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# PERCEPTION AND DECISION AT THE THRESHOLD OF TORT LAW: EXPLAINING THE INFREQUENCY OF CLAIMS

David M. Engel\*

## INTRODUCTION

The most intriguing question about injury victims in the tort law system has been lost in a fog of specious assertions, contentious debates, and political posturing.<sup>1</sup> That question, seldom asked and almost never answered, is why the vast majority of injuries never cross the threshold of tort law.<sup>2</sup> Indeed, most injury victims, even those who could bring legitimate tort actions, do not assert a claim of any kind against their injurer.<sup>3</sup> Instead, they absorb their losses and attempt to pay injury costs by drawing on their own resources, their health and accident insurance, or government programs and benefits.

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\* SUNY Distinguished Service Professor, SUNY Buffalo Law School. For their comments on this Article, thanks go to Marc Galanter, Fred Konefsky, and Lynn Mather. Thanks also for the many contributions of two dedicated research assistants: Frances Stephenson and Lauren Gray.

1. Marc Galanter has chronicled the seemingly endless debates over tort law and the inaccurate or misleading statements that have accompanied them. See, e.g., Marc Galanter, 2005 James McCormick Mitchell Lecture, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1415 (2006); Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457 (1998); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1098–1101 (1996) [hereinafter Galanter, *Real World Torts*]; Marc Galanter, *The Tort Panic and After: A Commentary*, 16 JUST. SYS. J. 1 (1993); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3–5 (1986). For an analysis of the underlying politics of these discussions, see WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 79 (2004).

2. See Galanter, *Real World Torts*, *supra* note 1, at 1101 (citing studies that demonstrate the low rate of claiming in injury cases); see also Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 448–49 (1987) (summarizing empirical studies showing low claiming rates in injury cases); 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, 1185 (1992) (“[A]t the outset of the litigation process, a large number of potential plaintiffs with valid claims never initiate a claim and thereby become instant false negatives.”).

3. The term “claim” in this Article refers to a request for compensation or other remedy that the injury victim lodges with any potential remedial agent, including the injurer. Claims need not involve litigation or its precursors. Examples of claims not necessarily connected to litigation include contacting an ombudsman; notifying the Better Business Bureau; contacting the injurer’s insurance company; or presenting a claim to a special compensation fund, such as the September 11th Victim Compensation Fund of 2001.

“Lumping” occurs far more often than claiming;<sup>4</sup> and litigation proves to be a rare event in most personal injury cases, conventional wisdom to the contrary notwithstanding.

According to a widely cited RAND Corporation study by Deborah Hensler and others, fewer than one in fourteen injury victims consults a lawyer, and only one in fifty files a lawsuit.<sup>5</sup> Nine out of ten never claim, contact their injurer or the injurer’s insurance company, or seek legal counsel. Instead, they absorb the manifold financial and psychological consequences of their injury and move on. The preference for lumping appears to extend across countries and cultures, despite some variation in frequency from one setting to another.<sup>6</sup> If research on tort law were driven by numbers alone, tort scholars would spend most of their time studying this vast aggregation of pre-legal encounters in which injury victims take no action against potential defendants, rather than the iconic but freakishly rare cases in which they claim, contest, litigate, and appeal.

Yet it remains surprisingly difficult to explain *why* claiming is so rare. Why do most injury victims lump their injuries rather than try to do something about them? Two kinds of explanations are suggested by the sparse literature on this topic: economic and cultural. The *economic* explanation portrays injury victims as rational actors who weigh the potential benefits of lodging a complaint or mobilizing the law against the costs in money, time, and aggravation.<sup>7</sup> The choice to

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4. The term “lumping” in this Article refers to instances in which an injured person does not lodge a claim, *see supra* note 3, or take any action against the injurer to request or demand compensation or other remedy. The term was originally popularized by William L.F. Felstiner. *See* William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *LAW & SOC’Y REV.* 63, 81 (1974) (“In lumping it the salience of the dispute is reduced not so much by limiting the contacts between the disputants, but by ignoring the dispute, by declining to take any or much action in response to the controversy.”).

