, the conclusion reminds us that Professor Marshall Shapo's entire body of work can be understood as a commitment to tort's virtue-production capacity.

I. A BRIEF HISTORY OF PUBLIC LAW EXCEPTIONALISM

Over the course of the nineteenth century, observers came to describe law as occupying two spheres: the "private" and the "public."[12] Private law was originally thought to identify and protect individual rights to own, to repel intrusions on ownership, and to exchange things owned, whereas public law empowered government limits on those rights.[13] The apotheosis of the private law era was the *Lochner* case,[14] in which the Supreme Court assumed that private parties were amply equipped to arrange their own social and economic relationships without government intervention.[15] Indeed, the *Lochner* Court conceptualized constitutional rights as a weapon *against* public efforts to equalize power imbalances.[16]

The reaction to *Lochner*, of course, contributed to the end of private law dominance. The Justices had inadvertently revealed that they were implicitly biased in favor of those who controlled the private marketplace.[17] This made clear to members of the rising intellectual school known as Legal Realism that ostensibly neutral common law rules were actually "a set of policy-driven results," often favoring the moneyed elite.[18]

As private law waned, public law increasingly captured the academic imagination. Throughout the twentieth century, the Supreme Court

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[11] 424 S.W.2d 627 (Tex. 1967).

[12] Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 885–86 (1991).

[13] *Id.* at 886.

[14] *See* Neal Devins, *The Interactive Constitution: An Essay on Clothing Emperors and Searching for Constitutional Truth*, 85 GEO. L.J. 691, 693–94 (1997) (reviewing LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF (1996)).

[15] Lochner v. New York, 198 U.S. 45, 57–58 (1905).

[16] *See* Devins, *supra* note 14, at 693.

[17] *See id.* at 693–94.

[18] William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 712–13 (1991).

positioned itself as a governmental forum receptive to identity-based social movements advocating race and gender parity.[19] Early in the century, the Court issued a number of opinions compelling profound changes in the substantive organization of American life.[20] Scholars initially responded to these groundbreaking and controversial pronouncements not by valorizing their substantive content, but by celebrating the infrastructure that produced them.[21] The so-called legal process approach suggested that the unique competency of public law "lay not in fundamental agreement about substantive principles, but instead in the open structures and procedures of government, the process by which we can govern ourselves notwithstanding disagreements."[22] On this theory, so long as an outcome resulted from the application of neutral interpretive principles, it was virtuous, regardless of how it affected lives on the ground.

However, when the Supreme Court declared segregated schools unconstitutional in *Brown v. Board of Education*,[23] those who adhered to the process approach observed that the decision did not—and arguably could not—satisfy their test of legitimacy. Writing in 1959, legal process scion Herbert Wechsler praised the *Brown* result, but damned the rationale that produced it.[24] He argued that because desegregation was not compelled by any neutral constitutional principle, the Court's action reflected a pure policy preference.[25] "Legal process . . . could never quite explain *Brown*, except as a case uniquely compelled by unusual circumstances,"[26] and that difficulty weakened academic loyalty to the process school. By the 1970s, progressive process scholars "found it impossible to remain true to legal process' purposivism without keeping one eye on substance."[27] A decade later, inspired by *Brown*, many came to think of constitutional litigation as "the social process by which judges give meaning to our public values."[28]

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[19] *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064–67 (2002).

[20] *See* Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2170–74 (1999) (citations omitted) (noting the popular narrative that the Supreme Court shifted in 1937 from a "free market" orientation and a "'war on the liberal welfare state'" to an embrace of "the constitutional legitimacy of the New Deal vision of activist government").

[21] Eskridge & Peller, *supra* note 18, at 709–10.

[22] *Id.* at 716 (emphasis omitted).

[23] 347 U.S. 483, 495 (1954).

[24] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959).

[25] *See id*. at 34.

[26] Eskridge & Peller, *supra* note 18, at 735.

[27] *Id.* at 724.

[28] *Id.* at 736 (citing Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979)).

Lawyers educated during this period were exposed to the belief that law was "responsible for doing something about the substantive ills of our society," via legislation and, more importantly, "by the enforcement of constitutional 'rights.'"[29] Put bluntly, by the 1960s, "the Warren Court [was], for [the] generation growing up in law school in that period . . . a heroic institution" because it actively advanced "civil rights and civil liberties."[30]

As public law was rising in the academic firmament, private law continued to shrink.[31] This downgrade was a product of both its jural structure and its doctrinal substance. The bipolar framework of private law litigation pitted two unsung parties against each other, neither of whom wielded the state power thought necessary for social change.[32] And even within tort—the one body of private law explicitly designed to identify and redress interpersonal wrongs—isolating an incident of wrongdoing between two people was not treated as a springboard for reform. If the defendant were ordered to remediate his wrong, that remedy would ordinarily be personalized to a single party's past losses, not expanded to prevent future injuries to similarly situated persons.[33] Consequently, next to public law's "tremendous ability . . . to sweep away power centers,"[34] private law seemed embarrassingly small.

Compounding tort's perceived structural irrelevance to the social justice project was the rise of scholarship contending that the primary substantive goal of tort doctrine was to optimally allocate wealth, rather than to facilitate systemic change.[35] For the latter half of the twentieth century,

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[29] Eskridge & Peller, *supra* note 18, at 748, 756.

[30] *Rethinking Rights After World War II*, COMMON LAW (Oct. 15, 2019), https://www.law.virginia.edu/commonlaw/show-notes-rethinking-rights-after-world-war-ii [https://perma.cc/SPY4-PXZH] (transcript of interview with legal historian G. Edward White).

