Introduction

Tort Law as Cultural Practice

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The chapters in this book examine tort law's norms, institutions, and procedures as cultural practices. Few observers, regardless of their academic background, their role in relation to tort law, or their political leanings, would challenge the assertion that tort law is a cultural phenomenon. Nor are they likely to reject our working proposition that tort law plays a role in constituting the very cultural fabric in which it is embedded. Yet, despite this consensus, it is surprising to discover that a rigorous exploration of tort law's cultural dimensions has rarely been attempted and that there is virtually no agreement across disciplines as to how such a study should be conducted. Tort law as a form of cultural practice has remained terra incognita. Even the pathways into this unexplored territory are but dimly perceived.

In this volume, a group of leading legal scholars and social scientists has embarked on a voyage of exploration. Drawing on the pioneering work of important precursors, these authors have begun to map the uncharted land. Their work not only identifies useful roadways for those who might follow, but it also demonstrates a variety of techniques by which the journey might be attempted. This collection makes no claim of completeness nor does it claim to have identified a single superior methodology or discipline. Rather, it identifies a large, potentially important area of inquiry and offers some illustrative attempts by a talented group of scholars to reveal the riches that future explorers might discover there.

This initial foray has two important features. First, it is multidisciplinary. The contributors come from different academic fields and departments, including

law, political science, sociology, anthropology, policy studies, and psychology. Through an ongoing conversation about their work, this diverse group of scholars generated mutual understandings and exchanges of insights, making this a truly *inter*disciplinary effort. Second, the collection is explicitly committed to comparative cross-cultural and historical study. Although some of the essays focus on tort law in the United States, others examine practices in quite different social and cultural settings, especially in Asia and Europe. Some draw comparisons across two or more societies or time periods. For reasons we will explain shortly, we think that such a comparative, multi-sited cultural approach to the study of tort law by interdisciplinary scholars is a relatively novel and, we hope, important contribution.

Cultural Dimensions of Tort Law Doctrine

Select any opinion from a first year U.S. torts casebook and you will find references to culture—both explicit and implicit—on nearly every page. As appellate court judges construct the common law of torts case by case, they use building materials that they quarry from their social and cultural environment. The resulting legal edifice reflects its surroundings even as it attempts to reshape them. Cultural elements are everywhere apparent in the practices and products of tort law. For example, the jury, drawn from an imagined but largely fictitious "community" in which cultural values and social norms are said to be shared, makes crucial pronouncements in tort cases about proper and improper conduct. In making these decisions, jurors are expected to deploy an avatar, the ubiquitous "reasonable person," who embodies typical cultural and social practices found in the community. Judges, too, rely on their presumed knowledge of the cultural environment when they dismiss some cases on the grounds that no "reasonable" jury could view them as meritorious, when they characterize certain behaviors as outrageous or acceptable, or when they express concern that tort law might suppress some activities to which they assume society assigns a particularly high value. All of these typical tort law practices rest on an assumption that judges, lawyers, and jurors are able to "read" their own culture to determine what is considered reasonable, outrageous, or valuable and that they can—and should—rely on such readings to inject cultural norms, values, and behaviors into the tort law system.

Some researchers have sought to highlight and analyze the cultural expressions they discover in tort law texts, but the cultural dimensions of tort law are apparent not only in case law doctrine. It is not enough to sift through the opinions of appellate court judges like an archaeologist in search of cultural shards. Culture is not some "thing" outside of tort law that may or may not influence legal behavior and deposit artifacts in the case law reporters. Rather, tort law and culture are inseparable dimensions of a single domain in which risk, injury, liability, compensation, deterrence, and normative pronouncements about acceptable behavior are crucial features.

Conceptual Limitations Resulting from the Tort Reform Debate

Because tort law expresses and constitutes cultural meanings on so many different levels, one might expect to find an extensive interdisciplinary literature exploring their interrelationships. It is somewhat surprising, then, to discover that scholars have generally neglected systematic analysis of this topic. Legal scholars have by and large confined their attention to culture as they see it reflected as an extralegal influence in appellate court opinions (see, e.g., Shapo 2003) or to nonempirical allusions to presumed cultural norms such as individualism, adversarialism, rights consciousness, and litigiousness. Social scientists have tended to focus on quantitative demonstrations that judges, jurors, and litigants have not, in fact, run amok or brought industries and medical professionals to their knees, as the media typically suggest. Tort law as an element or domain of culture has, however, gone largely unexamined.