5. DEBORAH R. HENSLER ET AL., *RAND, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 122 (1991).

6. *See, e.g.*, DAVID M. ENGEL & JARUWAN S. ENGEL, *TORT, CUSTOM, AND KARMA: GLOBALIZATION AND LEGAL CONSCIOUSNESS IN THAILAND* 79–80, 159–61 (2010); HAZEL GENN ET AL., *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 9 (1999); Masayuki Murayama, *Experiences of Problems and Disputing Behaviour in Japan*, 14 *MEIJI L.J.* 1, 31 (2007); Saks, *supra* note 2, at 1183–85. Note that the lumping rate can appear lower—and the claiming rate higher—in studies that measure rates of claiming in relation to a base of “grievances” (injured party blames someone else for the harm) rather than “injuries” (injured person may or may not perceive the harm as a result of someone else’s act or omission—or may not perceive the other party as culpable). Such studies are not designed to take account of the large number of cases that are lumped before they become grievances. *See, e.g.*, Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 *LAW & SOC’Y REV.* 499, 505 (1991).

7. *See, e.g.*, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 1 (1991) (applying a rational actor model to the analysis of formal law and informal “social norms” in disputes involving cattle ranchers in Shasta County, California); RICHARD A.

lump represents a considered decision that the payoff for action is simply not worthwhile in comparison to inaction. The *cultural* explanation, on the other hand, suggests that societal norms and practices imbue lumping, complaining, and litigating with particular meanings that lead people to value or disvalue them in distinctive ways.<sup>8</sup> Thus, it is sometimes said, asserting one's legal interests may be strongly disfavored in Japan, Korea, or Thailand,<sup>9</sup> but not in what some consider the more adversarial and rights-conscious culture of the United States.<sup>10</sup>

Both the economic and cultural perspectives are useful to a certain extent, yet neither provides an adequate explanation for the predominance of lumping in injury cases. The economic perspective derives from assumptions about human cognition and decision making that

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POSNER, *ECONOMIC ANALYSIS OF LAW* 268–70 (7th ed. 2007) (analyzing relative costs of invoking law compared to reliance on “social norms”); J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAPANESE STUD. 111, 111–12 (1988) (defending a cost-benefit analysis of the decision to engage in or avoid litigation, and urging a definition of cost that is attentive to social and cultural factors); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 80 (1983) (addressing the desirability of analyzing cost factors in the decision to litigate civil cases in comparison to choosing nonjudicial alternatives).

8. Marc Galanter's work has inspired much scholarship about the connection between culture, claiming, lumping, and litigation. In his seminal article, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, Galanter engages in a self-described “digression” on what he calls “litigation-mindedness,” noting that persons living in different cultural settings have widely varying tastes for rights and for the resort to law. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 104 (1974).

Lawrence M. Friedman's work has also been influential in emphasizing the importance of culture, particularly in the handling of injury cases. Friedman popularized use of the term “legal culture” to explain these variations: “‘Legal culture’ refers to public attitudes, norms, values, and ideas about the legal system.” LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 97 (1994). He suggests that a “trait” of legal culture is “that people who have expectations are willing to take concrete steps to see that their expectations are not disappointed, that justice is done. This is claims-consciousness, or rights-consciousness.” *Id.* at 99. Changes in legal culture are associated with variations in the rate and intensity of claiming. In contemporary American society, according to Friedman, legal culture has produced “the general expectation of justice, and a general expectation of repayment or recompense for loss.” *Id.* at 75.

