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LEGAL PERSONAL IDENTITY

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Abstract

From contract to tort, private law presupposes a conception of "legal personal identity"—an account of what makes individual legal persons "themselves," and "the same" across time, relied on in allocating legal positions, rights, duties, and powers. Scholars have noted the relationship between private law and personal identity before—but have largely presumed that the law straightforwardly reidentifies natural legal persons by the continuity of their bodies.

This Article challenges the reflexive identification of natural persons with their bodies in private law and offers an alternative—I argue that the law implicitly relies on something like the "narrative theory" of personal identity, described in the philosophical literature, which takes persons to be constituted by "self-narratives." On this view, the identities of persons are comprised of evolving psychological facts linked to one another in the structure of the story of a life—a view that at once recognizes that the psychological facts that comprise individuals' personal identities at any given moment change, but that changes without narrative structure disrupt legal personal identity.

Unlike a bodily theory, this account can explain the full range of harms that tort seeks to remedy and how it does so, makes sense of the way in which the law tethers the duties of agents to psychological characteristics and decision-making values of their principals, and the role legal personal identity plays in contract and property; shedding light on the broader normative and conceptual structure of private law.

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INTRODUCTION

Suppose that since entering a long-term contract, you've undergone a religious conversion and feel yourself to be a "new person"—is that "new person" bound by your "old self's" contracts?[1] Or perhaps the course of your life has been wrongfully disrupted by tort, and the law aspires to restore your "pre-tort self"—what does that mean?[2] Answering these sorts of questions requires the law to have some sense of "who" you are, and whether "you" are "the same" now as at some other time; a theory of "*legal personal identity*."[3] And even while theories of legal person*hood*—that is, what makes some particular entity *a* legal person—have been thrust into the spotlight with debates about artificial intelligence, fetuses, and animals, the law's concept of personal identity has attracted far less attention.[4]

Philosophers traditionally distinguish two senses of the "identity" of entities—"synchronic" identity, the question of what makes something unified and discrete at a given moment, and "diachronic" identity, the question of what makes it "the same" across time.[5] Legal theorists have previously observed that private law presupposes and relies on some

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[1] *See, e.g.*, LANDSTAR INVESTMENTS II, INC. V. SPEARS, 257 S.W. 3d 630, 632 (Mo. Ct. App. S.D. 2008) ("[I]t has long been a tenet of basic contract law that 'a contract generally binds no one but the parties thereto, and it cannot impose any contractual obligation or liability on one not a party to it.' (quoting CONTINENTAL CAS. CO. V. CAMPBELL DESIGN GROUP, INC., 914 S.W. 43, 44 (Mo. App. 1996)); 17B C.J.S. Contracts § 862 ("An individual cannot be liable for a breach of a contract to which he or she is not a party.").

[2] *See, e.g.*, Restatement (Second) of Torts § 901 cmt. a. ("[T]he law of torts attempts primarily to put an injured person as nearly as possible equivalent to his position prior to the tort."); *see also* Erik Encarnacion, *An Ideal of Resilience and the Law of Torts*, 73 DEPAUL L. REV. 395, 409 (2024) (describing that tort law "holds that plaintiffs ought to be placed in a position they would have occupied but for the wrongdoing").

[3] *See, e.g.*, Christina Starmans, *Identity Crisis*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF PERSONAL IDENTITY AND THE SELF 37, 38 (2022) ("Our justice system cares about *which individual*, not simply the characteristics of that individual."); *see also* James Toomey, *Narrative Capacity*, 100 N.C. L. REV. 1073, 1078 (2022) ("[T]he philosophy of *personal identity* tells us what makes us the *same* person across time").

[4] *See, e.g.*, VISA KURKI, A THEORY OF LEGAL PERSONHOOD 1–2 (2019) (summarizing contemporary debates about legal personhood and outlining a novel theory); NGAIRE NAFFINE, LAW'S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON 1 (2009) (same); *see also generally* CHRISTOPHER ESSERT, EVA MICHELER & PAUL B. MILLER, EDS., LEGAL PERSONHOOD IN PRIVATE LAW (forthcoming 2027) (outlining contemporary debates on legal personhood in private law).

[5] *See, e.g.*, Tomasz Bigaj, *Synchronic and diachronic identity for elementary particles*, 10 EUROPEAN J. PHIL. SCI. 32, 32–33 (2020) (distinguishing synchronic and diachronic identity of fundamental particles); Nils-Frederic Wagner & Georg Northoff, *Habits: bridging the gap between personhood and personal identity*, 8 FRONT. HUM. NEUROSCI. (2014) (same in the context of personal identity). For more on this distinction, and its relevance in the context of *personal* identity, see *infra* Part I.

conception of the "identity" of natural persons—but they have focused on the question of diachronic identity; of determining whether this person, now, is the same person as agreed to this contract, then; whether this person claiming to be owner is the same person who bought it.[6] And these scholars have largely thought the law's views on the matter to be straightforward—suggesting that the legal system automatically identifies an individual in the "same" biological human body as the same natural legal person.[7]

This Article challenges the straightforward identification of natural persons with their bodies in private law. For starters, private law as a whole presumes some conception according to which to *characterize* persons at particular moments in time—it needs a theory of their *synchronic* identity.[8] And while biological continuity might work as a proxy for the law's conception of diachronic identity, it could not do the work the law needs from a theory of synchronic identity—in agency and tort in particular the law necessarily takes persons, at particular moments, as complexes comprised (at least in part) of psychological characteristics.[9] And while, in principle, it could be that law relies on different theories of "identity" in different domains, and different theories of the synchronic and diachronic identity, there is little evidence that it *does*—and good reason to believe that the law's apparent diachronic identification of individuals by virtue of their bodies is a presumption rather than a committed normative position.[10]

Indeed, the better explanation of private law's concept of personal identity is that it relies on something along the lines of the "*narrative*" theory of personal identity described in the philosophical literature—the view that what makes persons themselves, and the same across time, is the continuous psychological construction of a self-narrative.[11] On the one hand, this view

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[6] *See, e.g.*, Kevin Tobia, *Personal Identity and the Phineas Gage Effect*, 75 ANALYSIS 396, 403 (2015) (noting the need of a conception of personal identity to reidentify owners and contracting parties); Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 82–83 (2014) (noting that contract law presupposes the continuity of personal identity and collecting sources); Christina Starmans & Paul Bloom, *Nothing Personal: What Psychologists Get Wrong About Identity*, 22 TRENDS IN COG. SCI. 566, 567 (2018) (same).

[7] *See infra* Part I.A, *see also, e.g.*, Mihailis E. Diamantis, *Corporate Identity*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF IDENTITY AND THE SELF 202, 203 (2022) ("Most practitioners implicitly assume that biological continuity is a serviceable proxy for any question the law may ask in regard to personal identity."); Kevin Tobia, *Introduction*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF IDENTITY AND THE SELF 1, 9 (2022) ("Numerical identity underpins contractual obligation, ownership of property, criminal responsibility, and many other intertemporal relations.").

[8] *See infra* Part II.B.

[9] *See infra* Part II.B.

[10] *See infra* Part II.C.

[11] *See infra* Part III.B. For the canonical text on the "narrative" theory of personal identity, *see generally* MARYA SCHECHTMAN, THE CONSTITUTION OF SELVES (1996).

admits the possibility that persons can undergo a great deal of psychological change over time while remaining "the same person" in the meaningful sense.[12] At the same time, the view takes changes that disrupt the *narrative structure* constitutive of persons as disruptive of identity in whole or in part—consistent with the possibility that certain kinds of psychological disruptions can sever or disrupt legal personal identity.[13] And unlike alternatives that situate conceptions of personal identity in bare psychological or bodily continuity, the narrative theory focuses attention on the *kinds* of psychological characteristics that the law looks to in characterizing persons synchronically, while plausibly sustaining the normative weight the law demands of the concept.[14]

Of course, private law nowhere says it is incorporating the "narrative theory of personal identity," nor any of its philosophic competitors.[15] But if you are looking for an overt explication of the law's theory of the identity of natural persons in legal materials, you'll be looking a long time.[16] My suggestion is that, rather, the law has functionally imported something like the narrative theory of personal identity by relying on the ordinary intuitions of judges and juries on what makes persons "themselves" and "the same" across time for purposes of allocating a wide, characteristic range of normative entailments—plausible because what the "narrative theory of personal identity" is a theory of are those very ordinary intuitions.[17]

Finally, the account offered here is of the law's understanding of the identities of *natural* persons in *private law*. This way of thinking about the inquiry sets aside at least two other important questions of legal personal identity—of the identities of *artificial* legal persons (corporations), and for purposes of *public* law (most prominently criminal law).[18] Because the metaphysics of corporations are so different than natural persons, and the normative purposes of criminal law so different from private law, there is no *a priori* reason to expect that the law conceptualizes personal identity in the

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[12] *See infra* Part III.B.

[13] *See infra* notes 109–121 & accompanying text.

[14] *See infra* Part III.B; *see also* Joshua Knobe, *Personal Identity and Dual Character Concepts*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF IDENTITY AND THE SELF 49, 57 (2022) ("If a person is me, that person has to keep my promises, teach my courses, and raise my children. And, similarly, if a person is me, that person should be cared for by my friends, should be punished for my misdeeds, and so forth.").

[15] *See infra* Part III.A.

[16] *See infra* Part II.

[17] *See infra* Part III.A.

[18] *See, e.g.*, Diamantis, *supra* note 7, at 203 (distinguishing the law's theories of the identity of natural and artificial persons, and nothing that "[l]awmakers recognized corporate personhood in large part to address the massive harms corporations can cause"); Konstantin Tretyakov, *Corporate Identity and Group Dignity*, 8 WASH. U. JUR. REV. 171, 171 (2016) (offering an account of the legal personal identity of corporate legal persons).

same way in these different contexts.[19]

The exploration proceeds in four Parts. Part I discusses the parameters of the inquiry—outlining the kinds of theory we are looking for, and the terms on which it might succeed or fail. As we'll see, the theory offered here is not an account of the "logical relation of identity" applied to legal persons. Rather, this Article offers a theory of the concept the law uses to allocate the package of legal consequences that travel with "who" a legal person is. Moreover, the Part discusses the relation of the concept I'm calling "personal identity," and the far-more-discussed concept of legal "personhood."

In Part II, I discuss the role that the concept of personal identity plays in private law, focusing on the paradigmatic doctrines of tort, agency, contract, and property. Scholars have noticed that contract and property law must have some mechanism for reidentifying legal persons over time, but have largely assumed that this occurs by virtue of their bodies. Agency and tort law, however, presuppose a method for *characterizing* legal persons at particular times, for which a bodily criterion would not do the work the law needs; and, in the end, the better explanation for bodily reidentification understands it as a presumption rather than a normative commitment.

Part III theorizes private law's conception of the legal identities of natural persons. While it could be that the law relies on different conceptions of personal identity in different contexts, there is no reason to believe that is, in fact, what is going on. Rather, something like the narrative theory of personal identity, a prominent philosophical account of personal identity, best captures the way in which the concept is operationalized in private law.

And finally, Part IV discusses what the perspective reveals about the normative structure, and limitations, of our private law; both in terms of its potential to explain otherwise puzzling aspects of doctrine and its normative organization more generally.

I. IDENTITY AND IDENTITIES

As we'll see, private law doctrines (at least contract, property, tort, and agency) allocate certain legal positions, rights, powers, duties, and liabilities based on "who" a particular legal person "is," and whether a particular legal person, now, is "the same" as that one, then.[20] For instance, at a high level, whether this particular person owns Blackacre depends on "who" they "are" ("'the same' person that came into it ten years ago?"); an agent's duties depend on "who" their principal "is" ("what would '*Phineas*' want me to do?")[21] This is our topic and the starting point of our inquiry. We are looking

[19] *See infra* Part III.A.
[20] *See infra* Part II.
[21] *See infra* Part II.

for a theory of *this concept*—the one by which the law allocates legal consequences based on "who" a particular legal person "is" and whether they are "the same" now as then.[22]

This language ("who," "is," "the same," and so on) is the language of *identity*—the concept having to do with "who" or "what" some entity "is," and what makes that entity "the same" or "different" across time.[23] For this reason, call the set of legal positions, rights, powers, duties, and liabilities thought to depend on "who" a "particular" legal person "is" *identity-dependent legal consequences*.[24] Call the concept by which the law attributes identity-dependent legal consequences *legal personal identity*.[25] Legal personal identity is, from this perspective, the legal cognate of the concept of "personal identity" in ordinary and moral discourse—the source of a vast literature because morality, much like law, is generally thought to allocate normative consequences by virtue of "who" individuals are and what makes them "the same" across time.[26]

In that literature, the question of "personal identity" is sometimes thought to necessarily be a species of something called the "logical relation of identity"—generally (if circularly) defined as "the relation everything has to itself and to nothing else."[27] This concept is thought to have several entailments that some theorists insist constrain theories of "personal identity" (at least those properly so called)—most characteristically transitivity (if *a* is "identical" to *b*, and *b* is "identical" to *c*, *a* must be "identical" to *c*) and binariness (*a* is either "identical" to *b* or it isn't; "identity" must not admit of degrees).[28] Of course, theorists in this vein have to concede that we use the

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[22] *See, e.g.*, SCHECHTMAN, *supra* note 11, at 1 ("Facts about personal identity stand at the core of our ordinary practice and lay the foundations for our day-to-day interactions.").

[23] *See, e.g.*, Harold W. Noonan, *Identity eliminated*, 67 ANALYSIS 122, 123 (2007) (describing language of "sameness" and "identity" as the language of identity, related to questions about what an entity "is"); DAVID LEWIS, ON THE PLURALITY OF WORLDS 192–93 (1986) (same).

[24] *See infra* Part II.

[25] *See infra* Part III.

[26] *See generally, e.g.*, JOHN PERRY, ED., PERSONAL IDENTITY (2d ed. 2008); HAROLD NOONAN, ED., PERSONAL IDENTITY (1993); DEREK PARFIT, REASONS AND PERSONS (1984); KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF IDENTITY AND THE SELF (2022).

[27] *See generally, e.g.*, ANDRÉ GALLOIS, THE METAPHYSICS OF IDENTITY (2016) (discussing philosophical debates about identity in a wide range of contexts); *see also* Harold Noonan & Ben Curtis, *Identity*, in EDWARD N. ZALTA & URI NODELMAN, EDS., STAN. ENCYC. PHIL. (2022) (offering this standard definition of the logical relation of identity).

[28] *See, e.g.*, Noonan & Curtis, *supra* note 27 (discussing these characteristic general entailments of the logical relation of identity); Joseph Butler, *Of Personal Identity*, in JOHN PERRY, ED., PERSONAL IDENTITY 99, 100 (2d ed. 2008) (distinguishing a "strict philosophical sense" of identity that is binary and transitive from the ordinary conventions of describing things as the same or different).

Indeed, these are not even the only consequences thought to be entailed by the "logical

"language of identity" in a variety of ways to refer to different sorts of relations that may not have these characteristics ("Phineas just isn't quite the same since the incident"), but argue that theories of "personal identity" in the "strict philosophical sense" must meet the desiderata of the logical relation.[29]

Setting aside verbal concerns about the proper use of the word "identity" (as well as philosophical reservations about whether a "logical relation of identity" even exists!),[30] suffice it here to say that there is no reason to assume

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relation of identity" of dubious applicability in the personal identity context. One additional example is "Leibniz's Law"—if *a* and *b* are identical, everything that is true of *a* is true of *b*. *See, e.g.*, Noonan & Curtis, *supra* note 27. *No one* thinks this principle applies in the *personal* identity context, where the whole project is to make sense of how individuals at different points in time, with non-trivially different characteristics, can meaningfully be thought of as the "same"—further suggestion that "personal identity" is not a species of the logical relation. *See, e.g.*, SCHECHTMAN, *supra* note 11, at 38 ("The *time-slices* that make up the life of some particular person are clearly *not* identical . . . .").

[29] *See, e.g.*, Donald L.M. Baxter, *Loose Identity and Becoming Something Else*, 35 NOÛS 592, 592 (2001) ("An historically important move is to say that such cases are cases of identity in name only."); Marua Tumulty, *How Philosophers Think About Persons, Personal Identity, and the Self*, DEBRA J.H. MATTHEWS, HILARY BOK, PETER V. RABINS, EDS., PERSONAL IDENTITY AND FRACTURED SELVES 16, 17 (2009) ("We say, for example, 'She became a different person.' . . . But a philosopher interested in the logic of identity would say that these ways of talking cannot be interpreted as true, literal statements about numeric identity.").

It is conventional, moreover, to distinguish between two "senses" of "identity" not discussed at length here—"qualitative" identity, a question of similarity, and the "stricter" question of whether a *particular entity* is *the same*. *See, e.g.*, Starmans, *supra* note 3, at 37. The classic examples to illustrate this distinction involve a distinction between saying that two tokens of a type are "identical," in that they are both instances of the type (say, two cars of identical make, year, and model), and saying that one token is identical to itself (as when we say that *this particular* car is identical to itself, but not identical to that other car of the identical make, year, and model). *See id.*

All interlocutors agree that qualitative similarity is not the concept by virtue of which law or morality allocates identity-dependent normative consequences. *See, e.g.*, Tobia, *Introduction*, *supra* note 7, at 7 ("Numerical identity underpins contractual obligation, ownership of property, criminal responsibility, and many other intertemporal relations."). From that perspective, you might think that the discussion throughout is necessarily about numerical identity.

But this framing tends to have the unfortunate consequence of suggesting that the concept under analysis ("strict, numerical identity") is an instance of the "logical relation of identity—which it isn't. Perhaps, then, it is clearer to set aside the concept of "numerical identity" and just note that we're talking about some sense of "sameness" *other than* qualitative similarity. *Cf., e.g.*, SCHECHTMAN, *supra* note 11, at 73 ("The notion to which I appeal here is the general use of the term 'identity' to refer to the set of characteristics each person has that make her the person she is.").

[30] *See, e.g.*, LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (C.K. Trowbridge 1999) ("Roughly speaking, to say of *two* things that they are identical is nonsense, and to say of *one* thing that it is identical with itself is to say nothing at all."); LEWIS, *supra* note 23, at 192–93 ("Identity is utterly simple and unproblematic.").

that the concept of legal personal identity under analysis is transitive and binary.[31] For starters, granting there are other uses of the "language of identity," as everyone does, there is no reason to presume that the *law's* use is in this "strict philosophical sense."[32] Moreover, the most plausible theories of the cognate moral concept—those which plausibly explain the allocation of identity-dependent moral consequences—are not binary or transitive; theorists that insist on these conditions get there by stipulation and find themselves unable to explain the normative consequences pre-theoretically attributed to the concept.[33]

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[31] *See, e.g.*, SCHECHTMAN, *supra* note 11, at 1 ("These theorists do not recognize that there is no monolithic 'question of personal identity,' but rather a variety of identity questions arising in different contexts, bearing diverse significance, and demanding distinct kinds of answers.").

[32] *See, e.g.*, John Locke, *Of Identity and Diversity*, in JOHN PERRY, ED. PERSONAL IDENTITY 50–51 (2d ed. 2008) ("Person, I take it, is the name for this self. It is a forensic term, appropriating actions and their merit; and so belongs only to intelligent agents capable of law, and happiness, and misery.").

[33] For example, Derek Parfit "solved" challenges of transitivity and binariness with arbitrary stipulation—simply asserting that there is no identity where less than half of ordinary psychological continuity is preserved, and ruling out identity in cases of psychological branching. *See, e.g.*, PARFIT, *supra* note 26, at 206, 297; *see also* SCHECHTMAN, *supra* note 11, at 43 ("Parfit responds to [the binariness] problem the same way he did the transitivity objection—with brute force—and he faces similar problems in his response."). But, of course, it's hard to see how anything moral could turn on a concept with such obviously ad hoc boundaries—which works for Parfit, because he concludes that "personal identity," *as he's defined it* "is not what matters." PARFIT, *supra* note 26, at 217. At best this shows that there's no transitive and binary concept of personal identity that is morally meaningful—not that there is *no* concept that is. *See, e.g.*, SCHECHTMAN, *supra* note 11, at 62 ("What is important to understand is that even if Parfit could convince us that *identity* is not necessary for survival, moral responsibility, compensation, and self-interested concern, we would still believe that these require something more than the relation described by psychological continuity theorists.").