This book is intended to address what we consider an important gap in the literature about tort law. The subject of culture is the purloined letter of tort law scholarship, almost too obvious to consider in a rigorous and systematic way. Yet we think there is another reason for this curious neglect of what should be a central topic for tort law scholars. Interdisciplinary researchers have allowed politics to set their research agenda. The debate over "tort reform" has, for more than two decades, defined the terrain that is considered legitimate and important for sociolegal research to explore.

Contemporary sociolegal scholarship on tort law has a surprisingly short history. As recently as twenty-five years ago, it would have been accurate to say that empirical research on the criminal justice system was broader, deeper, and

far more sophisticated than research on tort law, although crimes and torts are closely related phenomena. Over the past quarter century, however, social scientific research on tort law has flourished. We can no longer complain that we know little about the actual workings of tort law in the United States or the flow of cases from relatively informal or unofficial contexts through lawyers' offices and into the courts.

Even as our knowledge of the tort system has expanded, however, our insights into "tort law and society" have been limited by the predominant theoretical and policy frameworks. Of these, the most influential by far is the debate about the so-called "litigation explosion" conducted in the halls of Congress, the pages of popular magazines and newspapers, and the multiple forums of academia. The contours of this debate are now familiar. Tort "reformers" assert that tort litigation in the United States has vastly increased, that greedy plaintiffs sue at the drop of a hat, and that unscrupulous lawyers encourage thousands of frivolous lawsuits in order to collect their contingent fees (e.g., Boot 1998; Howard 1994; Huber 1988; Olson 1991). These assertions are widely accepted as factually accurate by much of the public, and they are repeated by news reporters, media commentators, politicians, and talk show hosts (see generally Haltom and McCann 2004), often accompanied by distorted or unverifiable urban legends about supposedly ridiculous lawsuits that clog our courts (Baker 2005; Daniels and Martin 1995, 1998; Galanter 1998; Haltom and McCann 2004; Hayden 1991).

Not surprisingly, much of the current sociolegal research on U.S. tort law has been undertaken in response to the litigation explosion critique and the "tort reform" movement it has spawned, with its call for caps on noneconomic and/or punitive damage awards, the elimination of joint and several liability, the establishment of screening panels for medical malpractice cases, and other restrictions on claiming and recovery by tort plaintiffs. Empirical research has been largely positivistic, behavioral, and quantitative, designed to measure whether tort litigation has actually increased over time or is "excessive" in comparison to other types of litigation (e.g., Galanter 1983; Saks 1992). It has examined not only the supposed excesses of clients and lawyers but also the actual behavior of jurors, who have also been the targets of critics because of their supposed credulity, irrationality, and largesse in bestowing enormous damage awards on undeserving plaintiffs (examples of important empirical research on juries include Hans 2000; Lempert 1993; MacCoun 1993; Vidmar 1995, 1999; Vidmar, Gross, and Rose 1998). Further, a growing body of research examines patterns in

damage awards themselves, with particular attention to punitive damages, since empirical evidence appears to contradict the critics' assertion that such awards are excessive and out of control (see, e.g., Daniels and Martin 1998; Finley 1997; Galanter and Luban 1993; Saks 1992).

Studies such as these have provided a far more extensive picture of the entire tort law "pyramid," beginning with injurious incidents in the pyramid's base and tracing the cases that injured persons perceive as wrongful as they travel through various levels of the tort law system—lawyer interviews, negotiations, filing of complaints, trials, verdicts, postadjudication processing, and appeals—or are abandoned. One of us (McCann) has dubbed this the "realist" school of empirical research on tort law. We view most empirical scholarship on tort law as a direct response to the tort reformers and the litigation explosion debate. Empirical research has therefore been shaped largely by immediate policy concerns of a very particular kind and has been aimed at debunking unsupported, anecdotal assertions about tort law with sophisticated, scientifically valid evidence.

