# INTRODUCTION

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Injury has been an inescapable part of human life since the dawn of civilization. Myths, epic poems, folk tales, and great works of world literature are all replete with stories of harms – accidental and intentional – and of the quest by victims to recover and set things right. Moreover, injury has always been entangled with law. Indeed, the very word "injury" derives from the Latin stem *jūs*, meaning "right" or "law," an indication of the presence of law at the core of the concept itself. We find it difficult to speak of injury in the Anglo-European tradition without referencing the legal interest it has impaired. Every legal system in the world concerns itself to some extent with the problem of injuries and the concerns of justice they raise.

As socio-legal research flourished in the second half of the twentieth century, scholars from many disciplines explored the mutually constitutive effects of law, culture, and society. A global interdisciplinary literature on "law and society" developed that portrayed law not as an autonomous body of knowledge or set of institutional procedures, but as forms of cultural practice and meaning making. Law, it was said, is too important to be left to the lawyers; understanding law in and as practice demanded the perspectives of anthropology, sociology, cultural studies, linguistics, and political science. From this multidisciplinary point of view, law appears as a dimension of culture, as a form of both official and informal "local knowledge," and as a particular discourse for expressing the "is" and the "ought" of social life.

To some extent, the problem of injury was addressed by this expansive and highly influential body of late twentieth-century socio-legal

scholarship. Certainly the study of crime and criminal justice, which is one important legal response to the social problem of injury, has flourished among socio-legal scholars, generating thousands of studies, some of which illuminated the interaction between the justice system and criminally injurious incidents. Yet the noncriminal manifestations of injury practice, including what lawyers refer to as the law of torts, have remained oddly neglected by socio-legal scholars until relatively recently. Twenty-five years ago, in a landmark article on tort law and society, Michael Saks (1992) could still ask provocatively in his title, "Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?" In the years since Saks's article, the situation has improved somewhat, with the appearance of many new studies of civil trial juries, personal injury lawyers, the role of liability insurance, settlements and damage awards, the role of race and gender, and other relevant topics.

Yet, despite the profusion of these recent studies of tort law and society, there has been relatively little attention to the subject of our proposed book – namely, the cultural dimensions of injury and the law. Only a limited number of scholars, including the three co-editors of this book, have explored the mutually constitutive processes through which the legal and extra-legal domains of culture shape one another (like the two hands drawing one another in Saul Steinberg's famous cartoon), as they acknowledge and respond to the social problem of injury.

The primary concern of the contributors to this book, then, is not to identify and measure the effect of various independent social variables on the workings of injury law. Rather, this group of authors shares a more basic (and, we think, original) interest in the subtle, formative, interactive processes through which injuries are perceived, categorized, associated with particular cultural norms and practices, and – sometimes through the invocation of law – contested, resisted, or accepted by the injury victim and the broader public. Above all, the authors share a concern with the extent to which these cultural norms and practices related to injury tend to produce, reproduce, and even magnify inequality and injustice in society.

The chapters in the aggregate thus aim to advance comparative analytical mapping of the relationship between injury and injustice at two levels – first, how, in different times and places, injury is imagined, experienced, defined and responded to; and second, how legal institutions and cultural practices in different times and places facilitate or

impede action to reduce and redress harm. This introductory chapter and the concluding chapter will generalize about these two analytical questions with an eye to guiding future inquiries and comparative theory building about injury and injustice.

## CORE THEMES OF THE BOOK

### The Social Construction of Injuries

The contributors to this book analyze different features in the broader landscape of injury. This landscape is found in every society, though its terrain varies from place to place. In general, however, the landscape of injury is distinctly uneven. Although injury and pain are universal experiences, they are not distributed equally. Injuries invariably affect the less privileged members of society disproportionately and thus create a hierarchy of risk and harm that mirrors social hierarchies of wealth, status, class, and power. The experience of injury, in short, flows down the social pyramid and pools among those who have the fewest resources to avoid it or mitigate its consequences. Hence the contributors' recurring attention to the interconnections among injury, inequality, and injustice.

Although the disparate frequency of injury among different social classes has been well documented, the analyses here go far beyond simple quantification. The authors resist a view of injuries as natural events, as things in the world that can be readily observed, counted, and tracked. Rather, the authors begin with the premise that injury is a social construct. What counts as an injury, indeed what counts as pain itself (see Jackson 2011), is the result of complex cultural and social processes, and it is their subtle and often invisible workings in particular social settings that produce outcomes that can be considered either just or unjust. Thus, all of the contributors to this book, in a variety of ways, attempt to make apparent and explicit those aspects of injury that are hidden or taken for granted. Using the tools of cultural interpretation, they attempt to reveal the origins of injustice and inequality that become connected through social practices to the problem of injury in society.

