MAURO BUSSANI AND MARTA INFANTINO*

Tort Law and Legal Cultures†

According to the common understanding, tort law is the branch of private law whose set of positive rules, institutions, and procedures aims to shift the costs of accidents from the victim to a different subject. Similar accounts of tort law are widespread and uncontested, yet they fail to do justice to the overall role tort law plays in societies. Tort law does not live in legislatures, law firms, courts, and law books only. It also lives "in the shadow" of the official system of adjudication: in the offices of insurance companies; in people's notions about injury and risk, responsibility and justice; in the languages and images associated with law in mass-generated popular culture; as well as in public debates about what values should be protected and promoted, at what costs, and at the expense of whom.

On the assumption that tort law is at the same time a product and a constituent of the very cultural framework in which it is embedded, the aim of this paper is to explore its cultural dimensions in a broad comparative perspective. Combining insights from legal anthropology, socio-legal literature, legal history, and comparative law, the article tries to understand the role that, in Western and non-Western legal traditions, tort law plays in responding to, and managing social conflicts. In this perspective, the paper studies the cultural frameworks that sustain the adjudication process outside and inside the courtrooms, and analyzes how notions, practices, and remedies of tort law "in action" vary across different social and cultural settings. It then puts forward some conclusions about the extent to which tort law notions, ideas, concepts, categorizations, and perceptions influence and, reciprocally, are influenced by the cultural framework of which they are an expression.

* Mauro Bussani is Full Professor of Comparative Law in the Faculty of Jurisprudence of the University of Trieste, and Adjunct Professor in the Faculty of Law of the University of Macau, S.A.R., People's Republic of China. Marta Infantino, Ph.D. (Palermo), LL.M. (NYU), is a postdoctoral fellow in the Faculty of Jurisprudence of the University of Trieste. The Introduction and Parts VI, VII, and IX are coauthored. Marta Infantino is the author of the other Parts.

According to the common understanding, tort law is the branch of private law whose set of rules, institutions, and procedures aims to shift the costs of accidents from the victim to a different subject. This set of rules is defined by statutory texts, judicial precedents, and/or scholarly writings, and it is ultimately applied by courts to the disputes brought before them. Similar accounts of tort law are widespread and uncontested, yet they fail to do justice to the overall role tort law plays in societies. What these accounts miss is that tort law does not live in legislatures, law firms, courts, and law books only. It also lives "in the shadow" of the official system of adjudication. It lives in the offices of insurance companies, which provide coverage for damages caused by the insured or third parties. It lives in people's notions about injury and risk, responsibility and justice, determining people's conduct in day-to-day activities and their litigation/non-litigation choices once a wrong has occurred. Tort law lives in the language, concepts, and images associated with law in mass-generated popular culture—newspapers, television, movies, novels—as well as in public debates about what values should be protected and promoted, at what cost, and at the expense of whom. From this perspective, tort law can be seen as a "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."[1]

Although there could be little doubt that tort law is at the same time a product and a constituent of the very cultural framework in which it is embedded, as of now tort law's cultural dimensions have gone largely unexplored. Legal anthropologists' work on wrongs and compensation has mostly focused on traditional societies[2] in which tort law, as we practice it in the West, either plays a minor role, or is indistinguishable from what we would dub criminal law. Socio-legal scholars, for their part, have mostly investigated selected Western jurisdictions, seldom venturing beyond the reasons which shape people's propensity to sue and to place trust in legal institutions. Other lines of research—such as legal history, comparative legal studies, law and economics, critical legal studies—have helped highlight particular aspects of the historical and cultural embeddedness of tort law adjudication. Most of the time, however, their contributions have remained confined to definite geographical and/or substantive areas of law, or have addressed, through specifically tailored methodologies, quite definite concerns and challenges.

Against this background, the aim of this Article is to summarize, through the variety of the approaches just mentioned, the current state of knowledge in our field. Combining insights from legal anthropology, socio-legal literature, legal history, and comparative law, we will try to understand the role that, in Western and non-Western legal traditions, tort law plays in responding to, and managing social conflicts. We will start by highlighting how the bearing of this role on the functioning of a society goes beyond what official law says (Part I), and encompasses a multiplicity of legal layers not enshrined in positive law (Part II). The analysis of the cultural framework that sustains the out-of-court adjudication process (Part III) will enable us to follow tort law claims inside the courtrooms, and to see how notions, practices, and remedies of tort law "in action" vary across different social and cultural settings. In more detail, we will then review the notion of injury (Part IV), the ideas circulating about causation and force majeure (Part V), the concept of fault and the standard of the "reasonable person" (Part VI), current categorizations of victims and wrongdoers (Part VII), and perceptions of what constitutes an adequate remedy (Part VIII). The survey will allow us to frame some conclusions about the extent to which tort law notions, categorizations, and perceptions influence, and reciprocally are influenced by, the cultural framework in which they "live."

I. WRAPPINGS AND INTERIORS

Societies differ—amongst each other and across the time—both in their perception of what social order is, and in their understanding of what is a disturbance of this order, as well as the ways in which the social order can be maintained or restored.[3] What is considered injurious in some place and at some time may become acceptable after the passing of a few years, or may be traditionally acceptable somewhere else. Also variable across time and space is the range of subjects who are entitled to react to the injury, as well as the range of subjects against whom the reaction may be directed. And equally variable throughout history and across cultures are the means, rituals,

1. David M. Engel & Michael McCann, *Introduction*, *in* FAULT LINES: TORT LAW AS A CULTURAL PRACTICE 7 (David M. Engel & Michael McCann eds., 2009). With regard to the American context, see also MARSHALL S. SHAPO, AN INJURY LAW CONSTITUTION (2012); MARSHALL S. SHAPO, TORT LAW AND CULTURE (2003); on European tort law cultures, *see* Ken Oliphant, *Cultures of Tort Law in Europe*, 3 J. EUR. TORT L. 147 (2012).

2. There are of course major exceptions, such as the studies conducted by Laura Nader and Sarah S. Lochlann Jain on tort law in American society: *see, e.g.*, LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 172–215 (2012); SARAH S. LOCHLANN JAIN, INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES (2006).

3. Among the many works on this subject, see RODOLFO SACCO, ANTHROPOLOGIE JURIDIQUE: APPORT À UNE MACRO-HISTOIRE DU DROIT 245–55 (2008); Sally Falk Moore, *Selection for Failure in a Small Social Field: Ritual Concord and Fraternal Strife among the Chagga, Kilimanjaro, 1968–1969*, *in* SYMBOLS AND POLITICS IN COMMUNAL IDEOLOGY 109, 140–41 (Barbara G. Myerhoff & Sally Falk Moore eds., 1975); BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 100–29 (1926).

and procedures societies resort to in order to handle disruptions of the social order. Sanctions, for instance, may include or exclude: force and threat of force, apologies, compensation (pecuniary and/or in-kind), retaliation, ostracism, seclusion, denial of favors, and restitutory or maintenance duties. Remedies may be administered by the victims themselves, by the community as a whole, or by third parties entrusted to solve disputes in a socially acceptable manner.[4]

Tort law should be counted amidst the institutional devices whose aim is to settle societal conflicts in case of disruptions of social harmony. Patterns of tort law may of course vary according to the liability regimes designed by official and unofficial law and according to the different features of the dispute resolution systems, including the presence or absence of, e.g., professional lawyers, contingent fees, collective actions, pro bono representation, jury trials, punitive damages, and so forth.[5] But variances of tort law's practices may also stem from the stratification of, and interrelationships between tort law and other remedies, such as unofficial traditional dispute resolution mechanisms, criminal sanctions, insurance payments, and alternative compensation programs.[6] At the bottom of all this, it goes without saying, one finds the different ideas, attitudes, trust, and beliefs that people in society hold with regard to litigation, institutions, and social relationships in general.[7]

These factors are also key to understanding why tort law systems whose exterior, official wrappings are apparently identical or fairly similar may nevertheless produce different applications.

4. On all of the above, see, e.g., Raymond Verdier, *Le système vindicatoire. Esquisse théorique*, *in* LA VENGEANCE 13, 22–24 (Raymond Verdier ed., 1980); CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 176, 187–95, 200–207 (1983); OSCAR CHASE, LAW, CULTURE AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 33 (2005).

5. VERNON V. PALMER & MAURO BUSSANI, PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW 7, 46–66 (2008); MAURO BUSSANI & VERNON V. PALMER, PURE ECONOMIC LOSS IN EUROPE 120–58 (2003).

6. Among others, see SACCO, *supra* note 3, at 246; *see also* Jean-Sébastian Borghetti, *The Culture of Tort Law in France*, 3 J. EUR. TORT L. 158, 170–72 (2012); Jörg Fedtke, *The Culture of German Tort Law*, 3 J. EUR. TORT L. 183, 200–202 (2012); Håkan Andersson, *Tort Law Culture(s) of Scandinavia*, 3 J. EUR. TORT L. 210, 216–21 (2012); Richard Lewis & Annette Morris, *Tort Law Culture in the United Kingdom: Image and Reality in Personal Injury Compensation*, 3 J. EUR. TORT L. 230, 232–34 (2012); Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, *in* FAULT LINES: TORT LAW AS A CULTURAL PRACTICE, *supra* note 1, at 66; ANDRÉ TUNC, LA RESPONSABILITÉ CIVILE 59–83 (2d ed. 1981).

7. *See, e.g.* Anthony J. Sebok & Lars Trägårdh, *Adversarial Legalism and the Emergence of a New European Legality: A Comparative Perspective*, *in* IMAGINING NEW LEGALITIES: PRIVACY AND ITS POSSIBILITIES IN THE 21ST CENTURY 154, 157, 162–63 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2012); SACCO, *supra* note 3, at 246; GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM xiii–xv (1985).

Let us give a few examples chosen not for their overall implications but as basic, easy-to-grasp pieces of the jigsaw we are trying to assemble.