We applaud and endorse much of the realist research on tort law, and we acknowledge that it has shed valuable light on a subject of great importance to American society. Yet this book arises out of a concern that the demands of this policy debate have been overly influential in determining our research agenda and have limited the theoretical significance of sociolegal scholarship on tort law. We wish to reclaim a broader, more culturally informed view of tort law that is not entirely shaped by immediate policy debates. We suggest that the scholarly foundations of such a view already exist, both in research on American society and in comparative studies of injuries and tort law in other societies around the world.

Toward a Cultural Approach to the Study of Tort Law

Scholars use the term *culture* in many different ways, and we do not attempt to advance any singular concept or approach in the book (see Friedman 1997; Nelken 2004). Nevertheless, the cultural analysis that the authors in this volume offer exhibits some clear and consistent themes. In general, they view cultural analysis as attending to the experiential frames of meaning through which social life is understood and transacted. As such, culture is not a separate variable to be isolated and studied for its independent causal significance, but rather it refers to the discourses, logics, and norms that structure and render meaningful

the practices of humans in various social contexts. Culture is not distinct from either the institutional processes that organize social life or the instrumental pursuits of interest by citizens, but rather it is constitutive of both. Our approach focuses on cultural understandings and norms as they are *enacted* in social practices. Culture, we might say, is practical meaning-making activity at work. To study tort law from a cultural perspective thus is to inquire about the specific categories of meaning construction that inform tort law practice, to locate these within densely mapped contexts of social interaction, and to examine their interrelationships with other forms of knowledge—especially other domains of legal discourse and extralegal moral, religious, technical, and familial discourses—that constitute social life. In other words, we ask how tort law is nested within and matters for the larger web of relationships and for the widely shared ways of thinking, talking, and acting that organize social life in particular times and places.[1]

In this sense, law, and tort law in particular, is a rich subject for cultural analysis. On the one hand, legal texts, ideas, and conventions are an important *source* of cultural values and understandings in most social contexts, and legal institutions are dynamic sites for making sense of the interplay among people negotiating social relationships through the use of legal resources (see Swidler 1986). On the other hand, legal practice in most societies offers a large, often transparent *window* through which one can view cultural norms, values, and practices in action, including those that are not necessarily "legal" in pedigree. After all, we know that judges, juries, attorneys, and litigants often draw on a wide array of cultural values, many of which are not uniquely or directly derived from formal law, in practical interactions within institutionalized legal settings such as courtroom trials (Conley and O'Barr 1990; Merry 1990; Rosen 2006; Yngvesson 1993). When we recognize further that the language, concepts, and images associated with law saturate mass-generated popular culture in television, movies, novels, cartoons, and the like, the cultural dimensions of law become at once more salient, more complex, and more challenging (Haltom and McCann 2004). Legal norms are distinguishable from, yet often intricately related to, extralegal norms such as religious, moral, technocratic, professional, and other group-based norms or values. Although law and culture can be understood as analytically distinct categories, therefore, in practice they are inseparable and mutually constitutive. A *cultural approach* to the study of tort law thus emphasizes the ways that legal practice is embedded within the larger framework of cultural norms, routines,

and institutional relations (Greenhouse et al. 1994; Rosen 2006). It revels in identifying the complexities of those relationships, which often are ripe with paradox, contradictions, and puzzles for the sociolegal analyst.

Specifically, the authors in this book view tort law as one set of cultural responses to the broader challenges of addressing risk and assignments of responsibility, compensation, valuation, and obligation related to injury that may be shared with or addressed by a range of other social institutions. Most scholarship by professional legal scholars addresses the black-letter constructions of these concepts and values by scrutinizing official reasoning by judges. But even that scholarship underlines the indeterminacy, contested character, contingency, and changing meanings of official tort law constructions. Indeed, it has become commonplace among empirically oriented scholars to view tort law as one of the most discretionary, dynamic, and indeterminate areas of legal activity in the United States. Its open-textured qualities allow great latitude for meaning making by all the actors in the tort law system and make tort law a particularly important site for the articulation and dissemination of cultural norms and images.