9. According to Takeyoshi Kawashima's frequently cited thesis, the Japanese are averse to litigation for cultural reasons. See Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (Arthur Taylor von Mehren ed., 1963). Kawashima's thesis has produced a substantial literature, much of it critical. See, e.g., Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31 (2006). Pyong-Choon Hahm advanced a comparable argument of nonlitigiousness with respect to Korean culture. See Pyong-Choon Hahm, *The Decision Process in Korea*, in *COMPARATIVE JUDICIAL BEHAVIOR: CROSS-CULTURAL STUDIES OF POLITICAL DECISION-MAKING IN THE EAST AND WEST* 19 (Glendon Schubert & David J. Danelski eds., 1969). Thai legal culture and attitudes toward litigation are addressed by Engel and Engel. See ENGEL & ENGEL, *supra* note 6.

10. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW*, at ix–x (2001); see also FRIEDMAN, *supra* note 8, at 97.

have been sharply challenged across many disciplines. Recent studies provide little support for the view that the mind engages in conscious deliberation and rational choice in the aftermath of a traumatic injury. On the contrary, studies of human cognition have convincingly demonstrated that most thought is unconscious and that our unconscious thought “shapes and structures all conscious thought.”<sup>11</sup> According to George Lakoff and Mark Johnson, the image of a rational actor deliberately weighing and choosing among different courses of action is merely a metaphor and not a valid empirical description of actual behavior.<sup>12</sup> Furthermore, the economic explanation fails to explain why the benefits of lumping would be so much higher than those of claiming—or why the costs, broadly defined, would be so much lower—that, when injured, a rational actor would choose inaction over action in nine out of ten instances.

Similarly, the cultural perspective leaves unanswered many questions about the prevalence of lumping. For one thing, as noted above, lumping appears to be strongly preferred across quite different cultures, despite some marginal variation in frequency.<sup>13</sup> Why should this be so, particularly in light of the very substantial cross-cultural differences in legal consciousness documented by sociolegal researchers?<sup>14</sup> Furthermore, as David Nelken has pointed out, we must be cautious about using culture in a circular fashion as both cause and consequence, as the explanation as well as the thing that must be ex-

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11. GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 13 (1999). “It is a rule of thumb among cognitive scientists that unconscious thought is 95% of all thought—and that may be a serious underestimate.” *Id.*

12. *Id.* at 518.

13. See sources cited *supra* note 6.

14. The cross-cultural literature on legal consciousness is large and growing, addressing variations across diverse societies. See GAD BARZILAI, *COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES* (2003) (Israel); ENGEL & ENGEL, *supra* note 6; Mary E. Gallagher, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, 40 *LAW & SOC’Y REV.* 783 (2006); Marc Hertogh, *What’s in a Handshake? Legal Equality and Legal Consciousness in the Netherlands*, 18 *SOC. & LEGAL STUD.* 221 (2009); Lesley A. Jacobs, *Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto*, 41 *LAW & SOC’Y REV.* 511 (2007); Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 *LAW & SOC’Y REV.* 219 (1987). Studies of legal consciousness in the United States have also proliferated. See, e.g., PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE*, at xi (1998); V. LEE HAMILTON & JOSEPH SANDERS, *EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES*, at xi (1992); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 1 (1990); LAURA BETH NIELSEN, *LICENSE TO HARASS: LAW, HIERARCHY, AND OFFENSIVE PUBLIC SPEECH* 5–7 (2004); Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 *YALE J.L. & HUMAN.* 343 (1990).

plained.<sup>15</sup> A satisfactory view of culture would not treat it in reductionist fashion as a mere independent variable or “a residual explanation when other explanations run out.”<sup>16</sup> And, finally, the cultural explanation for lumping may provide broad insights into widely shared images and ideas about the use and avoidance of law, but these images and ideas are not shared by everyone in a given society, nor are they forever fixed and unchanging. One must also explain how the general becomes specific—that is, how particular classes of injury victims come to embrace or resist particular cultural norms and practices in specific times and social locations.

