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Edited and Excerpted Transcript of the Symposium on Injury as Cultural Practice

University of the Pacific, McGeorge School of Law

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**Edited and Excerpted Transcript of the Symposium on
Injury as Cultural Practice**

TABLE OF CONTENTS

I. INTRODUCTION	69
II. WHAT COUNTS AS AN INJURY	70
A. <i>The Disability Critique</i>	78
B. <i>Distinguishing Prevention From Elimination</i>	80
C. <i>Complicating the Distinction Between Disability And Impairment</i>	80
D. <i>Tort Law as a Remedy for the Economic Consequences of Disability</i>	81
E. <i>A New/Renewed Role for Torts Law</i>	81
III. INJURY NARRATIVES	98
IV. REMEDIES FOR THE TRAUMA AND BRUTALITY OF INJURIES	129

I. INTRODUCTION

On March 7 and 8, 2014, the *Globe* presented a one and a half day symposium on Injury as Cultural Practice. The symposium featured interdisciplinary panels of social scientists, social theorists and lawyers discussing the topic, injury in cultural perspective. The purpose of the symposium was to begin a dialogue around how the meaning of legal injury is constructed through social and cultural practices. The premise of the symposium was that, while the requirement of an injury is fundamental to many civil actions in most countries of the world, the meaning of injury is constructed by cultural and social practices and not by law alone.

The concept of an injury arises from prevalent understandings of the person, the aspects of human beings that are considered fundamental to their identity and worthy of legal protection. But understandings of the person vary widely across time and space; the law reflects these variations and, at times, produces them. The symposium addressed some of the most difficult and important debates over injury now taking place in societies around the world. Issues included the tension between physical and reputational injuries, relational and emotional harms, virtual injuries, the normalization and inequitable infliction of injury on vulnerable victims, the hidden issues of causation, and the paradoxical degradation of victims through legal actions meant to compensate them for their disabilities.

Participants included social scientists as well as lawyers, and the subject matter extended to Europe and Asia as well as North America.

The following are edited versions of the transcripts from the conference panel discussions. The materials are grouped into three sections. Each section explores one aspect of the general conference theme of “Injury as Cultural Practice” as considered during the symposium proceedings. On the first day of the proceedings, the first panel discussed “What Counts as an Injury?” The next panel examined “Injury Narratives.” The symposium participants then heard from Michael McCann, Professor of Political Science and Gordon Hirabayashi Professor for the Advancement of Citizenship at University of Washington, who served as Rapporteur after the panel discussions on both days of the symposium. The participants then heard again from Professor McCann, as Rapporteur.

II. WHAT COUNTS AS AN INJURY

Mary Anne Franks, Associate Professor of Law, University of Miami.

Sagit Mor, Assistant Professor of Law, Haifa University Faculty of Law, Haifa, Israel.

Samantha Barbas, Associate Professor of Law, SUNY Buffalo Law School.

Anne Bloom, Professor of Law, University of the Pacific McGeorge School of Law.

Marc Galanter, Professor of Law Emeritus, University of Wisconsin Law School.

David Engel, Professor of Law, SUNY Buffalo Law School.

Gowri Ramachandran, Professor of Law, Southwestern Law School.

Mary Anne Franks, Associate Professor of Law, University of Miami School of Law. Injury Inequality.

FRANKS:

...

The particular focus that I have is what I’m calling “injury inequality.” That’s a concept that is pretty obvious, I think, in some ways. But I think in other ways it’s so obvious that we need to unpack it and see what kind of influence it’s actually serving in many different contexts, in both law and society.

What I mean by “injury inequality” is basically this—that the kinds of injuries that are perceived as, or in fact do affect, more powerful members of society tend to be overstated. They tend to be exaggerated. They tend to be front and center of a lot of cultural and social states. Whereas the types of injuries that do in fact happen to more marginalized populations, disfavored populations, tend to be devalued and tend to be somewhat marginalized.¹

1. For an example of this premise, see Mary Anne Franks, *More Thoughts on the Dangerous Fragility of Men*, CONCURRING OPINIONS (Mar. 4, 2013), <http://concurringopinions.com/archives/2013/03/more-thoughts-on-the-dangerous-fragility-of-men.html>.

I think this is harmful not only because this means that we're going to have a kind of an inefficient allocation of social and legal resources toward addressing the injuries of the powerful. But also that it sends really terrible messages in some cases. About what really counts as genuine harm and what does not count as genuine harm.

I'm also concerned with the fact that if the people with the most power engage in these types of practices where they overstate injuries to themselves and understate injuries to each other, they set certain norms and practices and norms and habits for everyone else that are going to be somewhat hostile to the idea of empathy and compassion to those who actually do experience more injuries more of the time.²

I'm concerned about these legal and social practices that might reinforce what we might call "status quo allocation" of risks, burdens, and benefits. Not just in the strict legal sense, although that is part of it, but also in a social sense. These are going to send certain messages and enforce certain ideas and values that are in fact in direct conflict with racial equality, gender equality, and class equality.

I think there are many different categories that we could explore of injury inequality. I have three main categories that I want to sketch out here, because they're the three that I have been thinking about a lot most recently. Those are "self-defense," that's the law and the rhetoric surrounding self-defense, "free speech," and "sexual assault."

The self-defense context. My argument here is that so much of the rhetoric surrounding self-defense, - that is the law of self-defense and the promotion of the idea of self-defense, and what I consider to be the often accompanying rhetoric of gun rights - that these really do circulate around an exaggerated sense of threat to white male power.

Of course, this isn't explicit in many ways. It's not as though these laws are being grounded in some sort of explicit call: "White men are in danger." If you look at the rhetoric of the NRA, if you look at the rhetoric behind the promotion and the defense of Stand Your Ground Laws, you do see this constant sense of there are good people under threats.³

Those good people generally tend to look like people like George Zimmerman or Michael Dunn, the two most famous cases to come out of the Stand Your Ground context in Florida.⁴

2. See Mary Anne Franks, *The Dangerous Fragility of Men*, CONCURRING OPINIONS (Feb. 28, 2013), <http://concurringopinions.com/archives/2013/02/the-dangerous-fragility-of-men.html>.

3. See e.g., NRA, *This Train Keeps a Rollin'*; *Castle Doctrine Sweeps America*, NRA-ILA (July 28, 2006), <http://www.nraila.org/news-issues/articles/2006/this-train-keeps-a-rollin%60.aspx> (discussing the need for "law abiding citizens" to be able to protect themselves when "confronted by an armed predator").

4. For the text of the "Stand Your Ground" law, see Fla. Stat. Ann. § 776.013 (West, Westlaw through 2014 2nd Reg. Sess.).

When you hear Wayne LaPierre talk on behalf of the NRA, many of the things that he will say has something to do with all of the threats that people face nowadays. Those include riots. Those include terrorists. Those include even hurricanes, according to Wayne LaPierre.⁵ I'm not sure how a gun helps you in a hurricane, but apparently there's some way that it would.

What's really interesting about that rhetoric is how much it capitalizes on the notion of injury. It's not in some ways about strength. It's not about acknowledging to any extent that there are in fact divisions of self-defense.

There are differences in how we perceive people's ability to fight back, or the right to fight back, but that's not really what the rhetoric focuses on. It's about how much we are potentially injured. There's injury around every corner. We have to make sure that we are well-armed and well-ready to take on those types of potential injuries. What actually happens though when we see this? This is something that's been very much on the radar for those of us who are watching Florida. I happen to live in Florida, so I'm there seeing it all unfold.

Of course, the first really famous Stand Your Ground case coming out of Florida is the George Zimmerman case.⁶ There we have a situation where a quite substantial person is patrolling a neighborhood with a weapon, and encounters a young black male who is unarmed, and who we have never heard any argument from Zimmerman that he thought he was armed. That he essentially feels that he is out of place, and that he poses some sort of threat. He poses some sort of threat to the neighborhood, and that entitles Zimmerman to go and confront him. Now, as to the fallout, so what actually happens, we don't really know. In the moments before the gun goes off, we don't really know what happens, because there's only one person who's left to tell the tale, and that is Zimmerman.⁷

The idea is that he gets to activate this notion of injury, this potential threat to the neighborhood, in order to kill someone else. When he does that, we set up a very interesting narrative about injury, because he is the man with a gun, patrolling a neighborhood. Trayvon Martin is a young black man who is simply trying to get home.⁸ We are meant to see this Trayvon Martin as the threat. He is the one who can commit injury, not the one who can be injured. Therefore, Zimmerman is entitled to use deadly force against him.

The Michael Dunn case does something very similar. For those of you who are less familiar with the details of that case, this happens at a gas station.⁹

5. Wayne LaPierre, *Stand and Fight*, THE DAILY CALLER (Feb. 12, 2013), <http://dailycaller.com/2013/02/13/stand-and-fight/>.

6. Greg Botelho and Holly Yan, *George Zimmerman Found Not Guilty of Murder in Trayvon Martin's Death*, CNN (July 14, 2013), <http://www.cnn.com/2013/07/13/justice/zimmerman-trial/>.

7. *Id.*

8. *Id.*

9. Greg Botelho, Steve Almasy, and Sunny Hostin, *Dunn Convicted of Attempted Murder; Hung Jury on Murder in "Loud Music" Trial*, CNN (Feb. 17, 2014), <http://www.cnn.com/2014/02/16/justice/florida-loud-music-trial/>.

Michael Dunn is sitting in the passenger side of a car. His girlfriend goes in to get some snacks. There is a vehicle, an SUV next to them, that's playing very loud music. He calls it "rap crap," or something to that effect.¹⁰ He orders the young men in the vehicle to turn the music down.¹¹

At that point, apparently they do turn the music down, but Jordan Davis, who is a 17-year old black man sitting in the back, apparently says something to the driver about how "we don't need to listen to him. Turn the music back up."¹² There's a kind of verbal exchange that gets very profane. At some point, what we do know is that Michael Dunn takes out his gun from the glove compartment, and he shoots at this vehicle. He shoots at it three or four times as the vehicle is parked next to him.¹³ As the driver panics, pulls out the vehicle and starts to retreat, he shoots at it another five or six times, at the same vehicle.¹⁴ When he is asked why he did what he did, he says that he saw a gun, that Jordan Davis was not just threatening him verbally, but also had a weapon of some kind.¹⁵

The troubling thing for Michael Dunn is that there was never any evidence of a weapon found.¹⁶ That might be due to the fact that there was not as good of an investigation as one might have hoped. The more troubling thing for Michael Dunn is that he never mentions a weapon to his girlfriend, not that night, not that morning after he hears that Jordan Davis had died.¹⁷ He never mentions the weapon until he's been arrested, and that has now become part of his narrative of why he used self-defense.

There again, you have a man who is sitting in his vehicle, who has a weapon, who in some sense considers the injury of loud rap music to be so great that he engages in this altercation, and at some point is so convinced that the young men in this vehicle pose a threat to him, that he hallucinates a weapon, or you might say, he might just have come up with this as a story completely synthetically later.¹⁸ Either version of this tells us he is willing to impart some kind of injurious impact to these young men that he does not know, and that's going to be grounds for him to use deadly force against them.

Unfortunately, these are not the only cases we could talk about. There's Theodore Wafer, who shot an unarmed black female teenager named Renisha

10. *Id.*

11. *Id.*

12. Michael Muskal, *Another Self-Defense Murder Case, Involving Race, Shakes Florida*, L.A. TIMES (Feb. 7, 2014), <http://articles.latimes.com/2014/feb/07/nation/la-na-nn-florida-self-defense-murder-case-20140207>.

13. *Id.*

14. Botelho, *supra* note 9.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.*

McBride after she came looking for help following a car accident.¹⁹ Or Randall Kerrick, who shot Jonathan Ferrell, who was an unarmed black man seeking assistance after a car accident.²⁰ Or Rodney Black, who shot two black men on his property, or near his property, because he thought they were trespassing.²¹ As it turns out, one of these men had bought the property next to him, and was in fact just coming to take a look at it. What do some of these cases tell us? Is Stand Your Ground and gun rights rhetoric really about real injury, or is it in fact exacerbating an already existing hierarchy, between whose injury counts and whose is perceived to count?

There's a whole other story to talk about with regard to domestic violence. Something that I'm happy to talk more about, because many of the promoters of Stand Your Ground and gun rights rhetoric have tried to use women and domestic violence victims as kind of a promotion for saying, "This is why you should support these laws."

As it turns out, there is a case ongoing in Florida, which gives a somewhat other reading to the notion that Stand Your Ground protects domestic violence victims. This is the case of Marissa Alexander, who was in her own home with her husband from whom she was estranged, but also recently given birth to their child.²² She had a Protection Order against him, because he had been abusive in the past. They have a conversation, in which she shows him the pictures of their child. She goes to the bathroom. He starts looking through her phone, and finds some text messages that make him angry, make him think that she is cheating on him.

When she tries to come back from the bathroom, he doesn't let her go. He's pushing on her. He's not letting her leave. She manages to break away. She flees to her truck in the garage, realizing that the garage door opener will not work (and this is something that is verified by her husband as well), realizing she has to go back through the house. Instead of just going back in the house unarmed, she takes the gun that she lawfully has from the truck back into the house. He doesn't want to let her leave. She's telling him, "You have to go." He says, "I am not going anywhere." She fires a warning shot to try to get him to leave.²³

19. Alana Semuels, *Detroit-Area Man Gets 17 to 32 Years for Shooting Visitor on Porch*, L.A. TIMES (Sept. 3, 2014, 4:38 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-porch-killer-sentenced-20140903-story.html>.

20. Mary C. Curtis, *In a Police Shooting Case in Charlotte, Fewer Headlines but a Familiar Call for Justice*, WASH. POST (Dec. 12, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/12/12/in-a-police-shooting-case-in-charlotte-fewer-headlines-but-familiar-call-for-justice/>.

21. Chris Dickerson, *Wrongful Death Suit Filed against Cabell Man Who Shot, Killed New Neighbor*, WEST. VA. REC. (Jun. 11 2014, 1:42 PM), <http://wvrecord.com/news/267724-wrongful-death-suit-filed-against-cabell-man-who-shot-killed-new-neighbor>.

22. *Another Florida Case Puts Crosshairs on "Stand Your Ground,"* NPR (Feb. 1, 2015), <http://www.npr.org/2015/02/01/383121919/another-florida-case-puts-crosshairs-on-stand-your-ground>.

23. *Id.*

You might have thought looking at the rhetoric of Stand Your Ground that this is exactly what we're supposed to protect. She's defending herself. She's in her own home. It's against someone that you can know in fact presents a threat of injury, because he has in the past threatened to kill her if she was cheating on him. The police here decided they are going to arrest her, they are going to charge her, and she doesn't get immunity for stand your ground in a hearing. She is getting a retrial because, originally, she was sentenced to 20 years and she is serving the beginning part of that 20-year sentence. She is getting a retrial because the appellate judge found that there have been some errors in terms of the burden of self-defense, but will not revisit the stand your ground issue.²⁴

As to the question of whether or not stand your ground in fact recognizes the injury that actually does occur to domestic violence victims and which they can take notice of when they are using deadly force, it doesn't look as though this is going to be a good example of that, which we can talk about more, maybe, later.

Just to touch on the other areas: the free speech context. What is interesting about many of the controversies over free speech is that when there is a group that is pushing to say this should be not protected speech, that this should be considered harmful, injurious speech that should be regulated, the answer often is there is only a narrow category of speech that can be regulated. If it doesn't fall into one of these historical categories of obscenity, or defamation or child pornography, then it simply - we have to assume - by default that it is protected speech.

When you have racial minorities raising hate speech claims as part of a way of trying to draw attention to the type of injuries this speech causes, or you have primarily female victims of online harassment or non-consensual pornography trying to say this is harmful and injurious, the response is there may be some harm here, but it's not very serious.²⁵ To the extent that it's anything at all, it's not nearly as serious as the injury to free speech that would occur should we do anything to regulate this. What that overlooks in many cases is that it overlooks that it's not even true that there are only these tiny categories of speech that are regulated. It ignores that fact that sometimes people don't even bring up the free-speech context when they're speaking of the types of conduct that can be regulated.

If we look at copyright law, fraud law, identity theft, trade secrets, nondisclosure agreements, confidentiality agreements, generally, these are all cases generally where people don't usually say, "Oh, we can't have physician-patient confidentiality or lawyer-client privilege because that would regulate our free speech." It's not even seen as being a free speech issue in many ways

24. *Id.*

25. See Mary Anne Franks, *Adventures in Victim Blaming: Revenge Porn Addition*, CONCURRING OPINIONS (Feb. 1, 2013), <http://concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html>.

because the injuries are so easily conceptualized by the people who might think about these types of conduct. We see that there's a certain shifting of even the frame of what is considered to be free speech in these types of potentially injurious forms of conduct.

I know I've only got a few minutes left so I'm just going to briefly touch on the sexual assault context. What I want to sketch out here is just the ways in which the actual injury to actual rape victims tends to be downplayed in light of the supposed risk either of false rape claims or the perceived injury of having a conviction on someone's record to their future professional and other interests. Even though there is a very, very tiny chance that a person will ever be accused falsely of rape, the notion of that injury is so real and so possible, it really does take up a lot of space with regard to how we handle sexual assault claims to begin with, how much scrutiny we need to take against them, and it manages to shift our ways of looking at the kinds of injuries that rape victims come forward to talk about. Even when we find ourselves in positions of convictions, even when someone is told or the court does find that there was an actual rape that was committed, very often the social resources and, in some cases, the legal resources, are geared towards the supposed injury to the rapist themselves.

One recent example of this, for those of you who were paying attention to the Steubenville rape verdict, you had a case where it was absolutely clear. There was photographic evidence that these two young men had assaulted this girl who was essentially passed out at a party. There was no doubt that really had happened.²⁶

Yet, CNN, other outlets that were covering the trial when the guilty verdict was read - and I should clarify here that the guilty verdict was one to two years in a juvenile detention facility - because these young men were under the age of 18, the immediate story that emerged from that was think about what this does to these young men's future prospects because they were very talented football players. "They're watching all of their lives go down the drain," was basically what the mainstream media reported on this as.²⁷ Not a single mention of the injury to the rape victim. This was really focused on the injury to the rapist themselves in a context where it was not even ambiguous that they had committed the crime.

There's more to be said about that, too, in what I would call the popular rehabilitation of convicted rapists like Mike Tyson,²⁸ R. Kelly.²⁹ R. Kelly is not a

26. Richard A. Oppel Jr., *Ohio Teenagers Guilty in Rape that Social Media Brought to Light*, N.Y. TIMES, Mar. 18, 2013, at A10, available at http://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html?pagewanted=all&_r=0.

27. See, e.g., CNN, *CNN Grieves That Guilty Verdict Ruined 'Promising' Lives of Steubenville Rapists*, YOUTUBE (Mar. 17, 2013), <https://www.youtube.com/watch?v=MvUdyNko8LQ>.

28. E. R. Shipp, *Tyson Gets 6-Year Prison Term for Rape Conviction in Indiana*, N. Y. TIMES, Mar. 27, 1992, at A1, available at <http://www.nytimes.com/1992/03/27/sports/tyson-gets-6-year-prison-term-for-rape-conviction-in-indiana.html>.

convicted rapist, but it's quite clear that he has committed many instances of sexual assault, and the different ways that people treat accused rapists and their accusers in ambiguous cases such as the Kobe Bryant case.³⁰ Many people seem to be absolutely convinced Kobe Bryant was not only innocent, but wrongly targeted. His victim, she was on the receiving end of death threats for a very long time, which was a large part of actually why she withdrew her complaint.

These are just a few examples that I want to sketch out about the damage not only, again, in terms of the social and legal resources we have, where we're allocating those resources to understand injury, when it's important, what we should do about it, but also the damage that's being done to the concept of injury itself when these are the types of conversations and these are the types of discourses that are promoted.

Sagit Mor, Lecturer, Assistant Professor, University of Haifa Law Faculty, Israel. *The Meaning of Injury: A Disability Perspective*.

MOR:

I start with this nice quotation from a book titled *Accidental Justice*:

"The roots of tort law lie in human suffering, maimed bodies, shattered spirits and extinguished lives."³¹

In my presentation, I would like to complicate the prevailing understanding of injury with the infusion of the disability perspective. When we talk about torts and equality or injury and culture, we are used to thinking about race and gender. But we don't think enough, I think, about disability as a component of identity and culture in our understanding of injury. In this talk I suggest to think about the experience of injury as an experience of enablement and argue that the meaning of injury is shaped by one's understanding of disability. If disability is understood as pain, suffering, tragedy, and misfortune, injury, too, is understood this way. But in an era of disability rights and disability critique that challenges this negative view of disability—that taken for granted understanding of injury as misfortune should also be challenged. A critical view of disability and injury, therefore, brings new perspectives to the study of the law of torts, which is the law of personal injury.

I suggest that the literature of disability studies and disability legal studies, and I will say more about it during my talk, offers a new set of tools to investigate the relationships between disability and injury, to interrogate the socio-legal construction of injury and to examine the resulting implications for

29. See David Streitfeld, *R. Kelly is Acquitted in Child Pornography Case*, N. Y. TIMES (Jun. 14, 2008), available at <http://www.nytimes.com/2008/06/14/arts/music/14kell.html>.

30. See generally Chuck Klosterman, *Kobe Bryant Will Always Be an All-Star of Talking*, GQ (Mar. 2015), <http://www.gq.com/sports/201503/kobe-bryant-nba-allstar>.

31. PETER A. BELL AND JEFFREY O'CONNELL, *ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW* xi-xii (1997).

tort law. A disability legal studies analysis seeks to examine the ways in which the law participates in the social construction of disability. Its focus of inquiry is not so much on the rights and entitlements of disabled people but more broadly on how assumptions about disability permeate any field of law, shaping the design of legal norms and institutions and shaped by them.³²

This mode of inquiry is particularly relevant to the realm of tort law. In fact, when it comes to the role of torts, the disability perspective is all encompassing as it sheds a new light on the entire field of personal injury law. It is not only about the identity of the wrongdoer or the injured person, even though there are important questions concerning the duty and standard of care towards disabled people or the expected level of care by disabled people. It is also not particularly about a specific area or issue of torts law as opposed to what the vast literature on wrongful life claims may suggest (the site in which disability critiques are considered most seriously).³³ It is rather about the structure and logic of torts law: It is about the meaning of the transformation from being non-disabled to becoming disabled.

One such fundamental challenge to torts law would be the following, “Is it possible to construct a concept of injury that is free of negative stigma and social bias against disabled people, but still acknowledges the pain and the moral wrong that an injury entails?”

I do not have a clear answer to that question, but I would like to offer some thoughts.

A. *The Disability Critique*

First I would like to introduce the disability critique. The disability movement and the disability study literature have transformed the meaning of disability from an inherently inferior condition to a more complex social, political and cultural phenomenon. A basic tenet of early disability studies theory was a distinction between impairment, which is a “neutral” bodily variation, and disability, which is the meaning that is assigned to that variation, as shaped by power relations, cultural assumptions and social practices. Disablement is, therefore, not only physical or cognitive or emotional, but also social; it is about social attitudes and environmental barriers and adequate social services.³⁴ The disability impairment distinction can also enrich and complicate our understanding of injury as a concept and experience that encompasses these two dimensions altogether: Like impairment, injury has a seemingly value-free descriptive notion of an event that has caused a bodily change. Like disability,

32. See generally Bill Hughes & Kevin Paterson, *The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment*, 12 DISABILITY AND SOC'Y 325 (1997).

33. See, e.g., Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?* 30 FLA. ST. U. L. REV. 315 (2003).

34. See Hughes, *supra* note 32, at 325.

injury has a more value-laden aspect of an event that may transform one's self-perception, social position, political power and even human worth and value. Following a substantial injurious or disabling event, one may be transformed from being "capable", "whole" and "normal" to becoming "incapable", "damaged" and "abnormal". This is not just because of physical and emotional limitations, but also, and maybe mainly because of society's response to disability.³⁵ The experience of injury is, therefore, influenced by the physical/bodily change that one faces as well as the disabling social conditions that he or she may experience.

Tort view of injury and disability is a tragic individualistic view that ignores the role of social structures in generating disablement. This message is transmitted by legal doctrines and by torts litigation which becomes a spectacle of misery in which claimants are forced to participate in order to receive a higher amount of damages. Viewed this way, torts law functions as a site of aggression, a site in which the negative views about disability are produced and reinforced. It is most evident in the realm of pain and suffering compensations. It is taken to the extreme in wrongful life and wrongful birth cases in which disabled people (allegedly) claim that they were better off if they were not born, and parents argue that having a disabled child is a harm to the family.

Yet, at the same time, torts law serves several other functions: It provides remedy for the economic consequences of disability, it serves to deter and prevent future injuries, and it expresses a social and sometimes moral disapproval of the injurious action. The challenge is therefore, to reconstruct a personal injury law that is capable of accommodating these complexities and that is compatible with a disability studies perspective.