Moreover, there is much reason to think that the actual black-letter rules of tort law do not tightly constrain decision making by judges, juries, litigants, attorneys, and ordinary disputants. Key concepts, such as proximate cause and assumption of the risk, are notoriously slippery and easy for result-oriented advocates and judges to manipulate. The doctrine of strict products liability, considered revolutionary when it was widely adopted in the 1960s, soon became riddled with elements appellate court judges drew from the negligence regime it had supposedly replaced. By the time the American Law Institute promulgated the so-called Products Liability Restatement in 1998,[2] "strict liability" was all but banished from the text. Moreover, even when judges endorse relatively "strict" versions of strict liability and instruct juries to apply them, empirical studies have often demonstrated that the issue of fault remains central to the jury's—and the public's—assumptions about blame and liability in American society. Hence our chosen title for this volume, *Fault Lines,* which underlines the broader discursive themes that permeate tort disputes in many contexts regardless of doctrinal categories.

Broadly speaking, empirical studies have further demonstrated how cultural understandings of risk and responsibility have shaped legal discourse and decision making from the everyday experience of "naming" an injury to decisions to "claim" a right, to advance a dispute, to contact an attorney, and to formalize

claims in official legal forums (Engel 1984; Haltom and McCann 2004). "The identifying elements of legal culture," posits David Nelken in Chapter One of this volume, "range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behavior such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations, and mentalities" (see p. 22) As such, cultural studies of tort law expand our understanding about the intersections of official legal doctrine and the broader normative or disciplinary discourses and institutional practices that constitute social life.

Advantages of the Comparative Perspective

Our emphasis on comparative study of cultural legal practices follows from these basic assumptions. We stress the comparative dimension, because we believe it is difficult to discern, much less to theorize about, the cultural aspects of tort law without comparisons to other social contexts where the perceptions of injury and risk, adjudication and compensation, are quite different (Nelken 1997). Comparison of variability across space and time can, for one thing, help to identify elements of contemporary U.S. tort law that may go unnoticed, be taken for granted as common sense, and thus be accorded little analytical attention. The focus on differences across space and over time enhances understanding of practices that we may overlook in our own culturally grounded experience. Moreover, the comparative enterprise can aid in analytical efforts to connect tort principles and practices to broader discourses, norms, and institutionalized relations in which the former play a constitutive role. It can aid in identifying the complex interdependencies as well as tensions among tort law and insurance institutions, health care providers, government regulators, and the like in different cultural settings. At the same time, comparative analysis can aid in normative assessment regarding the merits or failures of both tort law and broader constellations of practice in various times and places. This is essential to informed judgments about how well tort processes perform as well as to debates about institutional reform, even though that is not a primary goal of our inquiry. For American readers, comparisons to other societies can highlight the unique—some would say peculiar—features of our common law approach to tort law, tied as it is to the contingent fee, extensive pretrial discovery, and an expansive role for civil trial juries (Chase 2005). Finally, knowing more about

cultural practices related to torts is arguably valuable for the larger enterprise of theorizing in sophisticated ways about law generally. If legal systems are as pluralistic, loosely coordinated, and "messy" as much contemporary scholarship insists, more knowledge about particular understudied domains of legal practice should enhance understanding about the larger phenomena of legality.

Our approach in assembling this collection has been comparative in several specific senses. First, many essays compare familiar American practices and institutions to those in other societies, including but not limited to India, Thailand, Japan, the United Kingdom, Canada, and Italy. This explicit cross-national comparative dimension alone renders our volume a unique contribution to the sociolegal study of torts. Second, a number of studies in the following pages emphasize comparisons across moments of history within particular societies, often providing a developmental perspective on how changes in tort practices have been interrelated with other social changes. Both types of comparative analysis will advance our contention that "culture" should not be viewed as static, singular, or essentialized but, rather, should be examined in terms of its multiplicity and variability across time as well as space. The inclusion of some studies of tort law over time should illuminate the conditions in which social responses to injuries change and deliberate efforts at reform are attempted and with what results. Attention to the contemporary forces of globalization in particular may help us to explore changing practices of and debate about tort law in particular research sites. Such attention to challenges of exploring differential practices in various spatially and temporally bounded contexts highlights yet another meaning of our volume's title, *Fault Lines*.