Meanwhile, John Locke launched modern philosophical interest in "personal identity" by outlining a theory under which it is constituted by psychological, rather than bodily, continuity—based on thought experiments involving the allocation of the sorts of normative entailments under discussion here; "personal identity" understood as a "forensic" concept, one fundamentally about "appropriating actions and their merit." Locke, *supra* note 32, at 50–51; Schechtman, *supra* note 11, at 17 (noting that "[i]n each [of Locke's cases] our judgment of identity is based on judgments about its practical importance"). There is no indication in his discussion of this concept that he thinks it is (much less logically *must be*) transitive and binary—longstanding grounds of criticism of his account. *See, e.g.*, Thomas Reid, *Of Mr. Locke's Account of Personal Identity*, in JOHN PERRY, ED., PERSONAL IDENTITY 113, 114 (2d ed. 2008) (criticizing Locke's account of personal identity for failing to be transitive and binary). At best, again, this would show not that Locke's account doesn't plausibly describe the concept according to which we allocate identity-dependent normative consequences, just an illustration that that concept is not a species of the logical relation of identity. *See, e.g.*, SCHECHTMAN, *supra* note 11, at 49 ("Our naïve conception of psychological continuation does not . . . have the logical structure of an identity relation.").

And, finally, whether or not the best moral conception of personal identity is transitive and binary, there are particular reasons to suspect the *law's* concept isn't. Although we're theorizing the legal identities of natural persons here, it is worth noting that the law is perfectly comfortable with non-transitive, non-binary *corporate* identity.[34] Corporations split and merge all the time and the law has a variety of doctrines for allocating identity-dependent legal consequences in these cases.[35] Of course, it *could be* that the law has a transitive conception of the "identities" of natural persons and a non-transitive one for corporations—but clearly the law is *comfortable* with a sense of legal personal identity that is not a species of the logical relation; and at a minimum the legal personal identity of natural persons *need not* have these characteristics either.[36]

Another traditional, if contested, distinction in the philosophy of identity is that drawn between "synchronic" and "diachronic" identity—the question of what makes an entity a self-identical unity at a given moment as against the question of what makes it the same across time.[37] Roughly tracking this distinction, in the personal identity context, the philosopher Marya Schechtman distinguishes the *characterization question*—"of which beliefs, values, desires, and other psychological features make someone the person she is," and the *reidentification question*, of "what makes a person at time t_2 the same person at time t_1."[38]

These questions are logically distinct—it *could be* that the law thinks about characterizing the identities of legal persons at a given moment in some radically different way than it does in reidentifying them at different times.[39] And, as we'll see, distinguishing these different "senses" of "identity" can help make sense of the ways in which the law's conception of personal identity plays different roles in different legal domains.[40] At the same time, as conventional as this distinction is, there is a great deal of controversy about whether strictly partitioning inquiries into identity into these logically distinct

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[34] *See generally, e.g.*, MARTIN D. GINSBURG, JACK S. LEVIN & DONALD E. ROCAP, MERGERS, ACQUISITIONS, AND BUYOUTS (2025) (discussing doctrines governing corporate mergers).

[35] *See, e.g.*, Diamantis, *supra* note 7, at 209 (describing doctrines for allocating criminal liability of corporations after mergers or divisions); *see also* 11 Acquisitions & Mergers § 3:63.50 ("Several states, like Texas and Delaware, allow 'divisive mergers,' in which a state law allows a limited liability company or partnership to allocate its assets, property, rights, debts, liabilities, and duties among newly formed entities formed by the company.").

[36] *See infra* Part III.A.

[37] *See, e.g.*, Noonan & Curtis, *supra* note 27 (describing "a distinction customarily made between a criterion of diachronic identity and a criterion of synchronic identity . . . .").

[38] SCHECHTMAN, *supra* note 11, at 2.

[39] *See infra* Part III.A.

[40] *See infra* Part II.B–C.

buckets makes sense—after all, it is hard to believe that what makes an entity itself at a *particular* time would be wholly unrelated to what makes it itself *across* time.[41] And all else equal a theory that can make sense of the relationship between these two "senses" of identity is to be preferred by considerations of parsimony, coherence, and elegance.[42]

Finally, and relatedly, while the concept of "legal personal identity" is not a standard topic in legal theory, recent years have seen growing interest in theories of legal person*hood*—that is, what makes some entity *a* legal person at all—motivated by questions about the status of animals, AI, fetuses, and more.[43] In philosophical terms, theories of legal person*hood* offer accounts of a *type* (the kind, "legal person"),[44] while the account offered here is of the

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[41] *See, e.g.*, E.J. Lowe, *The probable simplicity of personal identity*, in G. GASSER & M. STEFAN, EDS., PERSONAL IDENTITY: COMPLEX OR SIMPLE? 137, 137 (2012) (arguing that questions of diachronic and synchronic identity do not involve distinct kinds of identity); André Gallois, *Identity Over Time*, in EDWARD N. ZALTA, ED., STAN. ENCYC. PHIL. (2016), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=identity-time (noting controversies over "whether synchronic and diachronic identity are," in fact "different kinds of identity"); Bigaj, *supra* note 5 ("The only difference between the two 'types' of identity lies in the way we pick out appropriate objects whose numerical identity/distinctness we are evaluating.").

[42] *See, e.g.*, John Perry, *Introduction*, in JOHN PERRY, ED., PERSONAL IDENTITY 1, 11 (2d ed. 2008) (noting that theorists of personal identity have focused on the question of diachronic identity, apparently on the hypothesis that personal identity at a given time is related to that question and perhaps easier); *see also generally* Elliott Sober, *The Principle of Parsimony*, 32 BRITISH J. PHIL. SCI. 145 (1981) (discussing the value of, and debates about, parsimony, simplicity, and coherence, in theorizing); ROGER SWINBURNE, SIMPLICITY AS EVIDENCE FOR TRUTH (1997) (same).

[43] *See, e.g.*, Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1004 (1982) ("A person cannot be fully a person without a sense of continuity of self over time."); *also* Anthony Quinton, *The Soul*, 59 J. PHIL. 393, 403 (1962) ("The soul, therefore, is not only logically distinct from any particular human body with which it is associated; it is also what a person fundamentally is."); *see also* Nils-Frederic Wagner & Georg Northoff, *Habits: bridging the gap between personhood and personal identity*, 8 FRONT. HUM. NEUROSCI. (2014) ("In philosophy, the criteria for personhood (PH) at a specific point in time (synchronic), and the necessary and sufficient conditions of personal identity (PI) over time (diachronic) are traditionally separated).

[44] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 3, at 1104 (discussing theories of personhood as based on atemporal cognitive abilities); *see also* Radin, *supra* note 43, at 971 (noting that Enlightenment theories of personhood, although they could shed light on personal identity are "simply an abstract autonomous entity capable of holding rights, a device for abstracting universal principle and hence by definition devoid of individuating characteristics"); Eva Feder Kittay, *At the Margins of Moral Personhood*, 116 ETHICS 100, 102 (2005) (noting that "[a]s the traditional requirements for personhood which McMahan adopts are not properties that humans maintain throughout their life, questions of personal identity, or who 'we' are, may not be identical to questions of personhood"); Matsumura, *supra* note 6, at 77 ("Questions of connection and persistence between past and present selves, which relate to personal identity, are conceptually distinct from questions about the

"identity" conditions of its *tokens* (what makes a "*particular*" instance of a "legal person").[45] As with questions of "synchronic" and "diachronic" identity, theories of a type are logically distinct from the identity conditions of its tokens.[46]

But, as with "synchronic" and "diachronic" senses of identity, it is hard to believe these questions are unrelated—it is widely thought that what makes some entity itself and the same across time is at least partially dependent on *what kind of thing* it *is*; that the identity conditions of languages and ships are different because languages and ships are different kinds of things.[47] In other words, while theories of legal personhood do not *answer* questions of legal personal identity, they are hardly irrelevant—and accounts that would take personhood to depend on radically different facts than personal identity face, at least, an uphill battle against considerations of parsimony, coherence, and elegance.[48]

From that perspective, it is worth our starting with the fact that contemporary accounts of natural legal personhood broadly take it to be some kind of *psychological* or *cognitive* kind; not the biological species concept *homo sapiens*.[49] That is, contemporary theories of legal personhood broadly

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centrality of past and present choices to the self and how the law should protect those choices.").

[45] *See, e.g.*, Quinton, *supra* note 43, at 404 (distinguishing between identity of tokens and types in the personal identity context).

[46] *See, e.g.*, PETER UNGER, IDENTITY, CONSCIOUSNESS, AND VALUE 6 (1990) (noting that the question of personal identity "must not be confused with the quite different question, 'What is a person?'").

[47] *See, e.g.*, P.T. Geach, *Identity*, 21 REV. METAPHYSICS 3, 3 (1967) ("I am arguing for the thesis that identity is relative."); *see also generally* NICHOLAS GRIFFIN, RELATIVE IDENTITY (1977) (arguing that identity relations are always dependent on the kind of thing in question); Locke, *supra* note 32, at 37 (noting that the identity conditions of different entities might be different); Gallois, *supra* note 41 ("*a* cannot be identical with *b*, unless there is a more specific answer to the question whether *a* is the same *thing* as *b*"); Alexander R. Pruss, *A Deflationary Theory of Diachronic Identity*, 90 AUSTRALASIAN J. PHIL. 19, 19 (2010) ("It is normal in the literature for the conditions to be specific to the kind of entity in question, as in the above examples that are specialized to persons.");.

[48] *See, e.g.*, Locke, *supra* note 32, at 33, 39 ("This being premised, to find wherein personal identity consists, we must consider what person stands for . . . ."); Butler, *supra* note 28, at 100 ("The inquiry, what makes vegetables the same in common acceptation of the word, does not appear to have any relation to this of personal identity; because the word *same*, when applied to them and persons, is not only applied to different subjects, but it is also used in a different sense."); *see also* Quinton, *supra* note 43, at 398 (noting that any theory of identity over time requires that "the two phases be of objects of the same kind").

[49] *See, e.g.*, *See, e.g.*, ALEXANDER NÉKÁM, THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY 27 (1938), ("Those theories . . . which assert that the human being or the human personality is in some way a natural substratum of rights cannot be substantiated by empirical evidence."); KURKI, *supra* note 4, at 23 ("[E]ven though virtually everyone agrees that human adults of sound mind are persons, there is widespread disagreement regarding

take the distinctive characteristics of the category of "personhood" to have something to do with *psychology* (usually either the phenomenological capacity to bear legally recognizable interests or the cognitive ability to exercise legal rights); holding that some entity's being a biological human being is neither necessary or sufficient for legal personhood.[50]

In short, this Article explores the concept, "legal personal identity," by which the law allocates a distinctive set of identity-dependent legal consequences in both synchronic and diachronic ways; taking a growing consensus that what legal persons are in the first place has something to do with psychology and cognition rather than biology as a starting point. With these preliminaries in mind, let's turn to the law.

II. LEGAL PERSONAL IDENTITY IN PRIVATE LAW

Legal personal identity is a concept implicit in private law—it is presupposed by its structure and relied on in its operation, without thorough explication in legal codes, case law, or treatises. To some extent, the implicit importance of a concept of legal personal identity to private law is fairly obvious and has been noticed before—contract and property, at least, must have some mechanism for reidentifying particular legal persons over time, which they generally do by straightforward, un-litigated, reidentification of their bodies. Less noticed, however, tort and agency require a mechanism for *characterizing* legal persons at particular moments, which they do with reference to *psychology*.

These ways of thinking about the identities of natural persons might seem in tension—but the better explanation is that contract and property (and anywhere else where private law must reidentify persons, including agency and tort) ultimately conceptualizes legal persons in non-bodily terms, but uses bodies as presumptive evidence of whatever it is that the law takes to normatively constitute the identity of natural legal persons as themselves across time.

A. Diachronic Reidentification in Private Law

The claim that private law necessarily presupposes some conception of

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the salient features that render them persons, as well as the import—moral or otherwise—of personhood.").

[50] *See, e.g.*, KURKI, *supra* note 4, at 25 (distinguishing theories of legal personhood based on the capacity to have interests or to exercise will over rights); *see also* Ori J. Herstein, *The Identity and (Legal) Rights of Future Generations*, 77 GEO. WASH. L. REV. 1173, 1174 (2009) (describing the "two prevalent theories of rights" widely thought to be constitutive of legal personhood).

personal identity, and is incoherent without one, has not escaped notice.[51] Indeed, *all law* presupposes a conception of legal personal identity—when A sues B, the court must have some way to ensure the "A" presenting themselves in the courtroom is who they claim to be, and that "B" is the proper defendant; when the people move to prosecute someone, or the tax authorities send a refund, we need to be able to make sure the person in question is who the government thinks they are.[52]

More substantively in private law doctrine, legal personal identity plays a straightforward, essential organizing role in at least the areas of contract and property. Contract law, for starters, essentially enforces agreements against "*the same*" particular people who entered into them.[53] It does not enforce obligations against persons other than those who undertook them—and if a purported contract defendant can show that they are not "the same person" who entered into the contract, they bear no liability.[54] To adjudicate contract disputes, then, the law *must have* some way to distinguish the particular individuals who agreed to a given contract from other legal persons—which just is a theory of legal personal identity.[55] In other words,

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[51] *See supra* note 6; *see also e.g.*, Matsumura, *supra* note 6, at 120 (explaining the centrality of personal identity to private law and collecting sources); Tobia, *Introduction*, *supra* note 7, at 9 ("Contract law's central premise is that a present contracting self can bind their 'future self.' . . . ."); Starmans, *supra* note 3, at 38 ("Moral responsibility, reward, punishment, ownership, promises, debts, self-conscious emotions, and relationships all depend upon a continuity of personal identity.").

[52] *See, e.g.*, JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 199 (2018) (describing "the architecture of legal duties owed to particular others and reparative remedies for their breach" as "[t]he basic interpersonal architecture of private law"); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 10 (1995) (describing as "the master feature characterizing private law" "the direct connection between the particular plaintiff and the particular defendant").

[53] *See supra* note 1; *see also, e.g.*, FCM GROUP, INC. V. MILLER, 17 A.3d 40, 54 (2011) ("Before turning to those cases . . . we set forth a general principle so fundamental that it rarely receives mention in case law or commentary, namely that only parties to contracts are liable for their breach." (quoting GAMBLES V. PERDUE, 175 Mont. 112, 115 (1977))

[54] *See, e.g.*, B-G&G INVESTORS VI, LLC V. THIBAUT HG CORP., 985 So. 2d 837, 842 (La. Ct. App. 4th Cir. 2008) ("With regard to breach of contract, it is obvious that an individual cannot be liable for breach of a contract to which he is not a party."); YUCYCO, LTD. V. REPUBLIC OF SLOVENIA, 984 F. Supp. 209 (S.D.N.Y. 1997) ("[A] non-signatory to a contract cannot be named as a defendant in a breach of contract action unless it has thereafter assumed or been assigned the contract." (quoting CRABTREE V. TRISTAR AUTOMOTIVE GROUP, INC., 776 F. Supp. 155, 166 (S.D.N.Y. 1991)).

[55] *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA L. REV. 1225 (1998) (describing contract law's commitment to enforcing agreements against the same person who agreed to it as "the very essence of contract"); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 214 (1982) (arguing that the essence of contract is the notion that "yesterday's legally binding private choice overrides today's contrary private choice").

contract law necessarily relies on a theory of legal personal identity in every case by concluding one way or another that plaintiff and defendant are "the same people" who agreed to the contract previously.[56]

Property law, similarly, relies on a conception of legal personal identity when it determines who owns what at a given time.[57] Property rights paradigmatically arise in two ways—first possession or transfer.[58] The first possessor of an unowned thing becomes its owner—requiring some way to identify who that first possessor is.[59] Similarly, when A transfers property to B, B becomes its new owner—requiring a method by which to ensure that A is indeed the owner and that B is "the person" to whom the transfer is effective.[60] And, in either instance, ownership *continues* in a particular owner from their acquisition—until they transfer it themselves, die, or the item is destroyed—demanding a theory according to which we can reidentify an owner at T_2 as the same person at T_1.[61]

The organizing role of personal identity in contract and property is, moreover, not merely some accidental feature of these bodies of law—it is intimately tied up with their normative purposes. Contract law is, of course, normatively committed to enforcing *voluntary* obligations—to holding the very same people who enter into agreements to their content, and only those people; it is only in this way that contract can facilitate *autonomy*, the creation of a self across time.[62] Whatever the details of your account of the normative

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[56] *See supra* notes 53–55 & accompanying text.

[57] *See, e.g.*, Robert P. Merges, *Restitution, Property, and the Right of Publicity: A Tribute to Professor Wendy Gordon*, 99 B.U. L. REV. 2415, 2436 (2019) ("Property gives its owner near-plenary rights over the future uses of an asset and in general permits the owner to set her, his, or its own price."); John Gardner, *What is Tort Law For? Part I. The Place of Corrective Justice*, 30 LAW & PHIL. 1, 12–13 (2011) (discussing the extent to which property law is interested in personal identity by virtue of needing to identify owners).

[58] *See, e.g.*, Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 459–60 (2009) (describing these methods of property acquisition).

[59] *See, e.g.*, PIERSON V. POST, 3 Cai. R. 175 (N.Y. Sup. 1805) (litigating the question of which of two claimants was the first possessor of a fox).

[60] *See, e.g.*, Donald J. Kochan, *The Property Platform in Anglo-American Law and The Primacy of the Property Concept*, 29 GA. ST. U. L. REV. 453, 488 (2013) ("The enforcement of consensual transactions is dependent on a determination that one has ownership, dominion, and authority to transfer the good or service involved in that transaction.").

[61] *See, e.g.*, D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 9 (2009) ("The *fee simple absolute* is unlimited in duration and is the closest thing that the American legal system has to absolute ownership of land."); ROBERT LAURENCE & PAMELA B. MINZNER, A STUDENT'S GUIDE TO ESTATES IN LAND AND FUTURE INTERESTS: TEXT, EXAMPLES, PROBLEMS AND ANSWERS 4 (2d ed. 1993) ("The fee simple continues forever."); *see also* TOOLE V. PETERSON, 31 N.C. 180, 182 (N.C. 1848) (litigating whether two similar names in a chain of title refer to the same person for purposes of determining ownership).

[62] *See, e.g.*, Matsumura, *supra* note 6, at 120 ("Personal identity offers a reason to

aspirations of contract law, then, its relationship to autonomy and the enforcement of self-commitments is only justifiable, if at all, on some account that takes the personal identities of individual persons to be normatively significant.[63]

Similarly, Margaret Jane Radin and others have suggested that ownership of certain kinds of property can play an important role in people's self-conception over time,[64] and many have argued that the law's recognition of owner's powers to make gifts and transmit property at death facilitate the construction of personal identity.[65] If our law were not convinced that what it takes to be the legal personal identities of individuals were normatively significant, in other words, our law of property might look very different.[66]

These observations about the implicit, presupposed role of some conception of legal personal identity in contract and property have been noticed by legal scholars.[67] Prior accounts, however, apparently tend to think that the question of legal personal identity in these contexts is *easy*.[68] For one thing, in noticing the role of a concept of legal personal identity in contract and property, theorists have thus far been exclusively concerned with

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enforce agreements rather than a reason not to."); Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. 433, 433 (2019) ("The assumption that contract is voluntary does enormous work in most normative theories of contract.").

[63] *See, e.g.*, Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 LAW & CONTEMP. PROBS. 19, 19 (2013) ("The proposition that the commitment to individual autonomy is one of the most important foundations of contract is a truism, almost a cliché."); Aditi Bagchi, *The Accidental Promise: Remaking the Law of Misrepresented Intent*, 2008 U. ILL. L. REV. 985, 1003 (2008) (describing the "prevailing conception of contract as mutual undertaking").

[64] *See, e.g.*, Radin, *supra* note 43, at 957 (arguing that ownership of certain kinds of personal property helps sustain and constitute personal identity); *see also* Hanoch Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 THEORETICAL INQUIRIES L. 391, 396–97 (2017) ("People have a right to private property, in this view, because, and to the extent that, it is conducive to self-determination (or self-authorship), ..."); Miranda Oshige McGowan, *Property's Portrait of a Lady*, 85 MINN. L. REV. 1037, 1041 (2001) ("Property expresses one's self-conception . . . .").

[65] *See, e.g.*, Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives and Cherished Possessions*, 28 YALE J. L. & HUMAN. 265, 266 (2016) (tying the power to transmit property at death to solicitude for personal identity); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L. J. 630, 634 (1992) ("The rhetoric of wills law portrays wills as exercises of autonomy and self-determination.").

[66] *See, e.g.*, Radin, *supra* note 43, at 968 ("This view of personhood also gives us insight into why protecting people's 'expectations' of continuing control over objects seems so important.")