What if we were to make a fresh beginning? Rather than starting with either the economic or cultural model, what if we were to search as broadly as possible among all available empirical studies of injury victims’ perceptions and decisions and seek clues that might explain the widespread preference for lumping over claiming? In this Article, I attempt to reframe the discussion of injury cases at the threshold of tort law by incorporating both the economic and cultural forms of explanation into a broader, empirically based view of how humans actually respond to physical harm. Instead of the familiar, step-by-step “decision tree” model of legal decision making,<sup>17</sup> I present an alternative approach that draws on studies of mind, cognition, and decision making, as well as cultural interpretation and ethnography. Because the research literature on lumping by injury victims is relatively meager, it is not yet possible to draw definitive conclusions about why claiming and litigation occur so infrequently. Nevertheless, I will present an alternative account of lumping that reflects contemporary models of human decision making and incorporates the scattered but illuminating empirical studies of how real people respond to painful and harmful life experiences.

Part II begins this reexamination of lumping by analyzing the assumptions about human cognition and behavior that underlie the decision tree model. It then presents an alternative model that rejects the

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15. David Nelken, *Law, Liability, and Culture*, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 21, 32 (David M. Engel & Michael McCann eds., 2009) (“How can we avoid the ever-present danger of circular argument? (They do it that way because that is how they do it in Japan, in Holland, or wherever.)”).

16. *Id.* at 32.

17. See, e.g., HENSLEY ET AL., *supra* note 5; William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC’Y REV.* 631 (1980–1981); Herbert M. Kritzer et al., *supra* note 6; Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC’Y REV.* 525 (1980–1981); Saks, *supra* note 2. I have used a variation of the decision tree in my own work. See David M. Engel & Eric H. Steele, *Civil Cases and Society: Process and Order in the Civil Justice System*, 1979 *AM. B. FOUND. RES. J.* 295.

step-by-step, rational choice approach and instead views the human mind as organically connected not only to the body itself (the so-called “embodied mind”) but also to the physical, social, and cultural environment. This alternative model of the human mind highlights the dual quality of cognition, both in its fast, automatic aspects and its slower, deliberative aspects—what some scientists call System 1 and System 2 thinking.<sup>18</sup> Part III applies this model of cognition to the experience of injury and examines the empirical studies that depict the embodied mind as it registers, interprets, and responds to painful and traumatic events. Part IV looks more closely at the role of the environment—physical, social, and cultural—in shaping the perception of injury as well as the determination of an appropriate response. Part V explores the recursive process through which the injury victim’s internal narrative is shared with others whose responses can reshape and redirect the victim’s response. Part VI offers tentative conclusions about the prevalence of lumping and the directions that future research might take.

In this initial effort to reconceptualize lumping, I have chosen to focus on *physical* injuries. The territory to be explored is vast, and one must start somewhere. I believe that what is true of claiming (or non-claiming) behavior with respect to physical injuries could prove applicable to other kinds of injuries, such as emotional harms, damage to property, and reputational injuries. Moreover, because researchers have discovered that the human body plays a central role in the processes of cognition, interpretation, and decision, an initial focus on harms *to the body* should yield especially rich results. If, in Daniel Kahneman’s words, “you think with your body, not only with your brain,”<sup>19</sup> then the cognitive response to bodily trauma or damage should prove a useful starting point for a more general attempt to explain injury victims’ overwhelming preference for lumping over claiming.

## II. TOWARD A RECONCEPTUALIZATION OF INJURY AND LUMPING

Sociolegal analyses of the tort law system have generally relied on a linear, stepwise model of decision making by the injury victim.<sup>20</sup> This