The first and most immediate implication for tort's law would be awareness to disabling images and environmental barriers. This means viewing disability not in a medicalized, individualized fashion, but rather through a social, cultural, or political lens while acknowledging and even emphasizing the many dimensions of the social construction of disability. The impact of stigmas and stereotypes, the bearing of social structures and institutions, and the ways in which the misallocation of society resources has led to poverty and lack of opportunities for disabled people.³⁶

This view of disability may go even further not only to negate the negative aspects of disability as socially reconstructed, but also to advance an affirmative view of disability that embraces disability pride and celebrates disability culture. This critical and important view of disability poses several difficulties relating to basic notions in torts, such as harm, fault and causation: the understanding of

35. See Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 YALE J.L. & HUMAN. 63, 70 (2006).

36. Sagit Mor, *Disability and the Persistence of Poverty: Reconstructing Disability Allowances*, 6 NW. J. L. & SOC. POL'Y. 178, 179 (2011).

disability as a source of pride may impact its framing as harm; incorporating an understanding of disability as a product of social barriers may affect the notion of causation, and the destabilizations of harm and causation may affect the attribution of fault to an individual wrongdoer.

Back to tort litigation as a spectacle of misery: can “happy litigants” litigate to receive sufficient compensation to cover their losses and expenses? These questions are not easy to answer.

B. Distinguishing Prevention From Elimination

One helpful direction may be to develop further the distinction that exists, at least to some extent, in the disability bioethics literature between *prevention* and *elimination*. While elimination of disabled people is an absolute wrong, prevention of disability is a goal shared for disability scholars and disabled people who disapprove the violation of autonomy and the infringement of bodily integrity that an injury entails, and at the same time are aware to the social consequences of an injury.

This distinction was raised, particularly with regards to prenatal diagnosis and care.³⁷ If disability-based termination of pregnancy is morally wrong based on disability advocates or at least questionable, should we care about pregnant women taking folic acid, eating right, and avoiding alcohol? That is the prevention and elimination dilemma. The challenge for tort law here lies in condemning dangerous acts back, but avoiding the devaluation of injured persons.

C. Complicating the Distinction Between Disability And Impairment

Another complimentary direction would be a more complex understanding of the relationships between *disability* and *impairment*. The division between impairment and disability was criticized by subsequent disability studies scholars for its neglect of the body—The physical experience of pain, and more broadly the lived experience of the body. The challenge, as some scholars put it, was “to rescue the concept of ‘suffering’ from its reactionary and tragic association. . . . [And] to think of suffering as a concept which reflects the mutual engagement of pain and oppression”.³⁸ Acknowledging pain allows more space for discussing the painful aspects of injury. Scholarship on the sociology of impairment and the social construction of pain may help us with these predicaments by offering an alternative that may be useful for the reconstruction of injury.

37. See, e.g., Adrienne Asch, *Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89 AM. J. PUB. HEALTH 1649 (1999).

38. Hughes, *supra* note 32, at 336.

D. Tort Law as a Remedy for the Economic Consequences of Disability

One common reaction to these concerns is the argument that tort law is a source of *financial relief* for disabled people. The economic consequences of disability are partially a result of the bodily injury and partly a result of the inaccessible society and inadequate social welfare policy. Tort damages may be a way to ameliorate these financial difficulties.

The problem for me here is that it benefits only the few. If we care about disabled people's economic opportunities we may need to take a different direction and rethink the relationships between tort law and social security law. A true and deep commitment to the economic and personal wellbeing of all disabled people should they need us to examine more carefully the structure of the welfare system, social insurance, and social security more broadly. Adequate health services, adequate social services (including education and housing services), and adequate disability allowances would allow this more injured people to remain fully integrated in society and to feel valued and worthy following an injury.³⁹

In fact, the more social and medical services are provided by the state the level of per punitive damages are awarded in courts can be expected to decrease. Furthermore, the more accessible, accommodating, inclusive, and egalitarian a society becomes, injured people's need for compensation for wage loss and pain and suffering can be expected to decrease as well.

E. A New/Renewed Role for Torts Law

What we might need is a new goal, new purpose, or a new role for tort's law. In a 1997 piece titled *Tort Law's Role as a Tool for Social Justice Struggle*, Lesley Bender, one of the first feminist critics of the tort law, argued that tort law was always about social justice and human dignity that was achieved through compensations, but somehow, with time, "the means . . . came to be understood as the end. . . ." ⁴⁰

We need to go back to tort law's initial role and purpose, which was, according to Bender, protecting human dignity and promoting social cohesion.⁴¹ I conclude with the challenge that I started with: the need to reconstruct a concept of injuries that is free of negative stigmas and social bias but still acknowledges the pain and the moral wrong that an injury entails.

39. See Mor, *supra* note 36, at 184-86

40. Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 Washburn L.J. 249, 251 (1997).

41. *Id.*

Samantha Barbas, Associate Professor of Law, SUNY Buffalo Law School
THE LAWS OF IMAGE

BARBAS:

In 1947, the “Saturday Evening Post” ran a critique of cab drivers in Washington, DC that accused them of cheating their customers.⁴² A photograph appeared with the article that depicted a woman cab driver. The caption did not name her and the article did not refer to her. Although the woman consented to be photographed, she didn’t know that the picture would be used in an article on cheating cabbies and she sued the magazine.

In 2012, after receiving calls from her neighbors, a woman found that her daughter’s picture had been used in an ad for an ice cream store without the daughter’s or the mother’s consent. Her daughter had simply “liked” the ice cream store on Facebook. She was affronted and embarrassed. People across the country whose photographs had been similarly exploited under Facebook’s Sponsored Stories program sued Facebook.⁴³

Angry at these false, misleading, unflattering depictions these individuals could have pursued numerous paths to recourse. They chose to sue. Like an increasing number of Americans in the past 100 years, these people turned to the law to help them defend their reputations and public images. The 20th century saw the creation and development of what I describe as an American law of public image, and the phenomenon of personal image litigation.

Under the laws of public image, as they currently exist, a person can sue if he or she has been depicted before the public in an embarrassing or upsetting manner, even if no one thinks less of the person because of it.⁴⁴ If a newspaper or a website publishes your picture in a way you find offensive, you can under certain circumstances, receive damages for the outrage you feel that someone has interfered with your public image and the way you want to be known to the world.

The laws of image consist of the tort actions for invasion of privacy, defamation, and intentional infliction of emotional distress. One’s image, or public image, as I define it, is one’s public face, the persona one creates and projects to others, an externalization of the self. Image overlaps with, but is distinct from reputation, which is an external judgment, how others see you.

Image law protects both the right to a good reputation and the right to one’s image, the right to control one’s public image and to feel good about one’s public presentation of self. These laws of image are a modern invention. They were created to address modern conceptions of the self and personal injury.

42. *Peay v. Curtis*, 78 F. Supp. 305, 306 (D.D.C. 1948).

43. Steve Henn, *Facebook Users Question \$ 20 Million Settlement Over Ads*, NPR (May 13, 2013), <http://www.npr.org/blogs/alltechconsidered/2013/05/14/182861926/facebook-users-question-20-million-settlement-over-ads>.

44. *See Peay*, 78 F. Supp. 305.

A historian of the American law and society, my work, which will be appearing in a forthcoming book, explores the origins of these laws of public image, tracing them to the rise of what I describe as an image-conscious self, the modal self of the mass mediated, mass consumer society of the 20th century. The laws of image, I argue, are an expression of the people who have invested heavily in their images, who have come to see their public images as critical to their identities, so that an injury to one's image constitutes an injury to one's self. I present a brief overview of the history from 1900s to 1960, what I see as the foundational years in this development.

The story begins with a rise of major urban centers in the United States in the late 19th century. Urbanization transformed concepts of self and social identity. In the cities, in contrast to small communities, one's social identity was often a function of first impressions and images rather than ongoing contact—what observers might infer about someone based on fleeting glimpses and chance encounters on the streets, and in other urban venues. Urban dwellers became conscious of themselves as superficial images in eyes of others. They sought to master and perfect their public images through careful manipulation of such externalities as their clothing, speech, and gestures.

There was to be a reward for this “impression management,” to use sociologist Erving Goffman's term.⁴⁵ At a time of great social mobility, when social hierarchies were yet unstable, it was thought that individuals could create new identities and advance in status by appearing more refined than they really were. As people became increasingly possessive and protective of their images, they became sensitive to threats of their public images, especially from the mass-market press. The popular press, which had begun to trade in gossip and other intimate accounts of personal life, was becoming an industry of counterimage, devoted to undermining people's social facades.

In the late 1800s, in significant number, both famous and ordinary people began to sue the press for defamation, the law's traditional remedy for injuries to reputation. Historically, the tort of defamation dealt with false statements that lowered one's standing among one's peers. It did not always or adequately address the problem of media gossip, with facts that were often true, and that did not necessarily injure reputation, but nonetheless caused humiliation and distress. The search for legal remedies for the gossip problem led to the invention of the right to privacy.

Proposed in 1890, the right to privacy was a right to not have one's picture or personal information displayed to the public against one's will, in an embarrassing or upsetting manner.⁴⁶ Long before it offered protection against unauthorized data collection, government spying or intrusions into one's private

45. See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

46. Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171, 177 (2010).

space, the right to privacy was a right to control one's public image, and to be compensated for emotional distress when the media interfered with one's desired public persona. By the 1940's, the right to privacy had been accepted in most jurisdictions. It was the manifestation of the personal image consciousness that had become central to conceptions of self and identity in image saturated, media saturated, mass society.⁴⁷

The majority of privacy cases did not involve disclosure of material that was especially intimate or private, but rather situations where an individual had been presented to the public in a way that contradicted her own self-image, even if not objectively negative. In 1944, a woman named Zelma Cason, who was the inspiration for a character in a famous book, sued the author. The portrayal was actually complimentary, although in one part the author described her as "an ageless spinster resembling an angry and efficient canary," and noted that she used profanity. The Florida Supreme Court held that although the depiction was really quite benign, Cason had a cause of action for invasion of privacy, because the author had interfered with her ability to create and project her own public persona as she wished.⁴⁸

The law of privacy was part of a larger body of personal image law that had come into being, as courts and legislatures sought to give people greater control of their public images in an age of proliferating mass communications.⁴⁹ Plaintiffs who had been publicly depicted in a manner that was highly offensive to them brought suit under the new tort of intentional infliction of emotional distress. New statutes imposed liability for the personal affront caused by the media use of people's likenesses without consent. In an historic shift, defamation law expanded to remedy not only harms to reputation, but injuries to people's feelings caused by displeasing media depictions, as when one woman sued a newspaper over the publication of a photo of her as a baby—not because it was defamatory, but simply because it was embarrassing.

With a rise of a celebrity culture and a consumer culture, the right to control one's image would by the 1950s yield a right of publicity, the right to reap the fruits from the commercial exploitation of one's image.⁵⁰ Popular support for these image torts tracked a growing cultural emphasis on social appearances and self-presentation in public.

In the early 20th century, as white collar jobs removed individuals from the production process, and demanded involvement with people rather than things, persuading and pleasing others, and selling one's self and one's image, was described as "essential to career advancement."⁵¹ Work such as Dale Carnegie's

47. *See Id.* at 209-10.

48. *See Cason v. Baskin*, 20 So.2d 243 (Fla. 1945).

49. Barbas, *supra* note 46, at 195-98.

50. *See* DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 249-250 (1962).

51. *Id.* at 252.

1937 bestseller “How to Win Friends and Influence People” reinforced the idea that the key to success was to manage one’s image in order to impress and manipulate others.

In the 1920s, the ad industry developed the concept of psychological advertising, which promoted products by creating anxieties around personal image. Ads reminded consumers that they were constantly on display before the critical, searching gaze of others, and that their appearances and public images could be doctored, repaired, refurbished, and improved. The beauty and fashion industries offered innumerable possibilities for transforming one’s image. The first half of the 20th century saw the popularization of the visual media—photography, film, and television, which accentuated the sense of being an image in the eyes of others. The film actor, who gained renown for his image, and for whom taking off and putting on guises was an art and a profession, became a role model and a cultural icon.⁵²

By the 1930s, images were being described as congruent with the self. In an increasingly mobile and diverse society, people were becoming unmoored from traditional sources of personal identity, such as family, communities, and institutional religion. There was a more malleable, free-floating view of the self. Social psychologists began to describe the modern self as fragmented and discontinuous. It was a set of shifting roles and multiple personalities, assembled out of the various impressions one made on others.⁵³

In the words of Charles Horton Cooley, the self is comprised of, quote, the imagination of our appearance to another person, the imagination of one’s judgment of that appearance, and some sort of self-feeling, such as pride or mortification.⁵⁴ The self was one’s image and even more one’s feelings about one’s image and one’s feelings about other people’s feelings about one’s image. By the postwar era, critics observed an other-directed self, a personality type, the modal self of an affluent consumer society, consumed with the act of constructing a pleasing social facade.

In 1962, the historian Daniel Boorstin observed that when people talked about themselves, they talked about their images.⁵⁵ The more that a desirable public image was regarded as the basis of status, advancement and personal fulfillment, and more one’s social appearance’s seen as coextensive with one’s identity, the deeper this sense of possessiveness towards one’s image and the sense of entitlement, including a legal entitlement, to control it.⁵⁶

The number of lawsuits of defamation of privacy grew steadily in the mid-20th century. Personal image litigation became a fixture of the legal landscape.

52. Barbas, *supra* note 46, at 190-92.

53. *See id.* at 195.

54. Charles Horton Cooley, *Looking-Glass Self* (1983), reprinted in *THE PRODUCTION OF REALITY: ESSAYS AND READINGS ON SOCIAL INTERACTION* 126, 126 (Jodi O’Brien ed., 2011).

55. BOORSTIN, *supra* note 50, at 249.

56. *Id.*

By the 1960s, when privacy, autonomy, personal choice, and self-expression had become cultural and legal ideals, the ability to define, express and construct one's public persona without interference from others was being cast as a fundamental personal right, critical to self-determination and self-actualization.

What we see over the course of the 20th century is the legalization of image, in that one's public image and appearance, once regarded principally as social matters to be worked out through social interaction, came to be regarded also as legal entities, proper subjects for legal supervision and intervention.⁵⁷ This marks an important development in the history of the law and the modern history of the self.

My argument that there has been a significant law of image in the United States is somewhat unconventional. As many have pointed out, American laws do not protect the right to one's image as extensively as in other parts of the world. In some European countries, under certain circumstances, newspapers or websites can be forbidden from publishing ostensibly newsworthy pictures of people or facts on the public record without the subject's authorization.

This broad protection of personal image would be unimaginable in the United States. Since the 1940s, American image laws have been substantially constrained by freedom of speech.⁵⁸ But free speech did not kill the libel and privacy tort. The privacy tort is not dead, as often described. The free speech restrictions represent another dimension, perhaps the flip side of our image consciousness. In a culture where images have been the currency of social exchange, where politics and social lines have been mediated by images, the ability to freely disseminate images of people and public affairs has been described as one of the core values in the First Amendment.

Expressive freedom in the US has come to embody two competing ideals. It means the freedom to express oneself through one's public image. At the same time, it's the freedom to make and distribute images of other people, even if caustic, embarrassing, or unflattering. We want to control our own public images, yet we want to be able to tear down other people's images freely and without restriction. What I'm trying to do is to re-frame the traditional story about the evolution of these laws by tying the history of the legal development to the rise of new concepts of self and personal harm, concepts that arose from the cultural circumstances and pressures of the United States in the 20th century.

My work is not a history of celebrities and public figures only, but ordinary people and their assertion of a right to protect their images, and their feelings about their images, which is a novel modern phenomenon. Politicians, actors, and other notables have long been concerned with their public images. Yet, contrary to what is often assumed, the majority of privacy and libel suits in the 20th century were brought by private citizens and many of quite humble background.

57. *Peay*, 78 F. Supp. at 307.

58. *Barbas*, *supra* note 46, at 206.

In a culture that has held out the possibility of social advancement and self-fulfillment through self-transformation, particularly through changes in external conduct and appearance. For every person, image may really be worth something. Thank you.

Anne Bloom, Associate Dean for Faculty Scholarship and Professor of Law, University of the Pacific, McGeorge School of Law; Marc Galanter, Professor of Law Emeritus, University of Wisconsin Law School “Good Injuries.”

BLOOM:

. . . Our project focuses on better understanding how contemporary American cultural practices see the difference between injury and enhancement. Consider the following practices: body building, corseting, head/neck shaping, foot binding, circumcision, dieting, piercing, tattooing, plastic surgery, serialization, castration. In each instance, the result of the practice can sometimes be read as injury, and other times be read as enhancement depending on the cultural setting. We could also call the results of these practices welcomed, valued or perhaps expressive injuries.

These arguably good injuries can be sorted along several dimensions. These are some of the dimensions we have identified: . . . temporary/permanent, reversible/irreversible, public/invisible, decorative/restorative, and signifying/masking. Some good injuries can also be understood in terms of a particular ordeal, a formative experience, or a marker of a stage of life.⁵⁹ More generally, whether injuries are viewed as harmful or enhancing is frequently influenced by fashion or religious obligation. Where either is at play, we tend to review the result of the practices like circumcision, piercing and tattooing as enhancement, rather than injury. This distinction between enhancement and injury is an important one for purposes of law and regulation.

Legal regulation of practices that are viewed as enhancement tend to focus more on hygiene and professional standards for the practices. Legal regulation of practices that result in injuries, on the other hand, generally focus on prohibiting the practice entirely, the age for consent, or perhaps awarding tort damages. . . . We are considering the intersection and overlap between cultural understandings of injury and enhancement, and the legal regulation of tattoo practices and plastic surgery.

We suggest that the increasing frequency of such practices may be associated with a categorical shift from injury to enhancement. At the same time, the increasing frequency appears to correlate with greater regulation of the practices in the form of professional standards and licensing. That said, it's not entirely

59. Amy J. Derick & Anne E. Laumann, *Tattoos And Body Piercings in The United States: A National Data Set*, 55 J. AM. ACAD. DERMATOLOGY 413, 413 (Sept. 2006), available at <http://www.sciencedirect.com/science/article/pii/S0190962206008310>.

clear whether an increase in tattooing lead to greater regulation, or the other way around. The same is true with plastic surgery.

We also know some that important differences in the regulation of tattoo practices and plastic surgery seem to correspond with differing cultural perceptions of these practices. I'm going to start with tattoo practices. Data on the prevalence of tattoos in the United States suggests a clear cultural trend in the direction of increased frequency in tattooing practice.⁶⁰ . . .

[T]attoo practices are often tied to marking or commemorating specific events or self-expression . . . They may also be employed to mark group identity as in gangs. At the same time, some tattoo practices are intended to express resistance to dominant norms, in which tattoos become emblems of self-determination. . . . When used in this way, tattoo practices are closely connected with the construction of individual identity and the expression of cultural norms. In either case, regulations on tattoos arguably interfere with the freedom to shape one's own identity and to participate in practices aimed at challenging dominant cultural norms.

However, around the same time that we see an uptake in tattoo practices, or perhaps a few years before, again it's not entirely clear which came first, we see increased regulation of tattoo practices . . . Generally, states regulate the minimum hygiene standards for the tattoo procedure itself, the equipment, the tattoo artist, and the building in which the tattoo practices are taking place.⁶¹ More than half of the states in the United States also require tattoo artists to register, be certified, or obtain a license before engaging in tattooing.

Although many states do not require tattoo artists to be registered, or certified, or licensed, almost all of them require the tattoo establishment itself be licensed. Most states also have regulations concerning and controlling the tattooing of minors.⁶² Here we see how the age of the tattoo recipients seems to mark a reverse categorical shift from enhancement back to injury if the recipient is too young.

Even among adults, the failure to provide consent can transform the practice from enhancing to injurious. The increased regulation of tattoo practices suggest a growing acceptance of tattooing as a practice of enhancement, rather than injury, but at the same time the restrictions of certain times of tattoo practices, such as tattooing minors, continues to suggest that under some circumstances the practice results in what the client may view as enhancement is stilled viewed as injury under law.

60. *Id.*

61. Valeria P. Carlson, Everett J. Lehman & Myrna Armstrong, *Tattooing Regulations in U.S. States*, 2011, 75 J. ENVTL. HEALTH 30 (Oct. 2012), available at <http://search.proquest.com/docview/1114672036?accountid=25316>.

62. *Tattoos and Body Piercings for Minors*, NAT'L CONF. ST. LEGISLATORS (Dec 2012), <http://www.ncsl.org/issues-research/health/tattooing-and-body-piercing.aspx>.

While law intersects with culture in this context, and perhaps shapes certain types of tattoo practices, the relationship between the two still seems complex. On the one hand, increased regulation seems to have legitimated and perhaps professionalized tattooing practices, and in doing so made the practices more accessible and culturally acceptable. At the same time, increased regulation may have lessened some of tattooing's transgressive and perhaps expressive appeal. . . .

Tattoo artists and recipients have their own norms about what is acceptable, including norms against copying designs, norms about placement of tattoos and norms regarding the use of obscenity, objectionable symbols and slogans. Some tattoo artists flaunt the norms. Generally, however, most tattoo artists work within the norms . . .⁶³

In short, while tattooing is commonly seen as a culturally transgressive act, it is not normless. In fact, tattoo practices seem to represent a way of negotiating autonomy, even so the parameters for what practices are permissible even outside the bounds of formal law appear to be subject to ongoing contestation in negotiation within the community of practice itself. . . .

Like tattooing, plastic surgery practices suggest that the line between injury and enhancements is culturally contested. Historically, plastic surgery practices began as a technique for normalizing bodies with culturally unacceptable differences. In this sense, the surgery was seen as necessary to repair some sort of injury and not to cause an injury itself.

Some of the earliest plastic surgeries were developed to rebuild the noses of 16th century syphilitics so the symptoms of the disease would be less visible. Similarly, the first plastic surgeons to perform so-called anti-aging surgeries, insisted upon the "bitter need" for the surgeries to erase the evidence of aging that marks older women as culturally different and unemployable.⁶⁴

The real surge in plastic surgery, however, occurred after World War One, when surgeons employed the techniques of injured soldiers.⁶⁵ Around this time plastic surgeons began to distinguish between plastic surgeries to repair injured body parts and cosmetic surgeries that focused on an enhancement.⁶⁶ This distinction is quite important for plastic surgery consumers. Cosmetic surgical practices became more cultural currencies to become more culturally accepted and typically qualify for insurance coverage when they are reclassified as plastic.⁶⁷

The distinction between plastic and cosmetic surgeries, however, is not always clear. The history of eye-lifts provides an example. The Japanese

63. See generally Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013).

64. KATHY DAVIS, *DUBIOUS EQUALITIES AND EMBODIED DIFFERENCES: CULTURAL STUDIES ON COSMETIC SURGERY* 25-27 (2003).

65. *Id.* at 24-25.

66. *Id.*

67. Anne Bloom, *Plastic Injuries*, 42 HOFSTRA L. REV. 759, 771 (2014).

physician Mikamo pioneered eye-lifts in 1896. At first, he focused on blending western and Japanese aesthetic ideals to perfect what was initially seen as a purely cosmetic procedure. Over time, however, he began to argue that the lids in his Japanese patient were physical defects or inherent injuries that needed to be corrected, repaired . . .⁶⁸

Today plastic surgeries are a multi-billion dollar industry and the number of procedures performed annually is on the rise.⁶⁹ Cultural reactions for this uptake, however, are mixed. On the one hand faking of physical attributes it's become so widespread that it's almost seen as culturally mandated especially for women of a certain age and social class. But while faking is ubiquitous, the acceptable possibilities for faking are also quite constrained. In the case of aging women, for example, it's not culturally acceptable to fake older. . . .⁷⁰

Consider in contrast the plastic surgery practices of the French artist Orlan who uses her body as a medium for her art.⁷¹ Orlan was undergoing multiple plastic surgeries to make parts of her body look more like the body parts that are portrayed in famous works of art.⁷² Instead of making her look younger, the surgeries tried to give her the forehead of Leonardo Da Vinci's Mona Lisa, and the chin of Botticelli's Venus.⁷³ Instead of trying to look natural, Orlan used her faking as a struggle against nature.⁷⁴

There's one important way, however, in which Orlan's artistic practice is not so different than ordinary plastic surgery consumers. Orlan emphasized that she used the surgeries as a way of becoming more fully herself.⁷⁵ In interviews with plastic surgery, consumers indicated the view their own surgeries in a similar way.⁷⁶ Most people undergoing plastic surgery say like Orlan that they view their surgeries as vehicles of self-expression and self-determination.⁷⁷

What is clear, however, is that ordinary plastic surgery consumers are not presented with the same array of options as Orlan. Although, Orlan was ultimately successful in getting surgeons to perform the surgeries that she sought. Most plastic surgeons would not agree to do surgeries like the ones that she obtained, even though she is a well-known artist. This is because the particular aesthetic result that Orlan has been seeking to achieve, that is, body parts that

68. *Id.* at 772.