[67] *See supra* note 6.

[68] *See supra* note 6; *see also e.g.*, Diamantis, *supra* note 7, at 203 (distinguishing between the legal personal identity of natural persons, taken to be a straightforward, intuitive issue of reidentifying bodies, and corporate personal identity, taken to be a difficult question of legal theory and doctrine).

personal identity in its *diachronic* sense—noticing that contract and property presuppose some mechanism for ensuring that a particular individual at T_2 is the same as some other individual at T_1; scholars have not theorized about what the law takes to *characterize* individuals at any particular time.[69]

And, focusing on the reidentification question of diachronic identity, scholars generally assume that private law reidentifies particular natural legal persons by virtue of their bodies—that the law just holds people to contracts to the extent they possess a body continuous with the person who entered into it, regardless, perhaps, of whether they are in fact the same person in some true metaphysical or moral sense; that it identifies the owner of Blackacre as the holder of a body physically and biologically continuous with its previous owner's.[70] To be sure, these scholars are obviously right that in most ordinary cases in contract and property the law rather unreflectively (or at least without explicitly litigating the question) assumes that the occupant of a given body at T_2 is the same legal *person* that occupied "the same" body at T_1.[71]

But the notion that the legal personal identity of natural persons just is comprised of the biological continuity of human bodies is misleading, or at least incomplete. For one thing, as we'll see, the private law doctrines of tort and agency presuppose a way to *characterize* legal persons at particular moments in time, not just reidentify them—which theorists haven't given us.[72] And the characteristics that tort and agency look to in identifying legal persons at particular moments are *psychological* and *social*, not bodily.[73] Moreover, upon reflection, it is not at all clear that either contract or property (or agency or tort) in fact reidentify legal persons *because of* the continuity of their bodies, as opposed to using bodily continuity *as a presumptive proxy*

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[69] *See supra* notes 37–44 & accompanying text.

[70] *See supra* note 6. Indeed, the intuition that legal personal identity is straightforwardly constituted by bodily continuity rather than psychological facts seems to extend to lawyers, not only academics. *See, e.g.*, Vilius Dranseika, et al., *Personal Identity, Direction of Change, and the Right to Withdraw from Research* (2021) (unpublished manuscript) (finding that lawyers were less likely than laypeople to conclude that there had been a disruption of personal identity after substantial moral change).

[71] *See, e.g.*, STATE FINANCE CO. V. HALSTENSON, 114 N.W. 724, 726 (N.D. 1908) ("It is also shown that Ackerland was in possession of the land when the mortgage was given."); TAYLOR V. BOWEN, 84 Mo. App. 613, 618 (Mo. Ct. App. 1900) ("The office of a name is to identify a person, but identification may be made by any other description which points him out and distinguishes him from others."); WOODWARD V. MCCOLLUM, 1111 N.W. 623 (N.D. 1907) (dismissing a claim of initials referring to a different person where "the notary before whom it was acknowledged certifies that the persons signing are the grantors named in the deed"); MORRIS LUMBER CO. V. HARRINGTON, 12 Pa. D. & C. 501 (Pa. Common Pleas 1929) (concluding on that "George Mansfield is the same person as one of the defendants" on the basis of testimony identifying him by his body.").

[72] *See infra* Part II.B.

[73] *See infra* Part II.B.

for the continuity of something else, which it really takes to be *constitutive* of legal personal identity.[74]

B. Synchronic Characterization in Agency and Tort

Tort law paradigmatically offers monetary damages in compensation for specified kinds of wrongful, injurious conduct, paid from tortfeasor to victim.[75] From this perspective, although a successful suit might open up a range of remedial possibilities,[76] tort's central aspiration is to restore the *status quo ante*—tort damages assume that the way to repair wrongful, injurious conduct is to restore (as best, of course, as money can) a world in which the tort hadn't happened.[77] Sometimes, this remedial project is relatively straightforward and has little or nothing to do with any conception of "personal identity"—if I've converted your stapler, I can get the world as close as possible to one in which no tort had occurred by giving you money for a new one; if the doctors have already made you all better, but it cost

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[74] *See infra* Part III.C.

[75] *See, e.g.*, WEINRIB, *supra* note 52, at 1 (describing the "most striking feature" of private law as its connection between two persons); Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L. J. 142, 145 (2011) (describing the basic purpose of tort law to compensate for wrongful injuries).

[76] To be clear, the availability of these alternative remedies does not pose a substantial challenge to the claim throughout that the organizing purpose of tort damages is to put the plaintiff in the position they would have been in had the tort not taken place. For one thing, some alternative tort remedies—most prominently nominal damages—are awarded when the victim *has* suffered some genuine disruption to their identity—just one particularly hard or impossible to compensate for in dollars and cents. *See, e.g.*, Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L. J. 1263, 1307 (2021) ("In these cases, restoring the rightful position, or preventing encroachment on it, should include rehabilitation or preservation of the party's status."); *see also* Erik Encarnacion, *Resilience, Retribution, and Punitive Damages*, 100 TEX. L. REV. 1025, 1062 (2022) (arguing that punitive damages can be understood on an account solicitous of the narrative identity of plaintiffs). For another, the claim that tort law is constitutively concerned with remedying certain kinds of harms to plaintiff's personal identities does not rule out that it might have *other* purposes too—occasionally punishing tortfeasors with punitive damages might be explained in this way. GARDNER, *supra* note 52, at 12 ("This book does not hold out much hope for the taming of value-pluralism.").

[77] *See, e.g.*, Restatement (Second) of Torts § 901 cmt. a. ("[T]he law of torts attempts primarily to put an injured person as nearly as possible equivalent to his position prior to the tort."); HARRIS V. STANDARD ACC. & INS. CO., 297 F.2d 627, 631–32 (2d Cir. 1961) ("The law attempts to put the plaintiff in a position as nearly as possible equivalent to his position before the tort."); *see also* Ronen Perry, *It's a Wonderful Life*, 93 CORNELL L. REV. 329, 375 (2008) ("The purpose of tort damages is to restore the status quo ante. This is one of the most basic features of tort liability without which tort law would not be tort law."); GARDNER, *supra* note 52, at 4 (describing as "the puzzle of general damages" the "longing to repair the irreparable").

money, I can pay for that.[78]

But sometimes what is different between our world and a world in which no tort occurred is *you*—the defendant's wrong has, in some sense, changed *the plaintiff*.[79] In such cases, the basic normative posture of tort requires "compensating" the plaintiff for this change—putting the plaintiff back as *they* were before the tort occurred; making them (as courts routinely say) "whole"[80] (from the perspective of their "pre-tort"[81] self), putting them in their "rightful position" (relative to how their life would have gone if the tort had never happened),[82] "*restitutio in integrum*" (restoration of whole self, *integrity*).[83]

To do this—to compensate, as it were, for the delta between "who" the plaintiff is now and "who" they were before the tort—the law needs some theory of "who" the plaintiff is at any given moment; a theory of legal

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[78] *See, e.g.*, 18 Am. Jur. 2d Conversion § 116 ("Ordinarily, the measure of damages in a conversion suit is the fair, reasonable, market value of the property at the time and place of conversion."); 2 Am. Law of Torts § 8:30 ("It is a well settled general rule, virtually subject to no deviation . . . that expenses for medical services are recoverable as an element or head of compensatory damages in personal injury litigation."); *see also* ."); GARDNER, *supra* note 52, at 163 ("Even when there is no car to hand back, and more generally nothing that can be the subject of an *in specie* return, there are still hopes of somehow putting things back the way they were by some proxy device.").

[79] *See, e.g.*, Ellen S. Pryor, *Rehabilitating Tort Compensation*, 91 GEO. L. J. 659, 661, 662 (2003) ("However we choose to think of tort plaintiffs for compensatory purposes—psychologically and physically, as a bundle of needs and preferences, or as decisionmakers operating within certain cognitive and rational boundaries—the post-injury self is often a changed self."); GARDNER, *supra* note 52, at 168 ("[N]otice that it is not just any old anything that concerns us here. It is al ife, or an aspect of a life. . . . It is a narrative, an arc that already passed through many points.").

[80] *See, e.g.*, SHARAPATA V. TOWN OF ISLIP, 47 N.E. 2d 1104 (1982) ("[T]he fundamental purpose of damages, is to have the wrongdoer make the victim whole."); *see also* Erik Encarnacion, *Making Whole, Making Better, and Accommodating Resilience*, 108 MINN. L. REV. 1335, 1336 (2024) ("The conventional story about compensatory damages is that they aim to make plaintiffs whole . . . .").

[81] *See, e.g.*, LAMPI V. SPEED, 261 P.3d 1000, 1004 (Mont. 2011) ("The law of torts works to ensure that an award of damages restores an injured party as near as possible to the party's pre-tort position—no better, no worse.").

[82] *See, e.g.*, J&D TOWING, LLC V. AM. ALTERNATIVE INS. CORP., 478 S.W. 3d 649, 655 (2016) ("[C]ompensation through actual-damages awards functions as 'an instrument of corrective justice, an effort to put the plaintiff in his or her rightful position.'" (quoting 1 Dan B. Dobbs, Law of Remedies § 3.1 at 28 (2d ed. 1993)); MALONEY V. HOME & INVESTMENT CENTER, INC., 994 P.2d 1124, 1133 (Mont. 2000) ("[T]he fundamental purpose of any tort remedy is return the plaintiff to his or her rightful position, or the position or state the party *would have attained* had the wrong not occurred.").

[83] *See, e.g.*, EDWARDS V. WILMINGTON TRANSP. CO. (THE CATALINA), 18 F. Supp. 461, 468 (S.D. Cal. 1937) (using this phrase to describe the purpose of tort damages); THE BALTIMORE, 75 U.S. (8 Wall.) 377, 385 (1869) (same).

personal identity.[84] In particular, this posture demands a theory of *synchronic* personal identity—the law must be able to assess "who" a legal person is at particular moments; to determine the ways in which "the plaintiff" now is different from "the plaintiff" was then, to distinguish between ancillary features of a legal person's "self," changes to which the law is not concerned with remedying (for example, where that self is located), and the normatively important features with which it is (for example, physical and psychological experiences, the loss of relationships and social standing, and so on).[85] To assess damages, then, tort must have a theory "of which . . . features make someone the [legal] person she is" at a given moment—a theory of synchronic personal identity.[86]

And indeed, as in contract and property, legal personal identity in this sense plays an organizing role in tort's basic normative structure. The fact that tort's remedies are tethered to characteristics of the identity of the plaintiff has proven puzzling to many scholars—it means, after all, that identically situated tortfeasors who committed the very same tort with the very same kinetic effects might face different liability depending on facts about their victim.[87] This is not how criminal law functions—and would not be how tort functioned if its normative purposes were, like criminal law's,

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[84] *See supra* Part I.A (defining the parameters of theories of legal personal identity); *see also* ."); GARDNER, *supra* note 52, at 229–30 ("Applying the continuity thesis at this point, one ends up thinking about how the plaintiff's future life, although unrecognizably different in its ingredients from the life she led before, could nevertheless be *as good as* the life she led before.").

[85] *See, e.g.*, Eric G. Anderson, *The Restoration Interest and Damages for Breach of Contract*, 53 MD. L. REV. 1, 44 (1994) ("The goal of restoring the victim to the *status quo ante* . . . is . . . part of the standard damages remedy for tort actions, which aim to compensate the victim for the harm caused by the defendant. The baseline against which harm is measured in tort is the plaintiff's position prior to the defendant's wrongful act or omission."); Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 L. & SOC. INQ. 195, 211 (2017) (noting the extent to which disabilities can come to play a foundational role in personal identity); *see also* FORMAN V. TOWNSEND, 66 N.Y.S. 3d 100, 102 (2017) ("Since placing the injured party in the same position as he would have been in if the tort had not occurred is the goal, the injury must be viewed from the eyes of the plaintiff.").

[86] SCHECHTMAN, *supra* note 11, at 2 (1996).

[87] *See, e.g.*, John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 437–38 (2006) (criticizing the mainstream understanding of tort damages as focused solely on the plaintiff's damages rather than the defendant's wrongdoing); GARDNER, *supra* note 52, at 159 ("The puzzle is to understand what reason I have to want the narrative of my life to continue, or to have continued, on the same arc as before."); TSACHI KEREN-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE 71–73 (2007) (criticizing the doctrines governing tort remedies as inegalitarian on these grounds).

retributive or deterrent.[88] But they aren't, and tort's focal solicitude for the personal identity of the victim, as a matter of characterizing the victim as a particular individual at moments in time, is entirely compatible with the leading contemporary account of the normative structure of tort law—corrective justice, under which tort is organized around the distinctive kind of interpersonal justice that arises when one distinctive person harms another, giving rise to an *interpersonal*, relational duty of repair.[89]

Consider, further, agency law. Agency circumscribes a legal relationship in which one legal person, a "principal," authorizes another, their "agent," to engage in legally effective acts on their behalf, which the law attributes to the principal.[90] Agents owe principals a distinctive duty of "obedience"—to follow their principal's instructions, if available; or to act as the agent reasonably believes the principal would have, if not.[91] Indeed, while described as a duty of "obedience," agents' duties are never in fact constituted just by the content of their instructions—agents are *always* to act "as if" their principal were there, as an "extension" of their personality; for which the

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[88] *See, e.g.*, HARRIS V. STANDARD ACC. & INS. CO., 297 F.2d 627, 632 (2d Cir. 1961) ("Recovery is permitted not in order to penalize the tortfeasor, but only to give damages 'precisely commensurate with the injury.'" (quoting GRESSMAN V. MORNING JOURNAL ASSOC., 90 N.E. 1131, 1133 (1910)); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1141 (2007) ("[I]t is now a familiar point of tort theory that the make-whole measure of damages renders descriptively implausible those theories of tort that purport to describe it as a scheme for deterrence."); WEINRIB, *supra* note 52, at 38 ("If compensation is justified at all, it is justified even for injuries that cannot be deterred. Similarly, if deterrence is justified, it is justified regardless of whether injury occurs.").

[89] *See, e.g.*, Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 107–08 (2011) (identifying the controversy between so-called "corrective justice" and "civil recourse" theories as the primary divide in tort law and describing the "civil recourse" view as the "outlier[]"); Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15 (1995) ("I have argued that corrective justice is the principle that those who are responsible for wrongful losses of others have a duty to repair them, and that the core of tort law embodies this conception of corrective justice."); *see also* Anthony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 LAW Q. REV. 530, 534 (1988) ("[O]utcome [responsibility] is crucial to our identities as persons; and unless we were persons who possessed an identity, the question of whether it was fair to subject us to responsibility could not arise.").

[90] *See, e.g.*, Restatement (Third) of Agency § 1.01 (defining agency).

[91] *See, e.g.*, Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 2 WM. & MARY L. REV. 513, 559 (2015) (describing agents' duty of obedience); Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in ANDREW S. GOLD & PAUL B. MILLER, EDS., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 7–8 (2014) (summarizing application of the "substituted judgment" standard when agents cannot get in touch with their principals and must act); James Toomey, *Fiduciary Standards*, 51 ACTEC L. J. (forthcoming 2026) (manuscript at 26) (describing the duty of obedience as "a form of substituted judgment").

meaning of what the principal said is powerful, if not dispositive, evidence.[92] That is, if an agent reasonably believes that, under the circumstances, the principal would have changed their mind, the agent is to do that—their duties are *constituted by* what the principal would have done under the circumstances, shielded by an evidentiary caveat circumscribed by the agent's reasonable epistemic access.[93]

Agency law, then, also presupposes some theory of legal personal identity—an agent's duties are generated and circumscribed entirely by characteristics of *the principal* as a distinctive legal individual.[94] That is, the agent is to act *as if they were* the principal; whatever the principal would have done, based on what the principal said, alongside the agent's knowledge of their goals, values, and behavior.[95] And, once again, the kind of theory of personal identity agency requires is *synchronic*; a theory according to which the law can characterize legal persons at particular moments.[96] An agent's duties are determined according to some theory of *who their principal is* at the *particular moment* the agent acts.[97]

And just as in contract, property, and tort, the role legal personal identity plays in the organization of agency law is closely intertwined with its normative purposes. Indeed, the fundamental normative aspiration of agency is enable persons to extend or project their distinctive legal personality into contexts where they cannot physically be.[98] A legal system *would only create*

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[92] *See, e.g.*, DeMott, *supra* note 91, at 3 ("This assessment has a subjunctive quality—as the principal's representative, the agent should aim to act 'as if' the principal personally had taken action and as the principal 'would have' acted . . . .").

[93] *See, e.g.*, Restatement (Third) of Agency § 3.01 ("Actual authority . . . is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf."); Toomey, *Fiduciary Standards*, *supra* note 91, at 35 ("[A]s an agency relationship goes on, it evolves with the changing identity of the principal; the agent's actions must be tied to who the principal is *now*, as that changes.").

[94] *See, e.g.*, DeMott, *supra* note 91, at 5 ("[A]lthough a principal's instruction raises no real doubt as to its meaning as a semantic matter, the agent must always decide what to do in response.").

[95] *See id.*

[96] *See supra* note 37–44 & accompanying text.

[97] *See, e.g.*, Toomey, *Fiduciary Standards*, *supra* note 91, at 35 ("The hallmark of substituted judgment . . . is its focal solicitude for an individual's personal identity."); DeMott, *supra* note 91, at 3 ("How the agent should understand the principal's instructions is contingent on circumstances when the agent must determine the action to take and on an honest assessment of what the principal would then wish the agent to do.").

[98] *See, e.g.*, DeMott, *supra* note 91, at 60 ("[A]n agency relationship [is] an extension of the principal throughout its duration."); ADOLF REINACH, THE APRIORI FOUNDATIONS OF THE CIVIL LAW 86 (John F. Crosby, tr., 1983) ("There is only one person who can grant [agency], namely the person in whom the legal effects are supposed to come about."); CARL WELLMAN, REAL RIGHTS 114 (1994) (observing that in agency relationships, "the agent is

such a mechanism if it thought that there *is* some normative value to the distinctive legal personal identities of individuals.[99] Agency law is, in other words, essentially organized around the law's view that there is something normatively valuable about what makes distinctive legal persons themselves at a given moment, which it takes to be worth recognizing and projecting in contexts in which the individual cannot be physically present.

Moreover, the way in which the law thinks about characterizing the identities of legal persons in these contexts is illuminating. Distinctive human bodies offer a *possible* theory of synchronic personal identity—it *could be* that what characterizes a distinctive legal person at a moment in time just is their physical body.[100] But that is not how either tort or agency thinks about the question—that is, the conception of legal personal identity that tort and agency law presuppose is *not a bodily one* (at least not exclusively).

This is most obvious in agency law. When the law tells agents to act *as* the principal would have under the circumstances, it generates their duties out of what principals *say* and *think*—their goals, values, personality, and preferences; psychological and mental facts.[101] In other words, when the law generates agents' duties with reference to the distinctive legal personality of principals, it takes that legal personality to be a complex of *mental* characteristics; here, in fact, legal personal identity appears to have *nothing* to do with the principal's *body* (except, of course, to the extent that the principal's psychological characteristics might have something to do with their bodily ones; and the fact that but through their body principals have no way to express what is on their minds).[102]

Of course, tort law offers monetary remedies for harms to plaintiffs' bodies—restoring their bodies, as best as possible, to the status quo ante—just as it offers remedies for harms to property.[103] But that is not *all* tort damages do—the law also aspires to restore the victim's identity to its pre-tort state in a variety of non-bodily ways; offering damages for pain and

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representing the agency of the principal").

[99] *See, e.g.*, Toomey, *Fiduciary Standards*, *supra* note 91, at 35 (arguing that the agency relationship is justifiable as a way of recognizing the normatively significant personal identity of the principal).

[100] *See supra* notes 37–44 & accompanying text.

[101] *See, e.g.*, DeMott, *supra* note 91, at 3 (noting that the agent's duties are comprised by what the principal would in fact have done had they been present); Toomey, *Fiduciary Standards*, *supra* note 91, at 35 (same).

[102] *See supra* notes 94–97 & accompanying text.