[31] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1976).

[32] *See id.*

[33] *See id.*; *see also* Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 424 (1992) (observing that, in Aristotle's view of private law, the individual plaintiff and defendant are distinctively "link[ed]"). Notably, during the 1990s and early 2000s personal injury attorneys attempted to mimic the practice of the social impact litigation of the 1960s and 1970s by bringing class action tort lawsuits that sought money damages for mass torts. *See* Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL. L. REV. 493, 496–99 (2001). More recently, attorneys have been bringing so-called "social policy tort" class actions to achieve "changes in institutional policies and practices" among defendants such as cigarette companies and gun manufacturers. *See id*. at 499–501.

[34] Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 484 (2000).

[35] *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26–31 (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33–34, 75 (1972); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 6 (1960).

just as constitutional law was being drawn larger in scope, tort law was being reconceptualized to do a single job: "bring[] about an efficient allocation of resources to safety and care."[36] Tort, in other words, was being reduced to a quasi-regulatory instrument of market efficiency. By the end of the century, the law and economics version of tort was the "dominant tort theory" in U.S. law schools.[37]

Throughout this period a minority of corrective justice scholars consistently argued against a market-centered version of tort, but even they did not position it as a mechanism for influencing social systems.[38] They insisted that the purview of tort was to "hold[] people responsible . . . for their wrongdoing."[39] This philosophical account of tort was geared toward something called "justice," but it was an altogether smaller and less impactful kind of justice than the racial, gender, and economic equality pursued by public lawyers.

The gulf between the intellectual ambitions of public law and its private counterpart have, in some ways, hardened into a modern assumption that the public sphere of the law is "superior" to the private one.[40] Acolytes praise public law for demanding that "citizens rise above their merely private concerns to join in a public dialogue to define the common good," thus "mak[ing] the citizenry more virtuous by modifying existing individual preferences."[41] Indeed, public law has been called a "site for the production of a ruling ideology about the necessity for the existing arrangements in social life."[42] Private law, a forum for mere individuals seeking one-off, backward-looking remedies, has been dismissed as unequal to the virtue production task.[43]

II. SYSTEMS AND STRUCTURES AND HEARTS AND MINDS

The transcript of Julius Jones's conversation with Hillary Clinton shows two people talking past each other about how to produce racial virtue

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[36] William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 855 (1981).

[37] *See* Jules Coleman, Scott Hershovitz, & Gabriel Mendlow, *Theories of the Common Law of Torts*, STAN. ENCYCLOPEDIA PHIL. (Winter 2015 ed.), https://plato.stanford.edu/archives/win2015/entries/tort-theories/ [https://perma.cc/57SL-UAT2].

[38] *See id.*

[39] *See id.*

[40] Farber & Frickey, *supra* note 12, at 879.

[41] *Id.*

[42] Eskridge & Peller, *supra* note 18, at 775.

[43] *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1056–58 (2004) (explaining why Chayes disdained the power of private law relative to public law and critiquing the legitimacy of Chayes's conclusions).

in the United States. Jones repeatedly asked Clinton to self-reflect about her role in creating laws that have decimated the Black community and to consider how a white worldview has perpetuated anti-Black systems.[44] Clinton repeatedly voiced her faith that systems created by legislation and litigation could address racial inequities.[45] They seemed to lack a shared vocabulary to discuss government's role in changing hearts and minds. This Part suggests that the nexus between government action and personal reflection capable of bridging their divide may be found within private law.

A. The Duality of Racism, the Duality of Law

Social psychologists have identified an "interplay" of factors responsible for U.S. racism, which can be roughly grouped into the sociopolitical and the psychological.[46] Sociopolitical factors include macro- and micro-segregation, racialized social hierarchies, racialized power structures, and misrepresentations of racial minorities in U.S. media.[47] Psychological factors include the use of category thinking, group factions, and "most insidious[ly]," passivism, which takes the form of denial and apathy about racial inequality in the country.[48]

The parallels between racism's dual causes and law's dual spheres is unmistakable. Sociopolitical causes of racism are external to individuals; they reflect choices made by the polity about allocating public power, spending public money, and constructing public spaces. Psychological

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[44] Jones asked Clinton:

> [W]hat in your heart has changed that's going to change the direction in this country? Like, what in you—like, not your platform, not what you're supposed to say—like, how do you actually feel that's different than you did before? Like, what were the mistakes? And how can those mistakes that you made be lessons for all of America for a moment of reflection on how we treat black people in this country?

Clinton's Meeting, *supra* note 2. When Clinton encouraged him to provide her with a legislative agenda to address the problem, he called that approach "victim blaming" because it indicated that "what the Black Lives Matter movement . . . needs to do to change white hearts is to come up with a policy change." *Id.*

[45] Clinton replied:

> I think that there has to be a reckoning. I agree with that. But I also think there has to be some positive vision and plan that you can move people toward. Once you say, 'You know, this country has still not recovered from its original sin'—which is true—once you say that, then the next question, by people who are on the sidelines, which is the vast majority of Americans—the next question is: 'Well, so, what do you want me to do about it? What am I supposed to do about it?' That's what I'm trying to put together in a way that I can explain it and I can sell it, because in politics, if you can't explain it and you can't sell it, it stays on the shelf.

Id.