69. See generally ALEX KUCZYNSKI, BEAUTY JUNKIES: INSIDE OUR \$15 BILLION OBSESSION WITH COSMETIC SURGERY (2005); see also American Society for Aesthetic Plastic Surgeons, QUICK FACTS: Highlights of the ASAPS 2011 Statistics on Cosmetic Surgery, available at <http://www.surgery.org/sites/default/files/2011-quickfacts.pdf>.

70. Bloom, *supra* note 67, at 765.

71. For a discussion of Orlan's art, see DAVIS, *supra* note 64, at 106-15.

72. *Id.* at 107.

73. *Id.*

74. *Id.* at 109.

75. *Id.* at 110.

76. *Id.*

77. DAVIS, *supra* note 64, at 110.

resemble those portrayed in famous works of art do not correspond with the range of aesthetic procedures that are considered acceptable to most plastic surgeons.⁷⁸

At an earlier point in history, for example, many plastic surgeons in the United States refused to perform surgeries that might allow an individual to fake race.⁷⁹ Today, plastic surgeons readily assist consumers with faking race, but they may refuse to perform other types of surgeries that they currently consider aesthetically undesirable such as the so called feline look in which plastic surgery consumers seek to look more like cats.⁸⁰

These aesthetic determinations of plastic surgeons on the other hand, are returned and supported by regulations that govern plastic surgery. We should put high professional standards set by plastic surgeons themselves and by legal standards and tort law that determine injury in the plastic surgery context by deferring to the judgments of plastic surgery. You're not injured unless the plastic surgeon says that you are. These judgments in turn restrict the self-expressive choices that plastic surgery consumers can make

GALANTER: I just want to add when we talk about cultural practices that there's really a long dimension say with society wide practices at one end, practices that are prevalent within majority groups and various self-defined minorities and finally people in the closet. It's not sufficient to say that these are cultural practices, but basically we have an enormous variety in which the same practice can be the most unthinking conformity at one end of the scale and violently individualistic definition at the other end of the scale. We need to refine our notion of corporeal practices to take into account this type of variation.

DAVID M. ENGEL, "STAIRS, CHAIRS, AND AUTOMOBILES: WHAT INJURY? WHAT LUMPING?"

ENGEL:

My paper attempts to catalog the reasons why lumping is so prevalent, at least in American legal culture. After four decades of socio-legal research, it seems clear that the puzzle at the heart of American tort law is not why so many people litigate but why so few litigate. It's pretty clear from all the research that's been done that the vast majority of injured Americans don't sue, they don't consult a lawyer, and they don't make any claim against another party.

This practice—or non-practice—has been termed lumping, which means that the injured party absorbs the cost and the consequences of the injury without any significant attempt to hold the injurer responsible, legally or non-legally. Researchers have found that roughly nine out of ten injury victims engage in

78. *Id.* at 109.

79. Bloom, *supra* note 67, at 769.

80. *Id.* at 768 n.68, 778.

lumping, not claiming, and only two to three percent wind up suing even when their injuries are caused by negligence.⁸¹

It is the dog that doesn't bark in the night that deserves our attention, but there's something mysterious about this massive tendency to lump our injuries. Why do so few injury victims assert a claim, and where do all the other cases go? It seems that the base of the tort law pyramid is really where the action is. Or rather, it's where the most important inaction is.

This question deserves more attention than it's received so far. The papers in this conference have made a great contribution by showing that injuries are cultural constructs. Injuries are not facts, they aren't givens, and even counting them raises difficult conceptual problems. By understanding how people construct injuries, and how they connect them to a sense of self, maybe we can begin to figure out the mystery of why so much lumping occurs. As I was thinking about this, I came up with at least six ways in which the social construction of injury might operate to increase the likelihood of lumping rather than claiming. They are:

1. Variability in the perception that pain even exists.
2. Even painful experiences may be interpreted as beneficial, not harmful.
3. Many harmful experiences are viewed as natural within particular social or physical environments.
4. The choice to expose others to the risk of harm may be hidden from view, making the resulting injuries appear inevitable.
5. Self-blame is a common response to injuries and reduces the likelihood of lodging a claim against anyone else.
6. Cultural norms tend to favor the ethic of personal responsibility over the ethic of social responsibility to prevent injuries or pay compensation when they occur.

Today I will have time to focus only on numbers two, three, and four. I will begin with the idea of "beneficial pain." A classic example is foot binding in China, a practice that was excruciatingly painful and made it difficult to walk for the rest of one's life. Yet, for a time, foot binding was not viewed as the infliction of an injury but as an enhancement of one's beauty and a symbolic token of nobility.

81. See generally David M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury*, 44 LOY. L.A. L. REV. 33 (2010), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1017&context=llr>.

A modern example is male circumcision. The American medical establishment endorsed male circumcision for more than a century because it was thought to prevent disease and deformity. And of course the Jewish and Islamic traditions have long viewed circumcision as conferring an important religious benefit. Today, however, some critics argue that male circumcision is a form of child abuse and even a human rights violation. They point out that the procedure is so painful for adults that it would require general anesthesia, but it's typically performed on infants without that precaution.⁸²

Nevertheless, some defenders of circumcision argue that pain itself can be beneficial. In the words of one mohel, who performs the circumcision on infants, "There is a misconception that pain is a bad thing to be avoided at all cost. Pain is part of life as a human being. We could not survive without pain. We could not learn and grow as individuals without pain. You cannot give your child a life without pain. The consequence of doing that would be disastrous."⁸³

As recently as the year 2005, more than 1.2 million circumcisions were performed on more than 56 percent of the newborn male babies in the United States. These numbers go up and down because the medical establishment keeps changing its position on the practice. For the most part, circumcised male babies are not seen as injury victims but as the recipients of a religious or medical benefit. The absence of claims or, in other words, the presence of lumping, strikes most people as normal and expected. This view may change if the position of the critics eventually prevails.⁸⁴

Natural injuries. Even when individuals feel they have been injured, their suffering may seem natural and not the basis for a claim. Chairs are a case in point. Consider the case of a middle-aged office worker who suffers from back pain, spinal deformity, varicose veins and circulatory and digestive problems. That individual can't recall any traumatic incident that caused the symptoms, just the development of pain and disability over a period of years. It may be surprising to learn that those very ailments, especially back pain and spinal deformities, can be caused by a familiar feature of our physical environment, the chair.

Galen Cranz, a researcher at Berkley, says there's nothing natural about chairs.⁸⁵ There are societies that have no chairs, and people in those settings

82. David M. Engel, *Perception and Decision at the Threshold of Tort Law: Explaining the Infrequency of Claims*, 62 DEPAUL L. REV. 293, 320-21 (2013).

83. Stuart M. Berlin, *From the Jewish Journal: Don't Fear "Brit Milah,"* BERIT MILAH NEWSL. (National Org. of Am. Mohalim/ot), Oct. 6, 1989, *quoted in* Dena S. Davis, *Male and Female Genital Alteration: A Collision Course with the Law?* 11 HEALTH MATRIX 487, 527 (2001), *available at* <http://www.cirp.org/library/legal/davis1/>.

84. *See* Michael Alison Chandler, *Circumcision, Long in Decline in the U.S. May Get a Boost from a Doctors' Group*, WASH. POST (Aug. 13, 2012), http://www.washingtonpost.com/national/health-science/circumcision-long-in-decline-in-the-us-may-get-a-boost-from-a-doctors-group/2012/08/10/7816526a-de3e-11e1-8e43-4a3c4375504a_story.html.

85. *See* GALEN CRANZ, THE CHAIR 23 (1998).

have much healthier spines and fewer diseases.⁸⁶ Moreover, she points out, there are better and worse designs for chairs.⁸⁷ We could reduce pain and suffering in our society significantly by producing chairs with lower seats that have less padding and a space between the seat and the back of the chair.

Office workers that are harmed by chairs rarely show up in injury surveys.⁸⁸ Their condition is viewed as a natural part of the aging process and not the result of an accident or a reason to seek a remedy from anyone else.⁸⁹ Lumping occurs as a matter of course without any conscious decision by the victim.

Falling down the stairs is a little different from being harmed by your chair, but a similar lumping process is at work. There's no doubt in the minds of the one million Americans who suffer painful stair falls every year that they have been injured. But stairs are everywhere. They are a ubiquitous part of our physical environment. The risks associated with them are usually seen as unavoidable. When people fall down the stairs, the blame is usually assigned to their inattentiveness, their age, or their physical disability.⁹⁰

In fact, however, a few ergonomics engineers have lately begun to demonstrate that these injuries are by no means natural or, in many cases, the fault of the victims. These one million stair falls every year can be significantly reduced by better stair design, including broader treads, shorter risers, and the elimination of variability in stair dimensions within a given staircase.⁹¹

As my grandmother used to say, "Who knew?" If no one knows that a design can be made safer, then most injury victims will continue to lump without giving it another thought.

The last topic I have time to discuss today is injuries resulting from invisible choices. Even when harms are created by conscious choice, that is, the deliberate weighing of risks and benefits by injurers, these deeply embedded choices may not be apparent to the victims or to society in general. As a result, even injuries caused by conscious design choices may be naturalized and resolved by lumping.

Sarah Lochlann Jain has described these invisible choices brilliantly in her book on *Injury: The Politics of Product Design and Safety Law in the United States* (2006).⁹² In her words, particular levels of risk and decisions about the distribution of responsibility for injuries are encoded in product design: "Design decisions ineluctably code danger and injury at the outset of the production

86. *Id.* at 18.

87. *Id.*

88. *Id.*

89. *Id.*

90. Engel, *supra* note 82, at 315-16.

91. *Id.* at 316.

92. See generally SARAH LOCHLANN JAIN, *INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES* (2006).

process . . . [and raise] the question of how human wounding counts, who ‘owns’ health, and how it is to count as a social good.”⁹³

Automobiles provide many examples to illustrate Jain’s point, such as air bags, which the automobile manufacturers resisted long after it was known that they could prevent many injuries and fatalities.⁹⁴ Eventually, a consensus developed that the public should no longer be exposed to the risks associated with collisions in cars without air bags.⁹⁵ Often the manufacturers’ decisions about safety lag behind what is technologically possible. They reveal a more fundamental set of assumptions about how much injury it is desirable or efficient to impose on society, and who should bear the pain.

A similar shift is now underway in the social consensus about providing rear view cameras on automobiles. Federal regulators estimate that 267 deaths, and approximately 15,000 injuries, are caused each year by vehicles backing up.⁹⁶ According to one study, the victims average only two years of age.⁹⁷

Everyone would agree that these harms to children should be counted as injuries, but are they actionable injuries? Not if it’s assumed that cars are a ubiquitous part of our physical environment, and that they naturally come with a blind spot making risks to small children unavoidable.⁹⁸ According to this line of thinking, such injuries are an inevitable risk of having automobiles. Good parents don’t let their kids play in driveways. Good kids listen to their parents. Maybe not my kids or your kids, but good kids do.

Once again, it doesn’t appear that any major technological breakthrough was needed to install rear view cameras in cars. Their absence simply reflected a set of assumptions about who should be responsible for the risk of harming children in this way, and whose costs and benefits should be given the most weight. These choices were invisible to most of us until the issue began to receive publicity, and eventually the attention of Congress.⁹⁹

A consensus recently emerged that a vehicle without a rear view camera is defective, that this type of injury should not be encoded in the vehicle design.¹⁰⁰

93. *Id.* at 56.

94. *The Truth About Airbags*, SMARTMOTORIST.COM, <http://www.smartmotorist.com/traffic-and-safety-guideline/the-truth-about-airbags.html> (last visited Oct. 27, 2014).

95. *Id.*

96. U.S. DEP’T. OF TRANSP., DOT-HS-811-144, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION: FATALITIES AND INJURIES IN MOTOR VEHICLE BACKING CRASHES (2008).

97. *Backovers—Child Tragedies*, KIDSANDCARS.ORG, <http://www.kidsandcars.org/back-overs.html> (last visited Oct. 27, 2014).

98. Keven Moore, *Avoid Tragedy of Driveway Accidents; Proceed with Caution*, KYFORWARD.COM (July 24, 2012), <http://www.kidsandcars.org/upload/pdfs/articles/2012/2012-keven-moore-blog.pdf>.

99. See U.S. DEP’T. OF TRANSP., RIN 2127-AK43, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION: FEDERAL MOTOR VEHICLE SAFETY STANDARDS; REAR VISIBILITY (2014).

100. *Preventing Driveway Tragedies: Rear Cameras Help Drivers See Behind Them*, Insurance Institute for Highway Safety Status Report Vol. 49, No. 2 (March 31, 2014), <http://www.iihs.org/iihs/news/>

Recent federal regulations mandate rear view cameras for all new cars and light trucks starting in May 2018.¹⁰¹

When shifts like this take place over time, injuries that were previously seen as unavoidable or even natural come to be perceived as actionable. Until then, these injuries and others like them are very likely to be lumped.¹⁰² Claiming would seem absurd and inappropriate. It would seem an attempt to cash-in on the child's misfortune and to shirk one's personal responsibility. Lumping is the normal and morally appropriate response.

I began by asking how we can explain why approximately nine out of ten people respond to serious injuries by lumping without making any sort of claim against the injurers. It now seems to me that the number is probably much higher than ninety percent.

Lumping is even more widespread than we thought, and that's because the concept of injury itself is a moving target.¹⁰³ It's continually reshaped by changing cultural norms and practices, potentially adding millions of illnesses and painful events to what's conventionally viewed as our injury rate.¹⁰⁴

I've tried to sketch an explanation of why our social construction of injury tends mostly to produce lumping rather than claiming on such a massive scale. For example, when painful experiences are framed as beneficial for medical or religious reasons, they're unlikely to result in claims. As the case of male circumcision demonstrates, if we don't see the injury, we lump without even realizing we've made a choice.

Other kinds of painful experiences are indeed considered injuries, but they're lumped because the victim and others view them as natural occurrences. These injuries are explained as the normal, and inevitable result of human interaction with the physical environment, with the chairs, stairs, and automobiles that are part of our daily lives. If responsibility for such injuries must be assigned, it is usually attributed to the victims themselves.

Experts may surprise themselves and us with the news that the risk of harm really isn't inherent in a particular instrumentality, or activity, and could be averted. That's what happened, for example, with respect to stairs and rear view cameras in cars. But in many instances it never occurs to anyone to rethink the most common features of our physical surroundings.

In other instances, designers and manufacturers are well aware of the injuries they cause, but they have calculated the risks and benefits and made invisible decisions to embed those risks in the products or services in ways that encourage others to view the injuries as unavoidable.

desktopnews/preventing-driveway-tragedies-rear-cameras-help-drivers-see-behind-them; *see also*, U.S. DEP'T. OF TRANSP., *supra* note 99.

101. U.S. DEP'T. OF TRANSP., *supra* note 99.

102. *See generally* Engel, *supra* note 81, at 44.

103. *See id.*

104. *See* LOCHLANN JAIN, *supra* note 92, at ix.

These are some of the ways in which injuries get steered away from the tort law system, leading injury victims to absorb their misfortune without asking the injurer for compensation or other remedy. Many injuries come to be seen as natural, as nobody's fault, even though the means to prevent them may actually be close at hand.¹⁰⁵

If lumping is more widespread than is usually thought, then tort law may be playing an even more marginal role than most of us ever suspected. If the dog almost never barks in the night, then perhaps we need to rethink when and how tort law matters, and how effectively it can actually provide compensation and deterrence or deliver corrective justice.

The answers can be quite important for the millions of Americans who suffer pain and misfortune each year, and who for the most part end up absorbing the cost and consequences themselves.

GOWRI RAMACHANDRAN, DISCUSSANT:

... Some overlapping themes I saw through all of these papers is that injury ... is a moving target, and whether we even conceive of it as injury, whether we conceive of it as a good injury, or a negligible, unimportant injury, something we dismiss, all of that seems to be affected by a number of different factors. There's the difference between whether we conceive of something as natural, or unnatural that seems to show up.

For instance, we see a lot of things in our environment, like chairs, and poorly designed stairs, as natural. Because they're part of the physical space, it's easy to ignore the choice that went into producing them. We also, I think, see a lot of the status of various people and their physical state, whether that status is disabled or able as natural, or when in fact it may be the product of a whole host of social and legal choices.

There are also some distinctions that seem to arise from whether we perceive someone's physical state as normal or abnormal. This is different, I think, from natural versus unnatural, whether we see it as conformist and typical or abnormal.

I think we saw a lot of that in the examples that Professor Bloom and Galanter gave us with tattooing and plastic surgery. Tattooing starts to seem less and less like an injury as it becomes more and more normal, even though I don't think any of us perceive of it as natural, even though the practice is extremely widespread now. Then there's also whether a certain status is valued or stigmatized. That can change whether we view entering or leaving that status as an injury, or the repair of an injury. Then, finally, there seems to be a lot of cultural shifting over whether something is deemed a *de minimis* injury, or a significant injury. I think there's this overriding theme that injury is culturally constructed.

105. *See id.* at 19.

... There also seems to be some cultural contest over whether, even something that everyone agrees is an injury is *de minimis* is something we should ignore versus whether it's significant. Is this something in someone's head, or just their feelings that are unimportant, or are the feelings of the White male property owner who feels threatened somehow incredibly significant, so significant that it justifies killing someone in response?

Then finally there seems to be a lot of cultural contests over whether we perceive something as tangible versus intangible status harm. The more tangible it's described as then the more we seem to see it as an injury. In Professor Barbas' piece I was thinking of this, because so much of what you talked about, it's an intangible thing. The feelings that someone has about the feelings that other people have about their persona. That was a great way of putting it. The law is describing it as an injury to image. It struck me that image is actually a physical thing, that you can visually see. It's not really an image in a lot of these cases it sounds like that's being harmed. It's not as if someone's photograph has been altered and manipulated, and they're made to appear in a way they do not, and then that's presented to the public. It's more things like the person's like of ice cream, or that sort of thing is being exposed.

Even through our language, when we want to decide the thoughts of real injury that law is going to take account of. We decide to describe it as if it's a tangible, physical injury, when it's actually not. It's actually an injury to something very intangible.

This is all super interesting, because all these papers, although some of them leaned more towards the descriptive than others, I think they all raise the big question for us that Professor Franks probably made the most explicit, which is, "What are the implications normatively of this, if we do make choices as a society about what we construct as injury, and what we construct as either non-injury or non-cognizable injury?"...

III. INJURY NARRATIVES

Greg Johnson, Associate Professor of Religious Studies, University of Colorado, Boulder.

Claire Rasmussen, Associate Professor of Political Science, University of Delaware.

Lochlann Jain, Associate Professor of Anthropology, Stanford University.

Yoshitaka Wada, Professor of Law, Waseda University, Tokyo, Jpana.

Michael Musheno, Faculty Director of Legal Studies Program, School of Law, UC Berkeley.

Greg Johnson, Associate Professor and Chair, Department of Religious Studies, University of Colorado. Motion Through Friction: Perpetual Kinship, Policing the State, and the Animation of Cultural Injury Claims in Contemporary Hawaii

JOHNSON:

... I'm a scholar of religion not law, but I'm going to be dealing with legal issues. Please help when you see ways I could be gently nudged to be clearer in the formulations I offer. As a scholar of religion, my attention has been drawn to how moments of legal and political struggle, and even happenstance, overtime get re-understood within traditions as moments of the formation of theological doctrine. That kind of an insight is fairly common with any Western religious tradition, and within the study of them.

A similar kind of insight is seldom applied by scholars of non-dominant traditions, particularly with regard to indigenous traditions. If indigenous traditions are experiencing moments of political and legal struggle, it is often regarded by the media scholars and others, as an inauthentic moment, or a merely political moment, or a moment where the tradition has gone in to decline of some sort. I want to push back against that and say, "No, this mechanism of friction is precisely the stuff of religious life."

The honing of perspectives, the owning of responsibilities and so forth, let's pay that due attention. It's a missed opportunity if we don't. My attention is drawn to Hawaiian legal contexts, and even the contexts where Hawaiians dispute among themselves, but to attend in those moments to the generative friction. What's coming out of that religiously? Who emphasizes what? How does the tradition take on new life at that moment, and so forth?

That's the general framework I'm working within, but I want to take you into a particular set of issues with regard to the state burial law. We have our tattoo picture here. This is Kaleikoa Kaeo. He's a famous native Hawaiian activist and scholar.¹⁰⁶ There's an example of what I was talking about before with the skull tattoos. In any case, the point of this slide is that in Hawaii, as with so many places today, culture, tradition, politics and law are inseparable. They're articulating many things at once, and so a protest like this can also be fully a religious moment in certain ways for certain people.¹⁰⁷ I just want to flag that analytical difficulty at the outset. Or analytical richness, as it can be thought of.

A quick sketch about burial law in Hawaii today. Of course, Hawaii was colonized in the 1800s. Then in the 1900s tremendous development, particularly by the military and by the tourist industry.¹⁰⁸ Native Hawaiians tended to bury their dead for the most part in beaches and beach sand. Of course, by way of

106. *Resistance against Militarization of the Pacific*, HAWAII PEACE & JUSTICE (Oct. 7, 2012), <http://www.wp.hawaiipeaceandjustice.org/2012/10/07/resistance-against-militarization-of-the-pacific/>.

107. Steven Lohse, Speech at the Interfaith Alliance Hawai'i Aloha e PCD-UUA Awards (October 2014), available at <http://www.pcd-uua.org/currentsdocs/Honolulumoralbeacon.pdf>.

108. *American Experience: Hawaii's Last Queen*, PBS, <http://www.pbs.org/wgbh/amex/hawaii/program.html> (last visited Feb. 22, 2015).

hotel development these are the most coveted sites.¹⁰⁹ We have serious tension in the making.

This tension came to a head in the late 1980s on the island of Maui at Kapalua. The RitzCarlton hotel is where it is, a place called Honokahua.¹¹⁰ One thousand one hundred sets of human remains were disinterred for the development of this hotel.¹¹¹ At about the same time, Native Hawaiians, like many American Indians, were really coming to political consciousness in the sense of saying, “Wait, we can work with the legal system, we can work through the legal system to agitate for rights and to make sure this kind of thing doesn’t happen.”¹¹²

Native Hawaiians pushed back. They said, “The ancestors are speaking to us. By coming out of the ground not of their own volition, by coming out of the ground they’re coming awake and saying, ‘Children, wake up and do something.’”¹¹³ This is how many Hawaiians talk about it.

They pushed hard against the state and asked for a new state burial law, the principal provision of which is that the state has five island burial councils.¹¹⁴ Each council is made up by a majority of Native Hawaiian religious and cultural experts.¹¹⁵ They have jurisdiction when human remains are found in certain circumstances to say how those human remains should be treated.¹¹⁶ I’ll come back to that in a minute.

One of the principal aspects of this is that the law now requires that an archaeological inventory survey (AIS) be done for each development site. At about the same time, a federal law was passed, the Native American Graves Protection and Repatriation Act, NAGPRA, that you may be familiar with.¹¹⁷

We have state law and federal law coming onto the scene at the same time, and a florescence of Native Hawaiian religious life around the notion of the dead and protecting the dead. This has always been part of Hawaiian life. They’re genealogical in their thinking, deeply. The ancestors matter, but now they matter in a newly concrete way that can be legally acted upon.

For 20 years, from the ‘90s until about 2007 and then the 2008 fiscal crisis, this state burial law worked pretty well from a Native Hawaiian perspective. It has started to fall apart from that same perspective because of lack of

109. Jeanne Cooper, *Hawaii’s Burial Conflicts Give New Life to Cultural Activism*, HAWAII INSIDER (Aug. 13, 2009), <http://blog.sfgate.com/hawaii/2009/08/13/hawaiis-burial-conflicts-give-new-life-to-cultural-activism/>.

110. *Id.*

111. *Id.*

112. *See generally* Harold Nedd & K haunani Abad, KAMAKAKO’I, <http://old.oha.org/kamakakoi/olanaiwi.html> (last visited Feb. 22, 2015).

113. *See generally id.*

114. Cooper, *supra* note 109.

115. HAW. REV. STAT. § 6E-43.5 (2013).

116. *Id.*

117. 25 U.S.C. §§ 3001-3013 (1990).

administrative oversight. That's really what I want to discuss by way of an example.