[103] *See, e.g.*, David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 263 (1989) (noting that tort law provides damages for "disfigurement [and] loss of function" among other things); 4B L. Chapman, Courtroom Medicine, Pain and Suffering § 120.02 (1967) (same); *see also* Restatement (Second) of Torts § 905(a) ("Compensatory damages that may be awarded without proof of pecuniary loss include compensation for bodily harm . . .").

suffering, for example, to restore the plaintiff's emotional state;[104] and damages for mental healthcare, to put them in the psychological state they had been in before.[105] Indeed, some torts—such as defamation, and damages for the loss of a relationship in wrongful death and loss of society—repair wrongs that don't cause any injury to the plaintiff's body at all; the harms that these torts are designed to remedy are *strictly* psychological or relational.[106]

To be sure, scholars have criticized tort's historical reticence to award damages for purely mental harm[107]—but that posture is best explained (whether or not *justified*) on evidentiary grounds, and tort's normative solicitude for psychology remains a core, timeless aspect of its structure.[108] In short, in both agency and tort, where the law needs to characterize the synchronic identity of legal persons, it does so in *psychological*, not only bodily, terms.

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[104] *See, e.g.*, Restatement (Second) of Torts § 905(b) ("Compensatory damages that may be awarded without proof of pecuniary loss include compensation . . . for emotional distress."); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 164 (2004) ("The awarding of damages for the noneconomic effects of pain and suffering has become an established (and well entrenched) moiety of personal injury tort law.").

[105] *See, e.g.*, Restatement (Third) of Torts § 19 cmt. b ("Medical expenses include reasonable counseling and other mental health care in response to emotional injuries resulting from the tort . . . ."); MUSA V. JEFFERSON COUNTY BANK, 620 N.W. 2d 97 (2001) (noting that recovery for mental health care expenses are treated the same as other health care expenses in tort).

[106] *See, e.g.*, Earl L. Kellett, *Proof of injury to reputation as prerequisite to recovery of damages in defamation action—post-*Gertz *cases*, 36 A.L.R. 4th 807 (1985) ("[A]ctual harm inflicted by defamatory falsehood include[s] impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering"); Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. REV. 437, 447 (2020) (observing a trend towards allowing damages in tort for "the relational injuries that result from the death of a family member").

[107] *See, e.g.*, Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 118 COLUM L. REV. 1901, 1902 (2018) ("Private law does not eye claims of emotional harm generously); *see also* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 467 (1998) (arguing that tort's hesitance to award purely emotional damages "devalues or undervalues the lives, activities, and potential of women and people of color"); Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 585–86 (1993) (summarizing a similar view).

[108] *See supra* notes 104–106 & accompanying text; *see also* Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 826 (2015) ("If emotional harm could be objectively detected and measured, there would be less concern that plaintiffs will fake emotional injuries, and less reason to afford emotional harm inferior status."); Bailey Kuklin, *The Labyrinth of Blameworthiness*, 51 UNIVERSITY OF SAN FRANCISCO L. REV. 173, 191 (2017) ("The epistemic obstacles aside, sometimes the law does seemingly take into account disrespectful attitudes.").

One final point revealed by the way in which tort and agency think about legal personal identity. We've already seen that the law's understanding of personal identity *need not* be binary.[109] The role the concept plays in tort and agency demonstrates that it *is* not. Consider a typical tort case in which the defendant's conduct has *partially* changed the plaintiff's identity—in which there is some delta between "who" the plaintiff is after the tort and before it, of the sort the law takes to be wrongful, alongside some continuity (the tort has *changed* the plaintiff in meaningful, wrongful ways; but not *completely*).[110]

Tort damages are designed to remedy the *aspects* of the plaintiff's identity that have changed—but tort law does not take these changes to have turned the plaintiff into a completely new person.[111] After all, the plaintiff, and only the plaintiff, has a cause of action, by virtue of there being some sense in which they *are* the same person as the one who had been victimized by the tort.[112] In other words, the structure of tort damages presupposes that it is possible to undergo a *partial* disruption of identity without becoming a *total* stranger vis-a-vis the person who experienced the tort—it is precisely these sorts of partial disruptions that tort law is designed to remedy.[113]

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[109] *See supra* 31–36 & accompanying text.

[110] *See, e.g.*, Pryor, *supra* note 79, at 661–62 ("[B]y using the plaintiff's pre-injury position as the measurement starting point, the traditional view misses the implications that follow when we realize that the post-injury self is often a different self than the pre-injury plaintiff.").

[111] *See, e.g.*, Sagit Mor, *The Meaning of Injury: A Disability Perspective*, in ANNE BLOOM, DAVID M. ENGEL & MICHAEL MCCANN, EDS., INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 27, 28–29 (2018) (noting the tension between the possibility that a tort could give someone a meaningfully new identity no worse overall than the one they had and tort's normative commitment to treat this as a compensable wrong).

[112] *See id.*; *see also supra* note 52; JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 30 (2020) (arguing that the plaintiff's autonomy to bring or not bring their tort claim is characteristic of tort); ANDREW S. GOLD, THE RIGHT OF REDRESS 4 (2020) (same).

[113] *See, e.g.*, GARDNER, *supra* note 52, at 187 ("The law of torts assumes this is how life is for most people, and accordingly does not ask plaintiffs to account for the whole of their lives, for all the numerous interdependencies among their goals, in assessing their damages."); *see also* HASHIMOTO V. MARATHON PIPE LINE CO., 767 P.2d 158, 159 (Wyo. 1989) ("These cross appeals involve two automobile accidents where the same person was victimized by two rear-end collisions in about eight months.").

While this distinction may seem to raise the possibility that the law operates with different conceptions of synchronic and diachronic identity, *see infra* Part III.A, it is in fact just an instance of challenge of making sense of the concept of identity in general—what theories of identity are theories of is how it is things can undergo changes of different kinds while remaining the same thing. *See, e.g.*, Diamantis, *supra* note 7, at 208 ("Diachronic identity refers to identity over time, even as an entity changes."); SCHECHTMAN, *supra* note 11, at 19 ("The problem of specifying what is involved in the continuation of a single psychological life is similar in structure to any other question about the continued existence

At the same time, private law in these contexts acknowledges that it is possible for a legal person to undergo a *total* disruption of personal identity—to have undergone sufficient change between T_1 and T_2, or change with a particular structure—such that their relationship with their "prior" self has been severed. For instance, at common law, an agency relationship could survive all kinds of changes to the character of the principal—with the agent's duties varying dynamically accordingly[114]—except the principal's death or incapacity.[115] Death, of course, is a total termination of personal identity (this is sort of analytic).[116] And on psychological accounts of personal identity, which agency presupposes, the common law test of incapacity—roughly, the loss of the cognitive ability to understand the nature and consequences of one's decisions[117]—might be thought to proxy the kinds of total psychological ruptures the law thinks of as a complete disruption of identity.[118]

Similarly, at common law, one's tort causes of actions *did not* survive their death.[119] And while it is a rare tort case in which the defendant's conduct

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of a changing complex entity over time and is approached in the same way.").

[114] *See, e.g.*, DeMott, *supra* note 91, at 3 (noting that "[a]lthough agency doctrine does not treat the principal as personally discontinuous over time, it also does not privilege the principal's prior preferences or intentions over those that the agent reasonably understands the principal presently to have at the time the agent determines how to act").

[115] *See, e.g.*, T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L. J. 1513, 1519 (1999) ("At common law, the death or incapacity of the principal automatically terminated the agent's authority.").

[116] *See, e.g.*, *See, e.g.*, SCHECHTMAN, *supra* note 11, at 122 (suggesting that death automatically terminates narrative personal identity); PARFIT, *supra* note 26, at 281 ("After my death, there will be no one living who will be me.").

[117] *See, e.g.*, NINA A. KOHN, ELDER LAW 28 (2d ed. 2020) (describing the "default question" of capacity as whether an individual has the cognitive ability to "understand the nature and consequences of the decision he or she is making").

[118] *See, e.g.*, Matsumura, *supra* note 6, at 109 ("People suffering from severe dementia or Alzheimer's disease might also lose their access to a narrative identity because their consciousness 'cannot be pulled together in a coherent whole.'"); SCHECHTMAN, *supra* note 11, at 147 (noting that in advanced Alzheimer's cases "the loss of narrative powers clearly brings about a change in capacities. Individuals who cannot process their experiences as ordinary adult humans do and so lose the flow of their lives, find themselves unable to participate in many of the activities that stand at the core of their lives as persons."); Toomey, *Narrative Capacity*, *supra* note 3, at 1125–26 (arguing that the law's conception of capacity can serve as a proxy for the continuity of identity).

[119] *See, e.g.*, 1 C.J.S Abatement and Revival § 148 ("At common law, causes of action enforceable only by personal actions for damages, in the form of a tort action, do not survive the death either of the person to whom or the person by whom the wrong was done."); *see also* 3 William Blackstone, Commentaries *302 ("[T]he rule is that action personalis moritur cum persona . . . ."); *see also* Sean Hannon Williams, *Lost Life and Life Projects*, 87 IND. L. J. 1745, 1752 (2012) (discussing the relationship between personal identity and tort causes of action).

is alleged to have caused the sorts of psychological changes likely to cause a *total* disruption of the plaintiff's identity—total amnesia, radical general personality change, and so on—it is illustrative that courts *struggle* to award and measure damages in cases where such claims *are* made.[120] Indeed, the award of damages in these cases seems to be motivated by deterrence, punishment, and prophylactic concerns about epistemic access to the constituents of the individual's identity rather than the ordinary compensatory motivation of corrective justice.[121] In short, the way in which the law relies on a conception of personal identity in tort and agency illustrates both that it is at least partially a psychological construct *and* that it is not binary in form.

To sum up—the basic structure of tort and agency presuppose a legal conception of personal identity not just in its diachronic, reidentification sense, but in the synchronic, characterization sense as well. And the *way* in which these bodies of law characterize individuals accounts for mental and social, not just physical, facts about them; and admits of both partial and total disruptions.

C. Rethinking Reidentification in Contract and Property

In tort and agency, we've seen that the law necessarily *characterizes* the legal personal identity of individuals, and that it does so with reference to

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[120] *Compare, e.g.*, MUSICK V. UNITED STATES, 781 F. Supp. 445, 452–53 (W.D. Va. 1991) (resolving a challenge to the award of pain and suffering damages based on the fact that "Musick specifically testified that he does not remember the events of June 7, 1984, nor does he remember being hospitalized"); *with* PITMAN V. THORNDIKE, 762 F. Supp. 870, 872 (D. Nev. 1991) ("The vast majority of jurisdictions require pain and suffering to be consciously experienced.").

[121] *See, e.g.*, MUSICK, 781 F. Supp. 453 (awarding pain and suffering damages not conscious experienced on the theory that they can be "inferred from the violence with which the injuries were inflicted"); *see also* FLANNERY V. UNITED STATES, 297 S.E. 2d 433, 438 (W.V. 1982) ("If we put aside the label 'loss of enjoyment of life' and look to its underlying function which is to measure the degree of permanent disability to the whole person arising from the injuries inflicted, some of the subjective content of the analysis disappears," and awarding such damages partially on concerns about the defendant's ability to evade liability for tortiously causing harm); *see also* MURRELL V. PATRIOT FRONT, 762 F. Supp. 3d 65, 81 (D. Mass 2025) (rejecting defendant's challenge to damages award for pain and suffering on the ground that the plaintiff had "diminished insight" into his own harm by rejecting the factual premise); *see also* ."); GARDNER, *supra* note 52, at 188 ("On the one hand, there are cases of catastrophic injury which may leave a plaintiff incapable of having aa future life structured by interlocking goals, or indeed by any significant personal goals at all. On the other hand, there are cases of plaintiffs, often younger children, who before they were injured didn't (yet) have a life structured by interlocking goals, or by any significant personal goals at all.").

mental, not only bodily, facts about them.[122] At the same time, we've seen that it is widely presumed that contract and property, while presupposing, too, some conception of legal personal identity, reidentify legal persons by virtue of the continuity of their bodies.[123] Upon reflection, however, the better explanation is that the law takes broadly mental and social facts to be constitutive of legal personal identity in both reidentification and characterization contexts, for which it takes bodily continuity as strong presumptive evidence.

Obviously, courts and juries rarely explicitly litigate whether a proffered contract defendant or purported owner is in fact who they are claimed to be, especially not with explicit reference to facts about something other than the continuity of their body—and the law does in general rather reflexively identify individual natural legal persons with their bodies for purposes of allocating contract obligations and establishing property rights.[124] But we can't infer from this that the law *identifies* legal persons with their bodies, and conclude that what it *cares about*, normatively, *just is* bodily continuity. It could be, for instance, that the law takes bodily continuity as *presumptive evidence* of the kind of continuity that it actually considers normatively significant.

Jurists are, of course, no strangers to legal presumptions—even quite strong ones—that do not directly track underlying normative substance.[125] The legal system is not, of course, committed to the proposition that all criminal defendants are innocent; and it takes their innocence or guilt to be a function, ultimately, of the particular facts.[126] But, cognizant of the possibility of error, and weighing the normative costs of certain kinds of errors against others, in the aggregate, the law *presumes* their innocence.[127] Similar logic

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[122] *See supra* Part II.B.

[123] *See supra* Part II.A.

[124] *See supra* Part II.A; *but see also* Reid, *supra* note 33, at 110–111 ("The identity of persons has often furnished a matter of serious litigation before tribunals of justice. But no man of sound mind ever doubted his own identity, as far as he distinctly remembered.").

[125] *See, e.g.*, Ronald J. Allen, *The Explanatory Value of Analyzing Codifications by Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 NW. U. L. REV. 1080, 1084 (1984) ("A number of the difficulties and ambiguities of the Rules can be explained and resolved if evidence law is organized around principles other than those ostensibly employed in the Rules.").

[126] *See, e.g.*, Christoph Engel & Alicja Reuben, *The People's Hired Guns? Experimentally Testing the Motivating Force of a Legal Frame*, 43 INT'L REV. L. & ECON. 67, 68 (2015) ("The presumption of innocence is the cornerstone of criminal procedure. False positives, i.e convicting an innocent, carry much more weight than false negatives, i.e., acquitting a guilty defendant."); Reid Kress Weisbord & George C. Thomas III, *Judicial Sentencing Error and the Constitution*, 96 B.U. L. REV. 11617, 1619–23 (2016) (discussing the risk of error in criminal sentencing).

[127] *See, e.g.*, Matthew Hale, Pleas of the Crown 289 (1694) (arguing that it is better that

justifies *irrebuttable* presumptions where they are accurate *often enough*, and the administrative benefits of having a clear rule *strong enough*.[128]

The relationship between bodily continuity and what the law might actually take to constitute personal identity is a prime candidate for a presumption (rebuttable or irrebuttable) along these lines. For starters, bodily continuity is easy to verify, while, if personal identity is constituted of anything other than the body it is overwhelmingly likely to have something to do with mental, psychological, and social facts.[129] That would necessarily be much harder to litigate, and more prone to error—courts can tell whether an individual occupies the same body just by looking at them (worst case, as when they are, say, wearing a false moustache, by taking their fingerprints), while litigating their psychological continuity would have to turn on the person's self-interested testimony and circumstantial evidence; inevitably a less reliable and more expensive proposition.[130]

At the same time, *whatever* one thinks actually constitutes personal identity, everyone agrees that (the facts being what they are) bodily continuity is a good *proxy* for it, closely *correlated* in fact.[131] Indeed, absent evidence to the contrary, we reidentify each other on the basis of our bodies all the

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five guilty men should be acquitted before one innocent man is convicted); 4 Blackstone, Commentaries 8226 (same but preferring that ten guilty men should be acquitted for an innocent one convicted).

[128] *See, e.g.*, Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1107 (2009) (arguing in favor of the law's crafting rules designed to "minimize[e] errors and allocate[e] the risk of error"); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1910–11 (1987) (noting that many of the law's "prophylactic rules" are based not on the legal judgment that a particular kind of proscribed or permitted conduct is or is not itself wrongful); Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J. L. & PUB. POL'Y 627, 637 (1994) ("[T]he courts, and numerous legislatures, concluded that these postings were so valuable that no evidence of lack of negligence could suffice to rebut them, thus creating what is known as an irrebuttable presumption.").

[129] *See infra* Part III.B; Theodore Sider, *Criteria of Personal Identity and the Limits of Conceptual Analysis*, 15 PHIL. PERSPECTIVES 189, 196 (2001) (noting that ordinary people have intuitions that associate the continuity of personal identity with bodily continuity).

[130] *See, e.g.*, Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353–65 (2008) ("The opacity of the human mind means that fact-finders are typically making guesses about an individual's mental state."); Michael J. Kaufman & John M. Wunderlich, *Messy Mental Markers: Inferring Scienter From Core Operations in Securities Fraud Litigation*, 73 OHIO ST. L. J. 507, 507 (2012) ("In all aspects of the law, proving that a defendant acted with a particular mental state is messy.").

[131] *See, e.g.*, Starmans, *supra* note 3, at 39 ("If a woman walks into your apartment, and she looks just like your roommate, you will likely assume she is your roommate."); Quinton, *supra* note 43, at 400 (noting that the bodily criterion "yields uncontentiously correct answers in the very great majority of actual cases of personal identification with which we are called upon to deal" and "it has the merit of realism, for it is, in fact, the procedure of identification that we do most commonly apply").

time—any theory that would take our identities to constantly reset notwithstanding bodily continuity is obviously a non-starter.[132] And not only would the *risk* of error be high in directly litigating some conception of personal identity other than a bodily one, the *stakes* are both high and asymmetric. To erroneously conclude that an individual is no longer the person they were means that the prior person is, for legal purposes, *dead*—not a conclusion to enter lightly.[133] In contrast, the risk of erroneously concluding that an individual still exists when they don't seem comparatively trivial.[134]

And consider, finally, the incentives on litigants were the law to attempt to directly litigate some non-bodily conception of legal personal identity in contract and property cases. Unlike the continuity of their body, which is obvious to all, individuals have uniquely privileged epistemic access to the continuity of their psychological experiences.[135] To the extent that a contract defendant's liability—even their amenability to suit—turns on whether they are the same person who agreed to the contract, we might worry about a defendant might claim, in bad faith, they are no longer the person they were to avoid liability, and not being able to prove they are lying.[136]

These are *precisely* the kinds of circumstances—in which we have a pretty good, easily measurable proxy for something difficult to measure, with dramatically asymmetric error costs, and concerns about bad faith manipulation—in which the law ubiquitously turns to presumptions to achieve normative goals that are not coincident with the content of the

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[132] *See, e.g.*, Christine M. Korsgaard, *Personal Identity and the Unity of Agency: A Kantian Response to Parfit*, 18 PHIL. & PUB. AFFS. 101, 115 (1989) (supporting a "physical criterion of identity" but "only a conditional one" because the physical continuity is not, morally, what matters, but "[g]iven the technology we have now, the unit of action is a human body"); Locke, *supra* note 32, at 44 ("The body goes too to the making the man, and would, I guess, to everybody determine the man in this case; wherein the soul, with all its princely thoughts about it, would not make another man but he would be the same cobbler to everyone besides himself."); Perry, *Introduction*, *supra* note 42, at 5 ("[T]he assumption that [body and identity] go together plays a large role in our daily lives. We make it when we identify others on the basis of appearance, or observed movements, or fingerprints."); Quinton, *supra* note 43, at 402 (noting that we use the bodies of others "as convenient recognition devices enabling us to locate without difficult the persisting character and memory complexes in which we are interested, which we love or like").

[133] *See, e.g.*, James Toomey, *Love, Liberalism, Substituted Judgment*, 99 IND. L. J. 1289, 1323 (2024) (describing the "moral consequences" of either "hold[ing] that someone might come back, when in fact they do not, or hold[ing] that someone will never come back, and is effectively dead, when in fact they do" as "profoundly asymmetric").

[134] *See id.*

[135] *See, e.g.*, James Toomey, *Executor Discretion*, 110 IOWA L. REV. 1323, 1330 (2025) ("[I]f the law (or anyone) wants to know what someone wants, we ask them and take their word for it.").

[136] *See supra* Part II.A.

presumption.[137] And in at least four ways, the evidence suggests that this is precisely what is going on.

The first is that there *are* instances in which contract and property law functionally take legal personal identity to be severed notwithstanding biological continuity of the body. Consider how contemporary private law treats dying. Death is the conclusive end of a legal personal identity[138]—it discharges personal contractual obligations,[139] ends ownership,[140] severs agency relationships,[141] and precludes victimization in tort.[142] Every state today permits determination of death by virtue of "brain death"—irreversible cessation of *neurological* function.[143] The difference between a brain dead corpse and a "living" human being is *mental*; a brain dead body can remain "alive"—sustaining *bodily* continuity—in a strictly biological sense, indefinitely with external support.[144] In terminating legal personal identity on

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[137] *See, e.g.*, Locke, *supra* note 32, at 48 ("Human laws punish both, with a justice suitable to their way of knowledge; because, in these cases, they cannot distinguish certainly what is real, what counterfeit: and cannot distinguish certainly what is real, what counterfeit: and so the ignorance in drunkenness or sleep is not admitted as a plea.").