[46] Steven O. Roberts & Michael T. Rizzo, *The Psychology of American Racism*, AM. PSYCH., June 2020, at 2, http://dx.doi.org/10.1037/amp0000642 [https://perma.cc/5V4D-CP7U].

[47] *See id.* at 4–8.

[48] *Id.* at 2–4, 9.

causes are internal to individuals; they involve choices made privately about contextualizing information, experiencing intimacy, and expending energy. Obviously, the internal and the external are symbiotic; individuals who lack personal context, exposure, and experience with other races may be more likely to prefer or tolerate racist systems; and the persistence of racist systems perpetuates the likelihood that individuals will live siloed lives that reinforce their psychological prejudices. Public law has obvious competency to address sociopolitical factors and to intervene in favor of "equitable laws, policies, and institutions,"[49] but it has little competency to address psychological factors or to intervene in favor of the "equitable thoughts, feelings, and actions,"[50] without which systemic change is bound to fail.[51] Perhaps because of the modern tendency to equate tort with market regulation, the competency of personal injury law to conduct that intervention has not been seriously evaluated. The remainder of this Part does so, drawing on theories of democratic accountability that involve personal storytelling and compelled listening, and suggesting that jury service is the single political site where such exchanges take place.[52]

B. Listening as a Method of Democratic Accountability

Political scientists have suggested that mutual accountability among all members of a society "is a critical democratic practice."[53] At the same time, they have observed that white people are rarely held accountable for racism because they claim to be ignorant of it.[54] Researchers attribute this "ignorance" to a government and culture that have adopted a "white gaze"

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[49] *Id.* at 9–10.

[50] *Id.* at 9.

[51] For example, a number of white communities in Jefferson County, Alabama evaded a 1969 court order to desegregate by seceding from the county school district, and observing that they described their motivation race-neutrally as a quest for "local control," thereby "provid[ing] cover for their efforts to preserve the whiteness of their schools." Nikole Hannah-Jones, *The Resegregation of Jefferson County*, N.Y. TIMES MAG.(Sept. 6, 2017), https://www.nytimes.com/2017/09/06/magazine/the-resegregation-of-jefferson-county.html [https://perma.cc/97YD-63HF] (explaining how Hannah-Jones attributed the success of the tactic to the willingness of "[m]ost white Americans . . . to ignore stark segregation and racial disparity as long as it came wrapped in so-called colorblind policy." *Id.*

[52] Skepticism about tort's virtue-production capacity may be aggravated by critical legal theory scholarship identifying aspects of doctrine that perpetuate systemic inequities. Doctrine that denies nonphysical injuries, adopts limited definitions of "reasonableness," and uses income probabilities to calculate damages all tend to disadvantage women and people of color. *See, e.g.*, Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 578, 580, 586 (1993); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 464 (1998). My argument that civil adjudication of tort claims may disrupt white passivity should not be understood to underestimate the extent to which tort doctrine is itself a system in need of scrutiny and reform.

[53] *See* Vincent Jungkunz & Julie White, *Ignorance, Innocence, and Democratic Responsibility: Seeing Race, Hearing Racism*, 75 J. POL. 436, 436 (2013).

[54] *Id.* at 436, 438.

which "naturalize[s] and stabilize[s] racial ordering," for example, seeing "the black body in white space as threat, the white body in black space as threatened."[55] The reality of this ordering belies the ostensible promise of the Constitution to produce fairness and equality for all citizens. As one scholar has summarized, "[t]he high visibility of the structures of democracy masks totalitarian undercurrents and offers those who prefer not to see an alibi for their blindness. In the real[ity] of race relations this motivated blindness has produced what we may call a 'non-racist racism.'"[56]

Scholars working in this space have observed that moral accountability for social dynamics may remain dormant so long as moral agents are responding to their "vision" of the social world.[57] Seeing has been described as a passive act which leads the viewer to impart an unwarranted "givenness and stability" to what is seen.[58] One way to reorient white perspectives on the social world, they have suggested, is to shift away from potentially deceptive "seeing" and towards mediated storytelling.[59] This technique is effective because unlike observation—conducted autonomously and uncritically—storytelling can establish a collaboration between speaker and listener.[60] In this collaboration, speakers craft narratives that carry moral judgments about the world they inhabit.[61] Listeners, in turn, are alerted to "social relationships and relevant identities" that they may not have perceived without prompting.[62] The listener is thus made aware of blind spots that may have obscured her vision of the world and is compelled to encounter uncomfortable realities the storyteller chooses to highlight.[63]

Notably, the storytelling model of democratic accountability requires both facilitating minority narratives and compelling majority engagement with those narratives.[64] Unlike dialogue, a communicative mode that tends to treat minority narratives as "reason-giving" accounts subject to debate,[65] storytelling centers on the authenticity of the narrator's experience. Narrators "articulate[] the different worlds blacks see, and . . . put[] open to

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[55] *Id.* at 436–37.

[56] *Id.* at 441 (emphasis omitted) (quoting John Fiske, *Surveilling the City: Whiteness, the Black Man and Democratic Totalitarianism*, 15 THEORY, CULTURE & SOC'Y 67, 70 (1998)).

[57] Jungkunz & White, *supra* note 53, at 442.

[58] *See id.*

[59] *See id.* at 442–43.

[60] *See id.* at 443.

[61] *See id.* at 442.

[62] *Id.* at 442.

[63] *See id.* at 443.

[64] *See id.* at 445.