A church on graves; this is Kawaiaha'o Church, downtown Honolulu. It's traditionally regarded as the most Hawaiian church for two reasons. It's one of the original churches in Hawaii. It dates from the 1820s. Congregationalist missionaries. It's also the most Hawaiian in a Native Hawaiian sense. That is, most of the congregation is Native Hawaiian. Some of the sermons are performed in Hawaiian language. Many of the prayers are done in Hawaiian language, and so forth.¹¹⁸

What we're really talking about is a dispute between Native Hawaiian Christians and Native Hawaiians who may be Christian, but for the purpose of this dispute wish to advocate against the church. The church itself is right in the middle of the capital district, downtown. The church recently sought to develop a multipurpose building, a large recreational facility on its grounds. To do so it would need to remove a lot of bodies from its existing cemetery.¹¹⁹

As this process started, more and more human remains were found. The number is over 600 at this point. Native Hawaiian burial law activists say that the church is at fault here for a variety of reasons, but most of all the state is at fault.¹²⁰ The state has injured them because it has not followed its own administrative processes, and that's what I want to get into.

We're talking about one example of the state's failure; the disinterment of 600 plus Iwi Kupuna, or ancestral human remains, from the grounds of and areas adjacent to Kawaiaha'o Church. An injunction is currently in place, so the project is stalled.¹²¹ We're talking in real time, this is happening now.

The construction has stopped. It's basically an open pit, the 600 Iwi Kupuna are in the basement of the church as we speak.¹²² It's before the Supreme Court of the State of Hawaii. I'll go more into that in a bit.

This is also about precedent and continuing issues in Hawaii about process and law. It's not just about this specific case. 600 injuries, at a minimum, are at stake from the Native Hawaiian burial protection activist point of view.¹²³ This is injury to the ancestors.

As I mentioned, the bones have always mattered. They're the source of mana, power, of the physical continuance of genealogy. They also fructify the land by burying, kanu, which means to plant. When you plant the bones you are nurturing the land and something will grow; a power will grow from that. If

118. *Kawaiaha'o Church Homepage*, KAWAIAHA'O CHURCH, <http://www.kawaiahao.org/> (last visited Feb. 22, 2015).

119. *Id.*

120. Rick Daysog, *Burial Counsel Blasts State Over Kakaako Project*, HAWAII NEWS NOW (Jun. 12, 2014), <http://www.hawaiinewsnow.com/story/25756615/burial-council-blasts-state>.

121. *Id.*

122. *Id.*

123. See generally Nedd & Abad, *supra* note 112.

they're disturbed that life force is cut off. That's the basic understanding. This is not invented tradition in that sense.

To move them is to disturb, to injure, the ancestors and the traditions themselves. In the present, the families, the 'ohana say they have been injured because they are the inheritors of that tradition. But also because they fought for what they regard as a good law, some 20 years ago, and now their due process is being violated.

That hurts, to have bought into the democratic system as indigenous people, to see it succeed for 20 years and then to suddenly work against them is the kind of injury we're dealing with.

Two distinctions I want to cover moving forward. I mentioned that the burial law has a couple categories. Two of the most important are previously known burials or inadvertent discoveries. The former finding triggers the jurisdiction of the burial councils, these groups that have the native Hawaiian advisers on them. And the latter category enables the state and developers to proceed without consulting the burial councils.

This is what's happening lately. The state has just said, "No, in most cases we're dealing with inadvertent discoveries." The problem is they're not using the archaeological inventory survey provision of the law that says the first thing that happens in development is a survey of the land to talk about the likelihood of known burials.

Also they're not consulting people who would know the oral tradition of the land to say if that's the oral tradition, give us this information that might be actionable. Basically, this amounts to an end around the most important part of the law.

This is precisely what happened in this case. The church and the state seem to have colluded. They did not conduct or publish an archaeological inventory survey, never mind that it's a burial ground, and did not engage the burial council, did not seek their advice. The other distinction that matters here is between a cemetery and a burial ground. A short answer is it's both.

As with many colonial settings, the church was built upon a Native Hawaiian sacred site. The church cemetery sits on top of the burial ground. The burial ground is larger than the cemetery so it's both. Cemetery law applies, but state burial law also applies.¹²⁴

The state, however, has been extremely equivocal on this point. At times, they'll say, "No this is a cemetery," and that cemetery law applies therefore the church can move the remains at will. Other times they say, "Well, OK even if it's not a cemetery what we're dealing are inadvertent discoveries," and then the state can still make the decision without consulting the burial council. But as you can see it's hard to have it both ways. It's hard for it to be a cemetery and for these remains to be inadvertent discoveries. What this inconsistency triggered for many

124. 25 U.S.C. § 3001.

members in the Native Hawaiian community was just a frustration that the law was being avoided and that human remains were being moved as a result.¹²⁵

What I want to talk about are the two pathways people in the community have followed to deal with this issue. The first being common in such situations out of protests, showing up at the church. I'm about to show you a video of protest saying, "This is a violation of our tradition." Media presentations, news stations, radio stations, other forms of social mobilization. Direct protests.

The other path has received far less attention, but I think it matters much more in this case, and it's policing administrative law. Native Hawaiians showing up at state meetings and saying, "Are you following the Sunshine laws, are you following Robert's Rules of Order, do you have a quorum?"

The nittygritty of process all the way up to, "By the way did you ask the church to submit archaeological inventory survey?" Just every fine point right up to the big points, being there at every single meeting and then when necessary, filing law suits saying, "The process has been violated."

In the larger framing of this project, I theorize that relationship between more dramatic episodes of protests and more mundane episodes of policing process, that I regard this at least equally important. How these work together dialectically to sustain the Native Hawaiian movement today. Let me show you just a very brief example of the kind of protest I'm speaking of [video footage shown] . . .

I just wanted to give you an example of how visceral and intense that sort of protest is, and it really does draw attention. The question is what does it do? It draws attention, that's important of course. But what it's doing more is protest in another key. People like Dana N one Hall filed a lawsuit. She knows this law very well, she's been on a burial council on Maui for 17 years. She helped draft aspects of its provisions, and finally she has an ancestor buried at the church.

You can see her language, it's all about due process and the violation of due process, and the way the burial law is not followed. She has pursued this, it went through the first district court and she was denied standing. The appeals court in Hawaii reheard the case and affirmed her position, and it's been remanded to the first circuit, particularly with reference to her claims about how the burial law provisions, or archaeological inventory survey, should work.¹²⁶

This is Dana here, on the occasion of her winning a cultural preservation award from the State of Hawaii. There's an irony there to. She gets awarded from the state for preserving culture, and yet she must challenge the state to make sure they preserve culture.

. . . This is testimony before the Office of Hawaiian Affairs in 2011 on the same matter, talking again about process. She wanted the Office of Hawaiian Affairs to chime in, to do something, to say, "You are in effect our tribal entity,

125. See generally Nedd & Abad, *supra* note 112.

126. See generally Hall v. Dep't of Land & Natural Res., No. SCWC-12-0000061, 2013 WL 6271902 (Haw. Dec. 4, 2013).

“speak for the ancestors, speak for us, speak for process.” . . . This is all about the church claiming that these are inadvertent discoveries, are unknown burials. She’s scandalized and she talks about the hurt and pain our people have endured. This is injury at that scale, of tradition over time.

. . . Thinking about injuries in this kind of a context, we need to talk about remedies. Three seem to be in place right now, and I’ll talk about both of these more in my paper.

First is the injunction I mentioned, that’s holding right now. Once the first circuit court begins to review the case a new injunction will need to be filed, but the signs are good. Also the appeals court said, “When the first circuit reviews it, they will need to follow the Nāone Hall’s recommendations that she is right, her reading of the burial law is correct.”¹²⁷ That the state and the church did to an end around the law and that has to be rectified. That’s just a huge victory because it’s about the standing of the law. It’s not just about this case.

Then finally Dana Nāone Hall and her attorneys invoked something called “The private attorney general doctrine,” in the State of Hawaii. This is, you probably know this much better than I do, it’s a doctrine that says if a matter is sufficiently significant, it matters to enough of the public, and the state’s not doing something about it, citizens can come forward to make this kind of a case, and be awarded fees in certain circumstances.

The court awarded fees from the church to Dana Nāone Hall but they claimed that the state is immune from such claims itself, about which Giorgio Agamben and others might have interesting things to say.¹²⁸ What’s the future for these sets of human remains, the 600 iwi kupuna ? They’re in a basement in the church, so we just won’t know until the Oahu Island Burial Council receives jurisdiction and then acts on it. Their tendency over time has been to follow tradition, which is to have the remains be in situ, that is in place. Put them back in the ground, forget your building, we’re sorry that’s the more likely outcome. But political forces being what they are, who knows?

Another remedy in the past that the state has pushed for, is a new site, to set aside a special new burial ground that will be protected in perpetuity. Native Hawaiians are anxious about that for a variety of reasons, the obvious one being that it sets a precedent. That any development site, people can say, “Well, the Ini Kapuna can just as well be moved.” They don’t want to go down that path.

Recently legislation has been put forward in Hawaii that the island of Kaho’olawe, which you may know is not occupied by anybody: it used to be used as bombing range by the U.S. Navy.¹²⁹ It has been returned to Native Hawaiians for their quasi-sovereign use. Some people have said, in cases like

127. See *Hall v. Dep’t of Land & Natural Res.*, 290 P.3d 525, 537 (Ct. App. 2012) *aff’d*, No. SCWC-12-0000061, 2013 WL 6271902 (Haw. Dec. 4, 2013).

128. The Hawaiian Supreme Court found that Hall could not be awarded attorneys’ fees because the state had not waived sovereign immunity. *Hall*, No. SCWC-12-0000061, 2013 WL 6271902, at *3.

129. S.B. 320, 27th Leg., Reg. Sess. (Haw. 2013).

this, what about using the island as a burial ground? To which some Hawaiians responded: first, religiously if you're not from Kaho'olawe you have no business being there dead or alive. Second of all, this really amplifies the problem we were just talking about, "Now it's OK to develop any site--just dig up the bones and move them to Kaho'olawe and no one knows anyhow?" Hardly a good result.

But what's interesting is it's been represented in the media as a victory for Native Hawaiians that the island should become a burial sanctuary. These countervailing tensions in the media and the public are interesting to think about.

A few closing thoughts. Much of this I've covered. The key issue here is that from some Native Hawaiian burial activists' perspective, it's a good law. It's not a question of fixing law or getting a new law on the books, it's a question of administration and due process.

Finally, the notion of motion through friction that I started with. I'm not saying it's a good thing that Native Hawaiians and the church, and the state are fighting. But I would say that a lot of interesting aspects of tradition are being vitalized in the process, and as a scholar of religion that's what I do, I look at those moments. I would say that one result is that these struggles are producing, in fact, better laws and better process, that's clear and obvious.

The third point I'd say is also really important. That this kind of friction motivates sharper articulations of tradition. That there's a lot of cultural learning going on here, and debate and reassessment of tradition, and people are saying, "What matters to us now, how do we articulate our Hawaiiness in this moment, and how will that carry us forward, that we're really seeing it alive." To me that's just fascinating. This is also true of disputes within the Hawaiian community. But that's another paper. . . .

Rasmussen, Associate Professor of Political Science, Interim Director of Graduate Studies, University of Delaware A Single Trait: Animal Injuries, Legal Trusts, and Non-Human Personhood.

RASMUSSEN: I want to begin with an injury narrative of Tommy, who is a 26-year-old male living in a trailer park in upstate New York. An activist group filed a writ of habeas on Tommy's behalf, arguing that he was being denied his liberty and due process in violation of *Romar*, on the basis of one small characteristic. That characteristic happens to be that Tommy is a chimpanzee.¹³⁰

I think this is an interesting case and they make an interesting argument, that legal persons are not necessarily human. . . . they filed specifically in the State of New York, because of case precedent that allowed individuals to file writs on behalf of enslaved persons, who are not fully human under the law. I want to

130. For a fuller accounting of the case, see *Nonhuman Rights Project Homepage*, NONHUMAN RIGHTS PROJECT, <http://www.nonhumanrightsproject.org/> (last visited Feb. 22, 2015), where they have compiled the legal documents associated with the case; see also Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES (Apr. 23, 2014), available at http://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html?_r=0.

suggest there's something interesting going on here with this idea of legal personhood . . . that the subject is being conceived here in ways that it challenges some of the conventional ways of thinking, both in terms of animal rights and rights more generally.

. . . I'm going to talk about two particular injury narratives here. The first of which is Tommy, who was one of several chimps who was included in this particular case. The non-human animal rights project chose to move ahead with this particular case, after the National Institutes of Health made a decision to end almost all testing on primates generally, but especially on chimpanzees, because they were seen as simply too analogous to human beings. Most of those chimpanzees have been relocated to primate sanctuaries.

This case was filed on behalf of Tommy and several other chimpanzees that were living in private zoos, or in private facilities. The argument is [that] these chimpanzees should be freed in order to be relocated to primate sanctuaries . . .¹³¹

I'm going to talk about a second injury narrative and that is of a pit-bull, appropriately named Johnny Justice. Johnny was 1 of the 32 dogs who were seized from "Bad Newz Kennels", which was the dog trading operation that was famously bankrolled and partially operated by Michael Vick, who at the time was a quarterback of the Atlanta Falcons, and of course it got a lot of attention. The fate of the Vick dogs is rather interesting in that, as a part of the criminal case, Vick was forced to pay restitution of approximately \$900,000 for the dogs. That was put into a trust that was overseen by a legal guardian, who was able to make a decision about what would happen to the dogs. Two of them were put down due to behavioral or health issues, and the rest were relocated to animal rescue. Some of them, like Johnny, were re-homed.¹³²

. . . I want to suggest that this [approach to the Vick dogs] fits into a broader shift to [a] focus on vulnerability and injury, rather than thinking about animal rights in terms of whether or not animals are appropriately rights-bearing, [or] if they are analogous enough to human beings or to certain groups of human beings. In many ways, this is not an entirely novel argument [as we can see] from Jeremy Bentham's famous utilitarian case for the care of animals. He said the important question is not whether or not they can think, but can they suffer?¹³³

There is a significant body of literature now focusing on this notion of vulnerability and a sense of shared vulnerability, not only recognizing the vulnerability and injury to animals, but thinking about the ways in which that

131. Michael Mountain, *Appeals Court Sets Date for First Chimpanzee*, NONHUMAN RIGHTS PROJECT (Sept. 12, 2014) <http://www.nonhumanrightsproject.org/2014/09/12/appeals-court-sets-date-for-first-chimpanzee-lawsuit/>.

132. For a first-hand account of this process see Rebecca J. Huss, *Lessons Learned: Acting as a Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69 (2008).

133. JEREMY BENTHAM *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, n.122 CLARENDON PRESS (1879).

challenges the human/animal boundary . . . You see that in work by folks not specifically focusing on animals, like Martha Fineman. . . ¹³⁴

Many of these arguments rest on this idea of a sense of shared responsibility towards these particular subjects and thinking about rights more in terms of that responsibility than the ability of subjects in order to make claims. ¹³⁵ Specifically, I would suggest one of the unique features of many of these arguments—[of] especially someone like Derrida who . . . talks about this notion of vulnerability—[is that it] that enables us to recognize the singularity of cases. Instead of lumping animals together into a category of things that suffer, Derrida argues that thinking [about] vulnerability relative to animals can highlight a sense of the singularity of the specific kinds of suffering of animals. ¹³⁶

. . . [I]t is no accident that these happen to be two cases in which the animals are given names. We know them by names as opposed to “Pit bull number six.” It’s interesting that the legal cases specify the nature of injuries to these animals in very specific ways. In the case of Johnny Justice, the legal case not only catalogued all of the various forms of physical pain that was experienced by these particular dogs in the dog fighting operation in training the dogs, but also mentioned the denial of human affection and socialization with other canines as a particular form of injury to these dogs, which is one reason why they were rehomed in animal sanctuaries. ¹³⁷

In the case of Tommy, the legal argument focused less on Tommy’s physical pain, though he continued to experience a great deal of physical deprivation, but [instead on] an argument that chimpanzees . . . are social creatures and that Tommy was actually being denied something that was very specific to him and to his particular species. ¹³⁸ I want to raise three very specific concerns about the kinds of arguments that are being made here, in spite of a shift away from a particular form of autonomous, rights-bearing subjectivity.

The first of these is that this is or must be seen within the context of an expanded realm of state and regulatory power under the bio-political management of life. This is about the insertion of animals into broader circuits of control more generally. . . . This increasing legal regulation of the conditions under which animals are living, in which they are reproducing, in which they are doing all of these things, are inserted into broader networks of, for instance, the rise of veterinary science, public health regimes, all sorts of circuits of the

134. Martha Albertson Fineman, *Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 1 (2008); Martha Albertson Fineman, *Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251 (2010).

135. See Fineman, *supra* note 134, 20 YALE J. L. & FEMINISM at 1-2.

136. Jacques Derrida, *The Animal That Therefore I Am (More to Follow)*, 28 CRITICAL INQUIRY 369, 396 (David Wills, trans., 2002).

137. See generally Huss, *supra* note 132.

138. Siebert, *supra* note 130.

management of life.¹³⁹ Within this, of course, are important ways of thing about or framing what kinds of animal injuries matter and under what conditions . . .

The second point I wanted to make is that we can't look at these cases outside of understanding and thinking through the ways that a right to authority over animals is also, in many cases, a reiteration of different forms of human hierarchy, and those who are seen as engaging in proper governance of animals. In the case of Tommy, this becomes very evident. In the petition that's filed, there's a lot of emphasis on scientific authority and its ability to tell us about injury to animals and proper treatment.¹⁴⁰

Of course, they draw very heavily on the work of primatologists and biologists, articulating an argument about the capacities for chimpanzees. . . [and that] the individuals running the zoo . . . have no official training for dealing with primates.¹⁴¹

The case of Jonny, in many ways, makes this even more evident in terms of who is seen as having proper authority or the ability to govern animals. . . . There were petitions filed by the Humane Society of the U.S. and the People for the Ethical Treatment of Animals who argued that the dogs ought to be put down because of what they'd been through, that it would be more humane to do so. They were seen as legitimate authorities over the life or death of these animals, even though the guardian did not eventually side with them.¹⁴²

. . . There was [also] a sense in which proper treatment of animals is seen as legitimating one's humanity. In this particular case, these individuals were very much dehumanized as a consequence of treatment of the dogs. What we see here is, their inability to engage in proper governance of animals was used as an excuse what were a construction of them as less than human . . .¹⁴³

[There also] remains a question [of] whose injuries become legible and in what ways?

. . . [The] focus on specific animals [] trigger[s] affect. Jonny Justice was a very photogenic dog, Tommy was a very human-looking chimpanzee. [This] triggers affect in a particular kind of way because we can attach to the individuality of these animals while we give them names. This motivates the sense of affect about their injury.

Part of the problem here is the way in which it prevents us from thinking through, more broadly . . . While it moves us away from a model of asking, "Are these rational subjects, whose rights claims we recognize," it redraws the boundaries of power into thinking about what conceptions of injuries prevail, what kinds of injuries do we recognize. I would suggest this has stakes, not only

139. *Id.*

140. *Id.*

141. See *The Nonhuman Rights Project Homepage*, *supra* note 130, where they have compiled the legal documents associated with the case; See also Siebert, *supra* note 130.

142. See Huss, *supra* note 132, at 81.

143. *Id.* at 80-85.

for thinking through the issue of animal injury, but also, obviously, in terms of thinking through some of those relationships of power amongst human animals as well . . .

S. Lochlann Jain, Associate Professor of Anthropology, Stanford University “Cancer Injuries.”

JAIN: I’m going to go into a couple of the issues I delve into in my book called “Malignant.”¹⁴⁴ The book provides a social analysis of cancer—a disease that I suggest and argue is both everywhere but also nowhere. At the same time as over half of all Americans will be diagnosed with some form of the disease,¹⁴⁵ the ways that we understand it are remarkably thin, given the thickness of our experiences with it. Within that, I include, especially, the ways we have for understanding cancer as an injury with many different causes.

One of the hardest things in talking about cancer, or taking cancer into a research project, is that it’s such a different thing for everybody.¹⁴⁶ A doctor might say, “Well, it’s obvious, cancer is a set of dividing cells. We can’t cure most advanced cancers, but we’re certainly getting closer.”¹⁴⁷ Even then, the discussion of what cancer is will be different in a debate about screening than it will be in a discussion about palliative care. It will be different for a clinician treating a 90-year-old than it will be for somebody looking at a 30-year-old and different again for an expert witness in a courtroom trying to determine if a specific diagnostic error has any bearing on a patient’s outcome or forecasted outcome.

A cancer patient, asked what cancer is, might enumerate his or her physical, economic and social losses or describe the humiliation of losing friends, or the loneliness of radiation treatment. A cancer survivor might speak of cancer in terms of odds that were beaten, or statistics.¹⁴⁸ Lance Armstrong, as we know often responded to accusations of using performance-enhancing drugs by diverting attention, instead, toward his cancer survivorship. For him, human cancer survivorship was, in fact, an identity.¹⁴⁹

Industrialists interested in developing fracking or other industrial processes might say, “Well, cancer is everywhere. There is nothing really that we can do about it.” This claim has been successful in courts where it’s virtually impossible to gain compensation for exposures to carcinogens, even though, for example, a plastics executive in the 1960s said that his company would be virtually liable to the entire U.S. population at some point.

144. S. LOCHLANN JAIN, *MALIGNANT: HOW CANCER BECOMES US* (University of California Press, 2013).

145. *Lifetime Probability of Developing and Dying from Cancer for 23 Sites, 2009-2011*, AMERICAN CANCER SOCIETY, <http://www.cancer.org/acs/groups/content/@editorial/documents/document/acspc-044512.pdf> (last visited Feb. 2, 2015).

146. LOCHLANN JAIN, *supra* note 144, at 5-6.

147. *Id.* at 5.

148. *Id.* at 30-31.

149. *Id.* at 6.

A hospital might advertise cancer as something that they have special insight into.¹⁵⁰

What I was interested in is the kind of moralism that often adheres to each of these positions. “I’m a survivor, so I can talk about cancer this way.” That’s what I was particularly interested in because, to me, that moralism always indicates a kind of boundary policing in the ways that we can think about things.

Indeed, there is a lot at stake in how we define cancer. There’s lots of money in both causing and treating cancer.¹⁵¹ There are tons of ideas about progress, whether it be medical or industrial, and ideas about the ways that we can treat other humans and in what context. There’s a lot about claims to expertise and what kinds of claims count.

As an anthropologist, I’ve aimed to understand cancer, not as a noun, but as a nexus of these concerns, economics and experiential concern.¹⁵² I’ve sought out the places at which these definitions of cancer collide.¹⁵³ It’s exactly at those interstices that I think some cultural framing of cancer can be found. When I say “cancer,” I mean both the disease that kills people and the zone of powerful forces and assumptions that come to form that idea.¹⁵⁴

I studied cancer for a lot of years before I started this book. Some of you know I’ve written a book called “Injury.”¹⁵⁵ I was particularly interested in that word; about how a specific injury of cancer slipped through many of the legal protections we have around defective products. Many of you know that it took decades to have cigarettes recognized as a dangerous product, for example.¹⁵⁶ In the broader project of this book, I’m completely committed to better understanding how and why cancer causation is so completely segregated from cancer treatment in so many debates around oncology, legal debates and so on.

The part that I want to talk to you about today is in vitro fertilization, which I’ll just call IVF. It refers to a process, as I’m sure you all know, of removing eggs from a woman’s ovaries, combining them with sperm, and then implanting the resulting embryo into the same or another woman’s body. I’m particularly interested here in the question of the people that are known as “egg donors,” for whom a series of drugs are administered to stimulate the production of extra eggs.

Donated eggs account for over a quarter of IVF live births, even though only about 12 percent of IVF procedures use them.¹⁵⁷ That means that donated eggs

150. *See id.* at 8.

151. *Id.*

152. LOCHLANN JAIN, *supra* note 144, at 5.

153. *Id.* at 4.

154. *Id.* at 2.

155. LOCHLANN JAIN, *supra* note 92.

156. *Id.* at 12-13.

157. LOCHLANN JAIN, *supra* note 144, at 128-29.

account for about 3 in every 200 births in the United States.¹⁵⁸ Still, the practice underpinned the viability of this multi-billion dollar industry, whose success would be too low without these donated eggs.¹⁵⁹ Interestingly, donors are asked to undergo a medical procedure for whom no medical benefit will accrue to, which raises this really interesting question of cost benefits. Since there's no benefit for the donor, there really shouldn't be any cost either.

I started to do this research into the long-term effects of hormonal drugs on these fertile women who become donors. On the one hand, this research was completely straightforward, because quite simply, no one has tracked the donors to understand the physical or psychological consequences of donation. In the 20-year history of artificial egg extraction, no one ever has. Still the IVF industry portrays the procedure as generally successful and extremely safe. I started kind of getting on track with this as a research project one day when I was attending a support group for women under 40 with cancer.

We found out quite by accident just in the discussion that several of the women in this group had either been egg donors or had gone through IVF. This kind of piqued my curiosity because it's quite a small percentage of breast cancers that happen for women under 40, and yet it's a very aggressive disease with very little research on this sub-category. I became curious about why the practice remains so common, and why there's still virtually no research on the practice.