[138] *See, e.g.*, Krista M. Pikus, *Life in Death: Addressing the Constitutionality of Banning the Removal of Life Support from Brain-Dead, Pregnant Patients*, 51 GONZ. L. REV. 417, 424 (2015) ("After death, someone is no longer considered a 'person' . . . .").

[139] *See, e.g.*, Restatement (Second) of Contracts § 262 ("If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.").

[140] *See, e.g.*, Melville M. Bigelow, *Theory of Post-Mortem Disposition: Rise of the English Will*, 11 HARV. L. REV. 69, 74 (1897) ("[O]ne's ownership or *having* necessarily comes to an end with death."); UNITED STATES V. LAND, 303 F.2d 170, 172 (5th Cir. 1962) (noting "the moment of truth, when the ownership of the decedent ends and the ownership of the successors begins.").

[141] *See, e.g.*, Restatement (Third) of Agency § 3.07(2) ("The death of an individual principal terminates the agent's actual authority.").

[142] *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 558 (2005) ("The dead person cannot be compensated—she is dead.").

[143] *See, e.g.*, Greer Donley, *Are Embryos or Fetuses Brain Dead? Implications for the Abortion Debate*, 45 PACE L. REV. 153, 154 (2024) ("[A]ll fifty states have adopted some criteria for establishing brain death . . . ."); Ariane Lewis, et al., *Determination of Death by Neurologic Criteria in the United States: The Case for Revising the Uniform Determination of Death Act*, 47 J.L. MED. & ETHICS 9, 9 (2019) (noting that "death by neurologic criteria (typically termed 'brain death') is legal death throughout the United States").

[144] *See, e.g.*, Donley, *supra* note 143, at 154 ("Though medical advances allow cardiac and respiratory activity to continue with artificial assistance, there is a national consensus that if the brain has ceased functioning, a beating heart is not life."); David Randolph Smith, *Legal Recognition of Neocortical Death*, 71 CORNELL L. REV. 850, 853 (1986) ("In response to the nagging uncertainties caused by the development of sophisticated life-support technologies, the law now expressly acknowledges whole brain death as a definition for death."); *see also* SCHECHTMAN, *supra* note 11, at 18 ("This intuition is also found in the widespread conviction that 'surviving' an accident for twenty years in an irreversible

the basis of brain death, then, private law suggests it generally thinks of the concept in psychological, not biological, terms.

Consider, too, the doctrine of legal capacity. Whether an individual has the legal capacity to make a particular decision recognized by private law is a *cognitive* test, it has nothing to do with the continuity of their body.[145] Incapacity generally relieves an individual of their pre-existing contractual obligations, and certainly prevents them from entering new ones.[146] And while the law doesn't *say* that incapacitated individuals cease to own their property, it doesn't recognize their efforts they make to exercise the powers of ownership.[147] In other words, incapacity is in many ways a *functional* termination of legal personal identity.[148] And it is determined on cognitive or psychological, not bodily or biological, grounds.[149]

In this connection, note the way in which the capacity doctrine, taken as a proxy for the continuity of personal identity, makes reidentification in contract and property look more like characterization in tort and agency—at least insofar as it, too, is not globally all-or-nothing.[150] It is entirely possible for an individual to have the legal capacity to make some property related

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vegetative state is no sort of survival at all, whereas a disembodied afterlife full of bliss . . . would be a very nice thing, and certainly a way to survive.").

[145] *See, e.g.*, 1 E. Allan Farnsworth, Farnsworth on Contracts § 4.6 (2d ed. 1998) (describing the test for contractual capacity as cognitive).

[146] *See, e.g.*, Elizabeth F. Emens, *Mindful Debiasing: Meditation as a Tool to Address Disability Discrimination*, 53 CONN. L. REV. 835, 905 (2022) ("The excuse of impossibility of performance is traditionally permitted to a contracting party when death or disability interferes with performance."); Restatement (Second) of Contracts § 261 cmt. a ("Even though a party, in assuming a duty, has not qualified the language of his undertaking, a court may relieve him of that duty if performance has unexpectedly become impracticable as a result of a supervening event . . . traditionally [including] . . . supervening death or incapacity of a person necessary for performance.").

[147] *See, e.g.*, Robert Barton, Lisa M. Lukaszewski, Stacie T. Lau, *Gifts to Caretakers: Acts of Gratitude or Disguised Malfeasance? New Statutes May Decide for Us*, 29 PROB. & PROP. 22, 23 (2015) ("A gift obtained, however, when the testator lacks capacity or when the gift is the product of fraud or undue influence voids the transaction.").

[148] The same was true, historically, of agency law, which terminated agency relationships at the incapacity of the principal, though this rule has been superseded by durable power of attorney statutes, designed to let individuals plan for their incapacity with agency law. *See generally, e.g.*, Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1. 3 (2001) (defining the history, purpose, and function of durable powers of attorney). One can be a tort victim while incapacitated, however, and the relationship between psychology and personal identity is less obviously on display in that context, from this perspective. *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 3, at 1107 n. 194 ("The doctrine of capacity does not play a similar thresholding role in tort law.").

[149] *See supra* notes 143–144 & accompanying text.

[150] *See, e.g.*, KOHN, *supra* note 117, at 28 (discussing different standards of capacity for different decisions).

decisions but not others, manage some property but lose control of the rest, or enter some contracts and not others.[151] On the perspective offered here, this is a kind of recognition of *partial* legal personal identity—one which turns on a spectrum of psychological, cognitive facts.[152] And, it seems unlikely to be a coincidence that the law's assessment of partial incapacity is not merely a *scalar* assessment of the *quantity* of one's cognitive functioning, but accounts for intuitions about the kinds of psychological and relational characteristics that are more or less central to the identities of persons—less cognitive functioning is required to get married than to enter a commercial contract, less capacity is required to execute a will than to make investment decisions.[153]

Second, while courts in contract law *rarely* take seriously efforts by defendants to relieve themselves of obligations on the ground that they are no longer the same person who agreed to the contract, there *are* cases in which they have, indeed, been persuaded by that argument. Specifically, Professor Kaiponanea Matsumura has explored a body of cases—mainly involving agreements regarding the disposition of frozen embryos and other family law contexts—in which courts have relieved contract defendants of obligation on the theory that they are no longer the same person who agreed to the contract.[154] If contract law foundationally, normatively *identified* legal persons *with* their bodies, these cases would not only be wrongly decided, but absurd—and courts would be acting lawlessly in even *entertaining* the

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[151] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 3, at 1083 (describing the ways in which individuals can have or not have the capacity to make different decisions).

[152] *See supra* Part I.

[153] *See, e.g.*, MIKE E. JORGENSEN, ELDER LAW 49 (2008) ("The standard for contractual and donative capacity in most states is a higher and more demanding standard of conduct than the standard for testamentary capacity."); 177 Am. Jur. 3d Proof of Facts § 4 (2019) ("[C]ourts have pointed out that the threshold of mental capacity is relatively low, so that even though a person might be under conservatorship and thus could not enter into an ordinary contract, he or she may have capacity to get married."); *see also* Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1239–46 (2013) (noting that the power to marry or divorce or draft a will is generally held to be non-delegable in the event of incapacity on the hypothesis that it is too personal).

[154] *See, e.g.*, Matsumura, *supra* note 6, at 87–91 (summarizing the apparent receptiveness of some courts to claims that the defendant is no longer the same person who agreed to the contract); *see also* IN RE MARRIAGE OF WITTEN, 672 N.W. 2d 768, 777 (Iowa 2003) (refusing to enforce a contract regarding the disposition of embryos on the hypothesis that "individuals are entitled to make decisions consistent with their contemporaneous wishes, values, and beliefs"); ZUMMO V. ZUMMO, 574 A.2d 1130, 1143 (Pa. Super. Ct. 1990) (declining to enforce a prenuptial agreement specifying that all of a couple's children would be raised in the Jewish faith on the theory that it is difficult for people to "project themselves into the future"); WEISS V. WEISS, 49 Cal. Rptr. 2d 339 (Ct. App. 1996) (declining to enforce a similar agreement out of concern for the prerogative to change one's mind about religious matters).

argument that the defendant is no longer the same legal person that they were.

To be sure, Matsumura criticizes these cases as wrongly decided for applying an erroneous theory of personal identity—but that's because he thinks that the particular kind of psychological theory the courts applied in those cases is inconsistent with contract law's general understanding of legal personal identity (incidentally, he too argues in favor of a narrative account).[155] Either way, the fact that courts will entertain (even in limited circumstances) arguments by contract defendants that, notwithstanding remaining in the same body, they are no longer the person that agreed to the contract in a sense meaningful to determining their contractual obligations, suggests that the law's routine reidentification of contract parties by means of their bodies is a presumption (indeed, perhaps even a rebuttable one) rather than an organizing normative commitment.[156]

Third, in a similar vein, there is a body of (mainly older) private law cases in which the identity of individuals *is* directly litigated—usually where the court has been presented with what might be alternative spellings of the name of a single natural legal person.[157] These cases hold that questions of personal identity are for the jury.[158] And the evidence on which they are decided is *not* exclusively bodily—thankfully, the court in *Toole v. Peterson*, in trying to determine whether then-deceased "John Watson" and "John Whatson" were the same person, did not exhume any corpses.[159] Rather, these cases mainly turn on proof of *social facts*—facts about the purported individual's familial relations, their transactions with others, and so on; different from, and more than, the physical continuity of a body.[160]

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[155] *See, e.g.*, Matsumura, *supra* note 6, at 76 (arguing that these cases are wrongly decided to the extent that they seem to rely on a non-narrative theory of personal identity); *see infra* Part III.B.

[156] *See supra* note 128 & accompanying text.

[157] *See, e.g.*, TOOLE V. PETERSON, 31 N.C. 180, 182 (N.C. 1848) (litigating the identity of a deceased individual in a chain of title who might have spelled his name differently on different occasions); AMBS V. CHICAGO, ST. P., M & O RY. CO., 46 N.W. 321, 322–23 (Minn. 1890) (same); MEANS V. PROTESTANT EPISCOPAL CHURCH COUNCIL OF THE DIOCESE OF TEXAS, 503 W.W. 2d 591, 592 (Tex. Civ. App. 1973) (same); *see also* JAMES H. BARRY & CO. V. JOHN H. CARUTHERS, 6 Rich. 331, 333 (S.C. Ct. App. 1853) (litigating the identity of an individual for purposes of establishing a particular defendant's indebtedness to the plaintiffs).

[158] *See* TOOLE, 31 N.C. at 189 ("The question of identity was a matter for the jury."); *see also* KNOX V. CATHOLIC WOMEN'S BENEVOLENT LEGION, 69 Pa. Super. 426, 429 (Pa. Sup. Ct. 1918) ("The learned trial judge left the question of identity to the jury. We think this was right.").

[159] *See* TOOLE, 31 N.C. at 182.

[160] *See, e.g.*, TOOLE, 31 N.C. at 183 ("They offered in evidence the Register's Books, which after objection by the defendant, were received by the Court, and from them shows nineteen deeds from John Watson and Wattson, to different persons . . . they further proved that the descendants of Joshua Grainger, Ju'r, the grand-son of Joshua Grainger, Sen'r,

And finally, seeing the reidentification of individuals in private law on the basis of their bodies as a presumption makes better sense of the law's normative organization. As already indicated, the role of legal personal identity in contract and property is essentially intertwined with the normative aspirations of these bodies of law—to hold the *same* individuals to their commitments over time; to recognize the *ongoing* ownership of particular property by particular persons.[161] Scholars have long pointed out that bodily continuity theories of personal identity struggle to make sense of the normative significance we associate with the concept—the continuity of a human body is just a biological fact, not the sort of thing that seems likely to ground moral effects.[162] Since private law *does* presume its conception of legal personal identity is a normatively significant one, it is easier to make sense of this commitment if its conception is not merely bodily.

And understanding private law's commitment to legal personal *identity*

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claimed and occupied lots on market street . . . ."); LEE V. MURPHY, 51 P. 549, 551 (Cal. 1897) ("The mortgage was between two residents of the same county, was executed and acknowledged in that county, and the names on the face of the instrument were the same."); AMBS V. CHICAGO, ST. P., M & O RY. CO., 46 N.W. 321, 322–23 (Minn. 1890) ("[I]t is a matter of common knowledge that very many, and perhaps at this day most, persons bear a double, or more than one, Christian name, and that in the writing of the name one of these very commonly indicated merely by its middle initial letter."); MEANS V. PROTESTANT EPISCOPAL CHURCH COUNCIL OF THE DIOCESE OF TEXAS, 503 W.W. 2d 591, 592 (Tex. Ct. App. 1973) ("[A]ppellees offered the affidavits of a grandson of Mary Fortney Kroll which contains a statement to the effect that John Fortney was sometimes called John T. Fortney or John Fordney."); KNOX V. CATHOLIC WOMEN'S BENEVOLENT LEGION, 69 Pa. Super. 426, 429 (Pa. Sup. Ct. 1918) ("The record of the church was properly admitted as furnishing competent proof of the date of baptism and necessarily that the date of birth preceded it, and of the identity of the parties named, but it was not conclusive . . . ."); *see also* TAYLOR V. BOWEN, 84 Mo. App. 613, 618 (Mo. Ct. App. 1900) ("A description of a party to a deed by name, residence and occupation only furnishes the means of identification. That is all any description can do. It does not of itself identify the party.").

[161] *See supra* Part II.A.

[162] *See, e.g.*, David Livingtstone Smith, *"Human" Is an Essentially Political Category*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF PERSONAL IDENTITY AND THE SELF 231, 235 (2022) ("It is difficult to see how the mere fact of belonging to a certain biological kind would endow one with this special status."); Quinton, *supra* note 43, at 402 ("In our general relations with other human beings their bodies are for the most part intrinsically unimportant."); Jessica Spector, *The Grounds of Moral Agency: Locke's Account of Personal Identity*, 5 J. MORAL PHIL. 256, 266 (2008) ("All this talk about human corporeality is meant to show that identity of material substance, identity of immaterial substance, and even identity of physical life, do not yet yield the principle of continuity of the *moral* man."); Walter Glannon, *Moral Responsibility and Personal Identity*, 35 AM. PHIL. Q. 231, 231 (1998) (theorizing a morally significant concept of personal identity and dismissing a strictly bodily criterion out of hand); Starmans, *supra* note 3, at 41 ("Perhaps our intuitions about personal identity don't reduce to physical intuitions because, intuitively, we don't think of people as objects.").

in non-bodily terms would harmonize our understanding of the normative commitments of private law across its domain. As mentioned, the consensus view on natural legal person*hood* is that it is not a biological category, but rather a psychological or cognitive kind.[163] And while it may not be a logical contradiction for the law to define legal personhood in terms of cognition, but the identity of legal persons in terms of the continuity of their bodies, it would be *odd*—surely the more coherent position is that, if the law thinks cognition matters in circumscribing the category of legal persons, it would also take their continuity over time to depend on similar facts.[164]

In short, although it is true that contract and property (and tort and agency) generally reidentify particular legal persons based on their bodies, the better interpretation of this phenomenon sees it as reflecting a legal *presumption* that the possessors of the same body are the same person they were previously in some *other*, non-bodily sense, rather than the law's commitment to the normative significance of a bodily conception of personal identity. In this way, law's understanding of personal identity for diachronic, reidentification purposes in contract and property can be seen to fit alongside its understanding of the way in which they are characterized at particular moments in tort and agency.[165]

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[163] *See supra* notes 49–50 & accompanying text.

[164] *See supra* notes 49–50 accompanying text.

[165] An independent possibility, more speculatively, is that the law might rely on a presumption of the continuity of identity by virtue of the body not only because of the risk of error, but to accomplish an allocation of legal rights, powers, and duties that the law would have independent normative reasons to want to accomplish either way. Suppose that A owns property and undergoes some transformation that, under whatever the law ultimately takes to be the normatively significant standard, transforms into a new person, B. Under the ordinary logic of private law, this would mean A is dead, their estate would be probated—and B, a new person in their body, would have no property of their own, without the ordinary relational resources for obtaining it. *See, e.g.*, John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988) (arguing that society presumes and relies on an intergenerational transmission of wealth that takes place mainly by investment in human capital in the next generation).

But B *is*, in an important sense, related to A—by virtue of sharing the same body, the same history, perhaps to some extent the same relationships, and so on. *See, e.g.*, ROBERT NOZICK, PHILOSOPHICAL INVESTIGATIONS 27–70 (1981) (arguing that in many problem cases of personal identity there is a candidate who is the "closest continuer" of the original person who, by virtue of that status, 'inherits' the normative entitlements of the original person). The law might be able to presume, from this perspective, that A, if she had known this would happen, might feel some special connection to B, and want the possessor of her body to have access to her property. *See, e.g.*, James Toomey, Jonathan Lewis, Ivar R. Hannikainen & Brian D. Earp, *A qualitative study of true self judgments, epistemic access, and medical decision-making*, J. MED. ETHICS (2025) (noting that people intuitively feel some normative standing to control the decision-making of a future occupant of their body).

The law, from this perspective, might presume the continuity of legal personal identity from A through B as a default way to transmit A's property to B. *See, e.g.*, Bernard Williams,

III. NARRATIVE PERSONAL IDENTITY IN PRIVATE LAW

Private law, we have seen, implicitly presupposes a conception of legal personal identity. From contract to agency, private law doctrines are incoherent without some mechanism for characterizing individual legal persons and identifying and reidentifying them across time. We have also seen some suggestion of *how* the law understands its notion of "legal personal identity"—it is, at least, not *exclusively* a bodily conception. This Part fleshes out a theory of the concept of legal personal identity by turning to the philosophical literature on the general concept.

In that literature, we will find that something along the lines of the "narrative theory" of personal identity best explains the law's conception—situating the ultimate locus of personal identity in the mental, focusing on the kinds of psychological traits that the law seems to care about, and recognizing both that legal persons can undergo a great deal of psychological change over time, *and* that *certain kinds* of psychological change without a narrative structure can disrupt legal personal identity in a variety of ways. Before getting there, however, I'll say a few words in justification of this methodology—of turning to the *philosophical* literature in making sense of the *law's* concept of personal identity.

A. Legal Concepts and Conceptual Construction

On the account offered here, "legal personal identity" is a legal concept—

The Self and the Future, 79 PHIL. REV. 161, 178 (1970) ("This line of talk is the sort of thing indeed appropriate to deciding the ownership of some property which has undergone some bewildering set of transformations; they just have to decide, and in each situation, let us suppose, it has to go to somebody, on as reasonable grounds as the facts and the law admit."). And, indeed, it *is* a default rule—with a trust A could trigger an alternative disposition of her property by reference to any specified psychological changes. *See, e.g.*, David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 ELDER L. J. 1, 32–33 (2016) ("A professionally drafted revocable trust instrument typically will include a provision for private determination of the settlor's competence.").

We might justify holding B to at least some of A's contractual obligations on similar grounds—out of the concern for A's contracting party C, who would otherwise be out of luck by the disappearance of A, while B might be unjustly enriched by C's performance; making contract enforcement in cases of radical psychological change look more restitutionary than contractual. *See, e.g.*, Restatement of Restitution § 1 ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."); *see also generally* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001) (situating the normative foundations of restitution in private law).

a category that the law relies on in resolving legal disputes. From that perspective, you might wonder why it makes sense to look to what philosophers (or, really, anyone other than lawmakers) have to say about the concept of "personal identity" outside of the law—after all, can't the law define its own conception of "legal personal identity" that bears no, or at least little, relation to the metaphysically or morally best understanding of that concept?[166] And, in a related vein, you might wonder why I am searching for "the" conception of legal personal identity at all—we've already seen that the notion I'm calling "legal personal identity" comes up in different ways in different contexts; might it not be that, rather than "private law" having a conception of personal identity, each discrete legal doctrine, or even discrete purpose for which the law needs to characterize or reidentify persons, has its own?[167]

The answer to both questions is the same—it *could* be. That is, the law *could* develop its own conception of legal personal identity distinct from the philosophically best or ordinary understanding of the concept.[168] And the law could rely on different conceptions of personal identity in different contexts.[169] It just doesn't seem like *this is what has happened*—for reasons we've already seen, the law does not appear to have thoroughly constructed its own, distinctive conception of legal personal identity; much less *several* distinct conceptions tailored to different contexts. Evidently, rather, the law has, by relying on intuitions of judges and juries, functionally imported an ordinary conception of the "identity" of persons over time; and there is no reason to reject the more parsimonious hypothesis that this conception is

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[166] *See, e.g.*, Brian D. Earp, Jonathan Lewis, Joshua A. Skorburg, Ivar R. Hannikainen & Jim A.C. Everett, *Experimental Philosophical Bioethics of Personal Identity*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF PERSONAL IDENTITY AND THE SELF 184, 193 (2022) (suggesting that the law's conception of personal identity for purposes of withdrawing from research differs from the lay notion and that "conceptual engineering" of the legal concept may be justifiable); Diamantis, *supra* note 7, at 207 (noting that experimental data suggests that the law's conception of corporate personal identity differs from the lay view).