Both English and New Zealand tort laws are grounded in the common law tradition. In New Zealand, however, the common law of torts plays quite a marginal role in providing compensation for personal injuries. This is because in 1972, New Zealand enacted a no-fault accident compensation scheme covering accidental injuries, injuries resulting from medical misadventure, and injuries resulting from work-related diseases.[8] The scheme's core principle of social responsibility represents a decisive and radical break from the ideology of individual responsibility traditionally underpinning Western law, including tort law. The effects of such a break have been far-reaching. Although New Zealand is still formally premised on a common law-style tort law, even victims of personal injuries which do not fall under the compensation scheme (such as, for instance, diseases unrelated to work) tend to have recourse to the general social security and social welfare systems that sit alongside the accident compensation scheme, rather than resorting to tort law remedies.[9]

The legal systems of both the United States and India are also rooted in the common law, and are characterized by highly visible judicial intervention in public life, and a widespread sense of the inherent litigiousness of their societies.[10] Nonetheless, the two systems have different rates of tort claiming, with the Indian rates being dramatically lower than those of the United States.[11] The discrepancy may be explained, it has been suggested, by the fact that Indian plaintiffs, as compared to their U.S. counterparts, may have much less incentive to go to court. Indians place less confidence than Americans in the courts' ability to settle private disputes, and prefer relying on unofficial practices and criminal penalties to do much of the legal work that tort law does in the United States.[12]

Japanese tort law provisions in the 1895 Civil Code reflect the influence that German legal doctrines had on the late nineteenth-

8. The scheme is administered by a public corporation, and is a hybrid of social insurance and social welfare, being funded partly by levies on risk-creating activities and partly by general taxation: Peter Cane, *Searching for United States Tort Law in the Antipodes*, 38 PEPP. L. REV. 257, 262 (2011).

9. *Id.* at 262 (also for the analysis of the differences underpinning the U.S. and Australian tort law systems, despite many similarities, *id.* at 265–82).

10. Marc Galanter, *India's Tort Deficit. Sketch for a Historical Portrait*, *in* FAULT LINES: TORT LAW AS A CULTURAL PRACTICE, *supra* note 1, at 44, 47; AMANDA PERRY-KESSARIS, GLOBAL BUSINESS, LOCAL LAW. THE INDIAN LEGAL SYSTEM AS A COMMUNAL RESOURCE IN FOREIGN INVESTMENT RELATIONS 110–14 (2008).

11. Galanter, *supra* note 10, at 52.

12. Timothy J. O'Neill, *Through a Glass Darkly: Western Tort Law from a South and East Asian Perspective*, 11 RUTGERS RACE & L. REV. 1, 1–2, 6, 9–13 (2009); Galanter, *supra* note 10, at 47 f.

century Japanese legal developments.[13] Yet, in spite of these common roots, very few accident cases are brought to court in Japan as compared to Germany. The Japanese legal system tends to create incentives to divert litigants from the courts towards non-adversarial settings.[14] Indeed, litigation in a given field is perceived by ruling elites as a sort of warning bell indicating a need to create new institutional responses to (what the occurrence of litigation has shown to be) an important social issue, thus precipitating the introduction of alternative compensation schemes that may remove cases from judicial control. Litigation, in other words, is perceived as a social signal that compensation has to be made available without litigation.[15]

Ethiopian tort law rules are contained in the 1960 Ethiopian Civil Code, at articles 2027–2161. These rules were inspired by René David, and incorporated many Western ideas, combining general rules of liability along the lines of the French and Italian models with some detailed (Anglo-American-style) provisions on specific causes of action.[16] Under the veil of such Westernized modern tort law, customary law and customary means of dispute resolution have continued to flourish, though.[17] Much of tort litigation is still managed as a collective enterprise involving the active participation of the whole community of the people involved. The last word belongs to the chief, and the most authoritative points of view are those of the elderly. But every community member has the right and the duty to participate in the process, and to propose solutions to the conflict—

13. PALMER & BUSSANI, *supra* note 5, at 46–47. German influences supplanted the French-inspired legal culture that had up to that moment dominated Japanese legal thought. *See* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 329 (3d ed. 2007); Masao Ishimoto, *L'influence du Code civil français sur le droit civil japonais*, 6 REVUE INTERNATIONALE DE DROIT COMPARÉ [REV. INT. DR. COMP.] 744, 749–52 (1954).

14. Suffice it to consider that, under Japanese tort law, damages for bodily injury are standardized in accordance with injury severity levels defined in the traffic accident compensation system. The standardized damages tables favor out-of-courts settlements, insofar as they make pre-judgment negotiations relatively predictable in respect of the damages element. Robert B. Leflar, *The Law of Medical Misadventure in Japan*, 87 CHI.-KENT L. REV. 79, 98–99 (2012); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and in the United States*, 20 LAW & SOC'Y REV. 461, 484 (1986).

15. Eric A. Feldman, *Suing Doctors in Japan: Structure, Culture, and the Rise of Malpractice Litigation*, *in* FAULT LINES: TORT LAW AS A CULTURAL PRACTICE, *supra* note 1, at 211; Takao Tanase, *The Role of the Judiciary in Asbestos Injury Compensation in Japan*, *in* FAULT LINES: TORT LAW AS A CULTURAL PRACTICE, *supra* note 1, at 233.

16. Franklin F. Russell, *The New Ethiopian Civil Code*, 29 BROOK. L. REV. 236, 239–41 (1963).

17. Mauro Bussani, *Tort Law and Development: Insights into the Case of Ethiopia and Eritrea*, 40 J. AFR. L. 43, 46–48; Dominic N. Dagbanja, *Customary Tort Law in Sub-Saharan Africa*, *in* COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES (Mauro Bussani & Anthony J. Sebok eds., forthcoming 2015) (on file with authors).

and it is the consent of the community that provides the main legitimation of the decision.[18]

The lesson to be learned from the foregoing is nothing but a caveat. Authoritative, official rules (as well as institutions and procedures) may or may not be in one-to-one correspondence with the values and the legal culture of the whole, or of the vast majority of the members of the concerned societies. This is why oftentimes official law may be best understood only in light of the unofficial environment that surrounds and deeply affects its functioning. This is also why the set of rules, notions, and procedures that are produced by official legal actors may only provide the starting point of research about the disputes managed by tort law mechanisms, and the ways in which these mechanisms actually work. The rest lies somewhere else, before and beyond the façade of official rules and official adjudication mechanisms.

II. LEGAL LAYERS

As the examples in the previous section show, it is often the case that remedies and procedures available under positive law are just the most evident part of the picture of a legal system's tort law. There may be rules and devices that have little or no authority according to the official sources of law, and, nevertheless, are prominent and effective in settling tort-like private disputes.

This certainly holds true outside the West, where positive law is frequently challenged by the relevance that societies assign to other, remarkably vital legal layers. The pervasive presence of non-State[19] legal layers helps explain the comparatively slight reliance non-Western legal systems usually place on officially posited tort law and official mechanisms of adjudication. In non-Western contexts, the role that State law and dispute settlement systems play in Western jurisdictions is often absorbed and performed by layers that have no relationship with the State. Good examples come from some of the legal systems mentioned in the previous Part. Today, as in the past, different sources of law coexist in the traditional Indian vision of the law, including secular customs, State law, and the various bodies of

18. *Compare* Daniel Haile, *Law and Social Change in Africa: Preliminary Look at the Ethiopian Experience*, 9 J. ETHIOPIAN L. 380 (1973); Thomas Geraghty, *People, Practice, Attitudes and Problems in the Lower Courts of Ethiopia*, 6 J. ETHIOPIAN L. 426 (1969). *See also* GLENN, *supra* note 13, at 68 (on the Dinka, in southern Sudan); TOM W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 164–65 (2004) (on the Shona, in Zimbabwe, and the Barotse, in Zambia); M. RITA BARTOLOMEI, GIUSTIZIA TRADIZIONALE E MUTAMENTO SOCIALE: IL PROCESSO TRADIZIONALE ABRON NELLA COSTA D'AVORIO XII–XIII 180–87 (2001) (on the Abron, in Ivory Coast).

19. A useful reminder to some readers is that the expression "State" will be used throughout this Article to refer both to sovereign (federal and/or regional) States and to their federal and/or regional constituents.

religious law.[20] Likewise, the Japanese traditional perspective demarcates State rules from those stratified in popular customs, the nature of which mixes moral principles of religious as well as secular origin.[21] In sub-Saharan Africa, traditional rules linked to the sacred control large parts of the legal reality, including the distinction between encouraged and prohibited conduct; they coexist with prescriptions about compensation and redress that are imposed by the other legal layers which have stratified one upon the other in the course of history: sacred law (be it traditional, syncretic, or Islamic), the laws of the colonizers, and the laws adopted by the modern independent States.[22]

But the presence of legal stratification is discernible also within Western jurisdictions. It is only in the last two centuries that the Western positivist attitude has been able to obscure the multilayered structure of the legal systems in treatises and books, as well as in teaching methods and syllabi and, consequently, in judicial culture and judicial decisions.[23] Yet multiple legal layers have always coexisted and still coexist in the West, where many non-official legal layers produce rules that flourish indifferent to the official law and take the settlement of disputes outside the ordinary circuits of adjudication.[24] The phenomenon is still easy to observe, especially outside urban contexts, in the solution of controversies arising from the exercise of property rights and small incidents of everyday life. Many of these conflicts are governed through unofficial systems of social control, in which participants of the same community (no matter the size and nature)[25] act as an informal cooperative club of enforcers, and help ensure that members and non-members honor the group's rules through a variety of remedies, ranging from the issue of warnings to the obligation of apology or compensatory relief, from negative gossip to forceful destruction and self-enforced seizure of assets.[26] Since these systems of social control exist alongside the official layer, people are often subject to multiple overlapping (and not so rarely conflicting) systems of tort law.

Special rules often apply also within Western personal (e.g., family, friends, neighbors) and/or professional communities. Within such communities, unwritten codes of conduct determine what a wrong is, and what remedies are available for each, creating more or less stringent inhibitions against using formal law.[27] For instance, the practices of personal communities, such as families and religious congregations, accomplish most of the goals performed by tort law on the basis of their own rules, choosing their own set of remedies, which include issuances of apology or personal services. Through such rules and remedies, personal communities provide a solution to the dispute that is perceived as the most appropriate by the community and the individuals involved.[28]

If the above articulation and relevance of unofficial law upholding "personal" communities are fairly well known,[29] a different example of how the same kind of law (i.e., of the unofficial mold) can control professional activities is given by the diamond industry. In this industry, one of the world's largest trading centers is the New

20. Werner Menski, Hindu Law: Beyond Tradition and Modernity 121, 247 (2003); Upendra Baxi, *People's Law in India: The Hindu Society*, *in* Asian Indigenous Law in Interaction with Received Law 216. (Masai Chiba ed., 1986). For similar observations about Nepalese tort law, see Lukas Heckendorn Urscheler, *Innovation in a Hybrid System: The Example of Nepal*, 15 Potchefstroom Elec. L. J. 98, 109–13 (2012).