[65] *Id.* at 447.

contestation the objective and official visions produced by the white gaze."[66] This model is dependent upon what is known as "silent yielding" by white listeners.[67] "[S]ilent yielding is a temporary transition point in which a historically privileged speaker yields the floor in order to better understand fellow citizens and allow for the inclusion of previously excluded voices" to influence his understanding of the world.[68] While listeners are compelled to be silent, their listening is "active," and can be "transformative."[69]

Though storytelling and silent yielding are potent interventions against the psychological passivism and category thinking that contributes to racism, white Americans are rarely asked or required to participate in this mode of communication. Further, sociopolitical realities reduce the likelihood that they will informally encounter or seek out such opportunities. As one scholar has summarized, pervasive segregation "results in racialized pools of knowledge," meaning that "[w]hite people typically do not have access to . . . racialized conversations" about the experience of segregation and discrimination and "have fewer incentives to be race-conscious."[70] Government does little to counter this dynamic. Indeed, one democratic theorist has noted "the virtual absence of an explicit normative commitment to listening in the work in democratic theory."[71] Political institutions "foster the articulation of interests but . . . slight the difficult art of listening."[72]

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[66] *Id.*

[67] *Id.*

[68] *Id.* at 448.

[69] *Id.* at 449.

[70] Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1120–24 (2008). The extent of majority exposure to and engagement with such conversation is dynamic over time. For example, surveys indicate that as BLM demonstrators and other activists mounted sustained protests against police brutality and the pervasive presence of anti-blackness in the country in 2020, many white citizens have sought out and attempted to act on such information. *See, e.g.*, Kim Parker, Juliana Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RES. CTR. (June 12, 2020), https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/ [https://perma.cc/QB5G-3GCF] (finding that 69% of Americans had talked with friends or family about race in the month following the demonstrations, 37% had used social networking sites to engage with content concerning race or racial equality, and about 10% had contributed money to advance the cause of racial equality). Although this phenomenon appears to be gaining traction in the present moment, it remains impossible to know whether such momentum will rise or fall in the future.

[71] Jungkunz & White, *supra* note 53, at 437 n.2 (citing SUSAN BICKFORD, THE DISSONANCE OF DEMOCRACY: LISTENING, CONFLICT AND CITIZENSHIP (1996)).

[72] *Id.* at 447 (quoting BENJAMIN BARBER, STRONG DEMOCRACY 174–75 (2003)) (noting "[t]he liberal reduction of talk to speech").

C. The Jury as a Site of Compelled Listening

The one political institution in the United States explicitly designed to facilitate joint listening is the jury.[73] Jurors are "compelled to appear, listen, and perform" as the arbiters of interpersonal disputes.[74] The institutional practice of jury service is essentially one of government-mandated listening. Where the plaintiff is claiming a race-based injury, the government is directing majority jurors to "yield[] the floor" and hear a "previously excluded voice[]" discuss how racialized aggression or neglect has caused her personal harm.[75]

Jurors each bring to this practice highly personal schemas, or "individual knowledge structures that have been shaped by past experiences and that define how a person expects the world to operate."[76] In order to persuade jurors to render verdicts based on the specifics of the personal conflict involved in a given case rather than on their category-level understandings of the world at large, lawyers must challenge "not only the jurors' self-perceptions but also jurors' perceptions of society, culture, and institutions."[77] Doing so "create[s] space for chang[e] . . . and may provide the impetus for re-examining previously held beliefs."[78]

Understood in this fashion, the conduct of a personal injury trial maps perfectly onto the model of testimonial narrative and silent yielding that democratic theorists have identified as an effective mechanism for surfacing and stripping away white racial passivity.[79] This is especially true in cases where Black plaintiffs claim personal injuries arising from anti-Black and racist behaviors. Further, it stands in stark contrast to the way public law litigation typically unfolds.

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[73] *See* Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 32 (2010) (conceptualizing juries as "democratic decisionmakers," producing microcosmic views on disputed issues through "face-to-face interactions unmediated by political parties or electoral politics").

[74] Danielle R. Cover, *Of Courtrooms and Classrooms*, 27 B.U. PUB. INT. L.J. 291, 307–08 (2018).

[75] *See* Jungkunz & White, *supra* note 53, at 448. Within private law, tort's explicit concern with wrong identification and injury compensation and its delegation of social norm identification to the jury, positions it as the primary site for mediated storytelling about the personal harms that result from racial, gender, and economic inequalities. Property and contract, with their emphasis on clarifying claims to ownership and coordinating wealth transfers, do not have at their center a concern with interpersonal care or the duty to avoid injuring and are therefore less likely to call for the kind of storytelling that can produce racial awareness. This is not to say that aspects of property and contract doctrine have not influenced, or been influenced by, the realities of race inequality in the United States. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 20–23 (1948) (finding racially restrictive covenants that inhibited Black homeownership unenforceable).

[76] Cover, *supra* note 74, at 315.

[77] *Id.* at 311.

[78] *Id.* at 316.

[79] *See* Jungkunz & White, *supra* note 53, at 448–49.