[167] *See, e.g.*, David W. Shoemaker, *Personal Identity and Practical Concerns*, 116 MIND 317 , 317 (2007) (suggesting that the different normative purposes to which we look to a concept of personal identity in different contexts justify relying on different conceptions); Tobia, *supra* note 7, at 5 ("Perhaps for some purposes (e.g. punishment), we identify Y with whatever X is his unique psychological continuous predecessor, but for other purposes (e.g., ownership), we identify Y with X only if they are biologically continuous.").

[168] *See, e.g.*, Sandy Steel, *Private Law Beyond the Law*, in MARIETTA AUER, PAUL B. MILLER, HENRY E. SMITH & JAMES TOOMEY, EDS., REINACH AND THE FOUNDATIONS OF PRIVATE LAW 150, 159 (2025) (noting that it is "entirely an open question" whether true metaphysical conclusions about extra-legal concepts "should have any legal significance").

[169] *See, e.g.*, James Toomey, *Property's Boundaries*, 109 VA. L. REV. 131, 187 (2023) ("Legislatures, of course, can pursue any normative goals they want however they want, not limited by concepts and their entailments.").

unitary and applied trans-substantively in private law.[170]

Legal concepts do not spring into being like Athena—they have to come from somewhere. And there are only two places from which they *can* come—either the law creates its own concept; or it imports one from outside the law. If the law is going to create its own concept, it has to *create its own concept*—that is, the boundaries and content of its distinctive conception must be in some way available within legal materials.[171] This is why when a novel statutory scheme like, say, the Racketeer Influenced and Corrupt Organizations Act creates a new, distinctively legal concept that doesn't track anything from outside of the law, say, the concept of a "RICO enterprise," it has to *give it content* in legal materials—in this case, the statute itself, case law, and Department of Justice interpretations.[172] Similarly, if the law is going to create *multiple* distinct conceptions, the boundaries and content of *each* of these must be available among legal materials.[173]

But legal materials do not explicitly contain a concept of "legal personal identity"—no statute or other enactment lays out the criteria for characterizing or reidentifying individual legal persons, across time or at a given moment; case law rarely engages with the issue directly; few treatises and little scholarship addresses it.[174] Of course, we can imagine a legal system that *did* create an explicit, exclusively legal conception of personal identity—a legal code could, for instance, tell us that natural persons are to be reidentified for contract purposes by virtue of the continuity of their bodies; or prescribe the particular set of behavioral characteristics to which the duties of agents are tethered.[175] But that is not what has happened in our legal

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[170] *See, e.g.*, Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16, 25–26 (2000) (noting the systemic benefits of presuming consistency in legal concepts across domains); Andrew S. Gold & Henry E. Smith, *Sizing up Private Law*, 70 U. TORONTO L. J. 489, 501 (2022) ("Organizing the world into (legal) persons and things permits legal relations to interact in more stylized ways than would be the case in a fully interconnected system.").

[171] *See, e.g.*, Mathew D. McCubbins & Mark Turner, *Concepts of Law*, 86 S. CAL. L. REV. 517, 539–40 (2013) (describing the positive law's construction of a concept of "legal person" that includes corporations, outside of the ordinary concept); *see also* Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173, 193 (2015) (noting that "limited liability was a legal invention intended to further economic ends").

[172] *See* 18 U.S.C. § 1961(4) ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"); *see also* U.S. DEP'T OF JUSTICE, CRIMINAL RICO: 18 U.S.C. §§ 1961–1968, A MANUAL FOR FEDERAL PROSECUTORS 69–70 (6th rev. ed. 2016) (discussing the RICO statute's concept of an "enterprise" by reference to statutory language and precedential judicial opinions).

[173] *See supra* note 171 & accompanying text.

[174] *See supra* Part II.

[175] *See supra* notes 171–172 & accompanying text .

system. Rather, as we've seen, the concept of personal identity in private law is *implicit*—it is *presupposed* by the structure of law; we know it is there because it *must* be there for the law to function the way it does, not because the law explicitly tells us anything about its content.[176]

If some conception of legal personal identity must be there, but it is not getting its content from within the law, it must be coming from somewhere else—imported from outside the law. This, too, is something legal systems do all the time—as when the law relies on ordinary numeric and temporal concepts in, say, defining the age of contractual majority or circumscribing tax liability.[177] So too, presumably, with personal identity. Needing a concept of legal personal identity, and not having created its own, what the law *must be* relying on an extra-legal conception of what makes persons "themselves" across time in some normatively relevant sense—relying on the *ordinary* intuitions of judges and juries.[178]

For these same reasons, while it could be that some legal system relies on different conceptions of personal identity for different legal contexts—a bodily criterion in property and a psychological one in tort, for instance—that does not seem to be what's going on in ours. Our legal system doesn't appear to have prescribed its own conception of legal personal identity in any context, much less *multiple* conceptions in different contexts.[179] Moreover, of course, while it is certainly possible for the law to use different conceptions for different purposes, considerations of coherence and parsimony counsel against jumping to the conclusion that this is what is going on—*especially* where the law does not explicitly tell us that it is.[180] And we've already seen

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[176] *See supra* Part II; *see also* Diamantis, *supra* note 7, at 203 ("Legal scholars rarely talk about personal identity, even though unstated and unexamined assumptions about identity are essential to legal practice."); Christian Mott, *Statutes of Limitations and Personal Identity*, in TANIA LOMBROZO, JOSHUA KNOBE & SHAUN NICHOLS, EDS., OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY, VOL. 2 243, 243 (2018) (noting the importance of unarticulated intuitions about personal identity in the law).

[177] *See, e.g.*, Toomey, *Property's Boundaries*, *supra* note 169, at 149 ("When a criminal statute prescribes sentences in 'years,' courts look to the concept of a year in its extra-legal sense; when the tax code prescribes mathematical procedures for calculating liability, courts rely on the generally extant concepts of numbers, multiplication, and division.").

[178] *See, e.g.*, Stephanie Chen & Oleg Urminsky, *What's Left of Me? The Role of Self-Continuity in Decision-Making and Judgments About Identity Persistence*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF PERSONAL IDENTITY AND THE SELF 71, 71 (2022) (suggesting that "the types of beliefs about the self that underlie decision-making are those that are likely to reflect how people think about the self in everyday life"); *see also* Reid, *supra* note 33, at 107 ("The conviction which every man has of his identity, as far back as his memory reaches, needs no aid of philosophy to strengthen it; and no philosophy can weaken it, without first producing some degree of insanity.").

[179] *See supra* Part II.

[180] *See supra* Part I.

that despite facial differences in the role of personal identity in tort and agency as against contract and property, it is not hard to make sense of these doctrines as working with a single, cohesive conception of personal identity—a non-binary one having something to do with psychology.[181]

If this is, indeed, a plausible account of the genesis and characteristics of the concept of legal personal identity, the philosophical literature exploring the cognate ordinary concept is precisely the place to look to flesh out the law's conception.[182] What that literature has always aspired to do is make sense of *our intuitions* about the concept of personal identity (in the normatively relevant sense)—by thought experiment asking the philosopher, the reader, and (in experimental philosophy) the public to make judgments about identity and the self, and then theorizing about those intuitions.[183] On the account offered here, this conception, theorized about by philosophers, *is also* private law's—imported into law by way of the intuitions of judges and juries.[184]

B. Personal Identity and Narrative Continuity

In trying to make sense of private law's implicit conception of personal identity, we have recourse, for better or worse, to a vast philosophical literature—indeed, the question of what makes people themselves, and the same person across time, is one of the great philosophical preoccupations of the past several centuries.[185] There seem to be, logically, three possibilities, each of which has its adherents in the literature—it might be that individual persons are characterized and identified by something to do with their *bodies*; something to do with their *minds*; or something *external*.[186] I suggest here

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[181] *See supra* Part II.

[182] *See, e.g.*, Matsumura, *supra* note 6, at 78 (turning to the philosophy of personal identity to make sense of the law's concept of personal identity in the contract context).

[183] *See, e.g.*, Perry, *Introduction*, *supra* note 42, at 7 ("When we philosophize, we are trying to discover what principles are implicit in these judgments, how they are related to one another, and why they are important."); Tobia, *supra* note 7, at 8 ("[T]he central *method* of philosophical thought experimentation—from Locke to Parfit—involves positing an intuitive response that is presumed to be *shared* among competent language users or reasonable interlocutors."); David Shoemaker & Kevin Tobia, *Personal Identity*, in MANUEL VARGAS & JOHN DORIS, EDS., OXFORD HANDBOOK OF MORAL PSYCHOLOGY (2022) (justifying experimental philosophy of personal identity on similar grounds).

[184] *Cf., e.g.*, ."); GARDNER, *supra* note 52, at 9–10 ("The big themes of private law . . . are also among the big themes of life.")

[185] *See, e.g.*, Chen & Urminsky, *supra* note 178, at 71 (noting that "a large literature in philosophy and psychology has explored questions of how people represent the self-concept and what changes people think will disrupt their identity").

[186] *See, e.g.*, Tobia, *supra* note 7, at 4 (dividing theories of personal identity into the "Biological View," the "Psychological View," and the "Anthropological View"); Harold

that only a subset of theories that characterize and identify individuals with reference to mental, psychological characteristics—roughly, accounts falling under the heading of "narrative" theories—make sense of the role the concept plays in private law.

For starters, for all its facial appeal,[187] we have already seen the challenges of identifying individual legal persons with their bodies.[188] A bodily conception of identity could not possibly do the work that agency and tort demand of it.[189] A bodily conception, too, struggles to make sense of the normative significance private law attributes to personal identity,[190] and doesn't cohere with the law's view of legal personhood as a mental, rather than biological, kind.[191] One of the most common arguments in favor of a bodily theory of personal identity in philosophy is that it appears more likely to be transitive and binary than its alternatives.[192] But we've already seen that the law's conception *does not* and *need not* have these characteristics, making this besides the point—not to mention that bodily continuity theories in fact face the same difficulties of transitivity and binariness as any other (bodies, in the science fiction of world of the logically possible in which all of these debates take place, can split and merge in the same ways psychologies can).[193] (*None* of the theories discussed here are transitive and binary, at least not without ad hoc stipulation—suggesting that we can't distinguish among them on those grounds, and that concepts "personal identity" according to which we allocate normative consequences simply are not a species of the "logical relation of identity," if anything is.)[194]

Noonan, *Personal Identity and Morality*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF IDENTITY AND THE SELF 87, 87 (2022) (citing prevailing philosophical views of personal identity as the "neo-Lockean psychological continuity account," "animalism," and "perdurance").

[187] *See, e.g.*, Harold Noonan, *Introduction*, in HAROLD NOONAN, ED., PERSONAL IDENTITY xi (1993) ("The most obvious theory of personal identity is that it is constituted by bodily identity: P_2 at t_2 is the same person as P_1 at t_1 if, and only if, P_2 at t_2 has the same body as P_1 had at t_1."); Thomas Fuchs, *Self across time: the diachronic unity of bodily existence*, 16 PHENOMENOLOGY & THE COGNITIVE SCIENCES 291, 291 (2016) (defending a bodily continuity account of personal identity).

[188] *See supra* Part II.B.

[189] *See supra* notes 101–108 & accompanying text.

[190] *See supra* note 162.

[191] *See supra* 163–165 & accompanying text.

[192] *See, e.g.*, SCHECHTMAN, *supra* note 11, at 69 (suggesting that if we set aside normative concerns and insist on transitivity and binariness, the arguments for the bodily theory are "overwhelming").

[193] *See, e.g.*, PARFIT, *supra* note 26, at 234–36 (arguing that bodily continuity theories face the same problems of logical form as accounts of identity as psychological theories).

[194] *See supra* note 33; SCHECHTMAN, *supra* note 11, at 88 (noting that our intuitions about the normative consequences usually thought to turn on personal identity are not transitive or binary).

Indeed, bodily views of personal identity have long been criticized in the philosophical literature for failing to cohere with intuitions—virtually everyone agrees that if you and I swapped brains, I would be "myself" in "your body" and vice versa.[195] And people are, in ordinary life, comfortable concluding that an individual might no longer meaningfully be "themselves" notwithstanding possessing the same body, as in advanced Alzheimer's dementia or after substantial brain injury.[196] For these reasons, bodily continuity conceptions of personal identity are the minority position in contemporary philosophy,[197] and experimental philosophy has confirmed that ordinary people do not have exclusively bodily intuitions about personal identity.[198] As we've seen, there is every reason to believe the law's

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[195] *See, e.g.*, Jim A.C. Everett, Joshua A. Skorburg, Jordan L. Livingston, Vladamir Chituc & Molly J. Crockett, *For Whom Do Moral Changes Matter: The Influence of Change Type, Direction, and Target on Judgments of Identity Persistence*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF PERSONAL IDENTITY AND THE SELF 15, 15 (2022) ("[I]dentity change is also an enduring trope in popular fiction and entertainment, from classic children's books like Mark Twain's *The Prince and the Pauper* to cult-classic 'body swap' movies like *Freaky Friday*."); SCHECHTMAN, *supra* note 11, at 18 ("The basic idea that what is important to us in personal identity is continuation of psychological life—regardless of the substance in which it is embedded—can be found in the numerous tales of metamorphosis and body transfer from ancient myths to the plots of television situation comedies."); Locke, *supra* note 32, at 44 ("For the soul of a prince, carrying with it the consciousness of the prince's past life, enter and inform the body of a cobbler, as soon as deserved by his own soul, everyone sees he would be the same person with the prince . . . ."); *see also* Williams, *supra* note 165, at 161 (conceding, in the course of defending a bodily conception of personal identity, that in cases of psychological swaps of strangers, we would intuitively say that the people swapped bodies).

[196] *See, e.g.*, Sider, *supra* note 129, at 196 ("We say things like: 'Jack just isn't the same person he used to be, now that he's been brainwashed by that cult.'"); James Toomey, *Understanding the Perspectives of Seniors on Dementia and Decision-Making*, 12 AJOB EMPIRICAL BIOETHICS 101 (2020) (finding that participants thought the ethical permissibility of intervening in their decision-making turned on whether dementia had disrupted their personal identity); Earp, et al., *supra* note 166, at 185 ("When we 'lose ourselves' in periods of mental illness; when a loved one starts to seem like a stranger after developing an addition; when a parent or grandparent with dementia doesn't recognize us, we may feel disoriented, disenchanted, or disturbed.").

[197] *See, e.g.*, Perry, *Introduction*, *supra* note 42, at 5 ("If we can have the same person on two different occasions when we don't have the same live human body, then it seems that a person cannot be identified with his body, and personal identity cannot be identified with bodily identity.").

[198] *See, e.g.*, Sarah Molouki & Daniel M. Bartels, *Personal change and the continuity of the self*, 93 COGNITIVE PSYCH. 1 (2017) (finding support for conception of personal identity based in psychological rather than bodily characteristics); Kevin Patrick Tobia, *Philosophical Method and Intuitions as Assumptions*, 46 METAPHILOSOPHY 575 (2015) (same); Sara Weaver & John Turri, *Personal identity and persisting as many*, in TANIA LOMBROZO, JOSHUA KNOBE & SHAUN NICHOLS, OXFORD STUDIES IN EXPERIMENTAL PHILOSOPHY, VOL. 2 213, 213 (2018) (same); Sergey Blok, George E. Newman & Lance J.

reidentification of individuals with their bodies in standard cases is a presumption rather than a committed normative position.[199]

The notion that personal identity might be constituted by something other than body or mind is less common in the literature.[200] The most common "external" accounts of personal identity are so-called *relational* views, which hold that individuals are constituted and sustained by their social roles and relationships.[201] To be sure, the notion that individuals are at least partially characterized and sustained by social relationships and roles is highly intuitive and finds support in experimental philosophy.[202] The law's conception of personal identity, too, vindicates this intuition to some extent—offering damages in tort, for instance, for the loss of relationships and companionship in wrongful death actions.[203] And, it seems unlikely to be a coincidence that the cases in which courts are most open to relieving contract defendants of liability on change-of-identity grounds are those involving the creation and termination of familial relationships, while the older cases rely on facts about relationships when resolving questions of personal identity.[204]

From this perspective, while relationships and social roles seem to play a

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Rips, *Individuals and Their Concepts*, in W.K. AHN, R.L. GOLDSTONE, B.C. LOVE, A.B. MARKMAN & P. WOLFF, EDS., CATEGORIZATION INSIDE AND OUTSIDE THE LABORATORY: ESSAYS IN HONOR OF DOUGLAS L. MEDIN 127, 127 (2005) (same).

[199] *See supra* Part II.C.

[200] *See, e.g.*, Kevin Patrick Tobia, *Personal Identity, Direction of Change, and Neuroethics*, 9 NEUROETHICS 37, 37 (2016) (noting that philosophy of personal identity is generally concerned with "brains and bodies").

[201] *See, e.g.*, Earp, et al., *supra* note 166, at 197 ("[I]t is increasingly recognized that the self and identity are not only diachronic but also relational." (citing CATRIONA MACKENZIE & NATALIE STOLJAR, EDS., RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (2000); John Christman, *Relational Autonomy, Liberal Individualism, and the Social Construction of Selves*, 117 PHIL. STUDS. 143 (2004); Diana Tietjens Meyers, *Who's There? Selfhood, Self-Regard, and Social Relations*, 20 HYPATIA 200 (2009); Brian D. Earp, Killian L. McLaughlin, Joshua T. Monrad, Margaret S. Clark & Molly J. Crockett, *How social relationships shape moral wrongness judgments*, 12 NATURE COMMUNICATIONS 5776 (2021)); Kittay, *supra* note 44, at 110 (arguing for the "role of social relations in the constitutions of identity").

[202] *See, e.g.*, Jennifer Mason, *Personal Narratives, Relational Selves: Residential Histories in the Living and Telling*, 52 SOCIOLOGICAL REV. 162, 162 (presenting results of a qualitative study showing the importance of relational roles to perceptions of personal identity); *see also* Serena Chen, Helen Boucher & Michael W. Kraus, *The Relational Self*, in SETH J. SCHWARTZ, KOEN LUYCKX & VIVIAN J. VIGNOLES, EDS., HANDBOOK OF IDENTITY THEORY AND RESEARCH (2011) ("describ[ing] the emerging theory and evidence on the relational self from the personality and social psychology literatures"); Michael J. Carter & Jen Marony, *Examining Self-Perceptions of Identity Change in Person, Role, and Social Identities*, 40 CURRENT PSYCH. 253, 253 (2021) (measuring personal assessments of their identity as tied up with social roles).

[203] *See supra* note 106.

[204] *See supra* Part II.C.

role in the law's conception of personal identity, the problem with the "relational" theory of personal identity is that it is not (and largely doesn't purport to be) the whole enchilada—a *complete* theory of personal identity, at least not the law's. Maybe I've been brainwashed by analytic individualism, but it is hard to accept that an individual human being raised in isolation—whatever other challenges they may face—*has no personal identity* because they aren't anyone's second-cousin or insurance broker or whatever.[205] And, of course, relationships and social roles change (often more or less arbitrarily) all the time—many people, indeed, think this is a *good* thing—without accompanying intuitions that an entirely (or even partially?) new person has been created.[206]

Meanwhile, in law, it is once again not clear what it would mean to say that agents' duties are constituted by a principal's relationships; tort offers plenty of damages for harms other than the loss of relationships; and an effort to relieve oneself of unrelated contract obligations because one, say, got dumped, is so outlandish I'm not sure it's ever been tried (though, as discussed above, there *are* cases of defendants getting out of contractual obligations *directly related* to the aspects of their identity tied up in a now defunct relationship—another case study in the law's non-binary conception of personal identity!).[207]

If the law's conception of personal identity is not bodily, nor external, it must have something to do with the mind. And, indeed, contemporary philosophers overwhelmingly hold that personal identity has something to do with psychology; experiments have shown that ordinary people largely think the same.[208] We've already seen that the law's conception of personal identity points to the mental—it is psychological facts that create the duties of agency,

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[205] *See, e.g.*, Visa A.J. Kurki, *Agency in Legal Personhood*, in CHRISTOPHER ESSERT, EVA MICHELER & PAUL B. MILLER, LEGAL PERSONHOOD IN PRIVATE LAW (forthcoming 2026) (arguing that relational theories of personhood cannot be complete)

[206] *See, e.g.*, Michael J. Carter & Jen Marony, *Examining Self-Perceptions of Identity Change in Person, Role, and Social Identities*, 40 CURRENT PSYCH. 253, 253 (2021) (noting that people are more comfortable changing role-based aspects of their identity over time than other aspects they consider to be more core to the concept).