Our cultural analysis demonstrates in particular that experiences of injury are constructed out of the repertoire of cultural resources available to subjects. These cultural resources can include a multitude of religious, moral, technical, politico-ideological, and, of course, legal norms or discourses that structure social relationships in different cultural settings. People are exposed to these multiple modes of knowledge

by their routine participation in various informal and formally institutionalized social settings. Popular understandings of injury, like most legal matters, are mediated by prior political beliefs, the social and religious networks in which individuals are situated, the frames of understanding crafted by political spokespersons, and media representations (Engel 2016, Ewick and Silbey 1998, Greenhouse 1986, Haltom and McCann 2004, Merry 1990). Many of the chapters that follow attempt to identify how structures of knowledge or discourse are deployed to construct the intersubjective worlds commonly inhabited by people who injure others or suffer injuries in particular times and places.

To some extent, the deployment of cultural knowledge in meaningful activity is a matter of relatively unreflective habit or practice, initially learned by instruction or example and galvanized into familiar routines and meaningful enactments through practical activity. At the same time, most constructivist scholars admonish against treating culture in deterministic terms; ideas do not "cause" specific meanings or choices (Pitkin 1972). Rather, experiences of injury become associated with different interpretations and practices through a complex process of meaning-making involving active subjects who operate within distinctive cultural contexts and draw on different legacies of life experience (Engel and Munger 2003). As Merry notes in her seminal study of legal consciousness, "the same event, person, action, and so forth can be named and interpreted in very different ways. The naming … is therefore an act of power" (Merry 1990: 111). People are not rendered passive by the cultural milieu in which they live their lives, but culture plays an important part in delimiting and shaping the ways they identify, understand, and respond to their injuries.

The chapters in this book demonstrate that variations in social position – by class, race, ethnicity, gender, sexuality, religion, family, intelligence, physical capacity, and the like – produce enormous variation in practical access to cultural resources of meaning making and social action, including legal mobilization. And while social scientists have done a good job tracing patterns of variation along these lines of social difference, thus making sensible how differently situated people construct meaning in their lives, the ineffable qualities of human agency and individual histories render unreliable even the most expert predictions about experience based solely on social location. Most social constructivist analysts thus balance attention to patterned features of social context, social position, and cultural discourse with attention to the often surprising dynamics of individual actions.

Injuries are variably constructed along a variety of dimensions. For one thing, differently situated people may vary in whether they come to think of harmful events as injuries. We usually identify injury with harm to our basic interests or well-being, and especially with physical or emotional pain. But some kinds of harmful and even painful experiences are not viewed as injuries. For example, people sometimes inflict damage – such as tattoos, plastic surgery, or extreme exercise that cause pain and even leave scars – on their own bodies for enhancement, but most such subjects do not view these inflictions negatively as injuries (Bloom and Galanter, Chapter 8). One reason is that the subjects typically choose to undergo these inflictions for purposes of self-expression or otherwise. Other forms of culturally sanctioned disfigurement, however, are not chosen by the subjects themselves. Pain and disfigurement inflicted on children, such as foot binding and male circumcision, are often inflicted without the subjects' consent, yet are typically understood by parents and other adults as not abusive or injurious, but rather as an enhancement of their beauty, social status, or spiritual well-being.

Moreover, many harms experienced as injury are interpreted quite variably with regard to whether the subjects should demand remedies or compensation from others. David Engel's chapter probes the variety of interpretations of harm – as accidents, as results of fate or karma, as self-imposed – that discourage claims of injury against others or on society, leading injured persons to choose to "lump it" (Engel, Chapter 5). Again, whether pain is experienced as injury and whether it merits claims against others varies among different cultural traditions and among differently situated people within specific social contexts. Along similar lines, Sagit Mor (Chapter 1) writes from a disabilities rights perspective to show how injury can be understood in such different ways. Injury and disability alike can be viewed negatively as tragic misfortune, as a diminishment of a person, she argues, but they also can be viewed more positively in terms of different mixes of abilities. Mor's chapter underlines the ways that constructions of injury are contested, often by social groups, movements, and policy makers, as well as by ordinary individuals.

Likewise, many chapters in this book demonstrate that culturally sanctioned constructions of injury are constantly contested and in flux; what was an "accident" or matter of fate one day may become an actionable injury in another period, just as injuries familiar to one social or technological context may fade into irrelevance at another time. For example, Samantha Barbas (Chapter 9) shows how the rise

of mass-mediated technologies gave rise to new categories of injury regarding images of the self, or representations of identity, that would have made little sense in different times. Løchlann Jain (Chapter 7) underlines that a plethora of historically new physical harms pervade our everyday lives in a technologically developed modern economy, so that we now find ourselves in a "time of injury." One implication is that we endure afflictions that are so common, so embedded in our lives, and so pervasive and enduring that we often do not even view them as injuries. Hence our project in this book of "mapping" the variety of changing ways that harms are or are not experienced as injuries and do or do not lead to claims for relief or reparation. While we look for patterns of interpretation and action among and within cultures, and among different spaces and times, our project again refrains from strong claims about social determinants. Authors in this collection return again and again to the active subjects who attempt to find meaning and determine a course of action that makes sense in the particular social position and cultural milieu in which they experience pain.