21. Edouard Dubois, *Étude socio-légale de la résolution des conflits au Japon*, 61 Rev. int. dr. comp. 383 (2009); Kahei Rokumoto, *Law and Culture in Transition*, 49 Am. J. Comp. L. 545 (2001); Feldman, *supra* note 15, at 6, 34. Similar is the traditional Chinese conception, which does not mix the *fa*, the rule imposed by the authority, with the *su*, the popular and secular custom, nor with the *li* (conventionally translated as "rite"), the ensemble of rules suggested by the traditional wisdom steeped in Confucianism. Randall Peerenboom, China's Long March Toward the Rule of Law 288 (2002); Derk Bodde, *Authority and Law in Ancient China*, 17 J. Am. Or. Soc. 54 (1954); *see also* Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 Ann. Surv. Int'l & Comp. L. 58 (2007).

22. Rodolfo Sacco, Il diritto africano 199 ff. (1995); *see also* Dagbanja, *supra* note 17, manuscript at 4; Alain Rochegude, *Ubi societas ibi jus: ubi jus, ibi societas*, *in* A la recherche du droit africain du XXIe siècle 115 (Camille Kuyu ed., 2005).

23. Mauro Bussani, *A Pluralist Approach to Mixed Jurisdictions*, 6 J. Comp. L. 161, 163 (2011); with specific regard to tort law, see Fedtke, *supra* note 6, at 184–87; Jon D. Hanson & Michael McCann, *Situationist Torts*, 41 Loy. L.A. L. Rev. 1403, 1406–15, 1418–32 (2008); Wagatsuma & Rosett, *supra* note 14, at 464, 494.

24. On the presence, in the West, of "multiple normative orders" that "push litigation to the periphery of dispute processing," see Stewart Macaulay, *Elegant Models, Empirical Pictures and the Complexities of Contract*, 11 Law & Soc'y Rev. 507 (1977); *see also* Esin Örücü, *What is a Mixed Legal System: Exclusion or Expansion*, *in* Mixed Legal Systems at New Frontiers 53 (Esin Örücü ed., 2010); Sean P. Donlan, *Histories of Hybridity: A Problem, a Primer, a Plea and a Plan (of Sorts)*, *in* Comparative Law and Hybrid Legal Traditions 21 (Eleonor Cashin Ritaine, Sean P. Donlan & Martin Sychold eds., 2008); Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 Ariz. J. Int'l & Comp. L. 69 (1998); Herbert Jacob, *The Elusive Shadow of the Law*, 26 Law & Soc'y Rev. 565 (1992). With regard to the international legal spheres, see W. Michael Reisman, Systems of Control in International Adjudication and Arbitration (1992).

25. W.M. Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. Cin. L. Rev. 417, esp. 418–20 (1985); Mauro Bussani, Il diritto dell'Occidente: Geopolitica delle regole globali 6–15 (2010).

26. On this point, Robert Ellickson's accounts are quite instructive. *See* Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 50, 87, 185, 209–19 (1991) [hereinafter Ellickson, Order Without Law]; *see also* Robert C. Ellickson, The Household. Informal Order Around the Hearth 92–125 (2008).

27. Lawrence M. Friedman, Total Justice 90–91 (1994).

28. Robert F. Cochran Jr. & Robert M. Ackerman, Law and Community: The Case of Torts 48–49 (2004).

29. Law and Ethnic Plurality: Socio-Legal Perspectives (Prakash Shah ed., 2007); Boaventura de Sousa Santos, Toward a New Common Sense. Law, Globalization, and Emancipation 426 f. (2d ed. 2002); Ethnic Minorities, Their Families and the Law (John H. Murphy ed., 2000); Lon L. Fuller, *Human Interaction and the Law*, 14 Am. J. Juris. 1 (1969); William G. Sumner, Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores, and Morals (1906).

York Diamond Dealers Club (DDC),[30] and in principle, activities conducted by members of the DCC fall under the jurisdiction of New York courts. Yet, while in principle there is no prohibition against going to court, DCC bylaws provide that any member that attempts to adjudicate his case in state courts will be fined or suspended from the club.[31] The DCC's own arbitration system, to which any member may resort if he has a claim arising out of, or related to, the diamond business, effectively supplants the option of seeking redress from a state court (around 150 disputes per year are submitted to the DCC arbitration system, and an estimated 85% of these disputes are settled during the mandatory pre-arbitration conciliation procedure).[32] However, the further point highlighted by the relevant literature is that the industry has a strong preference for the voluntary resolution of disputes, outside any adjudication mechanism run by third parties. This should come as no surprise. In an industry based on repeat transactions among members of small, professionally (if not ethnically) homogeneous groups, where dissemination of information about reputation is rapid and low-cost, the enforcement of private settlements is backed by reputational sanctions. Therefore, under the threat of social ostracism, intra-industry disputes are usually resolved cooperatively and with no need to have recourse (even) to an intra-community arbitration mechanism.[33]

Another illustration of the multi-layered structure of Western legal systems is that provided by Robert Ellickson in his seminal socio-legal study of the behavior of ranchers and farmers in Shasta County, California.[34] Among other things, Ellickson found that ranchers who let their cattle stray, although not legally liable under Californian law, are informally liable for trespass damage according to the customary rules applied by the members of the county's community. When a rancher violates these rules, the injured party may respond, first by issuing a warning, second by disseminating truthful negative gossip, and third by using force. The contrast between the rules of the State and those of the local community on cattle trespass—no liability vs. strict liability—is resolved by unwritten rules on conflicts of law giving priority, in these cases, to the informal control system over the formal one. Not all disputes, however, are amenable to resolution at the local level. In controversies over scarce water resources, for instance, the stakes tend to be high and the relevant technical issues complex. For these reasons, which are well known in the "tragedy of the commons" discourse and related debate,[35] the official legal system has a comparative advantage over local communities as an agent of social control. In case of differences over water use, therefore, the unwritten rules that determine the legal layer controlling the controversy drive the disputants out of the informal system, and permit the parties to assert their formal legal rights and entitlements in courts.[36] What counts, however, is that in the rural region of Shasta County the State-posited legal layer ends up disciplining a limited portion of societal conflicts. A substantial number of tort law disputes do not get into official legal proceedings, being settled informally or otherwise regulated outside the courts.

As we will see in the next Part, such a division of labor among legal layers is far from being exceptional, nor limited to a single California county.

III. The Selection of Tort Law Disputes

Whatever the subject matter or the setting of the dispute, what is certain is that most tort law cases in the West do not reach the judicial stage. The phenomenon can be best understood and assessed by resorting to the standard methodological tool of the "pyramid" of tort law disputes.[37] As we will see, this image, though proposed for West-

30. Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Leg. Stud. 115, 119 (1992). The same observations made in the text on the DCC apply to the other diamond trading centers in and outside the West, insofar as they are dominated by small ethnic minorities with close community ties—such as the community of ultra-Orthodox Jews in Antwerp, Belgium, or that of the Jains of Palanpur (a religious minority from a village in Northern Gujarat) in Mumbai, India. *See* Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchant in New York*, 31 Law & Soc. Inquiry 383, 410–12 (2006).

31. Richman, *supra* note 30, at 395–96.

32. Bernstein, *supra* note 30, at 124.

33. *Id.* at 135–43.

34. Ellickson, Order Without Law, *supra* note 26.

35. We are obviously referring to Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968); for further specifications and refinements of the same theory, compare, among many others, Michael Heller, *The Tragedy of Anticommons: Property in Transition from Marx to Markets*, 111 Harv. L. Rev. 621 (1998); James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & Econ. 1 (2000); Sven Vanneste, Alain Van Hiel, Francesco Parisi & Ben Depoorter, *From Tragedy to "Disaster": Welfare Effects of Commons and Anticommons Dilemmas*, 26 Int'l Rev. L. & Econ. 104 (2006).

36. Ellickson, Order Without Law *supra* note 26, at 240, 257.

37. The urtext of this line of research are the articles of William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 Law & Soc'y Rev. 631, esp. 633–37, 641 (1980–1981) and of Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 Law & Soc'y Rev. 525, 543–545 (1980–1981). Among later studies, see Herbert M. Kritzer, *Claiming Behavior as Legal Mobilization*, *in* Oxford Handbook of Empirical Legal Studies 625, 627 (Peter Cane & Herbert M. Kritzer eds., 2012); Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, DePaul L. Rev. 425, 426–28 (2000); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093, 1099–1100 (1996); Herbert M. Kritzer, William A. Bogart & Neil Vidmar, *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 Law & Soc'y Rev. 499, 501 (1991); Herbert M. Kritzer, *Propensity to Sue in England and in the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. & Soc'y 400, 401–402 (1991) [hereinafter Kritzer, *Propensity to Sue*].

ern settings only, may be used to describe the "lives" of claims in non-Western contexts as well.

The pyramid analysis takes for granted that, in every legal system—be it the law posited by the State or any other controlling body of rules—some injuries are considered to be recoverable[38] At its base, the pyramid encompasses only the injuries that are perceived as an adverse event by the victim—the so-called *perceived injuries.*[39] This starting level excludes unperceived injuries: people may not perceive injuries as such, because victims may be unaware that the injuries they suffered may give rise to a legal remedy, or because they may blame themselves or ascribe the injury to fate or chance.[40] Among the persons who do perceive the injury, only a small fraction blames some human agency. Such blaming creates a further level, that of *grievances.*[41] Grievances may lead nowhere. People may think that their perceived injury is *de minimis*, or that it is not socially acceptable for them to pursue their interests further. For instance, victims with ongoing social or economic relationships with their tortfeasors might not be at ease with the idea of vindicating their rights publicly against their counterparts. People may also be suspicious as to the fairness of the judicial system, or lack the resources necessary to fight back.[42] Some, however, do complain, typically to the human agency they think is responsible for the injury. We are now at the level of *pretenses.*[43] Many of these pretenses are satisfied in whole or in part because the concerned human agency straightforwardly assumes responsibility for what happened, issues an apology, and voluntarily pays compensation or restores the situation existing prior to the wrong—either personally or through her insurer.[44] In all these cases, the matter may be resolved without ever reaching the courthouse. But if the pretenses are not satisfied, they become *disputes.*[45]

38. In the literature mentioned in the previous footnote, this level is usually called that of *injuries* (Galanter, *supra* note 37, at 1099) or *perceived injurious experiences* (Felstiner, Abel & Sarat, *supra* note 37, at 633).