Third, the essays provide comparative perspectives on how tort law constitutes differences among citizens within particular contexts. A number of the essays will interrogate the implications of different tort systems for race, class, gender, ethnic, religious, and other forms of social differentiation. Feminist analysis of the gendered dimensions of tort law and broader cultural norms in particular receives extensive attention in several of the chapters in the volume. Our focus on tort law in relation to all of these forms of social differentiation underscores our commitment to analyzing culture in terms of power relationships and inequalities. We ask how tort law contributes to or challenges the larger patterns of who gets what, when, and how, and of institutionalized privilege and marginalization. To ask how constructions of norms matter in and for tort law is to ask fundamental questions about the organization of social power, hierarchy, and

inequality. These are core questions at the heart of our analytical project. And this emphasis on differential distributions of power dividing citizens and social groups in various contexts defines yet a third nuanced connotation of our book title, *Fault Lines.*

Organization and Content

The essays in this book are grouped into five sections. We begin in Part One with two quite different but complementary essays regarding puzzles and challenges faced by cultural analysts of law generally. Both of these essays were written by scholars whom we invited to comment on the separate substantive essays as a group and to provide an overview perspective on tort law as cultural practice. We were drawn to these scholars in part because they are from outside the United States and specialize in the comparative cultural study of legal practices.

David Nelken's essay (Chapter One) adapts his classic, genre-defining work on comparative cultural study of law to tort practices. His organizing idea is "legal culture," a concept directly related to our focus on a cultural approach to analyzing law, thus making it an appropriate essay to start the collection. Nelken structures the essay around two large theoretical issues concerning cultural analysis. First, he raises a series of complex questions about how we choose the appropriate units of comparative cultural study. He argues that a focus on comparisons across nation-states should give way to more nuanced studies of differential microcontexts within nations as well as macrolevel processes such as colonialism and globalism that transcend state boundaries. Second, Nelken addresses the fitting question of what cultural analysis offers or "does" for our understandings of law. The essay weaves explicit references to other studies that follow in the book together with Nelken's own comments about tort practice in the legal culture of contemporary Italy.

Keebet von Benda-Beckmann (Chapter Two) adds a further comment on the concept of legal culture in relation to comparative tort law analysis. Her primary goal is to interrogate the concept of "community," which is frequently invoked in discussions of tort law. For example, analysts often assert that juries are uniquely qualified—as representatives of *the community*—to apply shared norms in performing such tasks as the determination of negligence or the assessment of punitive damages. From an anthropologist's point of view, however, the concept of community that underlies such assertions is incoherent. As von Benda-

Beckmann observes, communities are actually heterogeneous, dynamic, and divided along lines of differential (class, race, gender, ethnic) social power, thus complicating all questions about who can speak on their behalf. Moreover, communities can be defined in many different ways, not only by geography but by common norms and interests, by shared knowledge, or by shared experiences. Even if it were clear which meaning of *community* is intended, there would be no reason to think that juries are more representative than judges. In the end, the concept of community and the representative role of the jury in relation to it should be understood as legal-cultural artifacts that demand interpretation rather than as statements of obvious social facts.

Part Two shifts from general discussion about the puzzles and challenges at stake in cultural analysis of law to four quite different scholarly examples of cultural analysis applied to tort practices. The aim of this section is to underline the very different types of projects through which scholars can explore the cultural dimensions of torts as practical legal activity. While each study focuses on one particular national context, the general analytical approaches and methodologies offer rich models for study and comparative analysis in general.

Marc Galanter (Chapter Three) starts the section with an intriguing macro-historical study of tort law practice in India since the late nineteenth century. His essay explores why torts play such a minor role in India's robust and flourishing legal system, one in which scarce and congested courts, immense backlogs, reputed litigiousness, and highly visible judicial intervention in public life coexist with low rates of court use by citizens and infrequent resort to tort claims. The essay shows how popular cultural stories of widespread litigiousness mask actual low rates of tort claiming, high rates of delay that discourage tort action, and heavy reliance on criminal penalties to do much of the legal work that torts might otherwise do. Despite some similarities to the United States in this regard, Galanter identifies a growing appetite for tort recoveries specifically in the area of intentional torts involving personal dignity and demands for increased compliance with caregiving duties rather than monetary compensation.

