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Dialectic of Injury and Remedy

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THE DIALECTIC OF INJURY AND REMEDY

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We are here to discuss injuries without remedies. I want to begin the discussion by considering the very complex relations between these two notions. My argument is: (1) Each is a cultural construction—but no less real for that. Both injury and remedy can, at a given moment in a given society, be regarded as positive and measurable. But if we step back, extend our time horizon, and widen our view beyond a given legal system, we see (a) that these notions are inextricably bound up not only with theories of justice but also with images of personal wholeness and social bonds; (b) that they are congenitally and indelibly normative; and (c) that although we can separate them analytically, they are, at least in part, constitutive of one another. (2) Further, that each, injury and remedy, is not static but changing in meaning and content—that there is what we might call a moving frontier that marks the addition of new territories and the subtraction of old ones. I emphasize these features, because I want to speculate with you about (3) the possible futures of injury and remedy.

I. INJURY AND REMEDY AS CULTURAL CONSTRUCTIONS

I begin by calling your attention to what I regard as the most important conceptual tool in analyzing legal encounters and legal change—the dispute pyramid, which traces potential pathways from "perceived injurious experiences" to remedies, via grievances, claims, disputes, and remedial institutions like lawyers and courts. The urtext of this conceptual track is William L.F. Felstiner, Richard L. Abel, and Austin Sarat's 1980 paper on *Naming, Blaming and Claiming*.[1] They chart the linkages between experienced injury and

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1. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980–81); *cf.* Marc Galanter, *Adjudication, Litigation and Related Phenomena*, *in* LAW AND THE SOCIAL SCIENCES 151 (Leon Lipson & Stanton Wheeler eds., 1986) (discussing adjudication as a cultural model and a social structure).

legal remedy.[2] My argument today can be seen as a series of footnotes to their inquiry, interrogating the concept of injury as a starting point for analysis;[3] enlarging the notion of remedy beyond the current legal boundaries; and adding a temporal dimension in which injury and remedy are not fixed and determinate, but labile, moving, plural, and contested.

I readily acknowledge that the participants in this symposium are already aware of each of these things. I see my task as juxtaposing them to enable us to move beyond the positivist limitations that, for convenience, we ordinarily adopt when operating in the legal realm of our own society and our own era. We recognize that remedies are cultural constructs: it is not a natural given that an injury is adequately erased or cancelled or balanced by revenge, payment, condemnation, or apology. What satisfies our sense of an appropriate and adequate remedy clearly depends on the cultural presuppositions that we bring to the question.[4]

We may, however, be tempted to think that injury stands on a different footing—that a broken arm or destroyed property is "there" independent of our cultural lenses. But on reflection, how do we distinguish injury from the great sea of troubles and discomforts and losses that afflict us? To take a pedestrian example, is a stubbed toe an injury? A deliberately stepped-upon toe? A misshapen toe? An attack of athlete's foot? A bunion? I propose that injury in its narrower sense emerges when the hurt entails some violation or deprivation of something we (or others on our behalf) feel that we are entitled to—bodily integrity, property, or social standing.

We sometimes use these terms stripped of their normative connotations. We use "injury" neutrally to describe a hurt or deprivation isolated from its normative context—for example, a broken arm or a blemished reputation. But I suggest that such usage

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2. Felstiner et al., *supra* note 1.

3. Felstiner, Abel, and Sarat begin their analysis with "perceived injurious experiences." They assume that most of these experiences correspond to some palpable injury; that some of these perceptions are mistaken (perceived but not really there); and that some actual injuries are unperceived. For their purposes it was not important to go beyond the perceptions that launch the process.

4. *See* WILLIAM IAN MILLER, AN EYE FOR AN EYE x–xii (2006). Of course this cultural template is specified and applied variably and unevenly by groups and individuals within a given culture.

is an extension of the core meaning that injury is a negative event that is a breach in the moral order.[5] We do not ordinarily speak of "injury" to property (apart from animals), which is not accorded standing to raise moral claims. The same point might be made for "remedy," which is sometimes employed to denote something ameliorative that does not entail moral desert—as aspirin is a remedy for headache, a mosquito net is the remedy for voracious mosquitoes. But I would argue that these "neutral" usages are extensions of the morally infused core connotations of these terms. In their narrower "central" usages, the two concepts help constitute each other. Perception of something as an injury—a breach in the moral order—poses the question of what sort of remedy might be forthcoming (or not)—apology, purification, punishment, compensation, or whatever. Contemplation of remedy, in turn, asks about the character of the injury to be remedied, the desert of the injured, and the responsibility of the injurer.