39. *See* Felstiner, Abel & Sarat, *supra* note 37, at 635; Galanter, *supra* note 37, at 1099 (dubbing them *perceived injuries*).

40. Felstiner, Abel, Sarat, *supra* note 37, at 633–37, 641; Miller & Sarat, *supra* note 37, at 532. Moreover, people may think that they have suffered an injury when in fact nothing happened to them. This is why this level also includes mistaken attributions of injury. Galanter, *supra* note 37, at 1099.

41. Felstiner, Abel & Sarat, *supra* note 37, at 632, 635.

42. Roderick A. MacDonald, *Access to Civil Justice*, *in* OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES, *supra* note 37 at 492, 510–15; Austin Sarat, *Access to Justice*, 94 HARV. L. REV. 1911, 1916–1917 (1981); *see also* Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1352–55 (2012); Lewis & Morris, *supra* note 6, at 256–57.

43. In the relevant literature, this level is usually referred to as that of *claims*: Galanter, *supra* note 37, at 1099–1100.

44. Lewis & Morris, *supra* note 6, at 238–40; Galanter, *supra* note 37, at 1099; Kritzer, Bogart & Vidmar, *supra* note 37, at 502–503; Kritzer, *Propensity to Sue*, *supra* note 37, at 402.

45. Felstiner, Abel & Sarat, *supra* note 37, at 637–39.

Disputes may get into the hands of *lawyers*, or of any other actor whom the relevant legal system considers an appropriate legal broker.[46] Among the disputes that reach these actors, some are abandoned and some end up in a Western-style courtroom. Many filed cases eventually result in settlement, and only a small fraction of them reach the next layer of *trials*, eventually becoming—sometimes after appellate and last-resort rulings—*decided cases* (and possibly binding precedents for future cases).[47]

Such a picture prompts several considerations.

First, it makes clear that, even in the West, many claims which might fall under the umbrella of positive tort law ultimately remain outside of it. Reasons are manifold, but at least in part they are to be found in the fact that a great number of potential tort claims are caught by official or unofficial mechanisms of conflict avoidance and dispute settlements, and are administered daily outside of courts. Insurance companies alone absorb a substantial fraction of potential tort law controversies, providing routinized and widely available procedures for dealing with compensation problems.[48] But many cases do not even reach insurance companies. Even when insurance coverage is available, claims may not mature or disputes may be abandoned or settled (before they enter into any formal level of complaint) according to unofficial rules and mechanisms on how to redress injuries.[49]

Second, the limited number of controversies that get to courts does not imply that official adjudication serves little or no purpose. Courts do not only directly resolve a significant minority of disputes, including the most complex ones; they also produce rules and standards, which work as a backdrop upon which parties, insurers, and lawyers may rely when bargaining outside the dispute resolution system, or straightforwardly in the shadow of the law. Thus, wherever State-posited law is the controlling layer for the disputes concerned, these rules and standards matter in the disputes actually brought before the courts, as well as in conflicts that never arrive at the litiga-

46. Galanter, *supra* note 37, at 1100.

47. *Id.* at 1100.

48. *See*, among many others, Parchomovsky & Stein, *supra* note 42, at 1352–55; Richard Lewis, *Insurance and the Tort System*, 25 LEGAL STUD. 85, 88 (2005); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1213 f., 1222 f. (1992); Sir Basil S. Markesinis, *La perversion des notions de responsabilité civile délictuelle par la pratique de l'assurance*, 35 REV. INT. DR. COMP. 301 (1983).

49. Miller & Sarat, *supra* note 37, at 542, 563 (determining that, comparatively, "[t]ort claims are least likely to be contested [i.e., reaching the judicial stage]. This reflects, we believe, a highly institutionalized and routinized system of remedies provided by insurance companies, and the well-established customary and legal principles governing behavior in this area.").

tion stage, influencing actors' behavior and expectations throughout society.[50]

It is not a one-way street, though. Equally true—and here comes the third observation—is that the pyramid metaphor makes clear how, in the West as well as in the Rest, factors determining the origin and development of a conflict lie largely outside the domain of official legal rules and procedures. Behind or aside from the tort law system, people's disputing choices are affected by the nature of the perceived injury (including its size, and the availability of the evidence), and by the parties' personal features—i.e., whether they are more or less knowledgeable, litigious, risk-prone, or resourceful. Moreover, people's responses to injuries are shaped by their own adverse expectations and social beliefs about entitlements—about whether the concerned parties should receive or offer apologies, engage in or avoid conflict interactions, and give or get compensation. These beliefs and expectations are part of the social fabric of the communities of which disputants are members. In the real world, there are of course many communities, and many people may be members of a multiplicity of communities simultaneously. But all communities express their own, dynamic networks of rules whose interactions govern official and unofficial systems of social control, and determine the selection of cases that ultimately will proceed up to the top of the pyramid.[51] On the one hand, as we said, the availability of official law and judicial adjudication impinge on the dynamics of these networks, and the layers in which they unfold. On the other hand, the backbone of values and legal cultures forges unofficial rules and means of dispute resolution, which in turn influence the way in which official legal layers are interpreted and administered, as the following Parts aim to show.

IV. The Notion of Injury

At the base of the dispute pyramid, and at the core of any tort law system, there is the injury—the harm entailing the violation or deprivation of something to which one feels entitled. Some maintain that injuries can be seen as cultural constructions.[52] One can agree with that conception or not. What seems clear is that it is sufficient to extend the time horizon or widen the view beyond the boundaries of a given legal tradition to appreciate how the notion of injury is bound up with theories of justice, images of personal wholeness, and visions of social bonds.[53]

50. Galanter, *supra* note 37, at 1101–1102.

51. Bussani, *supra* note 25, at 144–46; Miller & Sarat, *supra* note 37, at 529, 531.

52. *See, e.g.*, Marc Galanter, *The Dialectic of Injury and Remedy*, 44 Loy. L.A. L. Rev. 1, 2 (2010).

53. *Id.* at 2; Alan Page Fisk & Tage Shakti Rai, Virtuous Violence 10–12 (2015); David M. Engel, *The Cultural Interpretation of Injury and Causation*, 44 Loy. L.A. L. Rev. 33, 37–40 (2010); Dayna N. Scott, *Body Polluted: Questions of Scale, Gender, and Remedy*, 44 Loy. L.A. L. Rev. 121, 133 (2010); Joanne Conaghan, *Law, Harm, and Redress: A Feminist Perspective*, 22 Legal Stud. 319, 321 (2002).

We all know, for example, that what for an individual may be an injury for which someone should respond, may appear to somebody else as a little accident of life, a part of the great sea of troubles, discomfort, and losses that regularly affect any human being, and that one should handle by oneself.[54] Differences in reaction are often related to culture. Social sensitivity to interpret situations, as well as membership in a particular class, group, race, or gender, may shape the existence, nature, and perception of the harm. In the same vein, understanding of injuries cannot be disentangled from the economic, political, and social forces at work in the cultural context against which problems are perceived. These factors, attaching a sense of harm to certain events and not to others, play a crucial role in determining social and individual perceptions of injuries and in providing the connection between the modification of one's conditions and the subjective response to it. The evolution of these elements often results in changing perceptions of injuries. Other factors that may further influence the way in which injuries are understood are advancements in science, technology, and the ability to prevent the harm, as well as shifts in the framework of social meanings attached to certain events, interests, and behaviors.[55]

A series of illustrations will help better understand the foregoing.

(i) The relevance of time. Let us take the easiest of the possible Western-based examples. Think of how discoveries of medical science have altered our knowledge of human health and pathology, and moved the line between unavoidable adversity and remediable medical injury. Diseases that have always been considered mere misfortunes or the capricious acts of a malevolent god, may cease to be seen as such, and appear instead to be the result of an act or omission of some external agent who could have prevented or cured the disease itself.[56] Further, and in broader terms, one may think of how our understandings of the relationship between people and things, and of the nature and scope of property rights, impact our appreciation of harms and losses. In many societies, such as Ancient Rome or the southern U.S. states in the mid-nineteenth century, slavery was legally accepted. In these contexts, slaves were regarded as physical objects, and personal injuries to slaves were treated as property dam-

54. Galanter, *supra* note 37, at 1099; Miller & Sarat, *supra* note 37, 549.

55. Miller & Sarat, *supra* note 37, at 562; *see also* Joseph Sanders & V. Lee Hamilton, *Is There a "Common Law" of Responsibility?: The Effect of Demographic Variables on Judgments of Wrongdoing*, 11 Law & Hum. Behav. 277–97 (1987).

56. Galanter, *supra* note 52, at 4–5.

age to the slaveholder, rather than injury to the slaves themselves.[57] Both under Roman law and in nineteenth-century America (northern and southern states alike), the same idea according to which individuals may hold property interests in the body of others applied to women. A man was thus allowed (that is to say, was the only one allowed) to sue his daughter's or female servant's seducer for the damage that the latter caused to *his* honor or social status. Then, especially when seduction resulted in pregnancy, the claim could be for the loss of service and household labor that followed the "accident."[58]

(ii) The relevance of space. Even setting the historical perspective aside, the cultural nature of injury clearly emerges from current cross-cultural comparison. Let us take the case of a car accident caused by a driver's negligence, in which another blameless driver suffers a bodily injury. In the West, one would usually expect the victim of such an accident either to sue the tortfeasor or to settle with her own or the other driver's insurance company, and to get compensation for the economic and/or non-economic losses she sustained as a consequence of her bodily impairment.[59] As noted above, in Part III, such an expectation may sometimes prove unfounded, especially where unofficial rules and practices may deeply affect people's reaction to injuries.[60]

Outside the West, what is remarkable is how differently the same events may be perceived, not to mention dealt with. For instance, some empirical studies have shown that, in rural zones of northern Thailand, innocent victims of car accidents generally believe that, if they get injured (even seriously),[61] "it was just their time to be injured," and therefore tend to blame their own karma rather than the other driver's negligent behavior.[62] This is not to say that Thai people do not conceive the accident as an injurious experience. They do. Yet, the emphasis of their concern is placed on the disruption the accident has caused to the spiritual elements that accompany every human being rather than on the harm done to their body. Their personal injuries are thus not seen as relevant per se, but as a symptom of some disturbances in the flow of spiritual forces[63]—and it is such disturbances that the wrongdoer is expected to address.