[207] *See, e.g.*, Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 VA. L. REV. 1921, 1927–28 (2002) ("The interest in physical security is the core concern of tort law."); *see also supra* Part II.C.

[208] *See, e.g.*, Everett, et al., *supra* note 195, at 15 (noting that "a dominant view [of personal identity] attributed to John Locke posits that *psychological continuity* . . . [is] at the heart of personal identity."); Starmans, *supra* note 3, at 41 ("[A]dults and children have no hesitated to locate a person wherever his or her psychology is located, regardless of whether there is any spatiotemporal connection to the body it now occupies." (citing Kathleen H. Corriveau, Elisabeth S. Pasquini & Paul L. Harris, *"If it's in your mind, it's in your knowledge": Children's developing anatomy of identity*, 20 COGNITIVE DEVELOPMENT 321 (2005)).

psychological states that tort law (often) tries to restore; a perspective that aligns legal personal identity with the law's understanding of personhood and offers some grounding for the normative significance private law attributes to the concept.[209]

It is, of course, one thing to conclude that personal identity must have something to do with the mind, and quite another to figure out *what* it has to do with the mind—and that is where the controversies arise. For starters, it could be that individuals are characterized and identified as a particular, defined set of mental characteristics—say, facts about their personality, their values, the way in which they react to things and think about the world.[210] And, indeed, many people seem to define themselves and others by reference to an essential bundle of psychological features—citing, for instance, moral values, psychological traits, lifestyle features, and proclivities when asked to think about what makes them themselves.[211] Changes in these sorts of traits do, indeed, often lead to judgments of identity disruption.[212]

And we might see support for a view along these lines in the law. After all, goals, values, personality, and decision-making patterns are precisely the stuff out of which the duties of agents are comprised.[213] And when tort aspires to put the plaintiff in the position they were in, changes to personality and psychological characteristics are what it looks to.[214] For many people "core values" and personality characteristics are a source of normative value, and,

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[209] *See supra* Part II.B–C.

[210] *See, e.g.*, SCHECHTMAN, *supra* note 11, at 83 ("The idea that the goals and values of central to use define who we *truly* are is fairly common . . . .").

[211] *See, e.g.*, Zachary Horne & Andrei Cimpian, *Intuitions about personal identity are rooted in essentialist thinking across development*, 191 COGNITION 103981, 103981 (2019) (finding that many people have essentialist intuitions about personal identity); Shaun Nichols & Michael Bruno, *Intuitions about personal identity: An empirical study*, in JOACHIM HORVATH & THOMAS GRUNDMANN, EDS., EXPERIMENTAL PHILOSOPHY AND ITS CRITICS (2013) ("Open-ended, abstract questions about what is required for survival tend to elicit responses that appeal to the importance of psychological characteristics.").

[212] *See, e.g.*, James Toomey, *How to End Our Stories: A Study of the Perspectives of Seniors on Dementia and Decision-Making*, 29 ELDER L. J. 1, 39 (2021) (finding, for example, that one-third of a population of seniors would want to be restricted from being permitted to change their will if their personality changed, and nearly forty-percent would want to be restricted if their religious values changed); Rebecca Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 ARIZ. L. REV. 373, 381 (1986) ("Because illness and injury often produce significant changes in an individual's beliefs, values, and goals, and hence in her interests, conflicts between past and present interests, and perhaps the development of a new person, might not be uncommon."); Chen & Urminsky, *supra* note 178, at 77 (2022) ("While these approaches select a different feature to place at the center of the self-concept, they all conceptualize the self-concept as defined by a set of core features in general.").

[213] *See supra* notes 101–102 & accompanying text.

[214] *See supra* notes 103–106 & accompanying text.

as a matter of fact, these sorts of things *don't* tend to change all that often in adult life, which could justify the law's presumption of bodily reidentification.[215]

However common in fact, though, the problem with a view that would take personal identity to be constituted of an essential set of values and mental characteristics is that people *do* change, sometimes even dramatically—at least, the psychological characteristics, preferences, and values that people cite as constitutive of their identity at any given time are always subject to change, and at least sometimes do; making an account of personal identity grounded in a static essential suite of psychological characteristics a non-starter (and, indeed, it is a view that has never been taken altogether seriously in philosophy).[216]

In short, the law recognizes that people can undergo psychological change without a total disruption of identity—its concept of legal personal identity must be compatible with that.[217] At the same time, as has been emphasized, the law's concept of personal identity is not bodily.[218] That means that it must be possible, at least conceptually, for a legal person to remain the "same" despite disruption in their body; and for legal personal identity to be disrupted despite remaining in the same body (and, indeed, we have seen that this *is* possible with respect, at least, to the way the capacity doctrine functions).[219] In other words, *some* mental changes must be capable

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[215] *See supra* Part II.C; John W. Lounsbury, Jacob J. Levy, Frederic T. Leong & Lucy W. Gibson, *Identity and Personality: The Big Five and Narrow Personality Traits in Relation to Sense of Identity*, 7 IDENTITY 51, 51 (2007) (describing stability in Big Five personality traits and their role in self-conceptions of identity).

[216] *See, e.g.*, Matsumura, *supra* note 6, at 76 (describing changes to these sorts of characteristics as "inevitable"); Preston Greene & Meghan Sullivan, *What Matters in Psychological Continuity? Using Meditative Traditions to Identify Biases in Intuitions About Personal Persistence*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF PERSONAL IDENTITY AND THE SELF 111, 121 (2022) (noting "deep-set intuitions that [our] identity has remained constant even as [our] personality and thought patterns have undergone drastic change"); James Toomey, Jonathan Lewis, Ivar R. Hannikainen & Brian D. Earp, *Advance Medical Decision-Making Differs Across First- and Third-Person Perspectives*, 15 AJOB EMPIRICAL BIOETHICS 237, 237 (2024) (finding that participants widely assumed that strangers could change traits and preferences substantially without becoming a new person).

[217] *See, e.g.*, Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3, 19 (1971) ("[F]usion would involve the changing of some of our characteristics and some of our desires. But only the very self-satisfied would think of this as death. Many people welcome treatments with these effects.").

[218] *See supra* Part II.B.

[219] *See supra* notes 117–118 & accompanying text; Locke, *supra* note 32, at 41 ("Thus, we see the substance whereof personal self consisted at one time may be varied at another, without the change of personal identity; there being no question about the same person, though the limbs which but now were a part of it, be cut off."); Reid, *supra* note 33, at 109 ("When a man loses his estate, his health, his strength, he is still the same person, and has

of totally disrupting legal personal identity—the alternative would be a bodily account, which we've rejected.[220] On the other hand, *not all* psychological changes disrupt legal personal identity, even partially.[221] What we need is a theory of which is which.

The leading set of accounts of personal identity in the philosophical literature purport to draw exactly this line—this is the broad category of theories, with its origins in Locke, that take personal identity to be constituted by specified kinds of *psychological continuity*.[222] On these views, people remain themselves so long as some set of their present psychological characteristics maintain a certain relation to prior psychological characteristics—individual persons are, in other words, characterized by certain mental facts arranged in a specified way across time.[223]

Of course, while psychological continuity theories trade in a great deal of intuitive support, the devil here is still in the details—in working out *what* psychological features need to be continuous, how they have to relate to one another across time, and what sorts of changes disrupt the required continuity.[224] Locke himself, for instance, (is generally taken to have) thought that personal identity was constituted by the continuity of *memory*—but of course we lose or fail to retain memories all the time, and Locke had no theory

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lost nothing of his personality. If he has a leg or an arm cut off, he is the same person he was before.").

[220] *See supra* notes 187–199 & accompanying text.

[221] *See, e.g.*, Chen & Urminsky, *supra* note 178, at 73 ("[S]elf-continuity judgments are not simply defined in terms of feature overlap . . . because changes to some features are more important to the definition of the self than others.").

[222] *See, e.g.*, Locke, *supra* note 32, at 46 ("This may show us wherein personal identity consists: not in the identity of substance, but, as I have said, in the identity of consciousness . . . ."); Sydney Shoemaker, *Persons, Animals, and Identity*, 162 SYNTHESE 313, 314 (2008) ("[T]he history of the topic of personal identity has been a series of footnotes to Locke['s psychological continuity theory]."); Parfit, *supra* note 217, at 206–07 ("To turn to a recent debate: most of the relations which matter can be provisionally referred to under the heading 'psychological continuity' (which includes causal continuity).").

[223] *See id.*

[224] *See, e.g.*, Shaun Nichols & Michael Bruno, *Intuitions about personal identity: An empirical study*, in JOACHIM HORVATH & THOMAS GRUNDMANN, EDS., EXPERIMENTAL PHILOSOPHY AND ITS CRITICS (2013) (finding empirical support among ordinary people for psychological continuity theories of personal identity); Tobia, *Introduction*, *supra* note 7, at 4 ("Several empirical studies find that changes in psychological properties significantly influence people's evaluation of connectedness and identity, providing intuitive support for the Psychological View over the Biological View."); *see also* Parfit, *supra* note 217, at 208 ("We should need to explain what we mean by 'psychologically continuous' and say how much continuity the criterion requires."); SCHECHTMAN, *supra* note 11, at 19 ("The notions of psychological continuity over time and sameness of psychological life over time are no clearer, initially, than the notion of identity over time.").

of which are identity-constituting and which aren't.[225] Derek Parfit, more recently, defended a view of personal identity as defined by a kind of minimal continuity of mental states across time—but was forced to conclude (constrained as he felt by considerations of transitivity and binariness, it's worth noting) that personal identity in this sense was not, contrary to the assumptions of ordinary life and private law, normatively significant at all.[226] Alternative views along these lines have proliferated, proffering different psychological features continuous across time in different ways.[227]

In recent years, there has been growing interest in trying to make sense of the psychological constituents of personal identity in terms of their *structure*—that is, the *way* in which they are organized across time.[228] The most comprehensive of these accounts are *narrative* theories of personal identity—those that take individuals' identities to be structured in terms of a self-narrative; a psychological "story of [a] life."[229] On this view, new

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[225] *See, e.g.*, Reid, *supra* note 33, at 114 (raising this objection to Locke's memory theory of personal identity); *see also* Perry, *Introduction*, *supra* note 42, at 20 (granting that Locke's account can't address this difficulty but suggesting that related accounts can).

[226] *See supra* note 33.

[227] *See, e.g.*, Quinton, *supra* note 43, at 403 (defining personal identity in terms of "continuity of character and memory"); H.P. Grice, *Personal Identity*, 50 MIND 330, 340 (1941) ("[T]he self is a logical construction, and it is to be defined in terms of memory."); Sydney Shoemaker, *Persons and their Pasts*, in HAROLD NOONAN, ED., PERSONAL IDENTITY 20, 20 (1993) (defending a theory of personal identity grounded in a certain kind of psychological continuity); *see also* Noonan, *Personal Identity and Morality*, *supra* note 187, at 88 (noting the ways in which "Contemporary Neo-Lockeans" revise Locke's original theory).

One prominent account emerging from the contemporary experimental literature has it that ordinary people take identity to be comprised primarily of *moral* characteristics. "[B]ut the conclusion that a radical change in morality extinguishes personal identity seems implausible. . . . [And w]hen asked about identity, participants who understood the distinction between similarity and identity largely disagreed that any of these [moral] changes resulted in a new identity." Starmans, *supra* note 3, at 43–44; *see also* Knobe, *supra* note 14, at 67–68 (agreeing that the "moral change intuition . . . doesn't have anything to do with any of the concerns that are familiar from the existing literature on personal identity").

[228] *See, e.g.*, SCHECHTMAN, *supra* note 11, at 19 ("What is required to specify the notion of psychological continuity, then, is some account of just when change is gradual and lawlike *enough* to preserve continuity."); Chen & Urminsky, *supra* note 178, at 73 (noting that, substantively, which characteristics people take to be identity-constituting is "idiosyncratic—giving Rapunzel or Samson a haircut might make them feel more like a different person than would giving the average person a haircut"); *see also* Perry, *Introduction*, *supra* note 42, at 5("[S]omeone could not be said to have mastered the concept of a person if he could not say, given the requisite information, whether two events belonged to *the history* of one person."); Matsumura, *supra* note 6, at 103 ("Scholars in various fields have converged on an appreciation of the role that narrative plays in the establishment of personal identity.").

[229] SCHECHTMAN, *supra* note 11, at 93; *see also* Matsumura, *supra* note 6, at 103–04 ("At its core, narrative identity is self-constitutive."); Matthew L. Stanley & Felipe De

experiences or characteristics are "part" of an individual's identity where they form part of the narrative through which they understand their life (subject to a variety of constraints on what counts as a "narrative" and the relation it must bear to objective reality), and disrupt it where they do not.[230] In a related vein, other accounts try to distinguish the suite of psychological characteristics that are self-constituting from those that are not in terms of their *causal continuity*—holding that the characteristics that people take to play a causal role in their story over time are more central the identity of themselves and others than features that don't played such a role.[231]

While the details must still be worked out (it is, in particular, not entirely clear what distinguishes, objectively, "narrative" from "non-narrative" causal structure; and what sort of "causality" we are talking about),[232] what these accounts have in common is that they appear to satisfy our competing intuitions of personal identity—and fit with how the law understands the concept, or at least offer a path to doing so.[233] For one thing, these accounts

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Brigard, *The Importance of Morality for One's Self-Concept Predicts Perceptions of Personal Change After Remembering Wrongdoings*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF PERSONAL IDENTITY AND THE SELF 142, 144 (2022) ("Personal past events can be woven into a life story in a way that ensures our worst failures, improprieties, and shortcomings can be attributed to a distant, dissimilar past self who has changed considerably for the better.").

[230] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 3, at 1117 ("[L]ife stories *objectively* follow the structure of story in general . . . ."); SCHECHTMAN, *supra* note 11, at 150–51 ("[T]he formation of a narrative self-conception of the proper form creates a persisting subject with the phenomenological life and set of capacities peculiar to persons, and these last only as long as the narrative does.").

[231] *See, e.g.*, Chen & Urminsky, *supra* note 178, at 78 ("Our *causal continuity* approach to the self-concept instead suggests that the representation of the self-concept is not simply a set of features but also critically includes beliefs about the causal relationships between these features."); Sarah Molouki & Daniel M. Bartels, *Personal change the continuity of the self*, 93 COGNITIVE PSYCH. 1, 1 (2017) (finding that deviations from the expected causal trajectory of the self are seen as more disruptive than changes consistent with it); *see also* Rebecca J. Schlegel, Patricia N. Holte, Joe Maffly-Kipp, Devin Guthrie & Joshua A. Hicks, *Authenticity as a Pathway to Coherence, Purpose, and Significance*, in KEVIN TOBIA, ED., EXPERIMENTAL PHILOSOPHY OF PERSONAL IDENTITY AND THE SELF 169, 170 (2022) (outlining an alternative model of the self-concept based on "authenticity" and "coherence").

[232] *See, e.g.*, GARDNER, *supra* note 52, at 11 (noting that "a stripped-down thought-experiment of the kind favoured by many moral philosophers is simply not suitable for adjudication, or even (I would add) for much useful reflection"). But there are a variety of such accounts available in the literature. *See, e.g.*, SCHECHTMAN, *supra* note 11, at 96 ("[C]onstituting an identity requires that an individual conceive of his life as having the form and the logic of a story—more specifically, the story of a person's life—where 'story' is understood as a conventional, linear narrative."); Toomey, *Narrative Capacity*, *supra* note 3, at 1118–1123 (outlining an account distinguishing narrative from non-narrative personal changes).

[233] *See, e.g.*, GARDNER, *supra* note 52, at 74 ("Your biography is just the story of what

ground personal identity in the mental, not the body.[234] From this perspective, they can explain how the duties of agents might be tethered to the evolving psychology of their principal (and explain *which* such features are essential, making sense of the intuition that some psychological characteristics are more core than others), while making sense of tort's efforts to put a person's life story back on track.[235] And because our relationships are an important part of our life stories, these accounts can explain the appeal of relational theories of personal identity—and the law's solicitude for the loss of relationships in tort, alongside its evidentiary use of relational facts where identity is contested.[236]

Moreover, accounts along these lines can explain that while it is possible for the narrative continuity that comprises an identity to be wholly severed—and this does sometimes happen in cases involving advanced dementia, Phineas Gage-type-situations, and so on—such disruption is rare; as a matter of fact of human psychology, people generally *do* incorporate changes into their self-narratives, justifying the law's presumptive identification of individuals with their bodies.[237] Indeed, because our bodies play a role in *constituting* our life stories the way they are constituted, a narrative theory of personal identity can make sense of *a* committed normative role of the continuity of bodies in private law—and tort *does*, after all, compensate for harms to the body (the point above was just that this is not *all* it does).[238] And

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you do.").

[234] SCHECHTMAN, *supra* note 11, at 95 ("[I]n order to be a person one needs a particular kind of subjectivity and orientation towards one's life"); *see also* Toomey, *Narrative Capacity*, 1117 ("A life story is a subjective construct.").

[235] *See supra* Part II.B; Agnieszka Jaworska, *Respecting the Margins of Agency: Alzheimer's Patients and the Capacity to Value*, 28 PHIL. & PUB. AFFS. 105, 115 (1999) (noting the role of goals in valuable self-conceptions); GARDNER, *supra* note 52, at 174 ("By our rational nature we must all imagine our goals to have, or at least treat them as having, more value than other goals we could have had. In reality, they have that value because of the value of our having goals.").

[236] *See supra* Part II.B–C; Matsumura, *supra* note 6, at 108–09 ("Of course, new experiences can cause a person to revise her self-narrative, but that experience is usually processed through the narrative instead of externally to it."); Radin, *supra* note 43, at 967 ("Memory is made of relationships with other people and the world of objects.").

[237] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 3, at 1112–15 (summarizing the evidence and collecting sources); Matsumura, *supra* note 6, at 110 ("What the literature on narrative identity suggests, though, is that in addition to providing unity, the narrative process is adaptive.").

[238] *See supra* 103–106 & accompanying text; Catronia Mackenzie, *Personal Identity, Narrative Integration, and Embodiment*, in SUE CAMPBELL, LETITIA MAYNELL & SUSAN SHERWIN, EDS., EMBODIMENT AND AGENCY 100, 100 (2009) (discussing the role of bodily continuity in narrative theories of personal identity); Kim Atkins, *Narrative identity and embodied continuity*, in KIM ATKINS & CATRIONA MACKENZIE, EDS., PRACTICAL IDENTITY AND EMBODIED CONTINUITY (2008) (same).

(like all of these theories), narrative theories are not all-or-nothing—it is possible for an individual to have undergone *some* non-narrative changes, and, from that perspective, to have experienced a partial disruption of their identity, without experiencing *total* disruption.[239]

Finally, in contrast to other psychological continuity theories of personal identity, narrative theories are directly preoccupied with making sense of the normative significance that the law (and social life generally) presumes of our sense of personal identity—the difference between arbitrary continuity of random psychological features and *narrative* continuity is arguably precisely a normative one, at least according to proponents of this view; a question of meaning and value creation.[240] "[T]he most salient feature of narrative form in general is that the individual incidents and episodes in a narrative take their meaning from the broader context of the story in which they occur."[241] "[L]ife stories make lives meaningful."[242]

In short, we've seen that the law's conception of personal identity has something to do with psychology, admits of change, degrees, and the possibility of total disruptions, and is presumed to be normatively significant—the sort of thing according to which legal consequences could justifiably be allocated. In the philosophical literature, only something like "narrative" theory of personal identity meets these desiderata.

IV. NARRATIVE IDENTITY AND THE NORMATIVE STRUCTURE OF PRIVATE LAW

This Article has made two arguments. The first is that the structure of private law presupposes and relies on some conception of "legal personal

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[239] *See, e.g.*, SCHECHTMAN, *supra* note 11, at 98 (noting that between extremes of total incoherence and perfect narrative form "lie many possibilities—the narrative that is mostly intelligible with a few anomalous parts (the most common for persons), the conflicted story of the adolescent experiencing an identity crisis, or the disjointed story of the person with dementia").