Together they take us to questions of what is a person (or what are the various grades of persons), what are the proper relations between persons, and what is the suitable response to an invasion of, insult to, or diminishment of the person. We know that some societies emphasize remedies for breaches of honor; that others emphasize material losses; that some assign different worths to the losses of different strata of persons; that the array of remedies differs from one society to another, as does the portion of those remedies that are located in the legal realm and the extent to which socially prescribed or sanctioned remedies are actually realized.[6]

II. THE MOVING FRONTIER

We know that legal remedies—and their corresponding remediable injuries—each have a history. Think of recovery for violations of privacy or emotional distress. At one time those

5. The *Oxford English Dictionary* gives the following as the first definition of "injury": "Wrongful action or treatment; violation of infringement or another's rights; suffering or mischief willfully and unjustly inflicted." OXFORD ENGLISH DICTIONARY 981 (2d ed. 1989). The more neutral "hurt or loss" comes in third place. *Id.* The term "injury" derives from the Latin "injuria"—injurious, unjust or wrongful. *Id.* Note that "jur" is the same root that appears in jurist, jurisprudence, etc., and is closely related to "jus," the source of justice and related words. *Id.*

6. *See generally* MILLER, *supra* note 4 (providing historical perspective on "honor cultures").

remedies were not there, and now they are there.[7] Or think of defamation of public figures, alienation of affections, and breach of promise to marry. Once they were there as legitimate legal claims; now they are (mostly) gone.[8] So we can visualize a moving legal frontier in which some things are newly conceived of as remediable injuries, and formerly remedied injuries are redefined as undeserving of legal remedy.[9]

So injury and remedy are not fixed and determinate, but moving and changing. Is this change random, or is there a pattern? Is there some force driving the moving frontier? These questions take us back to naming and blaming—to changing perceptions of injury and changing attributions of responsibility for causing injury and providing remedy. In the long run, new ways of envisioning and understanding troubles and remedies are the hidden fount and engine of our expanding sense of injustice.

Crudely, our sense of legal injury and remedy reflects the changing capabilities of human society. Human inventiveness, accumulated in science, technology, and social organization, has enlarged our capacity to prevent and address many kinds of harm.[10] Think of inoculations, electrical insulation, and safer aircraft. As more things are capable of being done by human institutions, the line between unavoidable misfortune and remediable injury shifts. The realm of injury is enlarged.

To take a famous example, we can see this happen before our eyes in the well-known case of *The T.J.Hooper*.[11] The availability of radio sets that enabled ships to receive storm warnings changed the standard of seaworthiness, so that a tugboat owner violated his duty

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7. *See generally* Felstiner et al., *supra* note 1 (discussing the emergence and transformation of disputes).

8. *Id.*

9. Although my examples are drawn largely from tort law, I do not confine this observation to the tort arena. The moving frontier can also be observed in contract law (enforceable pre-nuptial and post-nuptial contracts, enforceable requirements contracts, etc.) and in criminal law, as indicated by the new protections afforded against sexual harassment, hate crimes, and various sorts of financial predation.

10. The effect of such change on human amenity is documented in the work of the late Julian Simon. *See* JULIAN L. SIMON, THE ULTIMATE RESOURCE (1981); JULIAN L. SIMON, THE ULTIMATE RESOURCE 2 (1998); THE STATE OF HUMANITY (Julian L. Simon ed., 1995).

11. 60 F.2d 737 (2d Cir. 1932).

of care by omitting to equip his tug with this new technology.[12] Being afflicted with an incurable disease has always been an inalterable misfortune; now that cures for many ills are routine, failure to achieve a cure may be seen as a remediable injury. Even a perception of insufficient vigor in pursuing a cure or distributing ameliorative drugs can give rise to a feeling of injustice and a claim of injury. As the scope of possible social interventions broadens, more and more terrible things become defined by the incidence of possible intervention. Thus, famine, social subordination, or flawed appearance are not inalterable fates, but a matter of appropriate interventions. What has been seen as fate may come to be seen as the product of inappropriate policy.[13]

In our own society and other developed societies, the discomforts and risks of everyday life have declined dramatically for most people over the past century, and there is a widespread sense that science and technology can produce solutions for at least many of the remaining problems.[14] Even so, we will not approach a problem-free world, for people are capable of identifying or inventing new problems as quickly as old ones are solved. This is not a cynical observation about an insatiable appetite for a "risk-free world." Rather, it is premised on the notion that the very same human capabilities that create solutions for existing problems—by fulfilling existing needs and wants—lead to the discovery or creation of new needs, new wants, and new problems. The technologies that produce agricultural abundance and automotive ease generate new problems of obesity and congestion. The rising expectations that track these advances in human capability enable us to identify, experience, and remedy new sorts of injustice.[15] For now, at least, these advances seem to be accelerating. A group of leading bioethicists observe:

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12. *Id.* at 740.