Cultural variances in the understanding of the notion of injury are pronounced within the Western hemisphere as well. Giving birth to a healthy child because of a doctor's negligence in performing a sterilization procedure or in advising the parents after the procedure is carried out may be seen as no injury at all in largely Catholic countries such as France, Italy, and Austria. In these jurisdictions, the birth of a child cannot, in and of itself, be conceived as a harm that can be legally compensated.[64] The same event, however, would be considered to be a harm, and would open the door to compensation of non-economic damages in non (majoritarian)-Catholic countries, such as Germany, England, and most of the United States. Yet, in England and in the United States, where damages for pain and suffering are awarded in these cases, the unwanted pregnancy is conceived of as harmful because of the doctor's infringement of the autonomy and freedom of choice of the unwilling mother,[65] while in Germany the pregnancy is relevant because it counts as an injury to the woman's health and body under § 253(2) of the Civil Code (BGB).[66]

As the preceding examples show, differences in the economic, cultural, and religious contexts against which injurious events take place may influence how those events are perceived and dealt with, by having an impact on the understanding of what injuries are and what causes them. From this point of view, the notion of injury appears to be inextricably intertwined with those of causation and attribution of responsibility, to which we now turn our attention.

V. Causation and Force Majeure

It is a general rule, valid everywhere, that liability in tort requires (proof of) causation. The victim has to demonstrate that there exists a sufficiently close, but-for causal relationship between the wrongdoer's behavior/activity and the damage she suffered. Typi-

57. James Gordley & Arthur T. von Mehren, An Introduction to the Comparative Study of Private Law 383 (2006) (on Roman law); Martha Chamallas & Jennifer B. Wriggins, The Measure of Injury: Race, Gender, and Tort Law 35 (2010) (on the United States).

58. Galanter, *supra* note 52, at 6; Engel, *supra* note 53, at 49; Kathryn A. Sloan, Runaway Daughters. Seduction, Elopment, and Honor 39–42 (2008).

59. Engel, *supra* note 53, at 44–45.

60. David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 Law & Soc'y Rev. 551–82 (1984) (presenting findings from a study of official and unofficial resolution of injury cases in a small community in the American Midwest).

61. Engel, *supra* note 53, at 46.

62. *Id* at 44.

63. *Id.* at 49. For the role ancestral spirits may play in African tribal societies, see Max Gluckman, Politics, Law and Ritual in Tribal Society 226–29 (1971).

64. *Compare* Cour de cassation [Cass.], June 25, 1991, D. 1991, Jur. 566 (Fr.); Corte de Cassazione [Cass.], sez. III, 8 July 1994, n. 6464, NGCC 1995 I, 1111 (It.); Oberster Gerichtshof [OGH] [Supreme Court] Sept. 14, 2006, docket No. 6 Ob 101/06f, Österreichische Juristen-Zeitung 171 (2006) (Austria).

65. *Compare* McFarlane v. Tayside Health Board, [2000] 2 A.C. 59 (H.L.) (appeal taken from Scotland, where the same solution applies), *and* M.A. v. United States, 951 P.2d 851 (Alaska 1998).

66. *See, e.g.*, Bundesgerichtshof [BGH] [[Federal Court of Justice] July 8, 2008, Case VI ZR 259/06, Neue Juristische Wochenschrift [NJW] 2846, 2008 (Ger.). It is to be noted that in Germany—unlike in England and the United States—the plaintiff may recover also her economic losses: *compare* BGH Nov. 16, 1993, NJW 788, 1994 (Ger.) *with* Rees v. Darlington Memorial Hospital, [2003] UKHL 52, [2004] 1 AC 309, *and M.A.* 951 P.2d 851.

cally, causation cannot be established when a force majeure event, that is to say, a factor beyond the defendant's control that she could neither foresee nor avoid, contributed to the production of the harm. In the latter cases, the causal link between the wrongdoer's behavior/activity and the victim's harm is deemed to have been broken.[67]

On the surface, it may seem that causation and force majeure imply purely objective assessments of facts. Such an impression, however, would be misleading. Psychologists and neuroscientists have long demonstrated that judgments about causation and impossibility are not so much determined by the underlying, allegedly "objective" sequence of events to be evaluated, as they are by the constraints in the evaluator's knowledge structure.[68] These constraints may lead us to accept intuitions about causation that are affected by cognitive biases. Without being aware of these biases, people tend: to react with heightened negativity toward individuals associated with an injury when these individuals are not members of the same group, to modify the sympathy towards the victim depending upon the total number of victims, and to alter their "attributions" in light of the attributions that others make against the same facts.[69] From this perspective, judgments about causation tend to reflect our cognitive and metacognitive errors, our own implicit motives, and our need to defend, bolster, and rationalize the interests of ourselves and those of the group(s) to which we belong.[70]

That is not all. In many quarters, it has been argued that notions of causation and force majeure remain nothing more than cultural constructs. Like the perception of injuries, understandings of causation and force majeure depend upon people's considerations for their and others' behavior, upon their apprehension of the dividing line between natural and social phenomena, and upon their visions of justice and of the society they live in. From this point of view, our convictions about the forces shaping the world and our assumptions about the distinction between nature and human agency, between what is beyond and what is within human control, are all inherently flexible and entirely context-dependent.[71]

Let us take the example of traditional Southeastern Asian theories of illness causation. When the victim of a negligently caused accident develops a mental illness, traditional Asian accounts for the impairment of mental health tend not to look at the impairment as a physiological consequence of some traumatic experience sustained by the victim, but rather to attribute the illness to some supernatural factors. The latter can stem from some asymmetry in the forces governing the natural world—such as imbalances in the qualities of *yin* and *yang* in Chinese culture, or of *am* and *duong* in the Vietnamese tradition,[72] or the heavy burden of *karma* that the Thai victim may carry because of non-meritorious acts committed in the past or in previous lives.[73] When a victim blames those forces or her *karma* for her mental harm, she is reconstructing the etiology of the events in light of her traditional knowledge about human affairs. Against such a picture, the fault of the person who caused the accident may appear to be an event of minor importance and may not even look like the "real" cause of the damage.[74]

On similar grounds, it has been noted that in some sub-Saharan communities, it is belief in witchcraft that explains why a man is injured or dies. In these cases, it may be clear that the man was hit or killed by somebody else, but what is deemed to be more important is the internal enemy, the witch, who caused that particular injury or death:[75]

> In the first place, if the spirits or God have been moved to wrath it will often be in response to some offence or breach of morality which the dead or injured person has himself committed. . . . Secondly, where the spirit is seen as operating through a human medium, this does not imply that the indi-

67. The possible citations are endless. In the comparative perspective, it suffices to refer to Anthony M. Honoré, *Causation and Remoteness of Damage*, *in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, ch. 7 at 3, 7 (1971), and Marta Infantino, *Causation in Western Tort Law*, *in* COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES, *supra* note 17 (on file with authors).

68. Hanson & McCann, *supra* note 23, at 1369–75; CHAMALLAS & WRIGGINS, *supra* note 57, at 125, 128; Jennifer K. Robbennolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489, 492, 511 (2010); Jon D. Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics and Deep Capture*, 152 U. PA. L. REV. 129, 136–39 (2003).

69. *See* Hanson & McCann, *supra* note 23, at 1370.

70. *Id.* at 1370.

71. See the authors cited *infra* notes 72–77, *see also* PAGE FISKE & SHAKTI RAI, *supra* note 53, at 52–53

72. LENA ANDARY, YVONNE STOCK & STEVEN KLIMIDIS, ASSESSING MENTAL HEALTH ACROSS CULTURES 104–105 (2003).

73. *See* Engel, *supra* note 53, at 47–49, 55–59.

74. *Id.* at 47–49, 55–59; ANDARY, STOCK & KLIMIDIS, *supra* note 72, at 105. For other possible examples outside Asia, compare JAMES PEOPLES & GARRICK BAILEY, HUMANITY: AN INTRODUCTION TO CULTURAL ANTHROPOLOGY 414–416 (9th ed. 2012) (Navajo culture); George M. Foster, *Disease Etiologies in Non-Western Medical Systems*, *in* THE ART OF MEDICAL ANTHROPOLOGY: READINGS 141, 145–146 (Sjaak van der Geest & Adri Rienks eds., 1998) (Latin America); JACQUES VANDERLINDEN, ANTHROPOLOGIE JURIDIQUE 111 (1996) (Azande); ROBERT POOL, DIALOGUE AND THE INTERPRETATION OF ILLNESS: CONVERSATIONS IN A CAMEROON VILLAGE 108–135 (1994) (Cameroon); John P.S. McLaren, *The Origin of Tortious Liability: Insights from Contemporary Tribal Societies*, 25 U. TORONTO L.J. 42, 69–90 (1975) (Azande, Nuer, Zulu).

75. GLUCKMAN, *supra* note 63, at 216–223. *See also* MAX GLUCKMAN, CUSTOM AND CONFLICT IN AFRICA 81–108 (1973).

> vidual physically responsible is the witting partner in the enterprise. . . . The random selection of a human being as an agent for supernatural caprice does not have much appeal as a basis for finding that person liable for any harm which is caused.[76]

The witch being the sole cause of the victim's injury or death, there is no reason to blame the individual who actually produced the accident.