The use of hormones for agriculture and medicine is not at all new; it's been used since the early 1930s for everything from fattening livestock to stunting the growth of girls that were considered to be too small.¹⁶⁰ This history of synthetic hormones has been documented and includes the purposeful withholding of correlations between hormone use and cancer by doctors who didn't want to worry their patients in the 1960s.¹⁶¹ Still, estrogen and progesterone are considered to be the core natural messengers of femininity and masculinity, and have been some of the most widely used drugs in the history of medicine.¹⁶²

Hormones are central to the functioning of the endocrine system. They control growth, mood, and the messaging required for reproductive cycles.¹⁶³ Here's how they're used in IVF egg extraction. In the first phase of egg

158. *Id.* at 129.

159. *Id.*

160. Nancy Langston, *Modern Meat: Synthetic Hormones, Livestock, and Consumers in the Post-WWII Era* 2-3 (Sept. 28, 2010) (unpublished colloquium paper) (available at <http://www.yale.edu/agrarianstudies/colloquypapers/05langston.pdf>).

161. LOCHLANN JAIN, *supra* note 144, at 131.

162. *Id.*; see also *Biology: Women: Neither As Hot or Passive as Once Thought*, PROBLEMS WITH GENDER (Sept. 26, 2011), http://www.aquestionofexistence.com/Aquestionofexistence/Problems_of_Gender/Entries/2011/9/26_Biology__Women__neither_as_hot_or_passive_as_once_thought.html.

163. LOCHLANN JAIN, *supra* note 144, at 139.

extraction called hyper-stimulation, doctors serially administer three potent hormonal drugs to encourage the development of extra eggs.¹⁶⁴

The brain processes these synthetic hormones as if they'd been produced by the person's own body to magnify certain aspects of the reproductive cycle.¹⁶⁵ First, the gonadotropin we're using is a hormone agonist as self-administered daily, for one to two weeks. You give yourself a needle for that. That blocks the pituitary function and creates this temporary menopause, which then enables the physician to sync the donor's ovulation with that of the woman who will receive the embryo.

Lupron is currently the most popular of these drugs. It was initially approved for the palliative care of prostate cancer.¹⁶⁶ It continues to be used despite an ongoing criminal investigation into its fraudulent marketing, the falsification of data, numerous settlements for price fixing, and findings of significant damaging, irreversible effects.¹⁶⁷ It's used, as you can assume, off label. That is, without FDA approval for this particular use.

Second, gonadotropin is injected.¹⁶⁸ This is a drug normally used to promote fertility in women who have a deficiency of the hormone. In fertile women, this overdose of the drug is used to trigger the ovary and the pituitary, to develop several egg-containing follicles.¹⁶⁹ A third injection at this time forces an extreme ovulation with the goal of producing several eggs, which are then removed with a long needle.¹⁷⁰ Some 120,000 cycles of IVF are completed in the US each year.¹⁷¹ No one has really good records on exactly how many cycles are done. The FDA doesn't regulate the process even though most people who undergo it assume it does.

It's in this area that's kind of medical. The people who do it are dressed in white coats and so on, and yet kind of not medical. It's clearly not for improving health or giving any medical kind of treatment. Clinics and spokespeople nearly uniformly communicate the lack of data on egg donation or hormones, as evidence that no risks exist.¹⁷² It's easy to say, "There aren't any reported risks in undergoing this process." When, in fact, no research has been done¹⁷³ . . . I'll give you one example of how studies tend to be reported . . .

164. Mayo Clinic Staff, *In Vitro Fertilization: What You Can Expect* (Jun. 27, 2013), <http://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/basics/what-you-can-expect/prc-20018905>.

165. LOCHLANN JAIN, *supra* note 144, at 139.

166. *Id.*

167. *Id.*

168. Mayo Clinic Staff, *supra* note 164.

169. LOCHLANN JAIN, *supra* note 144, at 139.

170. *Id.*

171. *Id.* at 131.

172. *Id.* at 131, 146.

173. *Id.* at 20.

A 2012 study found that the risks of breast cancer for those who had taken hormonal drugs for IVF at a young age actually increased by nearly 60 percent after 16 years. Most of the people in that demographic were still under 40.¹⁷⁴ A Reuters report based on this study, after saying something like that, cited this group, the ASRM, which is a self-proclaimed interdisciplinary group of fertility experts that represent IVF clinics, as claiming that this study should actually reassure women since IVF overall is not associated with an increased risk for development of cancer.¹⁷⁵ You can see how the rhetoric around safety is very much disguised in them.

There are many interesting features of the IVF phenomenon that I examined in trying to figure out how this question of health dimensions has been so completely elided. One of them is this question of donor recruitment. Recruitment pamphlets are these really bizarre kinds of archives because they have to try and get women to go through this really quite invasive procedure for, again, no benefit to themselves. They often turn to this rhetoric of “the magic of reproduction,” where you can be involved in something that is so much bigger than yourself, or that donation can be an act of humanitarianism.

One pamphlet, for example, turns this rather frightening and intrusive event of donation, that is to say, making your way to an office, sitting in the waiting room, dealing with strangers, being poked and prodded, giving yourself injections, having numerous blood tests that are involved into one that, “Many of our donors say has been one of their most rewarding experiences.”¹⁷⁶

It’s impossible to believe that some of the testimonials that are cited are actual, so perfectly do they address every concern that a woman might have. For example, if a potential donor were concerned about the drugs which you take, one pamphlet cites one woman ostensibly as having said, “It was exciting to see my body respond to the treatments as I daily got closer to giving my recipient the opportunity to bring a new life into the world.”¹⁷⁷

My research didn’t turn up any donor information that discussed the fact that no long-term health research has been done.¹⁷⁸ Even the word “donor” actively misrepresents the exchanges at play in the gamete market. Of all the ethical and practical considerations attending egg extraction many of the most vibrant debates turn on this issue of reimbursement and of payment. The ethicists often fret over this commodification of human life.¹⁷⁹

But this is a really false distinction, I would assert, between gifting and commerce, and it’s also common in organ exchange, for example, because it confuses a really critical point. That is, that even when the gamete is freely given,

174. *Id.* at 131.

175. LOCHLANN JAIN, *supra* note 144, at 131.

176. *Id.* at 134.

177. *Id.* at 134-35.

178. *Id.* at 146.

179. *Id.* at 136.

the doctors, the nurses, the moneylenders, the accountants, pharmaceutical companies, lawyers, and many others profit from the commercialization of gametes in this for-profit event of IVF.¹⁸⁰

Another point is that, despite the temptation to think of these hormones as safe because our bodies already produce them, the contemporary use of synthetic hormones in no way augments any kind of natural ovulation process. As is true with many other kind of supplements, including vitamins, just because a body produces a substance doesn't make it safe.

This is particularly interesting in this case because, to my horror at least, a more so-called "natural" state for women of reproductive age may well be that of being pregnant, in fact. Not giving birth is a known risk for breast and ovarian cancer since the hormones released during ovulation overload the hormone receptors in certain tissues.¹⁸¹

Pregnancy in fact gives a break of approximately nine months per child to these overloads, so over the course of two to four decades, these breaks add up. In other words, without the hormone vacations the pregnancy brings, the overloaded hormone receptors can create malignancies. The link between hormones and cancers has many consequences, but two I'll talk about here. One is that the reason that studies largely show that women who undergo IVF and then get pregnant, that is to say not donor women, did not have overall higher rates of cancer. These studies are often used as if they cover donors, as well, which, of course, they don't.

Then second is the reason many experts attribute the recent small decline in breast cancer mortality to the decline in the use of HRT in post-menopausal women.¹⁸² I'm sure you all know that drug companies promoted the HRT for decades for reducing hot flashes, weight gain, heart disease, and as a cure all for basically all of the problems of aging, reduced muscle mass, skin tone, memory, and so on. They did so without any evidence that HRT could, in fact, affect all these issues.

In 2010, as I'm sure you all know, 50 years after the introduction of HRT, enough convincing information was found against Pfizer that juries awarded millions of dollars in punitive damages to plaintiffs indicating reckless disregard for women's health in selling the drug without warnings or ethical study. Since then, more than 9,000 other women have also sued Pfizer. Some plaintiffs have shown that Wyeth knew the dangers of hormone replacement therapy well before the women's health initiative found that it caused increased rates of cancer, stroke and other health problems.

In other cases, Pfizer was able to argue that cancer has many causes and, therefore, couldn't be traced specifically to its products, which, of course, is a

180. *Id.* at 137.

181. LOCHLANN JAIN, *supra* note 144, at 146.

182. *Id.* at 37.

huge problem in thinking about cancer litigation, the timeline and the very general injury of cancer versus the very specific problems of exposure. In my book, I argue that this has huge consequences for the way Americans understand, live with and die of cancer.

... Before I finish, I would just make one more point about the kinds of blending of interests and social values that I think have enabled the invisibility and the lack of research on egg donorship. They include families and values of reproduction and so on. But there is also this anxiety about the relationship among birth control, IVF, family formation and abortion.

By coincidence, I think, the earliest attempts at IVF took place in New York and in the UK, around the same time of the aftermath of the 1973 U.S. Supreme Court case on abortion.¹⁸³ There's an interesting kind of correspondence there where pro-choicers worried that regulating IVF based on concerns for future children's health, for example, would lead down a slippery slope by setting a precedent for valuing the fetus' right to life over a woman's right to choice. That's, of course, at the core of the abortion debate. In this view, any public debate on IVF practices would reopen uneasy questions around abortion.

Similarly, a consistent pro-life position would require that no freezing or destruction of embryos take place, and that's a seemingly unavoidable aspect of IVF. Given the implications of that, perhaps this hush code over the last three decades of IVF isn't really that surprising. The industry and the people who undergo the procedures have interests in the silence and they wield considerable economic power. For example, the average birth mother undergoing IVF is white, married, in the top percent income bracket, educated, 36 years old and she's undertaking a highly visible, acceptable and widely advertised procedure.

... But the seemingly neutral framework encourages us to make a number of misguided assumptions, too. The idea that reproduction is a natural and healthy social and medical right. That science can help this process along. That the doctors who perform these procedures work primarily in the interest of health, rather than out of the intellectual curiosity or financial gain. That egg cells should be free or cheap, the hormones do not pose hazards, and that unborn children will not have certain rights to know their biological parents or put at risk for prematurity or other health risks.

The cluster of contradictory ideas here can sometimes crowd out the active debates about each of these complex points. In addition to an astonishing fact, really, that neither clinics nor governments in the US track the main players in IVF, the genetic parents, the birth parents or, even, the babies. Though couched in terms of the well-being of families, IVF is really a barely regulated billion dollar market. Unlike comparable commodity-based systems, the stock market, futures, meat production, this one exists without the usual legal or regulatory

183. *American Experience: Timeline: The History of In Vitro Fertilization*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/babies/> (last visited Feb. 22, 2015).

protections against injury or the expected guarantees of the product's or the contract's quality. Very few plaintiffs sue for egregious errors involving IVF. People find it galling to sue for a poorly designed product when that product is your baby.

These details of IVF embody the spectacular promise of science and technology and the extremes of marketing and profit-based medicine make IVF a perfect contemporary case study for understanding the ways that cancer slips through virtually every means we have for making injuries visible, for tracking down and compensating for them and easing the substantial burden of future injuries. It also offers a diagnosis of how we've configured notions of choice, children and health.

Yoshitaka Wada, Professor of Law, Waseda University, Tokyo, Japan.
"Expert and Patient Injury Narratives in Japan."

WADA: As everybody can see, I have a neck injury. It's not by accident. According to David [Engel]'s definition, it's a natural injury. After the morning discussion, I'm thinking of suing the manufacture of my chair . . . It's a very interesting topic, but today I make a presentation about a different theme, about the process and the politics of constructing the meaning of injury after an adverse event in a hospital setting. When the [] adverse event happen[s], the patient usually thinks that it is [an] injury caused by a physician's negligence or some malpractice. Many times, from the perspective of the physicians, it is just the natural result caused by [a] complication or something.

The idea of injury is very different, because physicians live in professional cultures and ordinary people live in another everyday culture . . . Of course, the lawyers are [also] strange people who. . . have a special way of thinking. There are many conflicting perspectives and narratives [that] come into the scene after the medically adverse event. I think the important idea is that of incommensurability. . . . Anyway, I think it is impossible to reach . . . complete agreement, because each actor lives in a different culture. In the area where incommensurability exists, we can see some power struggles between domination and resistance.

As a theoretical framework I borrowed the ideas of Pierre Bourdieu and Michel de Certeau, a French thinker.¹⁸⁴ I picked up the example as analogy about languages. Of course, when we speak in some language, we are bound by the grammar, vocabulary and expression specific to some language. Each person's speech also has its special individual characteristic. This language enables us to speak, but it also binds our speech. However, each speech act has very special, particular elements in it. For example, the young generation's speech uses some words very different way from the old normal usage of that word.

184. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (Steven Rendall, trans., Univ. of California Press, 1984) (1980).

Maybe, decades later, that kind of very strange young people's usage may come out as normal usage. Here is [the] recursive process of binding and reconstruction. Michel de Certeau found politics inside of this recursive model, that is, domination and the resistance.

Resistance means a tacit protest. It's an implicit, hidden resistance, something like young people's usage of a word in different way. I borrowed these ideas to analyze construction of the injury idea after an adverse event.

Let's see the patient's construction of meaning of medical injuries. Of course, it is a typical lay understanding of medical injury based on the common story of grief and pain. Their idea is sometimes constructed or reinforced by mass media articles or something like that.

However, the patient's construction of meaning of the injury is not so simple. Under the influence of the basic culture—in my case it is Japanese culture—there [are] some conflicting elements inside of this construction process. For example, that the monetary compensation is not a good thing for ordinary Japanese people, even for the victims of medical malpractice, because if you claim monetary compensation, it means that the person tried to transform the deaths of the family member to the money. It's a very bad image.

Japanese people, even the victims, try to avoid talking about monetary compensation.¹⁸⁵ Also, especially in Japan, we have a very small number of lawyers and small number of lawsuits.¹⁸⁶ Traditionally, we have a law-avoiding culture. To bring the case to court has a very negative image sometimes. Therefore, the patient's construction of the meaning of injury is done in a very subtle and conflicting matter.

For the healthcare professionals, construction of the meaning of medical injury also takes place in their professional culture. They find the meaning of injury not only from scientific medical views on causation, but also from a point of view shared with other staff as a member of the group. In Japanese culture, his/her position in the hospital or medical organization has critical influence on the person's construction of reality.¹⁸⁷

In Japan, 100 percent of the physicians working in the hospital are employees of the hospital. At the same time, Japanese medical school professors have a very strong power even after graduation. Usually, the medical professors keep [the] power to send the graduates to the local hospital. Local hospitals have to ask the professor to send a doctor to the facility. The law professor, like me, has no such power . . .

185. See Robert B. Leflar, *Public and Private Justice: Redressing Health Care Harm in Japan*, 4 DREXEL L. REV. 243, 263-64 (2011) (discussing how criminal remedies for malpractice are more common than private lawsuits in Japan).

186. Eric A. Feldman, *Law, Society, and Medical Malpractice Litigation in Japan*, 8 WASH. U. GLOBAL STUD. L. REV. 257, 267 (2009).

187. Leflar, *supra* note 185, at 247-49.

A professor at a medical school, in Japan, has very strong power. Then each physician, if they make some mistake or some bad result happened because of the complication feels responsibility to the patient, to their organization and to his professor. It's also a very conflicting matter. The legal system is usually considered to be a means to overcome this conflict between patients and physicians.¹⁸⁸

However, from our viewpoint, [the] legal system may work as a means to suppress parties' discourses. It is a domination of legal discourse both on patient perception and on the physicians' perceptions. It is an example that Japanese law defines that compensation as monetary compensation. Legal fact-finding is completely different way from the physician's idea of medical fact finding. Of course, for the patient meaning of the injury and remedy are also different from [the] legal way of thinking.¹⁸⁹

As I said, the patient wants a sincere apology or an explanation of the truth. Japanese victims of medical malpractice usually do not think monetary compensation is [the] primary purpose of suing. However, [the] court system cannot give this kind of remedy to the patient. It means even after court judgment, incommensurability between parties remains.

We turn to the resistance phenomenon. One way of physician's resistance is defensive medicine. Physicians try to avoid being sued by avoiding risky treatments or operations.

Another way of resistance is escape from risky practice. The hospital physicians quit the hospital and they open a small clinic, as they have to face with more serious, accordingly risky, hospitals. In addition, young medical students tend to avoid risky departments of medicine. For example, the data show the number of investigations by police on medical malpractice as [a] criminal case rapidly increased from 1999.¹⁹⁰ Obstetrics is the most risky and easy to be sued department; many OBG physicians moved to the more safe areas. This is a kind of resistance to the severe legal sanction to the physicians.¹⁹¹

Another thing that they tried is establishing a new dispute resolution mechanism to reduce conflicts with patients and to reduce the number of litigation. It is the in-house mediator system, where a person trained in mediation skills takes care of patients just after an adverse event happens. Its purpose is to satisfy the patient's need and remedy. Japanese patients do not want to go to court for monetary compensation. Of course, they need it, but it's not the first priority. Sincere apology and adequate and sympathetic explanation are much more important.¹⁹²

188. *Id.* at 249-50.

189. *See id.* at 257-58.

190. *Id.* at 245.

191. *See id.* at 261-63.

192. *See id.* at 254.

To facilitate that process, they made an in-house mediation mechanism. This can also be considered as a kind of the law-abiding resistance. We can find some changes of the legal system tacitly responding to the resistance from the parties' side. This data show the number of civil litigation for medical malpractice in Japan [shows slide].

The number began to increase from 1999 and reached its peak in 2004 when the number of the civil suits is 1,110. I think it's very small compared to that in the United States, but for us, it's a surprisingly high number. The number of criminal cases also increased and in 2006 one OBG physician is arrested. It is the first case [where a] physician is **arrested** for medical malpractice. After this case, many hospitals closed [their] obstetric departments and criticized police. Mass media also any began to emphasize [the] shortage of the doctors and their hard working environment in Japan.¹⁹³ Mass media's change of direction from physician bashing to reporting of problems in [the] healthcare system must have had influences on the behavior of court systems.

This data [shows slide] show the percentage of civil court cases that plaintiff wins. Usually in Japanese civil court, plaintiffs win in almost 90 percent of the cases. When mass media showed a very severe attitude against physicians, the plaintiff winning rate reached 40 percent. However, after the 2006 physician arrested case, it continues to decrease. Now in the medical malpractice area, the plaintiffs winning rate is very low—from 20 or 30 percent. That is, the court is influenced by the hidden resistance or mass media's position. It indicates [the] courts changed their attitude responding [to] resistance.

One more thing specific to Japanese courts in medical malpractice cases is [the] percentage of conciliation reached in litigation procedure. Half of the medical malpractice cases finished as conciliation.¹⁹⁴ In conciliation during litigation judges have no need to decide the meaning of the injury or to find the negligence and causation. These changes can be understood by my paper's framework. Under the influence of physician's hidden or implicit resistance [the] legal system also tacitly changed its behavior.

This is just a sketch of my project, and this is not completed. I want to make some case analysis and also macro and micro level change of court system analyzing statistics.

...

MICHAEL MUSHENO, DISCUSSANT: What I'd say to start out with is that these are really fascinating story sketches and the experts of these stories are before you. I'm not going to particularly try to get inside a particular argument about a particular subject matter. I'm trying to think about this project as a

193. *Doctor Acquitted of C-Section Death*, THE JAPAN TIMES, http://www.japantimes.co.jp/news/2008/08/21/national/doctor-acquitted-of-c-section-death/#.VOpL-fnF_pU (last visited Feb. 22, 2015).

194. Feldman, *supra* note 186, at 261.

project that's in formation here. What I really would invite the presenters to think about is the story that they're going to tell about other people's stories or narratives . . . I have some questions for [you] that maybe will help you further develop the sketches, which are already very fascinating.

The first question is, how is culture revealed in your study? What marks the force of culture distinct from other forces that give shape to injury? Here, I'm trying to get you to think a little bit more [about] . . . where [are] the boundaries of culture in the way you're framing the story that you ultimately want to tell, as this sketch becomes a thicker narrative?

Second question would be: how is injury articulated in your study? Where in the process of . . . people's imagining and acting on injury is your study focusing? We've heard a lot about [how] injury is a moving target. . . . that it moves, for example, across places and spaces. How is injury articulated? . . .

The third question is: how would you depict your mode of inquiry? How, in other words, are you substantiating the claims that you're making? Some of the claims in at least two of the papers are claims about injuries being unique to place. I'll come back to that, but how do you know for sure that the kind of structure of the injury that you're seeing is truly unique to that place? . . .

Fourth: . . . how is power manifested through the interplay of culture and injury? By whom is it being manifested and with what purpose? . . . How is culture revealed and what marks the force of culture distinct from other forces? I think that the studies divide into two.

If you think about narratives, or more particularly stories, you can focus on the plots, you can focus on the settings, you can focus on the characters, you can focus on the emotional content of a story or narrative. I think that for Greg's and Yoshitaka's study, the setting is really revealing of the culture. It's the setting.

There is something unique about Hawaiian indigenous culture. There is something about Japanese culture at this moment with regard to injury that you're trying to speak to. You are making claims of the uniqueness of the culture in these settings, and yet we have no—and this goes back to a term I found really interesting in your work, Yoshitaka—is this term of incommensurability. That is that there is no measure, if you will, articulated measure for which a baseline can be decided.

. . . . In my thinking right now, in the current form, three of your studies, it seems to me, are stories really about disputes. It seems to me that injury, in at least socio-legal parlance, is about trouble. Or may I even say about trouble in its formative stage. . . .

Michael McCann: . . . My role is as the Rapporteur. I'm not really sure exactly what that means, but I think that my goal is to try and construct some themes out of what we've talked about today and comment on them and comment on some issues that haven't been raised or to make explicit what has been implicit. I'm going to do that partly through this talk, and that's the part where I'm just going to rap. I'm not going to rap to rhyme, because I don't have

time . . . It's not a strength of mine anyhow. . . I'm not exactly sure what I'm going to say. I think I know where I'm going to end up . . .

First, let me try and just identify some themes and begin with the most obvious and then perhaps for the less obvious or the more implicit and make them explicit. At the heart of what we've talked about so far is that injury is a social construction. What does that mean, you say, that it's a social construction? It means that injuries or category of injury refers to events and relationships in material life but how we construct and make meaning of them, how we talk about them, how we make sense of them is constructed through conventions that are developed in specific sites of cultural interaction. We construct injury out of the material that we learn from cultures.

Injury, as we're familiar with it, is that which happens to bodies, happens to cognition psyches, like hate speech, to image and reputation, we learned about inter-reputations. Injuries or damage, usually we talk about injuries as damage. I should say I began where I usually begin any talk, which is with Wikipedia. It was not in wiki-dictionary. It wasn't helpful at all, because it said, "Injury, that to which happens to an injured person" . . . That's dictionary talk, and then it doesn't do much better after that, it identifies injury with harm. Actually, all the dictionaries I looked at online, Identified injury only as physical harm, which seemed to me incredibly narrow. I usually rely heavily on Wiki sources, but I'm not going to go with that.

When we think about injury as a social construction, which is sort of categories that we employ, to try and make sense of events. We learn first of all that injuries can be good and bad. . . . Also, the assessment of actionability, which is that when we experience an injury which we think is harmful and a violation of our rights—that we develop a whole series of categories and understandings—about when we can take action for redress, and how we go about doing that. That itself is also constructed. . . . We construct when we think we can take action, when a wrong is a violation of a right that is actionable, and when it's not. . . .

. . . To say that injury and the meaning of injury and how we act on injury [are] socially constructed is also to point to the fact of power. I would like to emphasize that through almost everything today we could talk about power. Power in particular because, after all, constructions are products of power. The meanings and the categories that we use and the tools we use to make meaning are products of society. A society where certain people have a greater stake than others and a greater ability to construct and say what really are the authoritative categories that we use.¹⁹⁵

One thing I would like to emphasize in a lot of the projects today is a little bit more focus on institutional sites of knowledge production and norm enforcement. We talk a lot about culture but culture isn't just freestanding and kind of the air

195. Fineman, *supra* note 134, 20 YALE L.J. & FEMINISM at 3-4.

we breathe. Culture is made in institutional sites and processes. A little bit more attention to those various sites where the terms of constructing meaning take place.

I think . . . first of all, those [sites] that we identify with official formal law which are not just personal injury law, that's come up a lot. But, after all, injury is defined in other domains of law, criminal law, and of course there is often a connection and overlap between criminal law and civil law in defining injuries. But also of course administrative regulation or regulatory law which attempts to regulate the construction of the unnatural world around us and protect the natural world so as to minimize injuries . . .