One theme that emerges from these chapters is how many members of society, in all societies, differ in their constructed "narratives of injury" from those of official legal actors, particularly judges and lawyers (see Yngvesson 1993). In many settings, official legal norms saturate social life and shape cultural understandings of denizens. But even these manifestations of law "in" social practice are highly variable. The often surprising finding is not just that disputes arise from different interpretations of official legal logics, but that social actors routinely construct their own terms of "legality" (Ewick and Silbey 1998) and often construct experiences of harm in ways that borrow little from, and even directly challenge, legal norms of injury. Yoshitaka Wada, in Chapter 6, is especially instructive in this regard. He shows how a medical malpractice dispute in Japan was understood through the very different standpoints of three key figures – the ordinary relational knowledge of a concerned mother, the medico-scientific knowledge of the doctor, and the legal knowledge of the lawyer. Law and injury, as we have said, are interrelated, but usually in complex, indirect, and shifting ways.

This fact of variability in constructions of injury and the appropriate or realistic responses to experienced injury underlines the important roles of non state cultural gatekeepers who interpret, mediate, or adjudicate among contending accounts, often adding authoritative weight to some versions over others. We can, after all, see normative weight in

each of the accounts in Wada's analysis, but we know that they will not count equally, that some accounts are likely to draw on more cultural or institutional authority than others. In Chapter 7, Jain similarly shows how medical science generally reinforces the nearly obsessive focus on linear cause and effect in personal injury law, but other fields of injury disputing often take place absent scientific standards. Bloom and Galanter (Chapter 8) also show how body-refiguring practices of physical "enhancement," what they playfully designate as "good injuries," have ceded increasing gatekeeping roles to tattoo artists and plastic surgeons. The accounts by Rasmussen (Chapter 3), Engel (Chapter 5), Barbas (Chapter 9), Franks (Chapter 10), and others further call attention to how mass and social media shape attitudes, norms, and practices of injury construction and disputing (see also Haltom and McCann 2004).

We also highlight the different ways in which official legal systems categorize and compartmentalize institutional mechanisms for responding to, and deterring, various types of harm. Every advanced legal system provides multiple domains of law to address alleged harms, including especially criminal law, tort law, administrative law, and regulatory law. Public and private insurance mechanisms often figure prominently as well. Legal specialists tend to highlight in particular the differences between criminal and civil, especially tort, mechanisms. They emphasize the role of the state as prosecutorial representative of "the people" in criminal matters versus state mediation and adjudication of disputes between mostly private parties in torts. The different perspective of legal specialists also places great weight on the varying standards of liability (with criminal law emphasizing intent to a greater degree), different evidentiary rules and burdens of proof, and different remedial mechanisms (with criminal law relying heavily on punitive incarceration or payment to the state, while tort remedies focus on monetary compensation directly to victim claimants). But, viewed from the perspective of "the law in action," these purported differences seem greatly exaggerated and can be very misleading. Indeed, many harms experienced by citizens can be addressed through both criminal and civil actions; high-profile murder trials often are pursued through both state prosecution and wrongful death civil suits. Moreover, elements of multiple legal mechanisms are often combined in official legal proceedings and, especially, the broader politics of disputing in mass media and other institutional terrains of the state. For example, legal challenges to Big Tobacco transitioned from decades of civil tort

litigation to hybrid "crim-tort" claims that mixed discursive elements and official roles from criminal and civil law (McCann, Haltom, and Fisher 2013).

The cultural accounts in this book recognize the porosity and malleability of official legal discourses and remedial mechanisms in practical interaction, within and beyond state institutional contexts. Arzoo Osanloo's intriguing study (Chapter 4) of how Iran's criminal code permits individual victims to demand or to forgo retribution, often based on a judge-led settlement, illustrates a creative melding of criminal and tort elements. Moreover, several later chapters in the collection (Chen, Chapter 13 and Koga, Chapter 14) disrupt and deconstruct traditional distinctions by focusing on how states sometimes position themselves as injured parties or are accused of being injurers. Even though states are representatives of their citizens in pressing these cases, the frameworks of disputing and claims for remediation tend to resemble civil law dynamics, often absent clearly established international or transnational rules, precedents, and institutional adjudicators.