Tom Baker's essay (Chapter Four) explores and problematizes the boundaries between torts and criminalization through the lens of insurance law and practice in the United States. Just as the insurance industry has struggled to define insurance as fundamentally different from, and therefore not about, gambling, so too has the insurance industry struggled to define liability insurance as disconnected from crime. As with the more fully explored relationship between

insurance and gambling, the relationship between insurance and crime depends more on culturally and historically specific images and ideas than on logical distinctions that can withstand critical analysis. Therefore, careful study of how the insurance industry ensures that it protects policyholders from tort liability, but not criminal liability, can help us better understand the culturally salient images and ideas that define the boundaries of the civil (as opposed to criminal) justice system.

Valerie Hans (Chapter Five) follows by addressing an equally fascinating question. In short, how and why do core concepts of tort law—judgments of injury, liability, the reasonable person standard, and the appropriateness of compensation—become defined by the jury's infusion of extralegal social norms and cultural understandings into its decision making? Hans draws on existing empirical research to interrogate the various institutional and psychological factors that facilitate the discretionary cultural construction of injury cases by American jurors, enabling her to offer a variety of insights about how and when this mix of generically legal and extralegal cultural norms matters most. Hans thus continues the project of examining the construction of tort law boundaries undertaken by Baker. At the same time, she raises an issue that is addressed in the chapter that follows: what are the sources of knowledge and norms in society that shape tort law?

William Haltom and Michael McCann (Chapter Six) inquire into the sources and content of popular understandings about personal injury from which jurors, judges, attorneys, and litigants enact tort law in practice. Haltom and McCann begin from the premise that much "public interest" tort litigation seeks explicitly to shape public perceptions, debates, and policy preferences on matters of personal injury, including especially harms created by mass-produced corporate products. Using tort litigation against fast-food vendors as a case study, the authors explore how the news media both construct dominant frames regarding legal "responsibility' and highlight key characteristics of participants in litigation over fast food. The study shows that news coverage has privileged cultural norms of "individual responsibility" while ridiculing plaintiffs and, especially, their attorneys, thus skewing moral and political debate in favor of corporate producers and to the detriment of consumers. Media coverage tends to eviscerate the transformative public goals of public interest litigation to discredit its advocates, and to ignore expressed demands for enlarged government responsibility almost entirely. The findings expose the challenges faced by legal advocates of reform

as well as document the institutionalized (re)production of legal knowledge and values that shape the cultural context of tort disputes in the United States.

In Part Three, the authors ask how tort law doctrine grapples with fundamental cultural categories such as personhood, mind and body, gender, race, and injury. They carefully examine how tort law attempts to define the injuries humans might suffer and the remedies that tort law provides or denies. In so doing, these authors illuminate the interconnections between tort law and culturally based assumptions about the "essential" qualities of individuals and the perceived status of different kinds of individuals in society. These essays on harms to the body and the mind are therefore deeply concerned with the ways in which tort law responds to issues of inequality, stigma, and discrimination arising in particular from gender, race, and sexual identity.

Martha Chamallas (Chapter Seven) examines the intentional infliction of injury to emotions or reputation through outrageous conduct that evinces racial or gender-based discrimination, harassment, and other forms of oppressive behavior. Tort law has tended to respond ambivalently at best to such claims and to reinscribe cultural patterns of racism or sexism when attempting to define the "outrageous" conduct that would give rise to liability. Chamallas argues that confining these cases to civil rights law has permitted unsympathetic judges to impose rigid limits on antidiscrimination claims, particularly in the workplace, and may reinforce the perception that they are specialized matters somehow separate from the cultural mainstream. To the extent that tort law permits antidiscrimination claims to "migrate" from civil rights law, it can acknowledge their broader cultural acceptance and also reaffirm the role of tort law as an enforcer of core cultural norms.