. . . But we also want to look at other sites, not just the formal legal system . . . because, of course, there are lots of other important sites of knowledge production about issues of injury. Among those that I do a lot of study regarding is mass media. . . Trying to make the case many times that mass media constructs laws much like the official legal system constructs laws. That the categories that people use in everyday life—negotiating their senses of responsibilities and rights—are shaped by what they read on TV, what they read in novels, by what we increasingly see in social media and YouTube, and so forth.

What is the right and appropriate thing to do, what is an actionable issue, what is an injury that deserves compensation is shaped by popular narratives that we consume. We know that actually changes what goes on in the official legal system. The jurors, for example, are very much shaped by their consumption of popular culture and often don't pay attention to what they're told in the instructions from judges.¹⁹⁶ They act on what David and I in an earlier iteration in this kind of project called fault lines.

We debated a lot [about using that term] because fault lines are not a legal category. [But] . . . jurors often used the term fault when they are trying to decide issues of responsibilities and liability. The popular culture conception of fault actually supplants the official law in a certain way. Or it becomes law as practiced, social legal studies would say.

Pay more attention to mass media but also to other sources and sites of knowledge production, including religion. We heard about religion today. Science and technocrats, scientific generation of knowledge—all of these come together. If we want to understand culture we need to look at [it] not just as free floating norms and ideas, but the sites of production that then come together and produce the categories which we put to work, and [use to] try to make sense of injury and which we use and contest in terms of injury. . . . The production of

196. See, e.g., Ellen Chilton & Patricia Hanley, *Improving the Jury System: Jury Instructions: Helping Jurors Understand the Evidence and the Law*, PUBLIC LAW RESEARCH INSTITUTE, <http://gov.uchastings.edu/public-law/docs/plri/juryinst.pdf> (last visited Feb. 22, 2015).

knowledge that then helps [us] construct the meaning of injuries. We also have to recognize that this all involves an unequal exercise of power.

The very first presentation . . . raised the issue on inequality in injury and I would urge that we keep it very much at the forefront, in that the ways that we think about injury—what we categorize as injury, is not injury, is good injury, is bad injury, actionable injury, non-actionable injury—are all products of an unequal political system, not just in the US, but everywhere. Every society has an unequal distribution of power.

Reliance on those categories often continues to reproduce power in ways that we don't recognize. To the extent that certain kinds of injuries we experience that, David Engel showed, we don't recognize as harmful or actionable, that just reproduces those relationships over and over and over again.

The production of knowledge has power and the ways in which the reliance on those produced forms of knowledge reproduces inequality is an issue to which we should be attentive as scholars to try and make explicit what is often implicit in social practice.

I would also emphasize, and this has come up before, the relationship between formal legal norms and informal practices. David Engel early on pointed out that although lots of people experience injuries, they first of all don't recognize them as injuries that are actionable, but even if they do, they rarely take formal legal action

Lots of people do take action. They just don't call a lawyer or call a police officer and enter into the formal legal system. They work it out on their own or they go to the local priest or rabbi, or they go to the local gang. Or they mobilize friends, or they find some way of dealing with an issue by mobilizing, going through an alternative dispute resolution authority or other forms of power that can work it out.

We want to look at that interaction of official law that sets the terms of official categories and the informal forms of negotiation in the shadow of law. You can always threaten that you're going to go to court, which gets other people's attention so you actually have a useful negotiating process. A lot of activity that actually takes place quite distant from law—through forms of knowledge and categories and understandings that are little shaped by official law.

What is injury about? From a legal perspective, mostly, but also from a question of power, at the heart contesting injury is about contesting terms of responsibility, or in the less legal terms, who's at fault, and who bears liability for redressing the injuries that were done, and for taking actions that would reduce the likelihood that those harms are going to be reproduced over time.

What I want to point out about that is the ways in which our conceptions of injury that are mechanisms of law—personal injury law, tort liability, criminal

law and the like—are all a part of constructing a society that's about responsibility.¹⁹⁷

Construction of injury is about assigning responsibilities to each of us for how we take actions that affect ourselves and affect others. They are part of those apparati of law and of disciplinary mechanisms that make us responsible, self-governing individuals.

That becomes very important. For example, the difference between good harm and a good injury and a bad injury partly is whether somebody engages in action that may pierce the body or which may have an effect on one that one desires. That's within my realm of self-government to determine that I want a tattoo or I want this kind of surgery or so forth. That makes it a good harm.

But when someone else does it to me and I don't want it, it's outside of my self-governance and it disrupts or impedes my ability to wield my situation, and that's a harmful injury. That's an injury that we call harm. Partly that dividing line between good and bad harms is tied to conceptions of responsibility and governance with individuals over themselves and over their worlds.

It's also that [which affects] actionability. If we want to make a claim that an injury was caused to us and that we deserve some sort of compensation or redress or change in procedures. . . . we have to fit our claims into those terms of responsibility. This was not my responsibility. This was somebody else's responsibility. And we all know what can happen when we take actions. We know that, "If I do something that's responsible for somebody else being harmed, I'm going to have to take responsibility, be accountable for that, perhaps be liable to pay money," and so forth. It fits into those mechanisms of self-governance, of governing each other and governing ourselves in important kinds of ways.¹⁹⁸

Of course, that issue of responsibility is complicated because it's tied into this idea of lumping and part of why people don't bring suits. . . . [W]e know from lots of empirical socio-legal studies, as well as theorizing about topics that often when people make claims that they have been injured, that they have claimed that I have certain rights to seek redress when injury is done to me. When somebody else does something to me that causes a harm that I did not desire and for which I am not responsible, in making that claim that often marks one as something less than a fully independent and responsible person because you couldn't fend off that harm happening to you.¹⁹⁹

Therefore, you have to go to the state or to a third party, declare your neediness, that you are less than fully independent and in full control of your life and you need the help of someone else, which further discounts your claim to be an independent and self-governed, rational, autonomous person really capable of looking out for your interest.

197. LOCHLANN JAIN, *supra* note 92, at 24-25.

198. *See generally* Bloom, *supra* note 67.

199. *See generally* Engel, *supra* note 81.

We see this in discrimination law a lot. When somebody claims discrimination, somebody discriminated against me and caused injury to me, that can end up only calling attention to or amplifying the fact that a person of color or a woman is really not able to fend for oneself and needs a third party, which makes us less than the qualification of being an independent, self-governed individual. That's often why people don't claim rights.

It's not only the deterrence of "it's costly to pay a lawyer". It takes a lot of time. It's very uncertain to go into a formal legal proceeding where you lose control over the terms of negotiation to lawyers and the juries and so forth. But also, you are defined as a victim. You're a victim.

You will declare your rights by declaring yourself a victim—it is a contradictory process. . . . By declaring one is a victim, one is wholly compounding one's sense of injury as a less than fully deserving rights-bearing individual. I'm not totally convinced by the argument, because I think a lot of times people claim rights and are empowered and, in fact, do really improve their lives. But there's always that possibility that one is actually compounding one's secondary status in that process.

I think talking about disabilities really brought that idea more clearly into focus. How do we claim rights to accommodation, how do people with disabilities claim rights to accommodation in nondiscrimination without further compounding the stigma of being a person with disabilities? That's a problem that often comes with almost all rights claiming about injury.²⁰⁰

. . . One of the points about social construction is that the labels, the categories and the forms of understanding about injury change over time. A lot of people refer to that. We began early on with the story about images of oneself and reputation, how that changes over the 20th Century.²⁰¹ We recognize that the terms and the categories and the forms of constructing the meaning of injury change over time. But how does that change take place? Some of it takes place out of aggregations of lots of little, individual changes that are below the screen that we can see in retrospect; we don't often see when they're happening.

A lot of it comes out of political contestation. That's why some attention as to who are the parties who engage in political contestation and what kind of political contestation transforms norms over time—that's often a very complicated process . . . I was reading in the paper some time yesterday . . . I've been thinking about a study that one of my graduate students is doing, and has completed the dissertation. It's about sexual violence in the Congo, the Democratic Republic of Congo in South Africa.

What's interesting about this—here's where the institutions become important—South Africa, which has a very progressive constitution which seems to really emphasize equality, including gender equality, which has a very well

200. See generally Mor, *supra* note 36.

201. See generally Barbas, *supra* note 46.

developed legal infrastructure, and to some degree, a very progressive judiciary, has a lousy record on gender violence, dealing with gender violence, discouraging, deterring gender violence, prosecuting gender violence.²⁰²

You contrast that to the Democratic Republic of Congo, which basically doesn't even have a state. It has a very underdeveloped state. It's a war-torn area. You would think that would be the last place you would really find progress made in gender violence. In fact, you do see a lot more that's happened with regard to prosecuting gender violence and changing norms about the acceptability of gender violence, especially by men to women.²⁰³

How does one explain that? What she shows is what happens in South Africa is that while you have this top layer of secular, formal law, . . . decisions made about kinship relations and familial relations are delegated to the local customary chiefs in the provinces. That reproduces old gender norms that sanction or that dismiss gender violence, not just men against women, but married men against wives and daughters and so forth, and [they] treat that much less seriously. When cases are brought, those authorities are just reproduced.

Whereas in Congo, you have this sort of decimation of the culture, a tremendous amount of violence because of the history of state violence and then introducing war among tribes. What's happened is that a whole maze—a complex network—of NGOs have come in and built a legal system, almost independent of the state, with these mobile tribunals and actors.

That has provided resources, including material benefits, promises of money, for redress, for all kinds of harms, including physical harms and medical benefits and so forth, to women, which provides an incentive. . . . That has dramatically changed attitudes. There's a lot of evidence for that, including among men.

That's where institutions matter. We tend to think, we identify law that deals with injuries with the state, but in fact, there are other mechanisms that happen. There's a lot of strange side effects of that. What's happened [in the Congo is] because NGOs offer money to women who claim rape, there's lots of evidence that lots of women claim rape when they weren't raped, because that's the only way they can get any kind of medical treatment at all. . . . Men start supporting the women in bringing claims because they get money that they all benefit from, so men are very in favor of these changes in certain ways. Now there's a countermovement towards stigmatizing the plaintiffs who are bringing cases.

It's complicated, so it's not a panacea, but you get fundamental changes. Institutions matter in that regard. Institutions can change norms and values and how injuries are imagined, but not in a simple, linear kind of way.

202. See, e.g., Mohamed Seedat, Ashley Van Niekerk, Rachel Jewkes, Shahnaaz Suffla, & Kopano Ratele, *Violence and Injuries in South Africa: Prioritizing an Agenda for Prevention*, 375 LANCET 1011 (2009), available at <http://www.savi.uct.ac.za/wp-content/uploads/2012/12/Lancet.pdf>.

203. Megan Bradley, *Sexual and Gender-based Violence in the Democratic Republic of the Congo: Opportunities for Progress as M23 Disarms?*, BROOKINGS (Nov. 13, 2013, 2:30 PM), <http://www.brookings.edu/blogs/africa-in-focus/posts/2013/11/12-sexual-gender-based-violence-congo-bradley>.

The last point I want to make comes back to this idea of injury is part of the overall responsabilizing complex of official law and informal social practice.

If we recognize that injury is implicated in structures of power and unequal power relations, then every time that people contest injury they are not only contesting the distribution of benefits and the distribution of liability for harms that take place but they're also, to some degree, either conforming and confirming or contesting how we think about legal personhood—that is, the status of people that claim rights to redress for injury.

A number of the papers have raised issues that go directly to this question about how focusing on injury isn't just about who gets what, when, where and how in an instrumental distributive way, but about how do we imagine who is a deserving rights-bearing subject or who can speak for people as deserving rights-bearing rights subjects.

I think about this with regard to Greg Johnson[’s paper]. That was the last thing that we focused on. In the Hawaiian case, with regard to people claiming injuries for ancestors, speaking for ancestors who can't speak for themselves, but not as separate souls, but as a continuation of a sentiment developing sense of communal self, if you will. That disrupts the conception of the autonomous, independent, individual legal subject that the whole legal system is based on. In Hawaii, it's reasonable to do that.

I think disabilities movements . . . I have a particular interest in disabilities for that same kind of reason . . . people claim rights to accommodation and against stigmatizing discrimination on the basis, precisely of not being, not fitting the model of the perfectly, [of a] fully able, independent subject. That's part of what raises the challenge, is how to claim rights as self-governing, autonomous subjects while recognizing that there's a disability, something that can get in the way of making one fully abled.

That's part of a project of reimagining the injury that's at stake is not something less than the fully autonomous, able person, but in fact, equally or differently abled. The real problem of the injury is not biological and natural, but is in the socially constructed world. That is a social problem and accommodation is an obligation we all have.

That raises issues about obligations that we have to each other which, I think, disrupt or call into question this conception about the autonomous individual.

I saw this most strikingly—this will be the last point—with regard to Claire Rasmussen's discussion of animals, where she called attention to the shift from humans, “The autonomous, adult, self-governing animals.” . . . Her discussion about Tommy, the chimpanzee and Jonny Justice, who can be understood as legal persons even though they're not humans.

One of the traditional ways we think about the legal subject is that human that can speak for him or herself—originally, for a long time only himself—as an autonomous, rational, self-governing individual who can articulate claims in terms of the conventional categories of responsibility and liability.

In the case of animals, whether chimpanzees, which we consider closer to human, or less, pit bulls, which are not quite so human . . . We'll get to that in a second . . . People speaking for them, which suggests that they are not legal persons, but it's an interesting idea that's at least been entertained in court and certainly been advocated before courts.²⁰⁴

This, in some ways, disrupts our conception about legal subjectivity, about responsibilities that we owe to people, in recognizing rights about who has rights, even if they do not claim rights. It disrupts how we think about these core issues.

What it does is [it] pushes us to think beyond our standard, negative rights that are very much at the center of the liberal legal tradition and take more seriously conceptions of positive rights, rights that bind us by collective obligations and responsibilities to provide everyone that's part of society with those resources that really make opportunities to participate in citizen societies meaningful.

We all take for granted things like education, but it pushes well beyond that in terms of a whole variety of things, like health care, to even minimum income for people. It pushes us to recognize some of those categories of international human rights, about positive socioeconomic rights, which are still quite alien in the United States.

They're not just different kinds of rights. They're grounded in different conceptions about the legal subjectivity and the responsibilities that we owe to others when we recognize their rights, somebody like that.²⁰⁵

I totally agree with the argument . . . This issue is raised especially about beginning from a baseline of vulnerability, especially by people like Martha Fineman, who has written about "The Vulnerable Subject."²⁰⁶

That's very problematic because it begins with a kind of negative. It's a base point that I think is very difficult, politically, because the most powerful groups are not going to want to begin from a baseline of someone else, because that's going to de-privilege them in a certain way. I think it's not the way to begin. The way to begin is with a positive conception of responsibility that we owe to all—that we're interdependent upon, recognize we are interdependent. We are products of our culture.

Our very sense of power and being depends on learning language and benefiting from our cultural inheritance. We depend on education that we get, whether it's publicly subsidized or privately subsidized, but it's usually some combination of both. We're all interdependent. We're all in this together. At a certain baseline, we all owe responsibilities to each other to recognize those rights, that [are] independent of qualifying as an autonomous being.

204. Siebert, *supra* note 130.

205. *See generally id.*

206. *See generally* Fineman, *supra* note 134, 20 YALE J. L. & FEMINISM 1; Fineman, *supra* note 134, 60 EMORY L. J. 251.

... It's that disruption of norms that we see in a relationship between a not-adult, less than autonomous person, and a dog, a non-autonomous human, but also a sense of responsibility and a sense of respect that seems to be to be a different conception of rights than we see raised by papers and the work of Claire and people like that.

I'll finish by saying that in some ways what it reminds me of—many of you I'm sure have read Patricia Williams wonderful—timeless book “The Alchemy of Race and Rights.” ... Patricia Williams who was descended from slaves, [whose] people were defined as property and not as humans as with rights—[she says] the task is not to dismiss rights but to reconstruct [them] as the obligations of an expanded universal self.²⁰⁷

In other words, we're not lonely individual selves, we are part of the larger collective self that takes responsibility for all that sustains our shared world.²⁰⁸ [She says] give rights to animals, to rocks, to trees, something like that. ...²⁰⁹ All those things we're interdependent with, we need to learn to grant respect and a sense of responsibility to, and that's a way of rethinking what rights are. That's the alchemy she says that we need to go through.²¹⁰

... That's what I see, thinking about injury gets us to some of those fundamental questions ...

IV. REMEDIES FOR THE TRAUMA AND BRUTALITY OF INJURIES

Maurice Stevens, Associate Professor of Comparative Studies, Ohio State University

Yukiko Koga, Assistant Professor of Anthropology, Hunter College

Khiara Bridges, Associate Professor of Law and Anthropology, Boston University

Raquel Aldana, Professor of Law, University of the Pacific McGeorge School of Law

Maurice Stevens, Associate Professor of Comparative Studies, Ohio State University. The Trauma Resiliency Model as Biopolitical Apparatus.

STEVENS: ...

Over the past decade or so, a theme has slowly surfaced in my work, like a bruise or the knob of a scar beneath the skin. Over time I've explored this emergent question, feeling for the sense of quest within it, and listening into the quiet ways it has announced itself. I trusted intuitions. I've followed the guidance

207. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 164 (Harvard Univ. Press, 1992).

208. *See generally id.*

209. *Id.* at 165. (“Give them [rights] to trees. Give them to cows. Give them to history. Give them to rivers and rocks.”)

210. *Id.*

of hunches, and I've looked through my peripheral vision, grasping for that which likes to slide away consistently, that which is hard to hold and even harder to represent with any deep sense of success.

Injury and what we make of it, suffering and how we elaborate it, memory and how we manage it. These have been my sites of inquiry and questioning and listening.

Over time, I've come to suggest that theories of trauma in the West primarily function in the main as apparatuses that constitute and operationalize a very specific form of subjectivity in the wake of events or experiences that disrupt or interrupt the putatively even flow of self-understanding or conceptualizing of the self. I refer to this process as "traumatization."²¹¹

The image of the damaged social fabric is often called upon to describe injury that encompasses collectivities. It's also interesting for the sense of calamity it carries. Something that was once whole and seamless now lies in pieces, begging their repair or release.

Thinking in terms of a torn social fabric, wrecked or ruined systems, scarred ecologies or broken bodies depends upon and also reproduces crucial oppositions in the hierarchies they represent— victim/survivor, perpetrator/victim, wounded/whole, innocent/jaded, untouched/ravaged, damaged/repared and so on. These oppositions also pre-suppose the temporality of collapse. Not only was there once a seamless and perfect subject or functioning set of relations or unsullied landscape, but there's always also the sense of the time before catastrophe, a time that while not now— indeed, perhaps because not now, offers visions of how a mended and better present moment might look.

There's also the promise of a time after now, a casting forward of our nostalgia into a futurity of possibility. Hope is the ruling signifier there. We imagine that this now, our unbearable now, can be surpassed. It can be over passed and it can be somehow avoided.²¹²

I want to suggest that this is one aspect that renders the valuation of injury and trauma and some of our rapidly institutionalizing responses to trauma in sites of catastrophe, disaster and conflict so important. Reflecting on how we step over the unbearable social now, precisely by insisting on a very specific biological now in post disaster interventions is what I'll be talking about for the remainder of the discussion.

I'll examine one mode of response to catastrophic contexts. One form of evaluative engagement that enacts traumatization. In particular, I'll review the conceptualization and the application of the trauma resiliency model training technology, and will do so with two goals in mind.

211. See Maurice Stevens, *From the Past Imperfect: Towards a Critical Trauma Theory*, LETTERS, (Letters: Newsletter of the Robert Penn Warren Center for the Humanities at Vanderbilt, Nashville, TN), Spring 2009, available at http://www.vanderbilt.edu/rpw_center/Letters/letters09.pdf.

212. PETER A. LEVINE, *WAKING THE TIGER: HEALING TRAUMA* 12 (North Atlantic Books, 1st ed. 1997).

First, to explicate how this interventionist model derives from and enacts traumatization. Second, to suggest by a kind of counter-example, that the trauma resiliency model instigates and provides insights into how we might imagine new ways of responding to the challenges posed by increasingly complex structures of injury with which we find ourselves daily confronted.

In order to do this, though, I'll ask us to move from thinking of identity as an object and instead to framing it as an activity of identification, that's a practice and a mode of cultural performance. I'll also ask us to notice how these particular practices come under pressure in various contexts of upheaval and to reflect on how subjectivization operates in the wake of such events as itself a form of traumatization.

Traumatization is the concrete and generally material process by which standard or typical structures that manage everyday disruptions, like suffering, deprivation, humiliation, physical endangerment, scarcity and so on, how they're gradually stressed and brought under unbearable pressure that results in their seemingly sudden, surprising or traumatic collapse. Thus traumatization is the slow development of the conditions of possibility out of which the traumatic event arises. Traumatization is the enabling condition for what we call "trauma."

Traumatization is also the drawing into or the intersectional coalescing of diverse and divergent practices, out of which the subject is constituted in fixed and identifiable ways. This drawing together of familiar practices results in our having the sense that we know when and where trauma has occurred, to whom and upon what its rupture has been visited. Who or what is the culpable agent in its production and why and how it should be addressed or remedied?

Traumatization is the hermeneutic process by which "trauma" in quotes achieves its being in the world—its functional and phenomenal meaning. Traumatization is also the harnessing of a discourse of trauma to a political social project of a particular type, situated in a particular time, embodiment and social location. Traumatization is a productive cultural practice that in the form of claims on truth, on knowability and reliable narrative understanding, accords cultural capital in the service of specifically contextualized political stakes.²¹³

It's also important to note that the temporality of traumatization is elastic and flowing. It's a temporality that's external to itself. It does not originate in some event before it is named. It is the temporality of seepage, of wasting, of the imploding political regime and historical epics. Because it is process bound, the temporality of traumatization has little or nothing to do with time. Its movement and unfolding is systemic and ecological and sometimes genetic.²¹⁴ The temporality of traumatization emerges through the particularities of its enactment. It's not already there. Its time comes out of the practice.

213. *Id.* at 145-55

214. *See id.* at 8.

The trauma resiliency model is one set of skills offered as a product by the Trauma Resilience Institute.²¹⁵ It also offers a Community Resiliency Model,²¹⁶ which I'll call "CRM" going forward, and the Trauma Resiliency Model for Veterans and Warriors,²¹⁷ "TRM-V-W." The techniques that together form these technologies are informed by theoretical models for the treatment of trauma and post-traumatic stress disorder in post-catastrophe context. Their focus is on the psycho-physiological effects of trauma and traumatic experiences, evidence and symptoms to find as consistent with post-traumatic stress disorder.

For all intents and purposes, TRM, CRM, and TRM-VW, trauma is PTSD. The implication has deep ramifications. In biologically oriented scholarship that informs the TRM, CRM, and TRM-VW interventional technologies, traumatic memories are unique in that they are understood as a bundle or a capsule of network associations and linked processes inscribed at the time of the event, but also existing outside of time.

The traumatic memory is multi-dimensional and multi-scalar in volume, involving imagery, sensations, perceptions, bodily functions, and processes of cognitive functions linked with reactions that are contemporaneous with the event. When one aspect of a traumatic memory is triggered, and this is the concept that they use about traumatic memory, so, within this concept, when one aspect of traumatic memory is triggered, it's said to activate the entire network of linked reactions, giving it both a sense of immediacy, its present tense, and a timelessness.²¹⁸

This notion of capsule memory also explain why apparently neutral stimuli, whether internal or external, can trigger extreme responses of fight, flight, or freeze—and you're probably familiar with those - and their concomitant conditioned autonomic effects. When a sufficient number of nodes, or when nodes with sufficient intensity, have been triggered, the linked images, emotions, affects, and physiological states all emerge in this collective activation as "the memory of the event." It feels like it's here now, or here/now, whatever you're going to make of it.

The Trauma Resource Institute is a non-profit organization, "committed to bringing wellness skills and trauma healing based on cutting-edge neuroscience to the world community one person at a time, one community at a time."²¹⁹ TRI

215. *Trauma Resiliency Model*, TRAUMA RESOURCE INSTITUTE, <http://traumaresourceinstitute.com/trauma-resiliency-model-trm/> (last visited Feb. 12, 2015).

216. *Community Resiliency Model*, TRAUMA RESOURCE INSTITUTE, <http://traumaresourceinstitute.com/community-resiliency-model-crm/> (last visited Feb. 12, 2015).

217. *Trauma Resiliency Model-Veteran & Warrior (TRM-V-W)*, TRAUMA RESOURCE INSTITUTE, <http://traumaresourceinstitute.com/trauma-resiliency-model-veteran-warrior-trm-v-w/> (last visited Feb. 12, 2015).