Recall that public law litigation was originally lionized for its multiplicity of parties and capacity to produce broad remedies in response to the documented impact of flawed systems.[80] Those characteristics position it to address the sociopolitical components of racism but may simultaneously prevent it from addressing the psychological problems of passivism and category thinking. Take, for example, *City of Los Angeles v. Lyons*,[81] a case in which a twenty-four-year-old Black motorist was pulled over by Los Angeles Police Department (LAPD) officers and, despite his cooperation, placed in a chokehold that rendered him unconscious and damaged his larynx.[82] The plaintiff asked the court to issue a permanent injunction barring LAPD members from using the chokehold in the future.[83] He supported his request for injunctive relief with "affidavits, depositions, and government records" that showed that 75% of those who had died in department chokeholds over the past eight years were Black men.[84] Nevertheless, the district court granted the city's motion for partial judgment on the pleadings in the first instance, and the Supreme Court ultimately called the plaintiff's fear that he was likely to be stopped and choked in the future merely "speculat[ive]."[85] The citywide statistical record was apparently insufficient to persuade the white majority of the Court that Lyons and other Black men were routinely and predictably abused during traffic stops regardless of their compliance.

In contrast, jurors in private law tort cases involving racially inflected harms are asked to assemble in groups of twelve or fewer to listen at length to a precise and unfiltered narrative from the actual person who suffered harm. Tort is not designed to center on composite statistical presentations, but rather to center on one person's story of her own injury. Jurors are explicitly invited to condemn the behavior that produced the injury if it is incompatible with community values.[86] Consequently, political science

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[80] Indeed, the 1966 revision of Federal Rule of Civil Procedure 23 governing class action litigation was designed "to facilitate civil rights litigation," and was deployed to secure judicially imposed plans to "desegregate schools, reform prison conditions, and expand welfare rights." Hensler, *supra* note 33, at 499.

[81] 461 U.S. 95 (1983).

[82] *Id.* at 97–98; *id.* at 114–15 (Marshall, J., dissenting).

[83] *Id.* at 98.

[84] *Id.* at 115, 116 nn.3–4 (Marshall, J., dissenting).

[85] *Id.* at 98–99, 108.

[86] Notably, Lyons brought both public and private claims in his case. The first four counts of his complaint sought individual damages from the officers and the City. *Id.* at 98. Midway through the litigation, the parties agreed to sever Lyons's damages claim from his structural claim, and the fate of the former is unclear. *Id.* at n.6. Though his quest for structural reform of the LAPD foundered because his statistical presentation was impotent against jurists' motivated blindness, one can imagine that his quest

research suggests that tort litigation may intervene against the "built-in blindness[]"[87] to racism that can doom systemic reform in a way that public law cannot, and may be understood as an expression of community norms. In other words, the smallness that has been depicted as tort's Achilles heel may actually be its hidden strength.

III. SILENT YIELDING IN ACTION

The iconic Texas tort case of *Fisher v. Carrousel Motor Hotel*[88] illustrates the power of silent yielding to produce meaningful interpersonal change on the ground. The case was brought by a Black National Aeronautics and Space Administration (NASA) employee who was denied service at a professional luncheon in Houston.[89] As explained below, Fisher's case was tried to a local jury at a unique moment in the city's history. Houston civic leaders at the time were making sociopolitical changes to integrate public spaces, but Houston residents appeared psychologically resistant to that initiative. Consequently, the case functions as a test of tort's capacity to activate the private transformation of "thoughts, feelings, and actions"[90] that appears to be inextricable from the success of structural change.

Fisher's victory was counterintuitive for several reasons. As a matter of doctrine, Texas law did not seem to recognize what happened to him as a compensable wrong. In his complaint, Fisher claimed that the hotel manager assaulted him, but Texas precedent conditioned assault liability on a defendant's use of a "threatening gesture"[91] or words indicating an intent to batter the plaintiff, and the manager removed the plate from his grasp without making any violent gestures or verbal threats.[92] The Texas Supreme Court ultimately revived Fisher's award by restyling it as a battery, but in doing so, it cited to no Texas Supreme Court case construing the "contact" element of

for individual vindication may have flourished because his compelling personal narrative of a gratuitous traffic stop, a demeaning and violent physical assault, and a casual dismissal at the close of the encounter penetrated juror consciousness.

87 *See* Jungkunz & White, *supra* note 53, at 436–37.

88 424 S.W.2d 627 (Tex. 1967).

89 *Id.* at 628–29.

90 Roberts & Rizzo, *supra* note 46, at 2. Of course, silent yielding does not flourish or produce anti-racist results in every tort cause of action, and untransformed juror bias can actually produce racist verdicts. *See, e.g.*, Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CALIF. L. REV. 507, 507 (2020) (suggesting that juror implicit bias can influence the assignment of responsibility and the size of plaintiff damage awards). *Fisher* is an example of tort adjudication at its best.

91 Texas Bus Lines v. Anderson, 233 S.W.2d 961, 964 (Tex. App. 1950).

92 *Fisher*, 424 S.W.2d at 628–29; *see also* text accompanying notes 97–103 (providing an overview of the altercation described).

that tort broadly enough to be satisfied by the touching of an item in the plaintiff's hand.[93] So his victory at trial, and eventual victory in the state high court, were by no means foreordained. What follows is exercise in "legal archaeology," a kind of legal history that attempts to "study . . . an individual case by reconstructing its historical, economic, and social context."[94] This kind of study relies on evidence "outside the law library"[95] to "recover alternative, 'unofficial' accounts of the dispute."[96]

A. The Injury

In November of 1963, two Houston technology companies invited a Black NASA mathematician, Emmit Fisher, to attend a professional conference where they were promoting equipment they hoped NASA might purchase.[97] Midway through the conference, held at the local Carrousel Motor Hotel, the thirty attendees broke for a buffet luncheon in the hotel restaurant, the Brass Ring Club.[98] When Fisher took a plate and joined the