To lift the veil of alleged objectivity surrounding assessments of causation and force majeure is equally easy and telling in Western settings. The passage of time provides us, as always, with good examples of diversity. Suffice it to think—again—of how changes in knowledge and technology have influenced our conception of the notion of justice, by including events once considered "natural" or uncontrollable among the circumstances that someone is now supposed to prevent or regulate. Because of the improved human capability in understanding and controlling diseases, hurricanes, earthquakes, and climate changes in general, these events may cease to appear to be inalterable fates, and may come to be seen instead as having their origins in human action or inaction, as the product of inappropriate policy or interventions. The growth of human knowledge, advances in technical feasibility, and rising expectations of amenity and safety may thus expand the sphere of what is considered an injury caused by a human agent, propelling so-called "natural" events from the realm of fate into the realm of what we have named grievances.[77]

Among the many possible instances, a good case in point is given by the development of remedies for wrongful birth in the United States and in France. Prior to the 1960s, claims in which a woman alleged that a doctor's negligence in providing her with adequate prenatal treatment or advice resulted in the birth of a child with serious genetic disorders were virtually unknown anywhere. Things changed by the 1970s. On the technological side, scientific developments about genetic risks to fetuses made it possible to predict higher risks of congenital anomalies. On the cultural side, a meritorious shift in women's social status fostered the idea that women could assert a right to control their own reproduction (before tort judges too), and to address complaints against those who interfered with that right.[78]

In 1973, the U.S. Supreme Court deemed abortion to be a fundamental right under the U.S. Constitution,[79] and in 1975 abortion was legalized in France.[80] In the United States as in France, initial battles over recognition of a cause of action for wrongful birth were largely fought over the terrain of causation. Although acknowledging the doctor's negligence toward their patient, courts generally dismissed these claims for lack of but-for causation. According to them, there was nothing that the defendants could have done that would have decreased the likelihood that the infant would be born with defects. As a consequence, the conduct of defendants could not be considered the cause of the baby's condition.[81] By the end of the 1980s in the United States, and the end of the 1990s in France, however, changes in available medical technologies and in social practices relating to abortion and reproductive choices ended up determining a shift in the notion of injury and causal attribution. In both countries, courts began to regard reproduction not as a normal, inexorable process leading to a child's birth, but rather as a mutable process, subject to human intervention. Judges became able to attribute the injury to sources beyond the body of the woman herself, to conceive of the injury as a dignitary harm to the woman, and to place some responsibility on the treating physician. At this point, proof of but-for causation was no longer considered an insuperable obstacle to compensation. Courts started reasoning that if the mother had been properly counseled by her physician, she would have secured an abortion and would not have incurred the emotional and financial expenses of raising an impaired child.[82]

The above illustrations show how tort law conflicts fuel a continual process of experimentation, monitoring, and adjustment in light of ever-changing scientific, economic, social, and cultural paradigms. Through decentralized, overlapping, and continually evolving interventions of private actors, each operating at different levels and from different spheres of authority, tort law adjudication constantly reshapes social ideas and practices about injuries, causal attribution,

76. McLaren, *supra* note 74, at 80–81.

77. *See supra* Part III; *compare also* Galanter, *supra* note 52, at 5–6; Jill M. Fraley, *Re-examining Acts of God*, 27 PACE ENVTL. L. REV. 669, 683–89 (2010).

78. CHAMALLAS & WRIGGINS, *supra* note 57, at 129.

79. Roe v. Wade, 410 U.S. 113 (1973).

80. Loi 75-17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse [Law 75-17 of January 17, 1975], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 18, 1975, p. 739.

81. *Compare, e.g.*, Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985), and Conseil d'État [CE] [High Administrative Court], Feb. 14, 1997, JCP 1997 II 22828. On these lines of case law as far as the U.S. are concerned, *see* CHAMALLAS & WRIGGINS, *supra* note 57, at 135–37.

82. In the United States, see, e.g., Smith v. Cote, 513 A.2d 341 (N.H. 1986); in France, see the well-known Perruche case decided by the Cour de cassation [Cass.] Nov. 17, 2000, JCP 2000 II 10438. The compensation rule established by the Perruche judgment, however, was later reversed by the legislator. *See* Loi 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé [Law 2002-303 of March 4, 2002 on the Rights of the Ill and the Quality of the Health Care System] J.O., Mar. 5, 2002, p. 4118.

and responsibility, and pushes the law to move in response to its challenges.[83]

VI. On the Subjective Side: Fault and No-Fault Liability Rules

Across (and, most of the times, also within) legal traditions, liability may be either established irrespective of the wrongdoer's state of mind or it may be found only if that person acted wrongfully, that is to say, negligently or with the intention to cause the harm. However, since theories of moral blame and expectations about what reasonable behavior is reflect a society's views about what is subjectively possible, ordinary, and approved by its members,[84] the breadth and content of the negligent and/or intentional (open or closed) tort liability rules may vary considerably across cultures.[85]

In the West, it is well known that legal scholars, historians, and anthropologists disagree on the importance of fault and no-fault models in the development of tort law. Many hold that liability was historically based on causation and damage alone. According to this view, in the process of allocating responsibility, "primitive" legal cultures disregarded the subjective, individual, "moral" aspects of conduct, which by contrast underlie the very idea of accountability in modern societies.[86] Others emphasize the historical inaccuracy and oversimplified analysis underpinning this "evolutionary" scheme, from strict liability to negligence, from collective to individual responsibility, from "uncivilized" to "civilized" tort law systems.[87] This is not the place to survey in detail the contents of the debate. What is worth doing, however, is to briefly investigate its basic assumptions, according to which strict liability rules and fault liability rules can always be distinguished and opposed as the extreme ends of the liability spectrum.

Under State-posited tort law, there is no doubt that, whatever forms the official liability rules take, lawyers and courts have at their disposal a range of different techniques to produce complex amalgams of the two types of liability, thus making any binary classification scheme too simplistic.[88] In many cases, it is sufficient to interpret the "reasonable person" standard for negligence liability in objective terms, and thereby to hold people liable for accidents that they could not have avoided even if they did their best.[89] Presumptions of fault may be construed so strictly as to make it impossible to rebut them.[90] Conversely, a person whose actions were blameless may escape strict liability simply because, in the judge's eyes, the kind of damage that she caused did not result from the risks typically associated with her activity.[91]

The contrast between strict and fault-based liability rules is overstated also with regard to settings where official legal layers, if not absent, are largely weakened. As many legal anthropologists have stressed, close studies of nominally strict liability systems in non-Western societies show how much room is left in those settings for consideration of the wrongdoer's state of mind.[92]

Indonesian Dou Donggo law, for instance, imposes "stricter than strict" liability on people for accidents that they "might" have provoked, regardless of whether or not they actually *caused* them in Western terms. In other words, Dou Donggo tort law is less concerned with what actually happened than it is with what *could have* happened. Potentially responsible tortfeasors may be held liable just as well as those who actually caused the damage. So, for instance, when a Dou Donggo man swings a stick at a goat to scare it off, and the

83. Among others, see Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 Envtl. L. 1, 5–7 (2011).

84. That the "reasonable person" standard is a culturally biased model is clearly shown by the way it was historically conceived of in Western jurisdictions until the late twentieth century. The reasonable person was embodied by the "reasonable man" in common law countries and the "bonus pater familias" (i.e., the "good father of the family") in the civil law tradition, a male who was an idealized, stereotypical white, adult, middle-class, and healthy person. Calabresi, *supra* note 7, at 22–25; Mauro Bussani, La colpa soggettiva: Modelli di valutazione della condotta nella responsabilità extracontrattuale (1991); *see also* Chamallas & Wriggins, supra note 57, at 89–117; Caroline A. Forell & Donna M. Matthews, A Law of Her Own: The Reasonable Woman As a Measure of Man 3–7 (2000). Moreover, basic psychology tells us that there are many cognitive and metacognitive biases affecting our judgment on the reasonableness of our and others' behavior; for a review of the most common among these biases, see Robbennolt, *supra* note 68, at 498–99, 501–502, 504–505.

85. Engel & McCann, *supra* note 1, at 2; Engel, *supra* note 53, at 46.

86. *E.g.*, Rudolph von Jhering, Das Schuldmoment in römischen Privatrecht 8–9, 20 (1867); Roscoe Pound, The Spirit of the Common Law 5, 140–41 (1963) (orig. ed. 1921).

87. *See, e.g.*, Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 Emory L.J. 575, 576 (1994); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925, 959–61 (1981).

88. *Compare, e.g.*, The Boundaries of Strict Liability in European Tort Law 7, 13 (Franz Werro & Vernon Valentine Palmer eds., 2004); Peter Cane, *Fault and Strict Liability for Harm in Tort Law*, *in* The Search For Principle: Essays in Honour of Lord Goff of Chieveley 171, 172 (William Swadling & Gareth Jones eds., 1999).

89. Mauro Bussani, *Negligence and Fault: Underneath the Veil*, *in* Essays in Honour of Professor Konstantinos Kerameus 183, 190 f. (2009); Mauro Bussani, *La responsabilité des sujets atteints de troubles mentaux en Italie et en common law*, Gazette du Palais, nos. 45/46 (Responsabilité civile) 11 (1997).

90. The Boundaries of Strict Liability in European Tort Law, *supra* note 88, at 6.

91. *Id.* at 7.

92. *See, among others*, Peter Just, Dou Donggo Justice: Conflict and Morality in an Indonesian Society esp.210 ff. (2001); McLaren, *supra* note 74, at 50–78 (providing many examples of absolute, strict, and fault liability rules in contemporary tribal cultures). *See also* Max Gluckman, The Ideas in Barotse Jurisprudence (1965), where the author argues that sub-Saharan traditional law of injury is based on strict liability, and yet the mental element of wrongs is always taken into account, as "what a reasonable man in those social circumstances would have felt." *Id.* at 213.

goat is later found beaten to death in the bush, the man is liable for the animal's death even if his stick never hit the animal. Among the Dou Donggo, causation and intentionality may be irrelevant; potentially harmful behavior may be sufficient for tort liability.[93] But the Dou Donggo operates this "stricter than strict" system without sacrificing equity. Societal judgments about the liability of potentially responsible tortfeasors are based on the individuals' capacity to control their tempers, passions, and emotions, and on the respect they showed for Dou Donggo moral and social values about the proper relationship between members of society and human nature. From this point of view, judgments of the Dou Donggo are grounded upon a precise sense of moral culpability, and are much more akin to the values undergirding the Western notion of negligence than to what is usually implied by the term strict liability.[94]

Under Melanesian Kwaio tort law, when a person's action result in another's death, the general rule is that compensation must be paid to the deceased's family regardless of the intent or negligence of those who are required to make the payment. In a classic Kwaio example, if a person suffers a fatal fall on her way to a feast, the sponsor of the feast must pay death compensation. The argument is that, had the hosts not held the event, the victim would not have been walking where the accident occurred.[95] The solution, however, cannot be viewed as a sheer application of strict liability rules (nor of "dramshop" rules).[96] Anthropological studies have shown that Kwaio legal culture never disregards the consideration for the wrongdoer's state of mind. On the one hand, the latter's intention to harm may be taken into account to heighten the amount of death compensation. On the other hand, while the absence of fault on the part of the person who, under (what we would name) strict liability rules, should be liable for the accident does not free her from the obligation to pay the death compensation, it does oblige the deceased's family to give back to the blameless killer all or part of the payment received. A common practice is that the family asks the killer to provide the costs of burying the deceased, for which service they give a large payment in return.[97]

93. Peter Just, *Dead Goats and Broken Betrothals: Liability and Equity in Dou Donggo Law*, 17 Am. Ethnologist 75, 81–82 (1990).