218. LEVINE, *supra* note 212, at 23-27.

219. Elaine Miller Karas, *Community Resiliency Model Workbook*, TRAUMA RESOURCE INSTITUTE (Sept. 15, 2013), available at http://pacificaidnetwork.org/wp-content/uploads/2013/12/Community-Resiliency-Model-Workbook-Sept.-2013.doc1_.pdf.

frames its work as being informed by fundamentals about the human condition that have emerged through the Trauma Resource Institute clinician's work in the field. TRI offers three products, as I said—the Trauma Resiliency Model, the Community Resiliency Model, and the Trauma Resiliency Model, VW.

These are training programs designed to transmit a very specific set of skills to clinicians and first responders engaging with people who exhibit reactions to highly stressful situations that are understood to be symptomatic of PTSD. TRI's training products focus on bodily experience in what they call "the mind-body approach," focusing on the biological basis of trauma and the automatic defensive ways that the human body responds when faced with perceived threats to self and other.

Although the biologically-based responses that TRM centers are considered to be classic PTSD symptomology, TRI projects are highly invested in shifting the discourse from abnormal and pathological response to the normative biological effects of events that overwhelm the human organism's capacity for adequate response. Shifting the discourse in this way allows for traumatic response to be understood not as weakness or impairment of psychology or character, but as biological, explainable, and treatable in ways that can be standardized and commodified.

This also mitigates feelings like shame, humiliation, and self-blame by suggesting that these symptoms represent the body's natural and normal attempt to stabilize the nervous system, returning it to a level of acceptable equilibrium for the individual's resilience zone, and this concept's super important in TRM CRM, and TRM-VW.²²⁰ These are biologically grounded, sensation-based practices that focus the individual on the possibility of local resiliency.

The practices contained within these models are divided into two distinct phases: the first is the self-care phase, and it's oriented by a core of six practices—I won't go into them here—but essentially it trains the trauma survivor and the first responder in skills aimed at reducing the symptomatic reactions that emerge in the aftermath of experiencing or witnessing an event that's life-threatening or seriously dangerous to yourself or someone else.²²¹

The second phase begins to move out from the basic manipulation of the neuro-biological processes and toward the metabolizing of traumatic energy through practices associated with somatic experiencing, and it's referred to as the trauma-reprocessing phase.²²² There's the individual self-care phase and the trauma-reprocessing phase.

A key concept in TRI's training products is the resilience zone. This is the base state of neurological equilibrium achievable by all. When in the resilience

220. See generally *Trauma Resiliency Model*, *supra* note 215; *Trauma Resiliency Model-Veteran & Warrior (TRM-V-W)*, *supra* note 217; *Community Resiliency Model*, *supra* note 216.

221. *Trauma Resiliency Model*, *supra* note 215.

222. *Id.*

zone, the individual is capable of clear thought, complex decision-making, emotional control, and possesses a capacity to manage internal bodily stimuli.

According to the TRM technology, when one encounters a threatening event, one's physiology prepares for the response of fighting, fleeing, or freezing, and these are understood as natural responses to threatening situations. In most instances after the threat has subsided, one's physiology also returns to a state of equilibrium. However, and its according to this model, if the threat is substantial enough or long enough duration, it can shock that system into a state of reaction that does not subside.²²³ Thereafter, very small stimuli can cause full-system response.

Once it's been determined that the subject has integrated the self-care skills, in phase one, into their activities of daily living in a regular way, the scene is ready to begin training in trauma reprocessing skills. These practices are derived most directly from the work of Peter Levine, in what's been termed somatic experiencing.²²⁴ According to Levine, the fixed action pattern that occurs at a time of a traumatic event traps affect in the autonomic nervous system, resulting in things being stuck in a hyper or hypo-active state of arousal.²²⁵ You might be depleted and depressed, or you might be over-stimulated in this model.

The TRI training products all recommend trauma reprocessing as the next phase of the subject's mastery of their neuro-physiological response to triggers, and each of the skills that they teach deepen the subject's capacity to bring under surveillance, control, and appropriate mediation what was previously ungovernable affect and sensation. All of these skills are practiced with a certified, TRM-trained clinician, whose services, or the certification of whom, can be obtained through the website and some of its products. You go on the website and you can purchase the services of a TRM-certified clinician.

The Trauma Resource Institute describes itself as a non-profit corporation, globally cultivating trauma-informed and resiliency informed individuals and communities by providing education and skills training, that's how they describe themselves.²²⁶ Over the past three years, TRI has been involved in interventional practices in China, Rwanda, Kenya, Haiti, and Japan, as well as domestically within the United States in the aftermath of Hurricanes Katrina and Rita, and in the Department of Behavioral Health San Bernardino County, after the fire storms in southern California. The way they put it, they're healing modalities to the international community, that's part of their mission. Working through already exit organizational networks, like religious aid, and military

223. *Id.*

224. LEVINE, *supra* note 212, at 61.

225. *Id.* at 116.

226. *Mission Statement*, TRAUMA RESOURCE INSTITUTE, <http://traumaresourceinstitute.com/mission-statement/> (last visited Feb. 22, 2015).

organizations, TRI is often contacted, or offers its services in the aftermath of natural, or man-made disasters.²²⁷

When one reads the field notes, and these field notes are actually available on the site, so you can go and check them out there. I mean you read these field notes that describe the organizations' work in Haiti for example. One notices the emphasis placed on assessing whether the local actors have absorbed, or mastered the techniques of the model.

The TRI clinician notes in these notes how well the local first responders have both integrated the TRM lexicon into their regular practice of speaking, and how great they look in the TRI t-shirts that they've been given.

...

If they're reporting back, it's a success. Interestingly though, much of the discussion in the field notes and indeed the entire second day of the latter phase of this three day training, focuses on how the local practitioners can better obtain funding for TRI, to provide more trainings in more areas. Grant writing and pitch-making are the subjects of days two and three of the training event.

TRI's function of assessing and ascribing value to injury in the development of markets for their product are hand-in-hand processes.²²⁸ Indeed one can sense the impulse to branding and brand control, when in the response, and this is in the notes there, too.

In response to one group's suggestion that the new trainees might bring TRM technologies out to these more remote areas in Haiti, or isolated communities, the TRI representative urges the group to seek grant support to have TRI clinicians from the United States brought in to do the training. Communities facing disaster are not the only markets, this is what I'm suggesting, and these are not the only markets that are being cultivated by TRI.

One can imagine potential collaborations for example, between local industries, inside industries, and US based producers, of the various products that TRI offers on the website. For example, on the website they offer props like pens with built in scrolls, that list the six self-care skills, or they have these Lance Armstrong bracelets that say "Shift & Stay."²²⁹

You can also imagine, the kind of lucrative potential in the introduction of the iChill app, which is an actual app that you can download to your iPhone or your Android.²³⁰ But you can imagine this being a product that is sold to the kind of local telephonic marketplace.

227. *Global Projects*, TRAUMA RESOURCE INSTITUTE, <http://traumaresourceinstitute.com/haiti-2/projects/> (last visited Feb. 22, 2015).

228. *See Trauma Resource Institute Homepage*, TRAUMA RESOURCE INSTITUTE, <http://traumaresourceinstitute.com/> (last visited Feb. 22, 2015).

229. *Shop*, TRAUMA RESOURCE INSTITUTE, <http://traumaresourceinstitute.com/shop/> (last visited Feb. 22, 2015).

230. *iChill Download Page*, TRAUMA RESOURCE INSTITUTE, <http://www.ichillapp.com/> (last visited Feb. 22, 2015).

The final concern that I'd like to raise has to do with the potential political effects of an increased, and this is sort of what's theoretically important to me also, this sort of increased focus on the biological now. It concerns me that this focus on the biological now that anchors TRM's technologies also calls our attention away from traumatization as a broader process.

Focusing on the biological now can encourage us to satisfy our urge to help, by evaluating and intervening in the face of another's suffering, without ever having to really ask larger questions, and more difficult questions, about how that suffering comes into being, or how our own intervention, accrues value to that instance of injury.

That is, these technologies encourage us to focus on the efficacy of immediate symptom abatement, rather than increasing, sort of increasing precarity more generally, and to do so in a way that is institutionally acceptable, and structurally supported, and I'll end here.

What I'm most interested in elaborating further is the possibility for developing more complex response systems. Because one thing I do value about what TRI is doing here, is that they're calling attention to the different scales at which these events exist. The biological, the individual, or organ level let's say, the individual, the community, the institutional, all at once. I found it to be very valuable.

What I'd like to be working out, going forward, is what a complex response system can look like. It takes multi scales, into consideration, and the fact that at each of those scales is due of a different temporality of experience, so we have multiple temporality signals.

Yukiko Koga, Assistant Professor of Anthropology, City University of New York, Hunter College. *Between the Law: The Unmaking of Empire and the Persistence of Redress in Post-Imperial-East Asia.*

KOGA: My presentation [is] about the temporality of trauma, I'm figuring out this temporality of trauma intersects with the temporality of law, in the profit of legally redressing the past injuries in a meaningful manner. The case I'm looking at is called the compensation lawsuits filed by Chinese war victims against the Japanese government and corporations, over the past two decades in various courts across Japan.

For those of you who may not be familiar with the cases, ever since the mid-1990s scores of lawsuits have been filed by mostly Chinese and Korean, South Korean war victims, against the Japanese government and corporations.²³¹ In Japan there is no class action lawsuit, so many of them take the form of collective lawsuits. Most of the lawsuits reached the Supreme Court of Japan in the past two decades, and it's something I'm trying to go back to and see what's happening.

231. William Gao, *Overdue Redress: Surveying and Explaining the Shifting Japanese Jurisprudence on Victims' Compensation Claims*, 45 COLUM. J. TRANSNAT'L L. 529, 533 (2007).

I wanted to go back to case law, possibly because in 2007 there was a Japanese Supreme Court ruling, which ruled against the plaintiffs — the so-called “comfort women,” the victims of the wartime sexual slavery and the victims of the wartime use of forced labor.²³² With the 2007 Supreme Court decision, the overall tone of many commentaries in law review articles and more public commentaries was that this Supreme Court decision marked the end of the legal redress movement for Chinese war victims.²³³

Many law review articles today reduce the issue to the matter of political will, basically turning the legal issue into a political issue. I’m questioning that observation. The paper I wrote is based on a year-long fieldwork I conducted last academic year in China, and Japan. I’ve been working with a group of Japanese lawyers for the past 10 years, who represent Chinese who are victims. Originally, I joined this legal movement more as a political engagement. I didn’t think about writing a book about it.

After the Supreme Court ruling I started to realize that there is something else going on that hasn’t been really analyzed, or written up. It is my first attempt to figure out what it was that I kept feeling very uncomfortable, while I work in one of the lawyer’s law offices during that year, and going through thousands of legal documents while participating in victims’ organization activities in China, in rural parts of China that I never explored before, even though I did field work in other parts of China.

This paper presents my preliminary findings. I hope it will bring out some interesting discussions about the law, and the place of law within the legal action, the redress for past violence. I will not go into my ethnography due to the time constraint today, because most of what I’ve written is very ethnographic. As an anthropologist, I think the summarized ethnography is not really ethnography, Ethnography is all about the details.

For the purpose of the presentation I will focus on what the law was doing in the course of the 20 years of lawsuits. It might sound like a funny question for us, when I’m dealing with a bigger case, and I think about the place of law, or the role of the law. My presentation hopefully will make it clear that the place and the role of law becomes more and more obscure, and vague, and then eventually disappear.

What I’m going to do is to briefly introduce what this course of legal action revealed to the public eye. Then we’ll go through three major legal doctrines

232. *Judicial Proceedings: Comfort Women*, G. W. U., <http://www.gwu.edu/~memory/data/judicial/comfortwomen.html> (last visited Feb. 22, 2015).

233. Saikō Sanbansho [Sup. Ct.] Apr. 27, 2007, Heisei 16 (ju) No. 1658 (forced labor case) and Saikō Sanbansho [Sup. Ct.] Apr. 27, 2007, Heisei 17 (ju) No. 1735 (comfort women case). On the basis of these rulings, the Supreme Court of Japan dismissed the appeals of other cases on the same day (Saikō Sanbansho [Sup. Ct.] Apr. 27, 2007, Heisei 17 [o] No. 985 [comfort women case]; Saikō Sanbansho [Sup. Ct.] Apr. 27, 2007, Heisei 14 [ne] No. 511; and Saikō Sanbansho [Sup. Ct.] Apr. 27, 2007, Heisei 8 [wa] No. 5435 [forced labor case]). For an example of how scholars view the cases, see Gao, *supra* note 231.

deployed throughout the course of the lawsuit to see what's being buried beneath these legal doctrines, which might point to something more fundamental to the issue. I want to focus on what the legal cases revealed that were quite dramatic. Except for a television series like "Law and Order," very often legal cases are not that dramatic, and most of the time you just go through procedures.

In the forced labor case there was a political drama, which revealed that the Japanese government committed secondary violence even after the war ended and the official end of the wartime forced labor. What happened was that during the course of the lawsuit, the Japanese lawyers representing the Chinese case discovered secret archives, which were supposed to be destroyed, or supposed to be hidden.²³⁴ More than 2,000 pages of these Japanese government archives detail the wartime use of forced labor and the post-war cover-up.²³⁵ That was dramatically displayed during the lawsuit and there was a huge public drama exploring this hidden archive.

What these archives revealed was not only the work and use of the forced labor but also how, immediately after the Japanese defeat in the Second World War in 1945, the Japanese corporations that enslaved Chinese forced labor received compensation from the Japanese government for "the loss of Chinese laborers" at the end of the war. I did not make a mistake in formulating this sentence. [laughs] It was the Japanese corporations which enslaved Chinese laborers during the war that received huge amounts of compensation money from the Japanese government, while the Chinese survivors were sent back to a civil war-torn China without a single penny paid to them.²³⁶

This compensation which defied our common-sense understanding of compensation—which I would call the "inverted compensation"—was revealed during the course of the lawsuit. In addition to this revelation that detailed these closed Japanese archives demonstrates how in post-war years in the 1950s and 1960s until the early 1970s the Japanese government really tried hard to hide their wartime use of Chinese laborers.²³⁷

Through this inverted compensation, this lawsuit revealed the unfinished project of the unmaking of the Japanese Empire within the economic sphere. It's hard to tell the impact of this compensation money for the recovery of the Japanese corporations in postwar years, but it was a significant amount. It would be hard to imagine how these corporations jump-started after the end of the war without this kind of bailout money from the government.

That was the major drama—the lawsuit revealed the unfinished project in the economic sphere, end of the story, many people thought. At the political level,

234. Gao, *supra* note 231, at 540-41.

235. Yukiko Koga, *Accounting for Silence: Inheritance, Debt, and the Moral Economy of Legal Redress in China and Japan*, 40 AM. ETHNOLOGIST 494, 498 (2013), available at <http://www.hunter.cuny.edu/anthropology/faculty-staff/full-time-faculty/koga-yukiko/repository/files/Koga%202013%20Accounting%20for%20Silence.pdf>.

236. *Id.* at 498.

237. *Id.*

there was no compensation for the victims, so the blame goes to the political maneuvering of the legal sphere and that lack of political will, which was translated into the inability for the law to address the compensation issue.²³⁸

As I was going through these legal documents, I started to notice something else might be going on, and that's the law's complicity in this project, which can be described as the economic form of unmaking of the Japanese Empire. I started reading through the legal documents and there were three legal doctrines deployed over the 20 years of lawsuits, which in the end resulted in an almost seemingly perpetual deferral of justice within the legal sphere.

Let me move onto what's going on in the deployment of these three legal doctrines. In all these lawsuits, most of the lawsuits didn't win from the lower court to higher court.²³⁹ The three doctrines were deployed in succession.

The first doctrine that was deployed was the statute of limitations. Since the original injury officially ended in 1945 when the Japanese Empire disappeared with the Japanese defeat in the Second World War, the court ruled that by the time the lawsuits took place in the mid-1990s, it was too late. Statute of limitations is 20 years in Japan in a civil case. The original inquiry ended in 1945 and it's 1995 or 1998 and it's too late. That was how it was ruled out initially. Although, that was later overcome on the principle of justice and fairness.²⁴⁰

Once the statute of limitations doctrine got over by the lawyers representing the victims, the second doctrine that was deployed by the court was the sovereign immunity doctrine. Sovereign immunity was a legal doctrine practiced under the Meiji Imperial Constitution, which was the constitution before 1945. After the Japanese defeat in the war, the Japanese government adapted a completely new constitution, the so-called peace constitution, in 1946. During the wartime, it was under the Imperial constitution, which had sovereign immunity²⁴¹.

The court ruled that because the original incident took place before the enactment of the new Japanese post-war constitution they deployed the sovereign immunity principle—to say, well, the Japanese government is not responsible for the state actions.²⁴² That's an interesting apparition of how legal framework from the past suddenly appears in front of the Chinese plaintiffs, who thought they were standing before the contemporary Japanese law.

I don't have the time to go into the details, but it was an incredibly difficult process for these victims to stand in front of the Japanese judges. Most of these victims are from rural China, where they don't have any running water or electricity or anything. Not even, sometimes, a regular postal service. They are so isolated that until the Japanese lawyers started to contact them, they didn't have

238. *Id.*

239. Gao, *supra* note 231, at 538.

240. *Id.* at 539-40.

241. Koga, *supra* note 235, at 496.

242. *Id.* at 499.

any communication with the other victims. They didn't have any means to go to Japan.

For them, it was such a big fear to stand before the Japanese law. What they didn't realize was they weren't really standing before the Japanese law. They were—according to the court—standing before the not-existing pre-war Imperial constitution. They were caught in this strange temporal gap between the present legal system and the disappeared past legal system. They were in a sense standing not before the law but standing *between the law*, despite the fact that they thought they were standing before the Japanese law.

The sovereign immunity principle later was again overturned by the lawyers representing Chinese victims.²⁴³ It just turned out after a very detailed historical research they did that the lawyers discovered that the sovereign immunity principle didn't have any codified legal foundation even under the Imperial Meiji Constitution.

The Japanese legal system is different from the US legal system, it's similar to the European continental legal system, and we need the codified law to make a case. It turned out that there was nowhere that they can find a codification of sovereign immunity. Even during the prewar era, it was just a practice that conjured up this image of principle.

Eventually the court also overturned the use of sovereign immunity. The lawyers representing the victims were getting upbeat. They broke the legal barrier of the statute of limitations, and they broke the barrier of sovereign immunity—two legal doctrines that they thought were written in stone and they couldn't break.

Then, in the Supreme Court case, the court deployed a third legal doctrine, which was that China renounced reparation claims in the 1972 communiqué between China and Japan, which established diplomatic relations between the PRC and Japan. The court argued the Chinese individuals don't have the legal right to seek compensation for their injury because in the Communiqué the Chinese government renounced its reparation claims.²⁴⁴

This was the very last legal frontier or legal doctrine that the court deployed to put the Chinese plaintiffs not before the law. Even though it seemed that they were standing before the law, but actually between the laws. This between space that is a kind of legal lacuna.

It appears that they are standing before the law, but in reality they are in this space, zone of exceptional space where the law doesn't exist. Law keeps presenting itself absent in front of them, and that legal lacuna is what I'm calling *between the law* as opposed to *before the law*.

243. See, e.g., Ni'igata Chihō Saibansho [Niigata Dist. Ct.] Mar. 14, 2007, Heisei 11 [wa] No. 543, Ni'igata Chihō Saibansho [Niigata Dist. Ct.] Mar. 14, 2007, Heisei 12 [wa] No. 489, and Ni'igata Chihō Saibansho [Niigata Dist. Ct.] Mar. 14, 2007, Heisei 14 [wa] No. 139.

244. Saikō Sanbansho [Sup. Ct.] Apr. 27, 2007, Heisei 16 (ju) No. 1658.

I kept wondering what this legal lacuna means and it seems inappropriate to reduce this legal lacuna to only the lack of political will. There must be something going on. I smell something fishy about this . . . perpetual absencing of law within the legal action.

I decided to go back to the foundational laws that defined Japan's post-war beginning. As I mentioned earlier in my presentation, the Japanese government adapted a completely new constitution, the so-called peace constitution, in 1946, and this constitution was drafted by the U.S. occupation. It was embraced as this peace-loving, incredibly progressive constitution which renounces any use of military as diplomatic means.²⁴⁵ When I went back to this constitution, which I read as a student with such affection and passion, I realized that there was something fundamental that's missing in this constitution.

Which was that, if it was written for the Japanese and when the Empire expired, yes, on paper the Empire expired, but what happens to the Empire's remains? What happens to the formal colonial subjects, who had no choice but to become colonial subjects?

Or the people who were part of the Japanese Empire and all of a sudden became something else. It just struck me all of a sudden how the Japanese constitution had nothing to say about the Empire's remains or what it means to de-imperialize the Japanese Empire within the legal sphere.

It doesn't address anything legally about what it means to de-imperialize. It was written instead as a post-war constitution. That post-wariness instead of post-imperialness became even more clear in another pillar of the post-war legal reform in Japan, which is the State Redress Act. State Redress Act was the very explicit legal code to negate the sovereign immunity principle, by saying the Japanese state is responsible for state actions in a legal manner.²⁴⁶ That's a very strong negation of the pre-war imperial legal system.

What's notable is one of the clauses within this State Redress Act says, [essentially] "This law does not apply to foreign citizens unless the foreign government offers reciprocal kind of legal framework," which ruled out China and Korea—Chinese and Korean citizens as benefiting from this new State Redress Act.²⁴⁷ In a way, it closes off any legal actions from the former colonial and imperial subjects through this newly in place State Redress Act, which is a redeclaration, explicitly, of what's not written in the constitution law.

What I started to notice was how in the language of the law there was a deliberate way of not dealing with post-imperial aspects. That's the law's complicity in not dealing with the huge projects of unmaking of the Japanese Empire that I started to see through these legal cases.

245. Nihonkoku Kenpō [KENPŌ] [CONSTITUTION], art. 9 (Japan).

246. Kokka Baishō Hō [State Redress Act], Law No. 125 of 1947 (Japan).

247. See Koga, *supra* note 235, at 499.

That aspect might be changing, however. I just want to—since I’m running out of time—just give you the very recent development that may really reshape this erasure of post-imperial process in the legal sphere.

In 2011, the South Korean Constitutional Court made a very significant decision, which claimed that it is unconstitutional for the South Korean government not to allow their citizens to seek legal redress for the wartime injuries.²⁴⁸ Similar to Chinese government, South Korean government renounced reparation claims when they signed a treaty in 1965 to establish diplomatic relations with Japanese government.

Japanese government in 1965 actually offered some kind of compensation money to the so-called “comfort women.” But the South Korean government, according to recently declassified South Korean government archives, actually refused to receive this compensation money that the Japanese government offered, and instead they sought economic assistance and economic investment from Japan.²⁴⁹

In 1965 South Korea was not democratic, so nobody wanted to invest, similar to China in the early ‘70s when it was still going through the Cultural Revolution. No European country wanted to invest in such a turbulent, unstable state.

The Chinese government also renounced reparation claims, but instead they received a huge amount of development assistance from Japan. It was a very complicated process, more than just a lack of political will. But in 2011, this South Korean Constitutional Court overturned that political trend by saying [essentially], “It’s unconstitutional if we don’t let our citizens seek legal redress.” After that decision, scores of competition lawsuits were filed within South Korean courts by South Korean victims of wartime use of forced labor.²⁵⁰

This new development in South Korea is spurring renewed interest among Chinese victims, lawyers and activists in China. Just this past week on February 26, a group of Chinese forced labor victims filed lawsuits against the Japanese corporations in the Beijing Regional Court. They haven’t accepted their filings.²⁵¹

248. Supreme Court [S. Ct.], 2009Da22549, May 24, 2012 (S. Kor.).

249. Treaty on Basic Relations, Japan-S. Kor, Jun. 22, 1965, 583 U.N.T.S. 8471.

250. See the South Korean Constitutional Court decision, “Challenge against Act of Omission Involving Article 3 of the ‘Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan’”, Constitutional Court [Const. Ct.], 2006 Hun-Ma788, August 30, 2011 (23-2[A] KCCR 366) (S. Kor.), which recognized the individual rights to claim compensation in the so-called comfort women cases. For an English translation of the decision, see <http://english.court.go.kr/>. The landmark decision by the Supreme Court of Korea on May 24, 2012 echoed the 2011 South Korean Constitutional Court decision in recognizing the individual rights to claim compensation from Japan. Constitutional Court [Const. Ct.], 2009Da22549, May 24, 2012 (S. Kor.).

251. Update 1-Chinese Wartime Forced Laborers Sue Japanese Corporation, REUTERS (Feb. 26, 2014, 2:53 PM IST), <http://in.reuters.com/article/2014/02/26/china-japan-lawsuit-idINL3N0LV2H520140226> (the court has since accepted the case).

In the past, five cases were attempted to be filed in Chinese courts, but all of them were not accepted by these Chinese courts.