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[93] *Id.* at 629. The Texas Supreme Court upheld the jury award and redefined the manager's conduct as a battery, observing that "[p]ersonal indignity is the essence of an action for battery." *Id.* at 630. But it conspicuously failed to cite any of its own cases for the proposition that "contact" should be construed so flexibly. Instead, it cited WILLIAM PROSSER, LAW OF TORTS 32 (3d ed. 1964), a 1941 Mississippi Supreme Court case, and a 1932 Texas appellate court case. *Id.* at 629. This judicial activism on Fisher's behalf is one of the remarkable things about the case. *See* Lisa R. Pruitt, *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), Draft Commentary, *in* FEMINIST JUDGMENTS: TORTS OPINIONS REWRITTEN (Feb. 5, 2020 draft) (manuscript at 3) (on file with author) ("Though I have taught *Fisher* for two decades, I remain surprised that the Texas Supreme Court in 1967 found a way to support the claim of an African-American man, even when doing so required stretching existing law to carve out a new doctrinal space for his claim."). The Texas court may have slotted the manager's behavior as battery in part to avoid invoking the tort that was arguably the best description of the interaction: intentional infliction of emotional distress (IIED). The justices noted that they had refused to recognize that "new tort" in 1953 and that they could compensate Fisher without reversing course on IIED by recasting the interaction as a battery. *See Fisher*, 424 S.W.2d at 630. Texas did not recognize the IIED tort until 1993, in *Twyman v. Twyman*. 855 S.W.2d 619, 620 (Tex. 1993). Notably, IIED, also known as outrage, has been disdained by many judges and scholars for being unduly "subjective." *See* Cristina Carmody Tilley, *The Tort of Outrage and Some Objectivity About Subjectivity*, 12 J. TORT L. 283, 284 (2019). On examination, outrage skepticism seems to be animated by the possibility that women and people of color will claim injuries arising from social dynamics favorable to—and ostensibly unrecognized by—members of dominant communities. *See id.* at 328–30. In such cases, jurors are asked to affirm the realness of either the plaintiff's or the defendant's life. *See id.* This is why IIED cases are arguably the most fitting forum for the kind of "mediated storytelling" contemplated herein to address "motivated blindness." *See supra* Part II.B. It may also be why it is considered disfavored in some sectors of the legal establishment. Tilley, *supra*, at 284.

[94] Debora L. Threedy, *Legal Archaeology: Excavating Cases, Reconstructing Context*, 80 TUL. L. REV. 1197, 1197–98 (2006).

[95] *Id.* at 1198 (quoting A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 12 (1995)).

[96] *Id.* at 1197.

[97] *Fisher*, 424 S.W.2d at 628; Plaintiff's First Amended Original Petition at 1, Fisher v. Carrousel Motor Hotel, Harris County Dist. Ct. No. 635699 (filed Sep. 11, 1964); *Negro Wins $900 Award from Court*, HOUS. POST (on file with author).

[98] *Fisher*, 424 S.W.2d at 628.

line, the club manager immediately approached him, "snatched the plate from [his] hand and shouted that he, a Negro, could not be served."[99] Although Fisher's corporate hosts interceded on his behalf, the manager stood fast and Fisher returned to the afternoon session of the conference without having eaten.[100] Fisher sued the manager and the hotel for assault.[101] But when he was asked whether he was "forced" to leave the club by being "take[n] by the arm and le[d] out or push[ed] . . . out," Fisher explained: "bodily, no, he didn't push me out . . . [h]e didn't grab me and throw me out."[102] Despite the lack of physical contact or threats of contact, Fisher testified that "he was highly embarrassed and hurt by [the manager's] conduct in the presence of his associates."[103]

B. The Public City

The significance of *Fisher* as a test of tort's virtue-production capacity fully emerges when the case is placed in historical context. Houston was founded in 1837 with the explicit goal of creating a transportation hub that would serve as a "commercial emporium [for] all Texas."[104] A century later, Houston was known locally as a "bustling oil town" but had no national profile.[105] So when NASA decided in 1961 to build its Manned Spacecraft Center in Houston, and President John F. Kennedy gave a speech there, it effectively "put [the city] on the map."[106] With NASA's arrival, Houston "shed its roughneck image" and "raised [its] international profile among the movers and shakers of the world."[107]

NASA's elevation of Houston's economic and cultural position in the country coincided with the intensification of civil rights activism in the city. Although Houston was "home of the South's largest black community,"

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[99] *Id.* at 628–29.

[100] *Negro Wins $900 Award from Court*, *supra* note 97.

[101] *Fisher*, 424 S.W.2d at 628.

[102] Trial Transcript at 14, Fisher v. Carrousel Motor Hotel, Harris County Dist. Ct. No. 635699 (June 14, 1966).

[103] *Fisher*, 424 S.W.2d at 629.

[104] Betty Trapp Chapman, *A System of Government Where Business Ruled*, 8 HOUS. HIST. 30, 30 (2010).

[105] Roy S. Estess, Opinion, *From JSC: Here's to 40 More Years, Houston*, HOUS. CHRON. (Oct. 24, 2001, 5:30 AM), https://www.chron.com/opinion/outlook/article/From-JSC-Here-s-to-40-more-years-Houston-2052220.php [https://perma.cc/WM7H-985J].

[106] Alex Stuckey, *Mission Moon: How 50 Years of Space Exploration Defined Houston,* HOUS. CHRON., July 21, 2019, at A9.