94. Just, *supra* note 92, at 210 f.

95. Hosts are also responsible for any other misfortunes that occur at, or in consequence of, the feast. *See* David Akin, *Compensation and the Melanesian State: Why the Kwaio Keep Claiming*, 11 Contemp. Pac. 35, 45 (1999).

96. As is well known, especially in the United States, dramshops may be held liable for the torts committed by their intoxicated clients. *See, e.g.*, Frank A. Sloan, Drinkers, Drivers, and Bartenders: Balancing Private Choices and Public Accountability 91 f. (2000).

97. Akin, *supra* note 95, at 45.

VII. Agents and Victims

Ordinary Western debates take for granted that liability rules, whether strict or negligence-based, apply in favor of some persons and to the detriment of others. Historical and cultural studies teach us, however, that the choice of the addressees and beneficiaries of tort law rules, and the relevance of social relationships to liability, vary across time and legal cultures.[98] Any society develops sets of notions, images, and practices regarding people's status within society. The same holds true for the manufacturing of a sense of identity and group-belonging,[99] the perception of the bonds tying people together, and, consequently, of who can be regarded as the victim of a tort, who is entitled to claim compensation, and against whom it can be claimed.

Western tort law teachings, for instance, traditionally focus on individuals—whether persons or entities—both as agents of wrongs and as injury-bearers.[100] By contrast, as we have noted above (Part III), many cultures regard injurious experiences as wrongs to the group in which victims and harmdoers hold membership. In these societies, committing a tort sets up a status relationship between the parties and their groups, a relationship which has to be adjusted through some form of remedy. Thus—it has been noted[101]—an accident involving two persons may, rather than giving rise to a "private" dispute between these subjects, expand to the group and become a "public" dispute, with a wide range of potential political and social impacts for the communities involved.

The latter pattern is manifest in traditions where tort law obligations and injuries are assessed in terms of breach of the supernatural or intra-group harmony. When liability is linked to the sacred, as happens, e.g., under traditional customary law of sub-Saharan Africa,[102] harm done to a member of a community is believed to injure all the other members of the same community. This is because among villagers, personhood is traditionally understood to be relational. Similarly, in rural northern Thailand[103]—to take another example—any member of the close-knit farming community is connected to others by the *khwan*, an essential life force found in all living beings.

98. Sally Falk Moore, Law as Process: An Anthropological Approach 91 (1978).

99. *See* Bussani, *supra* note 25, at 144–48, and further references therein.

100. Mauro Cappelletti & Bryant Garth, *An Introduction*, *in* Access to Justice and the Welfare State 1, 13–14 (Mauro Cappelletti ed., 1981); Lawrence Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State*, *in* Access to Justice and the Welfare State, *supra*, 251, 259–61.

101. Gluckman, *supra* note 63, at 183–96; Falk Moore, *supra* note 98, at 91; *see also* Jared M. Diamond, The World Until Yesterday: What Can We Learn from Traditional Societies? 79–95 (2012).

102. Sacco, *supra* note 3, at 203, 247.

103. Engel, *supra* note 53, at 46–48.

When a person suffers a trauma, the *khwan* may fly out of her body, causing her physical or psychological malaise and rendering her a dysfunctional and potentially harmful member of the community. Since the escape of the *khwan* affects the entire network of villagers, customary law provides that the entire community has a stake in seeing that the injurer pays compensation by sustaining the costs of the rituals to recall the fleeing *khwan*.[104]

A similar, "collective" understanding of victims and wrongdoers prevails in many other societies, where torts are usually seen as rupturing the bonds among the members of the community and their families, threatening the essence of families' identity and their place within society. Going back to sub-Saharan Africa, if a member of a family is insulted, or a woman is abducted against her will or the consent of her relatives, it is on the victim's family that the burden of the harm falls—and, correspondingly, it is up to the wrongdoer's family to remedy the situation. Initiating a complaint, thus, is not a matter of individual interest only. At the forefront, there is always the collective interest in addressing conduct that may disrupt the harmony of the society. Consequently, compensation is most often paid to the kin of the victim by that of the wrongdoer, rather than being treated as a matter between the victim and wrongdoer as individuals. This way, collective responsibility rules function as instruments of peacekeeping, providing an efficient tool to spread the loss among the group, and encouraging groups to police themselves to prevent their members from committing wrongs that might put the subsistence of the group at risk.[105] It is a corollary to this conception that no "tort" devices apply when both the offender and the victim are members of the same group, because those who would be obliged to pay are the same people who would receive the payment.[106]

All of the above may look foreign to Western legal cultures, but only at first sight. If still now there are special "group" liability rules for children or mentally disordered persons, for centuries Western laws have taken little or no account of the harm done to, and experienced by, individuals such as servants, slaves, women, the elderly, minors, and persons with disabilities. As we already reminded the reader (see above, Part IV), when harm done to these subjects has been considered relevant, it was because injuries were perceived essentially as an offense against the social group (family or lordship) to which the victim belonged. It was the head of the family, or the lord, who was entitled to receive compensation for the victim's loss, not the victim herself. And, conversely, it was the head of the family, or the lord, who was obliged to pay compensation for the harm caused by the persons subject to his authority.[107]

But this shift—from the level of individuals to that of the group—is not confined to our past. Today's tort lawsuits are mostly about getting monetary compensation. Despite claims that our tort law is premised on the notion of individual autonomy, in most of these conflicts the real wrongdoer is not the subject who bears the economic consequences of her acts or omissions. The one who foots the bill for the wrongdoer (besides families, employers, and other vicariously liable defendants) is most often her public insurance scheme or private insurance company. Insurers pay damages out of the public pocket filled with (national) taxpayers' money or out of the pool companies have built up out of premiums paid by (the group of) all their customers, including the defendant. Thus, insurance operates as a form of collective responsibility, in which the group of taxpayers or the group of customers of the same insurer contribute to the pool of assets that serves as a resource out of which to pay legal claims.[108] As should be clear, the substitution of the insurer for the actual tortfeasor is made possible by our notion of injury, according to which every interest and value can be commodified and monetized for tort law purposes. In other terms, our ideas about what is an injury are interconnected with our narrative about the notion of liability.[109] These ideas and narratives deeply affect our understanding of the subjects who should be obliged to redress the injury, and how they should do it. This straightforwardly brings our journey to its last stop, the realm of remedies.

VIII. Remedying the Wrong

If the notions of injury, wrongdoer, victim, or tort itself are cultural constructs, the notion of remedy is no exception. There is nothing natural in the idea that an injury could be adequately balanced or canceled by revenge, payment, condemnation, or apology. What satisfies our sense of an appropriate and adequate balance or cancelation clearly depends upon the cultural presuppositions that we bring to the fore, and primarily upon how we conceive of injuries and the goals of tort law mechanisms—which may include compensation, deterrence/punishment, efficiency, restoration of social harmony, maintenance of honor, and social and economic develop-

104. *Id.*

105. Julie A. Davies & Dominic N. Dagbanja, *The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective*, 26 Ariz. J. Int'l & Comp. L. 303, 308–309 (2009) (Ghana); Bussani, *supra* note 17, at 48 (Ethiopia and Eritrea); more generally, Sacco, *supra* note 3, at 203, 247; Diamond, *supra* note 101, at 81–91.

106. Gluckman, *supra* note 92, at 235–38; Sacco, *supra* note 3, at 249.

107. See the authors cited, *supra* note 105.

108. Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 Law & Soc'y Rev. 275 (2001) (also discussing the residual role that compensation paid by the actual tortfeasor plays within the U.S. system); *see also* Lewis & Morris, *supra* note 6, at 234–36; Peter Cane, The Anatomy of Tort Law 219–20 (1997); Falk Moore, *supra* note 98, at 115–16.

109. See *supra* Part V.

ment.[110] Further, there is a mutually constitutive relationship between injuries and remedies, insofar as the remedy itself—or the process of seeking the remedy, or the negotiation of an alternative to the remedy—may ultimately transform the victim's perception of the injury itself.[111]

For instance, Western tort law cultures underscore personal autonomy, individual rights, and the adjudication of rights through litigation as means to vindicate and protect interests, values, and prerogatives that are deemed to be socially relevant. Injuries can and ought to be (mainly) replaced by money.[112] The emphasis placed by Western tort laws on the monetization of damage compensation deeply influences the selection and framing of tort law actions. To give but one illustration, the need to ensure collectability of the damages award often leads victims to shape their tort law claims so as to match some insurance coverage. Since intentional injuries are usually excluded from liability insurance, victims of intentional torts are incentivized to mold their claims to find better candidates for liability. In practice, what could be brought as an intentional tort claim against the actual wrongdoer can also be filed as a negligence tort claim against those—usually insured corporate entities—who allegedly had the duty to refrain or prevent the intentional wrongdoer from injuring the victim. The transformation of the complaint thus helps victims to blame a defendant with a deep pocket behind her.[113]