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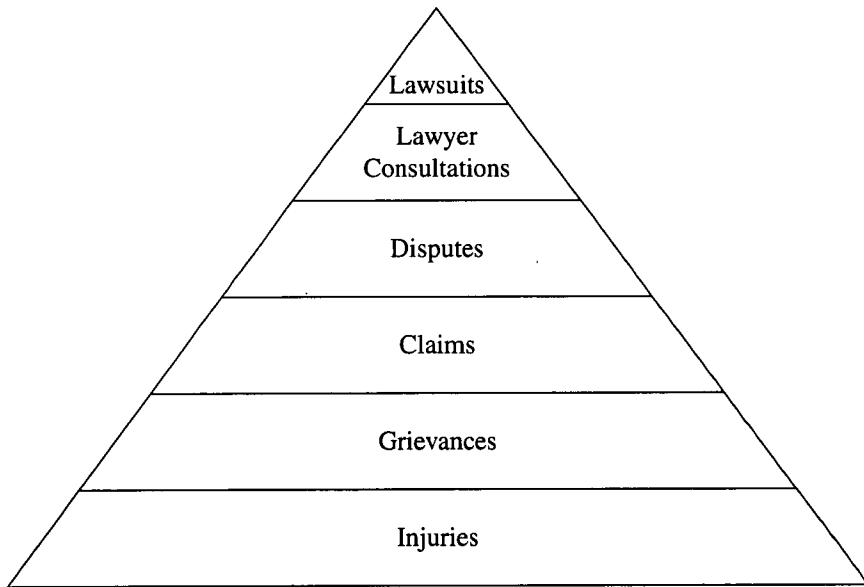
18. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 13 (2011).

19. *Id.* at 51.

20. See sources cited *supra* note 17; see also David M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation*, 44 LOY. L.A. L. REV. 33, 38 (2010) (“Turned on its side, the decision tree becomes the injury ‘pyramid’ that has provided the basis for most of the empirical research on tort law conducted during the past few decades, including my own.”).

model is often presented as a pyramid, the base of which consists of injurious events, while the upper levels consist of resources, institutions, or procedural options that the victim might select in his or her quest for a remedy.

FIGURE 1: PYRAMID MODEL OF THE TORT LAW SYSTEM<sup>21</sup>



A detailed variant of the conventional pyramid model appears in an influential article by Michael Saks.<sup>22</sup> It turns the tort pyramid upside down and presents it as a chart with the base (consisting of all actionable injuries, not just those that become grievances) on the top and the tip (consisting of injuries that have gone through all phases of the litigation process) on the bottom.

21. Figure 1 is adapted from a number of sources. See Galanter, *Real World Torts*, *supra* note 1, at 1101 fig.1; see also HALTOM & McCANN, *supra* note 1, at 79 fig.2; Miller & Sarat, *supra* note 17, at 544 fig.1. The representation of the tort pyramid in Figure 1, as contrasted with the representations in the three cited sources, features a bottom layer consisting of all actionable injuries, including those that are not perceived as such by the injury victims or do not give rise to a grievance.

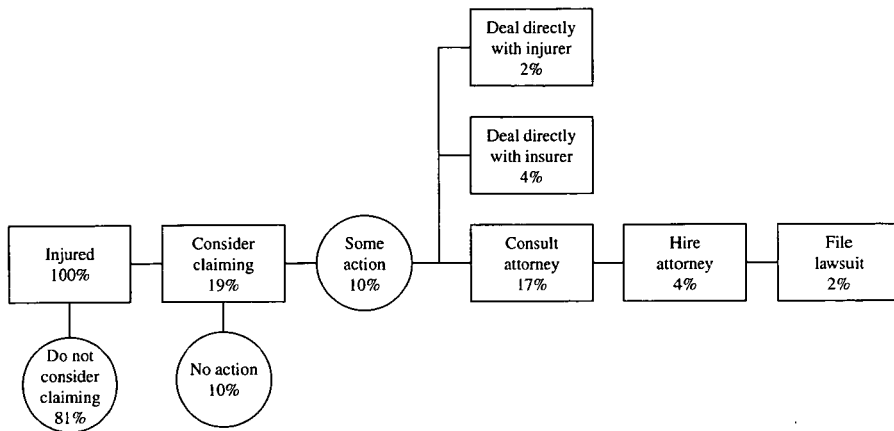
22. Saks, *supra* note 2, at 1173 fig.3.