[240] *See, e.g.*, Kim Atkins, *Narrative identity, practical identity and ethical subjectivity*, 37 CONTINENTAL PHIL. REV. 341, 341 (2004) (defending a narrative theory of personal identity on normative grounds); SCHECHTMAN, *supra* note 11, at 97 ("A person's self-conception is a narrative self-conception, then, insofar as the incidents and experiences that make up his life are not viewed in isolation, but interpreted as part of the ongoing story that gives them their significance."); *see also* Matsumura, *supra* note 6, at 106–07 (noting the normative values of narrative self-constitution); Stanley & De Brigard, *supra* note [S&D2022], at 154 (same).

[241] Schecthman, *supra* note 11, at 96.

[242] Toomey, *Narrative Capacity*, *supra* note 3, at 1116; *see also* GARDNER, PERSONAL LIFE, *supra* note 52, at 126 ("Whatever reasons we have . . . our contribution to the world—the story of our lives—lies in the extent of our conformity with them."); Gordon, *supra* note 65, at 273 (observing the role of narrative in value-creation).

identity"—a concept by which it determines "who" particular natural legal persons are at particular times and across time—in order to allocate a distinctive set of legal positions, rights, powers, duties, and liabilities. The second is that rather than prescribe its own, distinctively legal concept to do this work, the law implicitly relies on something like the narrative theory of personal identity, imported into law from ordinary life.

This perspective has a number of implications in making sense of private law's structure and aspirations. This Part discusses two. First, more speculatively, I discuss some ways in which making sense of legal personal identity in narrative terms might shed light on aspects of tort not yet discussed in depth. Second, note the ways in which understanding private law's conception of legal personal identity in narrative terms might shed light on its normative structure and commitments more broadly.

A. More on Tort and Narrative

We have, thus far, seen that *some* conception of legal personal identity is necessary to make sense of tort *damages*—tort's remedial structure presupposes a conception of legal personal identity.[243] Understanding legal personal identity in *narrative* terms, however, might offer some insight on the structure of tort more generally. The difficulty, for our purposes, is that a complete theory of the relationship between the law's conception of narrative personal identity and substantive tort law must await a complete theory of the *narrative* it takes to be identity-constituting.[244] It is worth sketching, however, the ways in which the account offered here might shed light on otherwise puzzling aspects of tort's normative structure beyond its understanding of remedies.

Consider, for example, the fact that tort paradigmatically (historically, exclusively) remedies injuries that are *not the fault of* the plaintiff—two plaintiffs who suffer the same injury will be treated very differently by tort if one of them "kidnapped themselves,"[245] as it were; that person might not even be a tort victim at all; their recovery is, regardless, offset to the extent of their fault.[246] Intuitive as this posture may be, it's proven puzzling for instrumental accounts of tort that see it as social accident insurance—there's been a harmful accident either way, and the best-situated cost avoider may well be

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[243] *See supra* Part II.B.

[244] *See supra* note 232.

[245] THE BIG LEBOWSKI (Working Title Films – 1998).

[246] *See, e.g.*, Fleming James, Jr., *Contributory Negligence*, 62 YALE L. J. 691, 691 (1953) ("In an action based on negligence, the contributory negligence of the plaintiff is a complete defense. So would run a general statement of the rule still widely prevailing in this country.").

other than the plaintiff.[247]

But making sense of tort law as organized around concern for self-narratives offers a path—consonant with corrective justice views of tort—to making sense of this relatively persistent doctrinal feature. As alluded to, what is distinctive about stories as opposed to arbitrary continuity is their *structure*—the way in which substantive stages are connected to one another.[248] From this perspective, we might expect that a tort system organized (at least partially) on the premise that the identity-constituting stories of lives are valuable and worth protecting would distinguish between events that might have the same substantive outcome but a different causal structure.[249] That is, indeed, precisely what the law does in distinguishing between plaintiffs who have suffered the same harm, but which occurred in a different causal structure at least with relation to their own fault.[250]

And understanding the plaintiff's personal identity in *narrative* terms seems to (at least roughly) track the distinctions tort's fault system in fact draws. An injury that a plaintiff causes herself is paradigmatically likely to have a narrative structure from her own perspective—a story of doing something foolish and suffering some harm in consequence.[251] This isn't a *disruption* (partial *or* total) of the plaintiff's narrative identity—it's just its ordinary construction by the plaintiff's choices and their consequences.[252] In contrast, the same injury caused by another is imposed, as it were, on the plaintiff's life story from the *outside*—from the perspective of the plaintiff, it is *not* a coherent construction of their self-narrative; it is a partial external imposition on the story of their life.[253]

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[247] *See, e.g.*, Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1756 (2007) ("In the enterprise liability narrative, plaintiff-conduct defenses like assumption of risk will fall away gradually as tort law moves towards principles that treat the problem of accidents as a systemic one, not one of individual morality or fault. But this has not happened."). Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1298–99 (1992) (discussing the challenge of tort's continued interest in fault for instrumental accounts); Cristina Carmody Tilley, *Just Strict Liability*, 43 CARDOZO L. REV. 2317, 2320 (2022) (noting that instrumentalist accounts of tort have been far more successful at explaining strict liability in areas of tort than corrective justice accounts).

[248] *See supra* note 228.

[249] *See supra* notes 228–230 & accompanying text.

[250] *See supra* note 247.

[251] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 3, at 1120 (describing intentional agency as an essential distinguishing feature of narrative structure as distinct from other causal forms).

[252] *See, e.g.*, SCHECHTMAN, *supra* note 11, at 159 ("[W]e can see that inclusion of a particular action in a person's self-narrative situates it in his life in such a way that he has agency with respect to it.").

[253] *See, e.g.*, *id.* at 89 ("[T]he degree to which a person is alive, and hence survives, seems linked to the degree to which her actions, experiences, and characteristics are her own—the degree to which her identity is expressed in her life.").

To be sure, in both of these cases, the substantive difference between "who" the plaintiff is now and "who" they were before the injury may well be identical.[254] In one case, the change was the result of the ordinary, coherent construction of a self-narrative, and the law takes this not to be a wrong at all.[255] In the other, the change is the result of an imposed disruption on the plaintiff's self-narrative, and the law takes this to be a wrong to that extent.[256] If we take tort to be organized around the normative conviction that the self-construction of a narrative identity is a valuable thing worth protecting, this distinction makes entire sense.[257]

Consider, moreover, another persistently puzzling aspect of tort law, this time from the tortfeasor's perspective—tort is paradigmatically concerned with remedying bad *outcomes*, not bad intents.[258] That is, the liability of tortfeasors who do the same thing with the same intent might be very different based on happenstance, from their perspective, of how much harm in fact occurs.[259] On most views of narrative personal identity, the stories that constitute identities are not just stories of our intents, or wholly the product of arbitrary subjective invention—they are stories of our interactions with the world and necessarily bear some relationship to it.[260]

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[254] *See, e.g.*, *id.* at 83–88 (noting that substantively identical values—such as being a smoker, mother, or attorney—can play importantly different roles in life stories); Chen & Urminsky, *supra* note 178, at 78 (same).

[255] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 3, at 1119 (describing whether a "decision has a cause *from the perspective of the individual*; whether the decision maker does (or could) see the decision as caused" as an essential component of whether a decision was narrative in form).

[256] *See, e.g.*, GARDNER, *supra* note 52, at 171 ("Sometimes, a disruption to your life can make it the case that now you can never succeed in one or more of the goals you were pursuing before the disruption. Pursuit of the goal brought value in your life, but, since the pursuit aimed at some success beyond itself, failure in it damaged your life.").

[257] *See, e.g.*, *id.* at 187 ("The law assumes that this is how life is for most people . . . .").

[258] *See, e.g.*, Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003) ("In general there is no compensation for blameworthy conduct that produces no damages." (citing WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984)).

[259] *See, e.g.*, Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in DAVID G. OWEN, ED., PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 389 (1995) (noting the dependence of tort liability on happenstance from the perspective of the defendant); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. Rev. 439, 439 (1990) (same).

[260] *See, e.g.*, GARDNER, *supra* note 52, at 67 ("A story of the inner life of a decision-maker, in which all else is treated as merely unfolding around him, could be an interesting literary experiment. In a way, it is the literary experiment conducted by Camus in *L'Etranger*. But, as that work shows, and was perhaps written to show, such an entity is hardly a person, and the record of his existence is hardly the story of a life."); SCHECHTMAN, *supra* note 11, at 119 ("[T]he narrative self-constitution view requires that an identity-constituting self-narrative fundamentally cohere with reality.").

From that perspective, a law of tort solicitous of narrative conceptions of personal identity might plausibly take account of characteristics of a *defendant's* story—distinguishing those whose stories involve causing harm to others and those who don't.[261] As John Gardner put it, "[o]ne's life story is a story of how one did, answering to reasons, and since there are reasons to succeed, one's life story is not told inasmuch as it fails to reveal how one's actions turned out."[262] Understanding tort as partially organized on the premise that identity-constituting self-narratives do important normative work, in other words, can help make sense of tort's focus on outcomes rather than intents.[263]

In short, although a thorough exploration along these lines must await a thorough theory of the narrative structure that constitutes personal identity, there is reason to believe that understanding legal personal identity in narrative terms might shed light on many of private law's otherwise puzzling doctrines.

B. Narrative Personal Identity and Normative Structure

The account offered here reveals several contingent, normative choices implicit in the structure of our private law—at least two worth closing on. The first is the law's assumption that a conception of legal personal identity defined along roughly narrative lines is normatively significant—enough, at least, to organize core legal doctrines around.[264] The second has been the choice to do so *implicitly*—relying on ordinary intuitions about what makes people themselves across time rather than overt legal explication.[265] Both of these *are* choices; the law could be structured otherwise, and the choice of one alternative over another answers to normative considerations.[266] The account offered here helps us see these stakes clearly.

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[261] *Cf., e.g.*, SCHECHTMAN, *supra* note 11, at 157 ("The story in which someone suffers an injustice and then is restored to her rightful position, for instance, is a happier story than one in which right never prevails, as the story in which someone works diligently and is well rewarded is a happier one than that of a life of unmitigated drudgery. Since the relevant subject has a legitimate and primary concern with her narrative as a whole, our practices and attitudes surrounding compensation are thus supported by the narrative self-constitution view as well.").

[262] GARDNER, *supra* note 52, at 70; *see also* ANTHONY M. HONORÉ, RESPONSIBILITY AND FAULT 15 (2002) ("We could not dispense with outcome responsibility without ceasing to be persons.").

[263] *See id.*

[264] *See supra* Part II.

[265] *See, e.g.*, RUTH CHANG, MAKING COMPARISONS COUNT 44 (2002) (describing that choices are irreducibly normative—they can be made well or badly); JOSEPH RAZ, THE MORALITY OF FREEDOM 339 (1986) (arguing that choices answer to normative reasons).

[266] *See supra* Part III.A.

Proponents of the narrative theory of personal identity believe that it is a normatively significant concept—indeed, as we've seen, one of the virtues, as a theoretical matter, of a narrative theory of personal identity is the path it offers to make sense of the law's assumption to that effect.[267] But not everyone agrees—indeed, some philosophers doubt whether narrative structure can ground normative significance in the way that proponents of the theory think (indeed, these theorists also seem to doubt whether it will, in the end, be possible to characterize "narrative" structure as distinct from non-narrative sequence; and in some cases deny that human beings, at least the author, experience themselves in narrative ways at all).[268] If these skeptics are right, we might have occasion to rethink the basic structure of private law.[269]

Imagine, for instance, that it turns out that bodily and not narrative continuity is what grounds the moral significance of "personal identity" (the allocation of identity-dependent normative consequences). It might be, in that case, that the law's conception of personal identity ought to just be a bodily one—we might have to jettison agency law and the parts of tort that take psychology into account, but maybe that is what we ought to do.[270] Similarly, as some philosophers have argued, it might be that "personal identity" does not exist or is not normatively significant at all—in that case, maybe the law ought not hold people to "their" commitments over time;[271] and, frankly I'm not sure what eliminativism about personal identity might mean for property law, but I imagine it would look somehow more communitarian.[272]

At the same time, it could be that it turns out that narrative personal identity is not *morally* significant, but that there are nevertheless good normative reasons for the *law* to be structured as though it were. Indeed, some scholars have argued that even if, as a moral or metaphysical matter, personal identity does not exist or is not morally significant, the law should still act as

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[267] *See supra* notes 240–242 & accompanying text.

[268] *See, e.g.*, Galen Strawson, *Against Narrativity*, 17 RATIO 428, 428 (2004); DAN P. MCADAMS, THE STRANGE CASE OF DONALD J. TRUMP: A PSYCHOLOGICAL RECKONING (2020) (contending that there are some exceptional people who lack narrative self-conceptions, including President Donald Trump).

[269] *See, e.g.*, SCHECHTMAN, *supra* note 11, at 101 ("The differences between the kind of life led by an individual with a totally nonnarrative self-conception and the kind of life led by the rest of us are so pronounced and important that it does not seem like an exaggeration to say that the individuals who live such lives are not persons.").

[270] *See supra* Part II.B.

[271] *See, e.g.*, Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 WAKE FOREST L. REV. 1, 1 (2018) ("The legal regime of contracting in a liberal state should not undertake to enforce a promise for its own sake, lest it underwrite a thick conception of personhood that favors moral stability over moral evolution.").

[272] *See supra* Part II.A; *see also* PARFIT, *supra* note 26, at 443 ("I have argued that, in various ways, our reasons for acting should become *more impersonal*.").

though it does on welfarist grounds.[273] Indeed, the law arguably does this in narrow domains already—asking decision-makers for the permanently incapacitated to do what the person in their care would have wanted, and insisting that executors of estates follow the instructions of a dead person; arguably the extension of a personal identity in law that does not exist in fact by legal fiction, driven by the normative goals of those domains.[274]

On the other hand, it might be that the law has good reasons *not* to endorse a particularly thick conception of legal personal identity, even if it does track the morally best understanding of the concept. Indeed, whether self-narratives are identity-constituting in any significant way is controversial, and we might want a broadly liberal private law not to endorse any particularly controversial view of what makes persons valuable across time.[275]

Of course, liberal legal regimes cannot be agnostic on *all* questions of value—and indeed they are *premised* on a commitment to the singular moral value of the person; liberalism is committed to rather than agnostic about the moral value of person*hood*, however controversial that may be as a moral matter.[276] So too, perhaps, for legal personal identity—it might be better to understand liberalism's foundational moral premise in this regard as a commitment not to "personhood" in the abstract but to the value of *each* distinctive person; making legal personal identity, like what counts as a person in the first place, precisely the sort of thing not left to individual

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[273] *See, e.g.*, Richard A. Epstein, *Justice Across the Generations*, 67 TEX. L. REV. 1465, 1470 (1989) ("No set of institutions can make sense if human preferences are radically discontinuous over time."); *but see* HONORÉ, *supra* note 262, at 4–5 (arguing that the normative value of personal identity could not arise by social agreement).

[274] *See, e.g.*, Toomey, *Love, Liberalism, Substituted Judgment*, *supra* note 133, at 1318–31 (making this argument); James Toomey, *Executor Discretion*, *supra* note 135, at 1359 ("[E]xecutors have long been recognized to be *something like* an agent of the testator and the estate.").

[275] *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM xix (2005) (noting that liberalism 'has to be impartial . . . between the points of view of reasonable comprehensive doctrines"); Ronald Dworkin, *Liberalism*, in A MATTER OF PRINCIPLE 181, 191 (1985) (defining liberalism as the principle that 'government must be neutral on what might be called the question of the good life'); William A. Galston, *Two Concepts of Liberalism*, 105 Ethics 516, 524 (1995) ("The heart of the tolerance a liberal society needs is the refusal to use state power to impose one's own way of life on others."); *see also* SCHECHTMAN, *supra* note 11, at 152 ("It would be nice if there were some way to argue that personhood is absolutely the best form of existence, but it is not even clear what it would mean to provide such an argument.").

[276] *See, e.g.*, James Toomey, *Parents as Liberal Fiduciaries*, 68 B.C. L. REV. (forthcoming 2027) (manuscript at 34) ("One proposition, in principle contestable, to which liberalism is necessarily committed is to the foundational, organizing value of the human individual . . . ."); Gerald F. Gaus, *The Moral Foundations of Liberal Neutrality*, in THOMAS CHRISTIANO & JOHN CRISTMAN, EDS., CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 83 (2009) ("Liberalism, I shall argue, is neutral between *persons* . . . .").

conscience.[277] And, in any event the role of legal personal identity in private law is largely (but perhaps not entirely)[278] a default rule, applicable if one opts in—if you don't think you have morally meaningful persistent identity across time, you do not need to enter into executory contracts or hire agents.[279]

Finally, we've seen that the concept of legal personal identity is apparently operationalized in the law by way of the ordinary intuitions of judges and juries about what makes natural persons themselves across time.[280] This too, could be otherwise—the law *could* adopt an explicit, thorough set of criteria of the legal personal identity of natural persons.[281] And maybe it ought to. We might think, after all, that relying on ordinary intuitions of narrative continuity and discontinuity is all well and good in easy cases, but with hard cases coming down the pike, in which it is not obvious what ordinary intuitions of narrative continuity will have to say—from classic philosophical thought experiments involving brain splitting and merging, to questions of the legal personal identity of advanced AI or space aliens—we might want an explicit test in advance.[282] And regardless, we might generally want the use of the state's monopoly on violence to turn on something more solid than ordinary intuitions about personal identity, and prescribe an explicit account of legal personal identity for all cases.[283]

In short, by revealing the implicit normative structure of private law, this

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[277] *See id.*

[278] It is possible to find oneself the owner of property (at least for as long as it takes to abandon it or give it away) without your consent, *see, e.g.*, POCONO SPRINGS CIVIC ASSOC. V. MACKENZIE, 667 A.2d 233 (Pa. Sup. Ct. 1995) (holding that, because real property cannot be abandoned, the owners of real property remained the owners notwithstanding strenuous efforts to abandon it), and of course being sued in tort is not up to you, even if you reject the assumption that it was "you" that committed the tort, *see, e.g.*, Louis W. Hensler III, *Civil Reconciliation Torts Theory: Making Torts Private Again*, 90 UMKC L. REV. 313, 338 (2021) ("Unlike contract, which arises only when parties agree, tort obligations are legal, not voluntary . . . .").

[279] *See, e.g.*, Toomey, *Substituted Judgment*, *supra* note 133, at 1331 ("It is not inconsistent with liberalism that the law adopts a default rule that works for many people, so long as those with other worldviews are allowed to opt out if they choose.").

[280] *See supra* Part III.A.

[281] *See supra* Part III.A.

[282] *See, e.g.*, Thomas Nagel, *Brain Bisection and the Unity of Consciousness*, 22 SYNTHESE 396, 397–98 (1971) (discussing difficult cases involving physical division of brains); Parfit, *supra* note 217, at 19 (discussing difficult cases involving fusion); *see also* KURKI, *supra* note 4, at 4 ("A judge or scholar may not need a theory of legal personhood—any more than a theory of ownership—to solve or comprehend easy cases, but the need for a theory may arise in hard cases.").

[283] *See, e.g.*, GARDNER, *supra* note 52, at 229 ("In working out what would qualify as a life as good as the one that the plaintiff had before, however, one is hamstrung by the fact that there is no natural transitive metric for comparing overall quality of life.").

account sheds light on the choices the law has made and how they might be made differently. If we didn't think that personal identity mattered, or that the narrative theory is the right one, or that ordinary intuitions about personal identity work well enough, we might want to rethink how the law conceptualizes legal personal identity.

CONCLUSION

Legal personal identity—the criteria by which we distinguish one legal person from another and determine whether this legal person, now, is the same as that one, then—is an essential concept of private law. From contract to tort, the basic structure of our private law presupposes some such conception—indeed, if the law did not take personal identity to be something of essential normative significance, it is hard to imagine private law that looks anything like ours. And yet it is a concept that has long avoided theoretical systemization.

This Article has explored the conceptualization of the legal personal identity of natural persons on which private law relies—implicitly, not explicitly, apparently imported into the law by way of the intuitions on personal identity of judges and juries. Specifically, it seems that the best explanation for the role of the concept of personal identity comes from the "narrative theory" of personal identity in the philosophical literature—the suggestion that our identities are constituted by the stories of our lives. This conception—like private law—recognizes that we are not our bodies, but our minds; not static but evolving; not limitlessly but in ordered ways.

We are, on the narrative account, *stories*—my claim is that private law has always understood that.