The above beliefs—that money can replace persons, losses, and pain, and that compensation may result from pursuing aggressively a remedy against the wrongdoer through litigation—are alien, or even offensive to other legal cultures. We do not find those beliefs, for instance, in societies where the very idea that money can be used as a depersonalized toll for bad behavior to be quantified by courts is completely foreign to the local legal tradition. This is the case for societies in which remedying the tort implies rebuilding the spiritual harmony of the community to which the victim belongs.[114] Indeed, in many tribal cultures, when a person is injured, her (matri- or patri-) clan may claim the transfer of cattle and/or women from the injurer's clan.[115] But monetization and depersonalization of tort law claims are also repugnant to societies whose remedial tort law rules place the accent on the restoration of the victim's (or her family's) honor. For instance, under the customary law of northern Somali tribes, as well as in that of the Albanian mountains, the only satisfactory reparation for killings, injuries, and offences against someone's honor is murder.[116] In these contexts, acceptance of blood money as a way of settling the feud is seldom accepted (and customary laws of some Albanian regions do not even authorize it),[117] for it is considered an inadequate way to retrieve what is seen as lost for good.[118] Blood, of course, is not the only way to vindicate the victim's lost honor. Other cultures, such as that of Ghana, conceive of tort law rules as a means to restore the plaintiff's and his group's standing within the community. Tribal laws of Ghana often hold that public admission and retraction of the tort are a sufficient remedy. The offender's confession of her disgraceful behavior before her peers provokes jeers and sneers that are often satisfactory to the victim, at least as far as less serious offences are concerned.[119]

Elsewhere, such as China, cleansing a dishonored reputation through tort law requires the wrongdoer to issue an apology to restore the victim's personality rights in the public eye and (in recent times) in those of the ruling political party.[120] Apologies are also at

110. Galanter, *supra* note 52, at 2; Scott, *supra* note 53, at 24.

111. Galanter, *supra* note 52, at 3.

112. Scott, *supra* note 53, at 123–24, 141–46; LOCHLANN JAIN, *supra* note 2, esp. at 34–36.

113. Tom Baker, *Insurance in Sociolegal Research*, 6 ANN. REV. L. & SOC. SCI. 433, 435–36 (2010); see also Lewis & Morris, supra note 6, at 242–43; ROGER COTTERELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 163–64 (2006).

114. Thus, in rural villages of northern Thailand, compensation for personal injuries, though it may be monetary, is aimed at providing funds for the performance of the ceremonies propitiating the ghosts who have been involved in the wrong. Engel, *supra* note 53, 47–49. In similar terms, but with regard to African tribal societies, see GLUCKMAN, *supra* note 63, at 108.

115. SACCO, *supra* note 3, at 249; *compare also* C. Daryll Forde, *Double Descent Among the Yako*, *in* AFRICAN SYSTEMS OF KINSHIP AND MARRIAGE, 285, 313–14 (Alfred R. Radcliffe-Brown & C. Daryll Forde eds., 1987) (Yako of Nigeria); *and* Sally E. Merry, *Relating to the Subjects of Human Rights: The Culture of Agency in Human Rights Discourse*, *in*, LAW AND ANTHROPOLOGY: CURRENT LEGAL ISSUES, 385, 386–87 (Michael Freeman & David Napier eds., 2009) (Papua New Guinea). In the case of the Yako, as well as in Papua New Guinea, it is the matriclan, and not the patriclan, that is entitled to compensation.

116. *See*, respectively, SACCO, *supra* note 22, at 42; RICHARD F. BURTON, FIRST FOOTSTEPS IN EAST AFRICA 174 (1966) (orig. ed. 1856) (on Somali law); DONALD MACKENZIE WALLACE, A SHORT HISTORY OF RUSSIA AND THE BALKAN STATES 89 (2006) (orig. ed. 1914); SISTO CAPRA, ALBANIA PROIBITA: IL SANGUE, L'ONORE E IL CODICE DELLE MONTAGNE 188, 194, 199 (2000) (on Albanian law).

117. Ian Whitaker, *Tribal Structure and National Politics in Albania, 1910–1950*, *in* HISTORY AND SOCIAL ANTHROPOLOGY 253, 268 (I.M. Lewis ed., 1968).

118. *Compare* BURTON, *supra* note 116, at 174 (Somalia) *with* Whitaker, *supra* note 117, at 253, 264–70 (Albania). On blood money under Islamic tort law, see Abdul Basir bin Mohamad, *Islamic Tort Law*, *in* COMPARATIVE TORT LAW, *supra* note 17 (on file with the author).

119. Dagbanja, *supra* note 17, Davies & Dagbanja, *supra* note 105, at 314–15.

120. Mo Zhang, *Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon*, 10 RICH. J. GLOBAL L. & BUS. 415, 467–70 (2011); Xiaoqian Hu, *When American Law Meets Chinese Law Eye to Eye: How Two Legal Systems Approach the Duty to Protect*, 10 GLOBAL JURIST, no. 2 (ADVANCES), art. 5 at 8–13 (2010); Bruce Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT'L L.J. 69, 90–93 (2006). Apologies are expressly included in the statutory list of possible remedies for civil wrongs. *See* Transliteration of Chinese Name (中华人民共和国侵权责任法) [Tort Liability Law] (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) art. 15(8) (China), *available in English at* http://www.wipo.int/wipolex/en/text.jsp?file_id=182630. Plain-

the core of the compensation system in the Japanese cultural framework. In Japan, even outside cases of defamation, remedying a tort entails a duty to apologize to the victim, in addition to or in substitution of the payment of an appropriate sum. The offender should display her willingness to maintain a positive relationship with the injured person, and express feelings of deep regret for what happened. While formal or written apologies are often deemed to be a sufficient form of reparation and may relieve the wrongdoer from (both unofficial and official) legal consequences of her misbehavior,[121] an offer of compensation without apology would be unlikely to satisfy the victim's needs and expectations.[122]

Notwithstanding the absence of an "official," State-driven enforcement machinery, unofficial mechanisms for remedies enforcement—from the blame of the community to the fear of supernatural reaction—usually operate well in ensuring that injurers and victims follow customary procedures.[123]

But the point is that, as the above examples show, in the field of remedies there exists a plurality of legal solutions, which may combine, sustain, compete, and conflict with one another, across and within the legal systems. To be sure, there are instances in which the mere existence of official (State-posited) law can work as an actual threat upon the injurer in order to compel her to comply with traditional obligations.[124] Yet, at other times, positive legal rules and courts' administration of justice may challenge the authority of other, parallel legal layers. A State's tort law procedures may offer remedies unknown to or denied by other legal layers,[125] or they may ban the

tiffs who sue in court usually require monetary damages as well, and there is some evidence that they do not seek to compel enforcement of a judgment directing the defendant to apologize if the defendant pays the damages: Liebman, *supra*, at 92.

121. Wagatsuma & Rosett, *supra* note 14, at 488. Under Japanese official law, offering an apology, and particularly letters of apology (shimatsusho), is an important "condition subsequent to the commission of the offence" which, according to art. 248 of the Japanese Code of Criminal Procedure (KEIJI KEISOHŌ [KEISOHŌ] [C. CRIM. PRO.]), may authorize the prosecutor to choose not to institute official proceedings against the author of a crime. Wagatsuma & Rosett, *supra* note 14, at 482. For similar observations with regard to the Fiji, see Letitia Hickson, *Hierarchy, Conflict, and Apology in Fiji*, *in* ACCESS TO JUSTICE: THE ANTHROPOLOGICAL PERSPECTIVE 17, 23–24, 27–31 (Klaus-Friedrich Koch ed., 1979). On the role apology may play in Western jurisdictions, and in the United States in particular, see Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141 (2011); Robbennolt, *supra* note 68, at 492–94.

122. Wagatsuma & Rosett, *supra* note 14, at 462.

123. Heckendorn Urscheler, *supra* note 20, at 109–11 (Nepal); Engel, *supra* note 53, at 65 (Thailand); Bussani, *supra* note 17, at 48 (Ethiopia and Eritrea).

124. Engel, *supra* note 53, at 65 (citing the example of the enforcement of Thai customary rules of compensation through the threat of bringing claim before the courts under official Thai law).

125. M.O. Hinz, *Traditional Authorities: Custodians of Customary Law Development*, *in* THE FUTURE OF AFRICAN CUSTOMARY LAW 153, 164 (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., 2011) (suggesting that judicial administration of criminal law penalties under official Namibian law has propelled changes in the

performance of traditional or customary legal rituals and form of redress,[126] thus initiating complex, mutually constitutive processes of erosion, adaptation, and resistance, which may involve the transformation of all the legal layers concerned—both the official and the unofficial.[127]

CONCLUSIONS

Western understandings of tort law—within and outside the legal discourse—usually represent this area of the law as a mix of rules, institutions, and procedures, administered and governed by official legal actors: legislatures, courts, lawyers, and legal scholars. As we have seen, however, such a picture tends to overlook the fact that—inside and outside the West—tort law is built up and continually altered by cultural attitudes, technological frameworks, and organizations of power.[128]

Ideas about what is a harm, who may cause or suffer it, and how it can be compensated or canceled stem from never-ending, dynamic processes. The latter are relentlessly triggered by the accumulation, crystallization, and contestation of knowledge, beliefs, stories, representations, images of justice, structures, social interactions, rituals, and practices of giving and taking—involving victims, injurers, and the wider groups and social networks to which they belong. Some of these features endure over time, across people, and throughout different cultures; others do not. Some of them operate overtly, others work in the shadow of the State and its positive law, and many live in a fluid space in between official and unofficial layers.

This is why a multilayered, pluralistic, comparative perspective on tort law is much needed. Such a perspective would help challenge traditional understandings of tort law, connect mainstream visions about tort law with the broader social contexts producing them, and

Ukwangali customary law—the customary law of the Western part of the Kavango region—leading traditional courts to take into account the existence of these penalties in assessing damages); Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT'L & COMP. L. 279, 285–88 (2009) (stating that Israeli judicial administration of tort law remedies in family matters is eroding the jurisdiction of rabbinical courts on family law issues, traditionally regulated by religious law).

126. Marilyn Strathern, *Losing (Out On) Intellectual Resources*, *in* LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS 201, 204–209 (Alain Pottage & Martha Mundy eds., 2004) (referring to judicial judgments in Papua New Guinea prohibiting local tribes from transferring women as blood payment in the case of a killing); Akin, *supra* note 95, at 47–50 (describing how British colonizers prohibited killing as punishment for serious moral transgressions such as adultery).

127. On these phenomena in general, see the observations of Richard L. Abel, *Introduction*, *in* 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 1–13 (Richard L. Abel ed., 1982).

128. NADER, *supra* note 2, at 209–11.

unveil the cultural assumptions which underlie and support the operations of tort law mechanisms. To delve beyond conventional wisdom, into the cultural frameworks in which tort law operates and is embedded, would be both this perspective's promise and challenge.