FIGURE 2: INVERTED PYRAMID MODEL<sup>23</sup>

		Tortious Injury	
		Present	Absent
Base of actionable injuries			
Decisions to claim			
Prospective cases presented to lawyers			
Lawsuits filed			
Settlements negotiated			
Trials commenced			
Trial Verdict for Plaintiff for Defendant	for Plaintiff		
	for Defendant		
Awards			
Changes from additur/remittitur review			
Appeals			
Compensation paid			

The RAND study cited above presents a third variant of the stepwise model in which the conventional tort pyramid is rotated ninety degrees clockwise and depicted in the form of a horizontal decision tree.

23. *Id.*

FIGURE 3: DECISION TREE MODEL OF THE TORT LAW SYSTEM<sup>24</sup>

All models of this kind tend to assume that the responses of injury victims can be understood and mapped in terms of a sequence of choices at key decision points—to complain or remain silent, approach the injurer, seek help from a third party, contact the injurer’s insurance company, consult a lawyer, file a complaint, settle, go to trial, and appeal.<sup>25</sup>

Such models rest not only on a distinctive understanding of how humans behave in the face of crisis or trauma but also, perhaps less obviously, on a set of assumptions about the human mind itself. They tend to assume that humans respond to challenging events in their lives by deliberately choosing among clear-cut options and by pursuing the pathways that appear most appropriate, rewarding, moral, or just. As we shall see, however, current research casts doubt on the validity of these assumptions.

First, injury victims are not like consumers who coolly and dispassionately choose among different brands of toothpaste. Rather, they are often severely traumatized individuals who have been shaken physically and, in many cases, suffered painful wounds, scars, and disabilities. They are frail and fallible beings, not sensible utility maximizers, and may not yet have recovered from a physiologically, emotionally, and psychologically devastating experience.

Second, even in the absence of traumatic injuries, it appears that human decision making does not typically depend on a rational weighing of options. In the terminology of Richard H. Thaler and Cass R.

24. HENSLER ET AL., *supra* note 5, at 122 fig.5.2.

25. *See id.*; *see also* Kritzer et al., *supra* note 6; Saks, *supra* note 2, at 1185.

Sunstein, Humans, rather than “Econs” (*homo economicus*), should be the actors we envision when we try to understand how law intersects with life.<sup>26</sup> Humans, as opposed to Econs, usually make their decisions on the basis of impulse, mistake, bias, and distortion, and are themselves unaware of the factors that prove determinative in their responses.<sup>27</sup>

Thinking with their bodies and not just with their conscious minds,<sup>28</sup> humans perceive events such as injuries through the activation of existing neural pathways and the triggering of general images and principles. Although we experience “thinking” as a purely intellectual process, it actually involves multiple bodily components, including our nervous, muscular, and respiratory systems. Perceptions and interpretations derive to a surprising extent from one’s physical state. For example, Daniel Kahneman reports that individuals who are already smiling tend to experience “a state of cognitive ease,” causing them to perceive new experiences with a sense of comfort, trust, and familiarity, as compared to individuals who are stony-faced or frowning.<sup>29</sup> So powerful is this bodily “priming” effect that it occurs even when the smile is artificially imposed on subjects by requiring them to hold a pencil horizontally in their teeth, forcing their mouth into a pseudo-smile.<sup>30</sup> Those whose bodies were smiling, even if they did not really “mean it,” tended to perceive things differently from others who were not smiling, with or without the help of a pencil in their teeth.<sup>31</sup> From this experiment, it is possible to imagine how significantly the traumatically wounded bodies of injury victims might shape their cognition, as well as their perceptions and decisions about negligently inflicted harms.

In order to reconceptualize how injury victims form perceptions and make decisions about future action or inaction, it is necessary to rethink the self that experiences injurious events. Antonio Damasio hypothesizes that the self “comes to mind” through a series of steps in which the brain and body are inextricably linked.<sup>32</sup> The sense of self

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26. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6–8 (2008).

27. *See id.* at 7–8.

28. KAHNEMAN, *supra* note 18, at 51.

29. *Id.* at 59–60.