That said, because criminal law frameworks and practices have been accorded by far the greatest attention by scholars, the studies in this book tend to focus more on injuries that are interpreted, disputed, negotiated, and adjudicated through civil tort conventions. We thus very self-consciously endeavor to rebalance scholarly engagement with these important if routine and sometimes less dramatic dimensions of injury practices in modern societies and states (see Engel and McCann 2009). And these are just some of the ways that the chapters that follow present both diversity in constructions of injury and variations in the institutional authority of norms and deciders for addressing competing claims by individuals, groups, organizations, corporate bodies, and states.

## Causation and Responsibility

The chapters in this book reveal that narratives of injury, including those within and without official law, tend to vary along two separate but often related critical axes: interpretations of *causation*, and constructions of *responsibility*. "Causation" refers to analysis of the stimuli or actions that produce harmful results. A determination of factual causation connects the injury victim to another party – an individual, a group, society at large or the state – who might be held accountable, and even legally liable, for the damages. It is widely recognized, however, that not all attributions of factual causation will justify the legal

attribution of responsibility for harm inflicted. Establishing causation in injury cases may help to identify a potentially responsible party, but causation in itself is not sufficient to determine liability. Even when it is clear that A has "caused" B's injury, the law still requires proof that A's actions were wrongful or fell below a legal standard of performance and were the "proximate" cause of the injury. In short, causation "in fact" is a necessary, but not sufficient, condition of legal responsibility. Furthermore, socio-legal researchers have demonstrated that people's thinking about causation can be biased by the attribution of moral blame. If A is viewed as a reprehensible person whose actions flagrantly violated social norms, then B (and other observers C) is far more likely to see a causal connection between A's actions and B's injury than under similar circumstances in which A is less morally blameworthy or suspect (Nadler and McConnell 2012). Once again, extra-legal moral judgments and legal protocols typically impinge on practices of injury determination, causation, and responsibility.

A good deal of scholarship has offered critical perspectives on the ways that the conventional legal preoccupation with causation narrows understandings of injury and liability. In particular, predominant discourses of causation tend to individualize responsibility for injury in ways that obscure and direct attention away from exposing broad, systemic patterns. For example, Løchlann Jain (2006) demonstrates how American law constrains constructions of injuries and of their causes, leading to the common perception that each injury is an isolated event with its own causal history, a view that obscures numerous easily foreseeable injuries that are systematically produced by the modern economic system. A broader understanding of the calculated decision-making that produces such injuries might lead to a very different conclusion about who should take responsibility for the victims of predictable "accidents" that are deemed acceptable in cost–benefit terms by product manufacturers. The principles of personal injury law, Jain writes, "narrow our modes of apprehension of what counts as injury, they divert attention away from other ways of understanding injury, and they miss the cultural implications of objects and the ways that objects are situated in networks of power" (Jain 2006: 151, see also Scales 2009).

The issue of temporality looms especially large in, and often challenges, most determinations of causality and, hence, responsibility. In general, the more remote in time the alleged source of a harm, the weaker is the claim of causality, not least because other intervening

factors often complicate the chain of causality. To take a simple example, a claim that an automobile accident caused a neck injury is likely to be far stronger immediately after the incident than three years later. The very term "proximate" connotes imminence or immediacy in related causes and effects; as such, time is rarely on the side of injury claimants. This is especially true in matters of physical harm that allegedly result from exposure to toxic environmental causes – pesticide use by farmworkers, asbestos in construction materials and paint, coal dust for miners, and the like. While claims for redress for such injuries seem sensible to victimized workers, untangling specific causes that accrue over (often shortened) lifetimes complicates determinations of responsibility for wrongful action.

Kaimipono David Wenger's critical discussion about the impossibility of successfully demanding reparation for the harms of slavery imposed by dominant white populations on African slaves turns to a large extent on the extended passage of historical time (Chapter 11). He quotes the federal district court in the 2002 *Slave Defendants* lawsuit: "Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago." Simply put, "this causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation" (Wenger, Chapter 11).[1] And this was independent of the "fatal barrier" posed by the statute of limitations. Similar constraints on successful claims about the continuing injuries produced by historical wrongs of states are evident in the accounts of Li Chen (Chapter 13), regarding how European colonizers' allegations of barbaric practices rationalized imperial abuse, and Yukiko Koga (Chapter 14), regarding claims of Chinese victims against imperial Japan.

All of these chapters show how time figures prominently in shaping assessments about causation and which claims of responsibility for widespread injury count in different times and places. Two other important points are relevant here. First, as noted above, is the "tension between legal concepts of causation used by lawyers and judges and those found in the broader culture" (Engel 2009: 252–4). Official law

[1] In re African-American Slave Descendants Litigation, 304 F. Supp. 2d 1027, 1075 (2002).