Anne Bloom (Chapter Eight) focuses on a type of body that is considered culturally anomalous—that of the intersexed person who has biological features of both males and females. Bloom demonstrates how courts may deny tort claims brought by transsexual plaintiffs because the judges impose an "either-or" categorization of the plaintiff's gender. Neither federal nor state law defines how a person's sex is to be determined and, as a result, the courts have been left to devise their own criteria for sexual categorization. To illustrate this, the essay draws upon a variety of tort cases, some involving transsexuals and transvestites but also many ostensibly "run of the mill" tort cases, involving product liability, medical malpractice, and other types of claims, where sexual identity is not directly at issue. An analysis of these cases reveals both the continuing reliance

on an understanding of sex as a pre-political biological given in American tort law and the fragility of the assumptions upon which this understanding rests. By continuing to base legal rulings on these assumptions, Bloom argues, courts effectively enforce prevailing binary understandings of gender and, indeed, produce their own legal/cultural norms about what it means to be a man or a woman. Finally, the essay connects the question of tort law's role in the regulation of sexual identity to a broader set of issues about the role of the body as a site of political and legal contestation.

Jennifer Wriggins (Chapter Nine) concludes this section of the book with a survey of race in tort law cases during the first half of the twentieth century. Although race has been extensively researched in the criminal justice system, its role in tort law has attracted very little scholarly attention. In part, as Wriggins observes, this is because tort law was presumed (by white observers) to be white and therefore not racial. Whiteness was understood as the "default" identity of litigants and witnesses, and the tort law decision makers—judges and jurors—were also generally white. Wriggins problematizes these assumptions and shows that whiteness was actually associated with a presumed set of attributes drawn from the culture in which tort law operated. In her comparison of damage awards for black and white decedents in wrongful death and survival cases in Louisiana from 1900 to 1949, Wriggins finds that the use of racist imagery and language was in tension with the general principle of equal treatment. In order to avoid an explicit disregard for equal treatment in tort cases, judges resorted to complicated and essentially segregated analytic frameworks to justify the much smaller damage awards for black versus white decedents. Accordingly, damage awards were sharply skewed by race, and patterns of inequality in the broader society were reproduced in the outcomes of tort litigation.

Part Four shifts attention to the themes of risk and responsibility in tort disputing, focusing on the types of macropolitical issues of legal culture that Haltom and McCann's essay raised. This section offers the most explicit examples of comparative cross-national study in the book, with the four studies variously addressing practices in the United Kingdom, Japan, and the United States.

Charles Epp's essay (Chapter Ten) examines the sudden emergence of tort lawsuits challenging police misconduct in the United Kingdom in the 1980s. He compares the legal culture of the United Kingdom, which traditionally has relied on top-down managerial approaches to accountability issues, to that of the United States, where populist approaches, including tort litigation, have

been prominent. The analysis shows that, despite these different national traditions, there has been some degree of convergence. In the United Kingdom, the interaction among activist strategies, jury decisions, and newspaper coverage reconstructed the issue of police brutality and racial bias, generating trends that paralleled familiar U.S. models. The study thus balances attention to differences between legal cultures with interesting insights into the processes by which some degree of convergence can develop in a globalizing world. Even with convergence in institutional strategies on some levels, however, Epp shows how the meanings of similar legal practices can continue to differ in important ways.

Lynn Mather (Chapter Eleven) presents a study that is very similar to Epp's, although she focuses her comparison on the different trajectories of litigation against tobacco companies in the United Kingdom and the United States. Like Epp, Mather places great emphasis on differences between legal institutions and culture in the two countries to make sense of the fact that litigation in Britain was far less consequential than in the United States. Particular attention is extended to expectations and incentives for lawyers, judges, and juries in the two countries, and, following the earlier essay by McCann and Haltom, to media coverage of the litigation campaigns as well as to surveys of public attitudes toward lawsuits seeking recovery for injuries. Mather concludes her study of differences by, like Epp, examining changes in British law that are altering traditional tort practices in the United Kingdom to make them more like those in the United States.

Eric Feldman's study (Chapter Twelve) of medical malpractice litigation highlights what he views as a profound shift in Japanese legal culture. After World War II, the tort law system tended to create incentives to divert litigants and potential litigants from the courts to nonadversarial settings where disputes could be resolved without publicity and without the articulation of new social norms. At the most, tort law functioned as an early warning system to alert the ruling elites that they must create new institutional responses to important social issues. In contemporary Japan, however, things have changed. Tort law now attracts larger numbers of claimants who appear galvanized by an emergent sense that formal legal activity is socially acceptable and efficacious. Structural and procedural reforms have both legitimated tort litigation and made it more feasible than in the past. Medical malpractice litigation thus provides a striking illustration of a significant transformation of Japanese legal culture in the direction of adversarial legalism and away from a presumed avoidance of tort law.