[107] Jeannie Kever, *The NASA Impact: Forty Years Ago the National Aeronautics and Space Administration Was Born, and Houston Hasn't Been the Same Since*, HOUS. CHRON., Oct. 25, 1998, at 6.

white Houston had strictly enforced racial separation for nearly a century.[108] The announcement of *Brown* in 1954 did little to immediately change daily life in Houston. Indeed, the leaders of the city school district hoped to maintain a "separate but equal" system "well into the 1960s despite *Brown*."[109]

In the face of city resistance to *Brown*'s directive and message, Black students at segregated Texas Southern University launched Houston's sit-in movement in March 1960.[110] As the students applied public pressure, older "black leaders had quietly begun closed-door meetings with the white establishment, which feared that civil strife would be bad for the city's image."[111] By September of 1960, seventy Houston lunch counters had been desegregated.[112] Still, business leaders would not integrate movie theaters and restaurants, and student protests continued.[113] In 1962, city hotels were desegregated.[114] The movement culminated in May 1963 when students threatened to disrupt a parade celebrating the NASA Mercury space mission.[115] Fearing that the city's reputation as a booming, modern metropolis would be tarnished on national television, city leaders agreed to desegregate those institutions as well.[116]

C. The Private City

While these initiatives dismantled some of Houston's public signifiers of race inequality, they did little to change Houstonians' private approach to race inequality. A well-established network of private social clubs meant that white Houstonians could continue socializing and networking in segregated spaces. As explained by Mary Beth Rogers:

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[108] Zan Dubin, *Chronicling the Quiet Desegregation of Houston*, L.A. TIMES (Feb. 11, 1998, 12:00 AM), https://www.latimes.com/archives/la-xpm-1998-feb-11-ca-17755-story.html [https://perma.cc/MPX8-NJJW]. In 1876, the Texas constitution created a segregated public school system, and the state legislature segregated intrastate rail travel in 1891. TYINA L. STEPTOE, HOUSTON BOUND: CULTURE AND COLOR IN A JIM CROW CITY 29–30 (2016). City ordinances adopted in the early 1900s "prohibited integration in every space where black and white people made contact . . . . [In 1907,] the city council segregated theaters, hotels, restaurants, and public facilities." *Id.*

[109] Andrew Joseph Pegoda, *The University of Houston and Texas Southern University: Perpetuating "Separate But Equal" in the Face of* Brown v. Board of Education, 8 HOUS. HIST. 19, 19 (2010).

[110] Dubin, *supra* note 108.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] THOMAS R. COLE, NO COLOR IS MY KIND: THE LIFE OF ELDREWEY STEARNS AND THE INTEGRATION OF HOUSTON 78–79 (1997).

[115] Dubin, *supra* note 108.

[116] *See id.*

> No prominent business leader in Houston wanted to let anything happen to disrupt the economic boom. So if Houston's black people wanted to eat at a dime-store lunch counter downtown, let them! The integration of a few restaurants or public facilities did not matter to the city's white leaders, since most of their important business and social affairs took place in private, segregated . . . clubs—the Ramada Club, the Houston Club, and the River Oaks Country Club.[117]

The site of Fisher's conference, the Carrousel Motor Hotel, was a physical embodiment of this tension between Houston's public, sociopolitical gestures towards diversity and its private, psychological preference for homogeneity. The Carrousel board of directors had acquiesced to the new citywide policy of integration, but established a private dining club whose bylaws prohibited integrated service within the public hotel.[118] This Brass Ring Club had "separate and distinct ownership" from the hotel, and its own board of directors.[119] However, the same individual served as vice president of the hotel and president of the club.[120] Further, the club had no paid employees; instead, the hotel "furnish[ed] the labor and the service, the waiters, and they furnish[ed] the food."[121] In other words, the Brass Ring appears to have been a "club" in name only. The sole purpose of operating the "private" Brass Ring within the "public" Carrousel was seemingly to legitimize the exclusion of Black diners like Fisher.

D. The Jury

Although trial records contain no personal information about the jurors empaneled to hear Fisher's case, educated guesswork suggests it was largely, if not entirely, white. At that time, Black people constituted just 20% of the Harris County population, and thus just one-fifth of the venire from which

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[117] MARY BETH ROGERS, BARBARA JORDAN: AMERICAN HERO 94 (1998). The commercial sector's voluntary desegregation of select venues was reinforced less than a year later by Title II of the Civil Rights Act of 1964, which compelled the integration of public accommodations throughout the country. 42 U.S.C. § 2000(a)–(b) (2018) (signed into law on July 2, 1964).

[118] Trial Transcript at 32, Fisher v. Carrousel Motor Hotel, Harris County Dist. Ct. No. 635699 (June 14, 1966).

[119] *Id.* at 33.

[120] *Id.* at 30.