13. JUDITH N. SHKLAR, THE FACES OF INJUSTICE 51–82 (1990).

14. LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 42 (1985).

15. This process may not be unidirectional. If the ambit of the realm of (in)justice tracks the expansion of human social capacity, what might we expect if that capacity were to shrink, for example, due to the massive demands of, say, climate change? Might a contraction of the social capacity for remedy and protection be accompanied by shrinkage in the realm of perceived injuries?

> As the possibilities for significant and large-scale genetic interventions on human beings come closer to being actualized, we may be forced to expand radically our conception of the domain of justice by including natural as well as social assets among the goods whose distribution just institutions are supposed to regulate.[16]

In this area, too, increasing human social capability is propelling matters that were in the realm of fate into the realm of injury and remedy.

There are other dimensions to the moving frontier. Not only does society's concern expand to include new kinds of injuries, but it moves to the troubles of the sorts of people who were previously held of little or no account—for example, women, subject peoples, people with disabilities, and sexual minorities.[17] Changing sensibilities among the advantaged and the spread of resources for mobilization to less advantaged groups, both closely linked with changing communication technologies, bring new candidates for remedy onto the social agenda and often onto the legal agenda.

Almost all of my examples have been of individual injury and remedy. But many sorts of injury are widely shared (food poisoning, defective consumer goods, etc.) and/or inseparably collective (neighborhood deterioration, crime, etc.). Legal remedies in such instances may entail action by public agents or private entrepreneurs (like class-action lawyers) rather than claiming by individuals.

The enlargement of the sphere of remedy does not necessarily lead to less unremedied injury. There is not a fixed sum of injury in the world that is diminished by every achievement of remedy. If the sphere of perceived injury expands dynamically with the growth of human knowledge, with advances in technical feasibility, and with rising expectations of amenity and safety,[18] the domain of unvindicated and unremedied injury may grow rather than shrink.

This is even more the case if we take into account the actualization of prescribed remedies. Some remedies are readily and routinely actualized—for example, compensation for automobile

16. ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 63 (2000).

17. FRIEDMAN, *supra* note 14, at 107.

18. *See id.* at 70–72.

injuries. But other types of injuries, for example those from smoking or medical negligence, are far less frequently pursued to legal remedy.[19] A study of medical malpractice in New York State estimated that "eight times as many patients suffered an injury from negligence as filed a malpractice claim in New York State. About [sixteen] times as many patients suffered an injury from negligence as received compensation from the tort liability system."[20] Compiling data on low claiming rates, Richard Abel concluded that the tort system suffers from a chronic "crisis of underclaiming" that leads to failure to compensate needy, deserving victims and failure to deter unreasonable risks.[21] Many obstacles may inhibit claiming (e.g., ignorance, hostile attention, expense), discourage perseverance, and thwart awarding of a remedy.[22] The cost of actualizing rights creates a zone of immunity that insulates injurers and depresses the instances in which legal remedy is sought.

III. THE POSSIBLE FUTURES OF INJURY AND REMEDY

What are the implications of recognizing the moving frontier? First, increases in remedy do not imply a corresponding decrease in the amount of unremedied injury. In an expanding social and legal universe, justice/injustice is not a zero-sum game, but both grow together, because injustice increases along with the advance of human inventiveness, knowledge, and capability—and very possibly faster than we can institutionalize justice. New perceptions and claims of injury are likely to arrive before social arrangements change to make the vindication of such injuries routine and ordinary. But once remedy is institutionalized, it teaches us to find more injuries by analogy.

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19. *See* PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK: THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF NEW YORK 6 (1990).

20. *Id.*; *cf.* PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 24 (1985) (finding that one in ten negligent injuries at most resulted in a claim, and of those, only 40 percent received compensation).

21. Richard Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987).

22. *Cf.* David M. Engel, *The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984) (discussing obstacles to recovery for injury in a small community).

Second, in a world of expanding capabilities and rising expectations, where claims of injury and injustice proliferate, we cannot avoid the necessity of rationing remedy. Remedies use up resources—money, organization, and not least the limited supply of attention. Even if resources are also expanding, every expenditure involves corresponding opportunity costs. And justice is not the only thing we want. Few would argue that the lowest-priority claim for justice should enjoy a lexical priority over every other goal. Some grievances can be addressed, but not all grievances. In deciding which are worthy candidates for attention, we cannot rely on common sense, for common sense is an unstable residue of past understandings, constantly being compromised by advancing technology and changing perceptions.