Takao Tanase (Chapter Thirteen) raises similar questions about the evolution and current characteristics of tort law in Japanese legal culture, but he suggests that in the Japanese context adversarial legalism is by no means an end in itself. Tanase's study focuses on tort claims related to asbestos exposure, a problem discovered relatively recently in Japan. He observes that tort victims and their lawyers do indeed appear quite willing to press their claims, not only before workers' compensation tribunals but in court when necessary. Nevertheless, Tanase contends, the claimants support the collective goal of "equal justice" over the individual goal of "full compensation" in these cases. Viewing the Japanese government as the party primarily responsible for these calamities, litigants seek solutions that provide some compensation to every victim rather than ensuring that a few victims receive the full payment they may deserve. Moreover, the ultimate goal of litigation is to forge an administrative-compensation system that will remove asbestos cases from judicial control. As one of the litigants observed, "Litigation is necessary to make compensation available without litigation."

Part Five explores three key tort law concepts—causation, duty, and obligation—across time and space. All three concepts are highly contested sites in which varying meanings are asserted by different groups of social actors. Here we see with some clarity how legal and cultural interpretive frameworks can sometimes clash and at other times reinforce one another in times of social change and struggles for power.

David Engel (Chapter Fourteen) examines one of tort law's core concepts—causation—in comparative perspective, drawing on materials from the United States and Thailand. Citing Wex Malone's classic article on causation in American tort law, Engel suggests that the causation requirement in tort litigation is a crucial site of tension between legal doctrine and societal norms and beliefs. By analyzing this tension, researchers can better understand why tort law is embraced or rejected—and by whom. In Thailand, it is relatively obvious that the highly simplified concepts of causation in litigated tort cases bear little relationship to the rich, multicausal narratives offered by injury victims in personal interviews. Popular understandings of causation, associated with recent transformations in Thai culture and society, ultimately lead Thai injury victims away from law. In American society, popular discourses of causation are highly variable and contested, but victims tend to construct interpretive frameworks that are distinguishable from tort law and stand in opposition to it. This chapter demonstrates how such discourses shape and are shaped by tort law and how

they help to explain the use, avoidance, and variable role of tort law in the handling of injury cases.

Ann Scales (Chapter Fifteen) continues the discussion of causation in her chapter. She notes that prevailing discussions of causation in American tort law are linear, "scientistic," monocausal and constructed in ways that are consistent with an emphasis on individual responsibility and self-determination. Yet such conceptions of causation, she contends, fail to acknowledge long-standing philosophical demonstrations that monocausal explanations are no more than convenient inferences. They are, in the terminology of this volume, cultural constructs and not facts of nature. If the rigid and purportedly scientific concepts of causation applied in modern tort cases are indeed no more than "convenient inferences," then who is it that finds them convenient—and inconvenient? Scales presents a powerful argument that the causation requirements of American tort law systematically disadvantage and cause harm to women. They are the primary consumers of a plethora of pharmaceuticals that are inadequately tested and improperly marketed, while the drug companies rely on stringent causation requirements to shield themselves from tort liability. Scales concludes by suggesting how current causation requirements could be transformed in ways that would recognize the realities of pharmaceutical testing and marketing procedures and the harms they disproportionately inflict on women.

Nancy Reichman and Joyce Sterling (Chapter Sixteen) explore in the final chapter how changes in the social construction of legal "duty" can help to make sense of curious trends in litigation. Duty is usually defined in terms of social relationships; injury is a form of social disruption. Tort law manages definitions of both injury and responsibility. Obligations that appear in legal thought are products of specific contextual factors that have to be understood and explained. Using trial court cases and Colorado Supreme Court cases filed in Denver from 1862 through 1917, they probe the types of factors that affect the development of the concept of duty. How does the type of injury, the status of the parties involved, the relationship of parties, or the location of the accident influence the court's definition of cases eligible for tort recovery? The authors' analysis of cultural meanings at stake in tort disputes with tramways and railroads provides a host of provocative insights, many of which problematize and deepen familiar arguments about how tort law subsidized corporate development in American history.