[121] *Id.* at 34. A selective membership process, limited number of admitted members, and material entry fee have been identified by courts interpreting the "private club" exception to the Civil Rights Act as indicia of bona fide membership clubs not governed by the Act. Institutions that claim club status but lack these characteristics have been denominated "sham" clubs. *See* Margaret E. Koppen, *The Private Club Exemption from Civil Rights Legislation—Sanctioned Discrimination or Justified Protection of Right to Associate?*, 20 PEPP. L. REV. 643, 654–64 (1993).

the jury commissioner could draw candidates for service.[122] Consequently, assuming that the jury seated in Fisher's case was perfectly representative of the local community, it is likely that at least nine of its members were white. And it is reasonable to assume that the jury seated was *not* perfectly representative of that community, as court administrators and attorneys had for years (both purposefully and inadvertently) adopted practices that reduced the number of minorities in the at-large jury pool and in actual seated juries.[123]

In short, the jury was drawn from a community that had intentionally and stubbornly refused to integrate schools despite an emphatic public law directive to do so. This same community appeared to go along with integration of low-status venues such as lunch counters and movie theaters only because they could take refuge from diversity in established white-only social and business clubs. And they created sham clubs like the Brass Ring for the express purpose of maintaining a racial divide in spaces where no such bona fide private institution existed. Put simply, the pervasive segregation in 1966 Houston makes it unlikely that white jurors went into Fisher's trial primed to vindicate a claim that his public right to equality had been undone by private bias.

E. The Silent Yielding

Given the reality of White Houston in 1966, one suspects that the jurors who convened to hear Emmit Fisher's case brought with them knowledge structures that had "naturalize[d] . . . racial ordering" and produced the kind of "non-racist racism" that eludes moral accountability.[124] Nevertheless, at the end of the trial, they awarded Fisher $400 in compensatory damages and $500 in punitive damages.[125] What explains this counterintuitive result?

It seems that the trial may have produced some measure of psychological transformation among the jurors. It did so by replicating, in a

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[122] U.S. BUREAU OF THE CENSUS, U.S. CENSUSES OF POPULATION AND HOUSING: 1960, 15 (1960), https://www2.census.gov/library/publications/decennial/1960/population-and-housing-phc-1/41953654v4ch4.pdf [https://perma.cc/G27T-YGLP].

[123] Although the Civil Rights Act of 1875 prohibited race-based exclusion from jury service, and the 1880 Supreme Court case *Strauder v. West Virginia* invalidated a state law keeping Black people off of juries, states adopted evasive measures to discourage diverse juries. 100 U.S. 303, 305 (1880); *see, e.g.*, EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 9–10 (2010). And even when the juror pool was diverse, it remained common practice for attorneys in the South to use selection tactics that excluded Black people. The Supreme Court was asked to repudiate these tactics in 1965 but did not fully do so until 1986. *See id.* at 12 (citing Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986)).

[124] Jungkunz & White, *supra* note 53, at 436, 441 (internal quotation marks omitted); *Negro Wins $900 Award from Court*, *supra* note 97.

[125] *Negro Wins $900 Award from Court*, *supra* note 97.

state-sponsored forum, precisely the dynamic that political scientists Vincent Jungkunz and Julie White have advocated to confront white apathy and denial.[126]

Emmit Fisher was a paradigmatic storyteller. He testified at length and from a distinct moral vantage point about his experience at the Brass Ring, telling the jury that "[he] was highly embarrassed [when] [e]verybody focused their attention right on [him] and they started mumbling."[127] When the meeting host apologetically told Fisher that the club was not going to bend its policy, Fisher accepted his apology and said: "I will not cause your company any further embarrassment."[128] Fisher then testified:

> I left the Brass Ring Club. I went back to the room where the meeting was, and I waited about forty-five minutes until the rest of them came back . . . I didn't eat at all that day . . . . I can't say that I was too hungry after that. I didn't desire food.[129]

The jurors' political obligation on the day of the trial was to listen to Fisher. They were prohibited from posing questions, contesting his account, or making speeches, as white Americans are often given to doing in other political contexts.[130] Instead, they were confined to the jury box, and for an entire day were compelled to train their attention on a Black-centered account of the world, not transmitted via categorical summaries or statistics, but narrated by Emmit Fisher himself. They spent additional time in the jury room, reflecting on Fisher's story. At the close of this process, they accepted the realness of his wound at the hands of White Houston. They then exercised moral accountability by issuing a verdict meant to make him whole and punish the club manager.[131] One might say that the trial changed their hearts.

CONCLUSION

Modern public lawyers seem to doubt that a body of law devoted to resolving one-on-one disputes about yesterday's fractures can power social change. Professor Marshall Shapo has never been plagued by this doubt. While he has lauded public law for taking on the campaign against "misuses

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[126] *See supra* notes 54–69 and accompanying text.

[127] Trial Transcript at 7, Fisher v. Carrousel Motor Hotel, Harris County Dist. Ct. No. 635699 (June 14, 1966).

[128] *Id.* at 9.

[129] *Id.* at 9–10.

[130] *See supra* notes 71–72.

[131] *See* Judgment, Fisher v. Carrousel Motor Hotel, Harris County Dist. Ct. No. 635699 (June 14, 1966). The Texas Supreme Court upheld the jury award and redefined the manager's conduct as a battery, observing that "[p]ersonal indignity is the essence of an action for battery." Fisher v. Carrousel Motor Hotel, 424 S.W.2d 627, 629–31 (Tex. 1967).

of power," he has quietly insisted over the course of decades that tort remains an indispensable response to "egregious examples of bias" like *Fisher*.[132] He has been alive to the potential of tort because he has never seen it as the law of market efficiency or the law of moral philosophy, but rather as the law of "social cohesion."[133] Out of complacency, it brings us awareness; out of categories, it brings us people. Out of a conversation about the care owed between two human beings, tort brings us civic virtue.

[132] Marshall S. Shapo, *Millennial Torts*, 33 GA. L. REV. 1021, 1036 (1999).

[133] Marshall S. Shapo, *A Social Contract Tort*, 75 TEX. L. REV. 1835, 1844 (1997).