Third, we should expect that some claims presently regarded as frivolous and undeserving will come to be considered serious and legitimate, as emotional injury and sexual harassment claims have in the recent past. The moving frontier suggests that many such claims that are presently seen as beyond the pale will eventually be located within the boundary of recognized claims. Consider such an "outlandish" claim as a right to an attractive appearance. Although this remains far off, consider that we have recently moved partway there—displaying a grossly unattractive appearance was once considered a criminal offense.[23] How about a right to have my rare disease researched? How about rights to protection from the seductions of tobacco and fast and fattening food? (After all, we once embraced a claim to freedom from the harms of alcohol.) How about a right to genetic manipulation to resist these seductions? And what about a right to pleasant weather? Can we imagine a right to fashion "designer children"? And what of a right to a remedy for the dishonor and deprivation inflicted on one's ancestors?[24] Which of

23. *See generally* SUSAN SCHWIEK, THE UGLY LAWS: DISABILITY IN PUBLIC (2009) (discussing legalized discrimination against deformed beggars and others in the United States in the nineteenth and twentieth centuries).

24. On the growing prevalence of such claims, see Marc Galanter, *Righting Old Wrongs in* BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 107, 107–09 (Martha Minow & Nancy L. Rosenbaum eds., 2002). *See also* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999) (discussing, in part, reparations for human rights violations inflicted on he ancestors of contemporary claimants).

these do we think will be reached by the moving frontier? Which do we feel safe in predicting will not? Contrariwise, are there cases where the present frontiers of protection and remedy will recede?[25]

These new, cutting-edge claims—complex and problematic and many at the high end in terms of the affluence of those who assert them and the high cost of vindicating them—can be expected to multiply. In these new territories, the problems of equal equipage and competence may be accentuated. The moving frontier of justice multiplies the number of contests in which the conditions of equal participation are not present.[26] For the most part, the advances in human capability and control that drive the justice frontier are located in or managed by artificial persons (APs)—corporations, governments, organizations—who are generally more proficient players of the law game than natural persons are.[27] In such areas, individual lawsuits may be supplemented or displaced by collective initiatives in the forms of aggregate or class litigation or regulatory intervention.[28] Or, such lawsuits may be suppressed by using contract to corral them into captive forums where they cannot become the basis of public policy.[29]

We have been imagining scenarios in which injury and remedy are increasingly legalized—i.e., defined by legal institutions and pursued in processes institutionalized there.[30] We assume, with some foundation, that with the growth of the legal realm, the portion of remedy to be found there is growing vis-à-vis other locations like apology, revenge, charity, and so forth. We assume that legalization

25. There may be contractions in the zone of injuries that are regarded as eligible for remedy by public institutions. For example, we have seen the elimination of remedies for breach of promise to marry, alienation of affections, and so forth, and a decline in protections against violations of the sense of honor.

26. *See* Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000). We like to think of the legal system as a site for remedies and protections for the injured and disadvantaged. But the creation of specialized remedial institutions brings in its train different levels of capacity to use them and thus amplifies differences at the same time that it overcomes them. *See* Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y REV. 217, 289–90 (1974).

27. Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1373, 1387–92 (2005).

28. *Id.*

29. *Id.*

30. Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 MOD. L. REV. 1 (1991).

will proceed in tandem with modernization and globalization. I was brought up short by reading David M. Engel and Jaruwan S. Engel's tale of motor vehicle injuries in Thailand.[31] They describe delegalization as Thais shifted from "villagers' Buddhism," which contained customary remedies for such injuries—remedies that were occasionally backstopped by the courts—to "Buddhism in the abstract, separated from the efficacious local remedy systems to which it was formerly linked."[32] I am not proposing that the world is necessarily going this way, but the experience in Thailand suggests that we should question the easy assumption of continuing legalization. The initiatives toward the privatization of justice (ADR), the reduction of legal remedies (via tort reform), and the shift away from definitive adjudication (i.e., the vanishing trial throughout the common law world)[33] suggest that individualized legal claiming is not necessarily the future of injury and remedy.

31. DAVID M. ENGEL & JARUWAN S. ENGEL, TORT, CUSTOM, AND KARMA: GLOBALIZATION AND LEGAL CONSCIOUSNESS IN THAILAND (2010).

32. *Id.* at 135.

33. Marc Galanter, *A World Without Trials*, 2006 J. DISP. RESOL. 7 (2006).