This time the Chinese foreign minister had expressed a very positive remark for this new development. It's very likely, but even in a couple of weeks, we might hear news about this Beijing Regional Court accepting the lawsuits from the forced labor survivors and their family members.

If that happens that will really open up a new legal frontier, which will really question this post 1945 legal framework based on the cold war; that is, postwar legal framework as opposed to the post-imperial, post-colonial legal framework. There is something interesting to monitor in the next several weeks. Let me finish here . . . Thank you.

Khiara M. Bridges, Associate Professor of Law and Associate Professor of Anthropology, Boston University “When Pregnancy is an Injury: Rape, Law, and Culture.

BRIDGES: . . .

I teach in the law school at Boston University. When I got the job, they said, “You, you can have the job, but you have to teach criminal law.” That was a shock to me, because I hadn't thought about criminal law since I was in law school. I was like, “Fine I'll do it.” I decided to use the same casebook that I used when I was in law school. . . .

Eventually we got to this unit on sexual assault. The book had reproduced a variety of states' sexual assault statutes in order to sort of show the varying ways that states take with defining what rape is. I got to the Wisconsin sexual assault statute. There in the book the statute defined first degree sexual assault as, “[S]exual contact or sexual intercourse with another person without consent of that person [which] causes pregnancy or great bodily harm to that person.”²⁵²

When I read it, the light started to shut off and then it came back on. A door flew open. An angel descended from heaven . . . I was so incredibly fascinated by the way that the statute equated pregnancy and substantial bodily harm or great bodily harm as equivalent.

Let me just back up a bit. States do take varying approaches to defining sexual assault. Usually, it's some sort of combination of facts, force, and non-consent. Once states have defined sexual assault, some states, a lot of states, divide sexual assault into categories that impose different sentences, based on the presence or absence of aggravating factors.

You might have a first degree rape in which there's non-consensual forced sex, in which an aggravating factor is present. You might have a second degree rape in which there's force, non-consent, and there's no aggravating factor. They might even have a third degree rape, where there's no force, it's just non-

252. WIS. STAT. § 940.225(1)(a) (2012) (defining first-degree sexual assault as “sexual contact or sexual intercourse with another person without consent of that person” that “causes pregnancy or great bodily harm to that person”).

consensual sex, et cetera. The infliction of a substantial bodily injury, or a great bodily harm, or a serious personal injury, or similar during the course of a rape, is an aggravating factor that can elevate a rape to a more seriously graded offense.

The question then becomes, “What is a substantial bodily injury?” Most states follow the model penal code formulation of substantial bodily injury or great bodily harm. Model penal codes define serious bodily injury as, “[b]odily injury, which creates a substantial risk of death, or which causes serious permanent disfigurement, or protracted loss, or impairment of the function of any bodily member or organ.”²⁵³ Accordingly, it’s not intuitive at all that pregnancy should be understood as a substantial bodily injury or its equivalent. As a result you have states like Wisconsin, who’s specifically providing that pregnancy should be treated the same as substantial bodily injury. You have Michigan and Nebraska, specifically providing that pregnancy is a serious personal injury.²⁵⁴ You see courts in a lot of jurisdictions, including California, as well as the Seventh and Eighth Circuits and others, allowing juries to consider on a case-by-case basis, whether a victim’s pregnancy should be understood as a substantial bodily injury in that case.²⁵⁵

Why should we care? First reason, it’s fascinating, but three other reasons. We should care, because this construction of pregnancy as an injury runs directly counter to positive constructions of pregnancy within culture.

What do I mean by positive constructions of pregnancy? In the original reiteration of the paper, I caught a hegemonic.²⁵⁶ It’s a very powerful idea of pregnancy that is disseminated, and reiterated, and justified by various institutions, including religion, politics, etcetera. This idea, this positive construction of pregnancy says that pregnancy is inherently . . . is beautiful, it’s life affirming. It’s always going to be a positive event in the life of a woman. Which is not to say that this positive construction of pregnancy cannot understand or disavow that pregnancy is frequently burdensome, it’s painful, it’s physically testing.

According to the positive construction of pregnancy, these negative aspects about pregnancy are overshadowed or overcome by the beautiful aspects of pregnancy. The negative aspects make the experience bittersweet, but it is always and in every case more sweet than bitter. The fact that the criminal law rejects the positive notion of pregnancy in its entirety and says, “No pregnancy is an injury,” creates a possibility that this negative construction of pregnancy may be received

253. MODEL PENAL CODE § 120.0(3) (1981).

254. MICH. COMP. LAWS § 750.520a(n) (2012); NEB.REV. STAT. § 28-318(4) (2012).

255. See, e.g., *People v. Cross*, 190 P.3d 706, 717 (Cal. 2008) (Corrigan, J., concurring) (“Factors such as the age of the victim, as well as the outcome, duration, or problems associated with a pregnancy may make its impact even *more* substantial”); *United States v. Guy*, 340 F.3d 655, 658 (8th Cir. 2003) (emphasizing individual circumstances of the case).

256. Khiara M. Bridges, *When Pregnancy is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 461 (2013).

within culture as a construction of pregnancy that is as legitimate as a positive construction. It's counter hegemonic. These laws create the possibility for the re-imagining of pregnancy within other areas of the law in society more generally.²⁵⁷

The second reason why we should care, or perhaps the third one is, the first reason was that it's fascinating. The third reason we should care is because it's significant that the historically male institution that is the law reflects an experience of the body that is profoundly female . . .

Fourth, we should care because of recent arguments that antiabortionist activists have been making. Reva Siegel at Yale Law has pretty much dedicated her life's work to documenting the extension of what she calls "Woman-Protective Antiabortion Argumentation," or WPAA.²⁵⁸

Woman-protective anti-abortion argumentation is essentially arguments that restrictions on abortion rights—that we ought to have restrictions on abortion rights in order to protect women from harming themselves. We have to protect women by restricting their ability to get an abortion. Why? Because abortion harms women.

The story that she tells is one in which opponents of abortion used to argue against abortion rights by focusing on the effects that abortion had on the fetus. According to the former line of argument, abortion should be made illegal because it kills fetuses. It injures fetuses. However, the fetal focused argument didn't win anti-abortion activists the result that they wanted, which was the sympathy of the majority of Americans as well as the overturning of *Roe v. Wade*.

In response, activists adopted their advocacy in light of the criticism that anti-abortion activists cared too much about fetuses and too little about women. They redirected their advocacy and they said, "No, no, no. We, too, just like the pro-choice people, we too care about women." According to the new strategy, abortion should be limited not only because it harms fetuses, but also because it harms women.²⁵⁹

The movement has been arguing that abortion is harmful because it leads to post-abortion syndrome, mental health problems, depression, trauma, increased post-traumatic stress disorder specifically, increased risk of breast cancer, as Lochlann told us yesterday. When you prevent women from being pregnant or from carrying pregnancy to term, you're allowing for the buildup of hormones that ultimately will cause breast cancer and ovarian cancer.

Anti-abortion activists have been saying, "No, we need to protect women from getting these abortions that harm them, because they lead to all of these

257. *Id.* at 458.

258. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L. J. 1694, 1706-35 (2008) (examining the history of the woman-protective antiabortion argumentation).

259. *Id.* at 1713-16.

horrible conditions of the body.”²⁶⁰ Restricting abortion protects women from these ills, but most importantly, woman-protective anti-abortion argumentation has made it into jurisprudence, which is perhaps the scariest part of this for those who are interested in abortion rights.

In 2003, the court decided *Gonzales v. Carhart*, which is called “Carhart 2,” because there is a “Carhart 1,” which was a much better decision.²⁶¹ . . .

In Carhart 2 in 2003, the court upheld the federal Partial-Birth Abortion Ban Act, which prohibited certain methods of performing second and third trimester abortions. It is a very gruesome procedure, but there are reasons for the procedure. But nevertheless, Congress banned it. It said doctors can’t do it anymore. The Supreme Court upheld the ban.

In upholding the ban, the majority opinion, which was written by Justice Kennedy. Kennedy went above and beyond the call of duty in that opinion, as he so frequently does, but he said that, “[i]t is unexceptionable”—and I’m quoting—“it [is] unexceptionable to conclude that some women come to regret their choice to abort the infant life [that] they once created and sustained.”²⁶² Furthermore, he cited an activist named Sandra Cano, who has made it her life’s work to document women basically saying that their lives were destroyed by their abortions. He cited her amicus brief, which provided 96 pages of excerpts testifying that abortion in practice hurts women’s health.²⁶³

. . . I want to show how Mary Ann’s framework for injury inequality can be used to understand what anti-abortion activists have done here. Prior to their woman-protective anti-abortion argumentation, when they were focusing on harm to the fetus, they were basically saying that, “Yes, abortion should be made illegal. Yes, there’s an injury to women when they are forced to bear pregnancies that they don’t want to bear, but the injury to the fetus ought to trump that injury to the woman.”

What they’ve done now with woman-protective anti-abortion argumentation is to change the calculus altogether. Now they’re saying, “OK. Let’s make abortion illegal, because yes, women who have to bear pregnancies, they’re injured perhaps by having to bear a pregnancy, but that injury is going to be outweighed by both the harm to the fetus as well as the harm to the woman should she get post-traumatic stress disorder.” It’s a Jiu jitsu, if you will. They’re using arguments that, pro-choice arguments against pro-choice activists.

In light of the court’s acceptance of woman-protective anti-abortion argumentation, it is safe to assume that we’ll see more of it. In fact, protecting women has provided the justification for the wave of abortion restrictions that

260. *See id.* at 1719.

261. *See Gonzales v. Carhart*, 550 U.S. 124 (2007) (Carhart II).

262. *Id.* at 159.

263. *Id.*

burden abortion access through the informed consent process.²⁶⁴ Those restrictions are as ubiquitous as they are conservative.

The relationship between woman-protective anti-abortion argumentation and these criminal statutes that treat pregnancy as an injury is one of challenge.²⁶⁵ The question that we have to ask, is it fair to say that abortion is harming women when unwanted pregnancy itself is a literal injury to women? Is it fair to say that women are being harmed by the modality that is curing them of an injury, if pregnancy is an injury?

If abortion does harm women, then on what principle can we compel women to remain injured—that is, unwantedly pregnant—in order to protect them from a harm, which abortion may be. Women are faced with two evils. An injury that is pregnancy and a harm that is abortion, on what principle should be denied the right to decide which of the two evils they will endure? These sexual assault statutes counsel a retrieval of abortion rights advocacy that has fallen out of use and from some, but not every, memory.

Abortion rights activists used to argue that we ought to protect abortion rights because unwanted pregnancies are injuries to women.²⁶⁶ Indeed, providing phenomenological accounts of pregnancy as injury was the precise legal strategy of the National Abortion Rights Action League, NARAL, in *Thornburgh v. the ACOG*, which the court reaffirmed *Roe v. Wade* in that case.²⁶⁷

In an amicus brief, NARAL attempted to demonstrate the fundamentality of the abortion right, not by looking to constitutional text or history, but rather by looking to women's experiences of their pregnant bodies as injured.²⁶⁸ The brief quoted letters of women who described what it felt like to bear an unwanted pregnancy. Women described themselves as terrified. Just as you're terrified if you have been injured.²⁶⁹

. . . In light of the spread of woman-protective antiabortion argumentation, abortion rights advocates might need to focus on this phenomenological experience of pregnancy as an injury. . . .

We have to acknowledge that these rape statutes that treat pregnancy as a great bodily injury or substantial bodily injury, they could reflect two competing formulations of when pregnancy is an injury.²⁷⁰ In one formulation, pregnancy is an injury whenever it is the result of non-consensual sex.²⁷¹ Essentially, rape

264. Siegel, *supra* note 258, at 1694.

265. *Id.* at 1800.

266. *Guy*, 340 F.3d at 657.

267. *Thornburgh v. Am. Coll. Obstetricians*, 476 U.S. 747, 759 (1986).

268. *See generally* Brief for the National Abortion Rights Action League et al. as Amici Curiae in Support of Appellees, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (nos. 84-1379), 1985 WL 669630.

269. *Id.* at 29.

270. NEB. REV. STAT. § 28-318.

271. WIS. STAT. § 940.19 & § 940.225.

makes pregnancy an injury. In another formulation, pregnancy is an injury whenever it is unwanted. The non-consensual nature of the sex is irrelevant. Whenever a woman experiences her pregnancy as unwanted, that's what makes it ontologically a physical injury.²⁷²

I favor the latter formulation because it accurately describes the one in which pregnancy is an injury whenever it is unwanted, not only when it is the result of non-consensual sex. I favor that formulation because it accurately describes how women experience unwanted pregnancy. I think it's the profound unwanted-ness of the pregnancy that results from rape that makes it an injury.

A woman carrying an unwanted pregnancy, whether it is due to rape or not, tends to experience it as a harm that is happening to her body.²⁷³ It is the wantedness that determines the phenomenology of the pregnancy.²⁷⁴ It should be the wantedness that dictates the ontological status of pregnancy. Which reminds me of Anne and Marc's paper from yesterday. Perhaps wantedness makes pregnancy something like an enhancement. It's the unwantedness of the pregnancy that makes pregnancy something like an injury.

It's the same state of the body, but it's the desire for it. If I break my nose, I don't want it to be broken. It's definitely an injury. But if I break my nose pursuant to a nose job—not an injury. It's an enhancement. I think it's wanted in the latter case. That's what determines the ontological status of the pregnancy. However, I have to contend with the alternative formulation that pregnancies are injuries only when it is the result of non-consensual sex. Unwantedness is irrelevant. Consent to sex dictates whether a pregnancy is an injury, according to this alternative formulation.²⁷⁵

It's true that in other areas of the law the absence or presence of consent transforms phenomena into legal injury. The absence of consent transforms phenomena into legal injury. When I consent to being punched by another in a boxing match—no legal injury. In the absence of my consent to get hit—assault, I'm calling the police.

If I consent to have someone in my house because I'm having a dinner party—no legal injury. Absence of consent—you're trespassing. If I consent to have someone paint a beautiful mural on my wall in my backyard—no legal injury. Absence of consent—defacement of property. When consent is absent, a legal injury results in a lot of cases.

With respect to pregnancy, it's tempting to phrase the question as whether consenting to sex that results in pregnancy is tantamount to consenting to the pregnancy, such that a woman cannot assert that the resulting pregnancy is a legal injury. However, the claim in this paper is much broader than that. I'm not

272. MICH. COMP. LAWS § 750.520.

273. Brief of Petitioner at 12, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1985) (Nos 84-495 and 84-1379), 1985 WL 669630.

274. *Id.* at 21.

275. *People v. Cross*, 45 Cal.4th 58, 66 (2008).

claiming that the criminal law statutes recognize that pregnancy without consent is a legal injury. I'm saying that these statutes recognize that pregnancy without consent is a literal injury.²⁷⁶ It's an injury to the body.

The question when properly formulated has to be something along the lines of whether consenting to the sex that results in pregnancy is tantamount to consenting to the pregnancy such that a woman cannot assert that the resulting pregnancy is a literal, physical injury to her body. I'd say no. The answer has to be no. Consenting to sex, a woman only consents to the risk of becoming pregnant, not to the actual pregnancy itself. I'll say that again. A woman has only consented to exposing herself to the risk of becoming pregnant by consenting to sex. She hasn't consented to the pregnancy itself.

This is relevant because in many other contexts, we don't lose the claim of having been injured by unwanted things that happen to us, even when we have exposed ourselves to the risk that those things will indeed happen to us. If I say, "Guys, let's go bungee jumping. Let's do it. Let's run outside." "It's going to be awesome. It's going to be amazing." I'm consenting to exposing myself to the risk of dying, but also being injured should something happen.

If something should happen, if my bungee cord snaps, no one's going to say to me, "The concussion that you have, those broken legs, the black eyes, those aren't actual injuries to you, because you consented to expose yourself to the risk that those things will happen to you."

The same thing happens in the context of pregnancy. When a woman has exposed herself to the risk that she'll become pregnant by consenting to having sex with a man, should the risk materialize and should she become pregnant, she may justifiably identify her unwanted pregnancy as an injury although she consented to exposing herself to the risk that she would be injured. . . .

RAQUEL ALDANA, DISCUSSANT

. . . I want to begin first with the theme of in-between law that you raised, Ms. Koga. I won't repeat a lot of what you explained, but one of the things that you were talking about was lost complicity and in placing the Chinese victims in -between the law when they went before the Japanese tribunals. . . . I want to suggest that part of what is going on has to do with Japan being a former empire and even in the post-empire years still holding on to the vision of empire, both for itself as an identity, but also the way other nations identify Japan.

. . . I was just thinking about this as a way of thinking about how also the culture of empire both as an identity as a nation and also the way nations are perceived as developing nations, poor nations, versus nations with economic power, at least in the way that perhaps Japan and China, in their particular periods of time, may have defined this absence of the foreign or the international law in that context.

276. WIS. STAT. § 940.19 & § 940.225; MICH. COMP. LAWS § 750.520.

That's one issue. Another theme that you didn't speak about as much, but I was struck about . . . is the theme of economy and law. Just by way of explaining, you talk in that paper about China's complicity in deciding to settle and in some ways betray the victims by deciding to tell Japan, "Listen. You don't have to pay us reparations."

In many ways, this was an attempt on behalf of the Chinese at the time to capitalize on the economic bilateral relations with Japan. It was also at a time when Japan was at an economic advantage, at a more powerful time, economic time. It resulted in money that flew from Japan in the form of aid to China. I also found it fascinating how subsequently in this history that you tell us, Japan, when it became less of an economic power and had a lot of incentive to play nice to China, started to settle out this case, despite the fact that these cases had been unsuccessful in Japanese courts, and settled out of their own, decided to pay some of the reparations in settlements. . . .

Now, I want to move away from those broader themes to the theme that Professor Bridges talked about in a very different context . . . As I was reading your article, and thinking about pregnancies injury, the very first thing that came to my mind . . . the fact that no one ever has talked about pregnancy as injury. I'm thinking, if there were mass rapes, there must have been pregnancies all over the place that were the direct result of this brutality and it's so invisible.

. . . As an enhanced, in the same way that it's being discussed in the rape situation here in the U.S., whether rape as an injury even plays a role, especially when in the most obvious cases, where it's being used as a war weapon, where it would perhaps seem less controversial to suggest the idea that rape should be treated as injury.

Having said that, one of the reasons that I don't think that it may happen is because of the implications on the remedy, which is, if you treat it as an injury, then what's the remedy, and of course abortion comes up.²⁷⁷ I think that the clash of cultures . . . I think that if we try to bring the idea of pregnancy as injury beyond the U.S. to a global setting, in particular in the context of contested law, like human rights, I don't see how it would win because of the implications on the remedy as abortion.

. . . The final thing that I want to say is to tie the paper a little bit to our Professor Stevens' work on trauma and the implications that involve reparations. One of the themes that Professor Koga didn't get to talk about is in her paper, she describes beautifully the process of victimization and the silence that followed.

277. See MICH. COMP. LAWS § 750.520a(n); NEB.REV. STAT. § 28-318(4) (2012); *Cross*, 45 Cal.4th at 66. Both statutes list pregnancy as a "personal injury" among other "personal injuries" such as disfigurement, chronic pain, and mental anguish. Even though pregnancy is listed as a "personal injury," there remains an issue as to when pregnancy qualifies as a "personal injury." In *People v. Cross*, the Court avoids deciding whether every pregnancy resulting from unlawful sexual conduct, forcible or otherwise, will invariably support a factual determination that the victim has suffered a significant injury within the meaning of the statute at issue. Instead, the court concluded based on the facts of the specific case.

Both self-imposed, but also imposed on the victimization of the Chinese. You describe how, in some instances, some of the victims haven't spoken about it at all, even to their own children as a choice, in order to rescue them from the trauma that they had experienced.

Certainly, I think that the natural tendency in situations as traumatic as crimes against humanity is silence as a response. It's also very natural, sometimes self-imposed as a self-censor mechanism, but sometimes through law, like amnesty for example, and also, through the rhetoric of forgiveness. It's better to forgive than to hold onto that pain. I was thinking about that and then I was thinking about how the type of intervention that you're talking about, that is immediate intervention, doesn't happen. It just doesn't happen with respect to a lot of these victims. Or, it doesn't happen right away.

. . . It made me think about the disconnect between legal processes and the psychology of trauma and how careful we need to be. . . . We have to balance on the one hand the need for collective reparations and breaking the silence, and on the other hand, the psychology of trauma and learn more about how to deal with that in the context of atrocity and trauma. That's all. Thank you. . . .

Professor Michael McCann, Rapporteur: The Rapportuer is going to rap to wrap things up . . . Yesterday, we mostly talked about individual injury and individual experience . . . A lot of focus on [the] construction of the rights bearing, self or rights bearing subject. [There was also] some attention to collective experience, collective injury, and collective experience with the injury yesterday. . . . That was much more front and centered today.

I think that the collective injury, collective experience, and collective action around injury is an important issue that's different in some ways than [the issues raised by] individuals . . . You have the related issues . . . which both individuals and collective injuries raise, about gender, about race, about class, about larger questions that go to inequality. . . .

. . . . Then there's the temporal dimension . . . we were introduced to the temporal dimension dealing with past horrors and injuries. Yesterday, with Johnson's piece, it came up a few times. But it's much more front and centered today.

I want to talk about a couple of the papers—expand on those themes just a little bit. First of all, if you go to [Maurice] Stevens' paper . . . What I was most intrigued about the paper was almost a sort of, not an afterthought, but a secondary or tertiary issue in the presentation itself. . . . It's the kind of medically licensed individualized way of dealing with trauma. It's a way of dealing . . . [that can be] . . . an evasion of dealing with the larger sources of what the injuries were and the political responses and [also] thinking about how it might redefine the community.

. . . I would want to suggest that that's a big part of what we should look for and think about and analyze in responses to mass injuries, catastrophes and so

forth. One kind of example . . . [is] mourning after mass injuries²⁷⁸ . . . If you've ever been to . . . you can actually go to the Tenement Museum and see what the conditions of garment production was like in Manhattan. I urge you to go if you're close by.

The thing now—a fire broke out, a couple hundred people died. It was very tragic . . . men and women, but they were mostly Italian and Jewish. What happened as a result of that was a moment that exposed precisely the issues about exploit working conditions, unsafe working conditions, and regulation.²⁷⁹

. . . That led to a kind of national reconsideration about the conditions of these workers. That led to . . . [looking] at the workplace conditions, the issuing of regulations, raising wages of the workers, and also a broader change in the racial constellation of America. Italians and Jews who had been largely excluded as non-white or not part of the WASP sort of majority, now we're included in the dominant society near white they were accepted as white . . .

The tragedy is a moment of reconsideration and reconstruction. Although at the same time that it expanded to immigrant groups as a sort of white status, part of the community of rights bearing individuals, not fully, but a big step forward . . .

. . . . Mass injury can be an opportunity for reconstruction. It can also be a moment for evasion. That really connects very much [with] Yukiko Koga's argument. . . . 9 -11 . . . could have been a moment for another reconsideration. We could have reconsidered a . . . policy in what we were doing around the world that had something to do with the roots of terrorism and why so many people hate us and want to wreak violence on the nation and killed these people.

It could have been a moment to reconsider the difference between individual innocent people who died in the Towers and collective non-innocence—that responsibility that we bear. That could have been a moment . . . but that wasn't the moment. Instead, what we did was engage in a military campaign. . . . It's a way to not have a political conversation about what are we doing? What is our sense of responsibility? What kind of reconstruction might have taken place?

We can think about collective injuries as a potential redefining moment for who we are . . . you've seen Yukiko's Koga story about the Chinese dealing with these injuries. . . . What we have is kind of . . . a kind of erasure of the memory [and] responsibility for what took place.

In many ways, that's what I would say happened with 9-11. That's one way to interpret that. Those are two different models of what can happen. Thinking politically about how we deal with mass trauma, mass injury, trauma that causes injuries.

278. See Bender, *supra* note 40, at 260 (asserting that tort law must continue to develop so that it raises our legal consciousness about the necessity for appropriate remedies for dignitary harms and personal harms caused by social inequalities such as mass injuries).

279. Doug Linder, *The Triangle Shirtwaist Factory Fire Trial*, UMKC, <http://law2.umkc.edu/faculty/projects/ftrials/triangle/triangleaccount.html> (last visited Feb. 22, 2015).

Thinking about collective injury invites us to raise some questions of a different scale in significance than just individual injury. Both of them provide an opportunity for raising issues of structural inequality, gender race relations, ethnic relations, religious religion, and so forth.

...

Two things. The value of a comparative to cross-national and cross-regional and cross-temporal. . . . types of stud[ies] when we're looking at how these issues play out. . . .

The other thing that I would mention . . . is . . . [that] increasingly we need to think about the . . . national law, primarily secular law. . . . [and] its intersection with religious law, often in separate legal systems within the nation's state. . . .