30. *Id.*

31. *Id.*

32. *See generally* ANTONIO DAMASIO, *SELF COMES TO MIND: CONSTRUCTING THE CONSCIOUS BRAIN* (2010). With respect to the inextricable link of brain, body, and sense of self, Damasio observes that

the brain’s protoself structures are not merely *about* the body. They are literally and inextricably *attached* to the body. Specifically, they are attached to the parts of the

as an active and aware entity begins with spontaneous *primordial feelings* of existence.<sup>33</sup> It progresses through the formation of a *core self*, which provides images of the individual engaged with external objects.<sup>34</sup> The final step in the emergence of the self, according to Damasio, is the development of the *autobiographical self*, which is “defined in terms of biographical knowledge pertaining to the past as well as the anticipated future.”<sup>35</sup> The autobiographical self “embrace[s] all aspects of one’s social persona.”<sup>36</sup>

Consistent with Damasio’s model, the autobiographical self would appear to be central to the process through which injuries are experienced, connected to the identity of the person who has been harmed, and then associated with a set of ideas about the meaning of the experience and how to respond. Although most aspects of the self operate without human awareness and are beyond the reach of conscious deliberation or control, Damasio notes that the autobiographical self operates both consciously and nonconsciously:

[T]he autobiographical self leads a double life. On the one hand, it can be overt, making up the conscious mind at its grandest and most human; on the other, it can lie dormant, its myriad components waiting their turn to become active. That other life of the autobiographical self takes place offscreen, away from accessible consciousness, and that is possibly where and when the self matures, thanks to the gradual sedimentation and reworking of one’s memory.<sup>37</sup>

Damasio’s concept of the emergent self provides a starting point for reimagining how humans interpret and respond to injuries. After an injury, nonconscious interpretive processes would begin to operate immediately. The harm would trigger both an organic response and a cascade of images and ideas through which the individual would make sense of what had happened. At the same time, the individual would attempt to position this traumatic experience in the flow of the autobiographical narrative that constantly runs through one’s mind, shaping both behavior and sense of self.<sup>38</sup>

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body that bombard the brain with their signals, at all times, only to be bombarded back by the brain and, by so doing, creating a resonant loop. This resonant loop is perpetual, broken only by brain disease or death. . . . [T]he body is best conceived as the rock on which the protoself is built, while the protoself is the pivot around which the conscious mind turns.

*Id.* at 21.

33. *Id.*

34. *Id.* at 22–23.

35. *Id.* at 23. The autobiographical self is discussed more extensively in Part V of this Article.

36. *Id.*

37. *Id.* at 210.

38. DAMASIO, *supra* note 32, at 23–26.

It must be emphasized that much of this perceptual and interpretive process takes place nonconsciously and is not the product of reasoned analysis or deliberate choice. Individuals may at times engage in conscious decision making as they weigh alternatives and choose their course of action; but even when they consciously choose one option over another, their decision is powerfully influenced by the nonconscious processes that come before.<sup>39</sup> Our sense of careful, rational choice is often illusory. As John A. Bargh has observed:

Automaticity pervades everyday life, playing an important role in creating the psychological situation from which subjective experience and subsequent conscious and intentional processes originate. Our perceptions, evaluations, and the goals we pursue can and do come under environmental control. Because these perceptual interpretations, likes and dislikes, and reasons for our behavior are not consciously experienced, we make sense of them in terms of those aspects of which we are consciously aware, and our theories as to what would have caused us to feel or act that way.<sup>40</sup>

According to this view of human cognition, then, it is a mistake to conceive of the earliest stages of personal injury cases in terms of the body receiving a wound followed by the intellect debating how to respond. Rather, we should imagine body and mind together experiencing and interpreting the injury in relation to the self and the environment through a process that is largely nonconscious or preconscious.<sup>41</sup> When the body suffers harm, what Kahneman<sup>42</sup> and others refer to as System 1 would spring immediately into action. System 1 comprises the automatic processes that quickly and effortlessly generate the “impressions and feelings that are the main sources of the ex-

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39. See KAHNEMAN, *supra* note 18, at 24 (“System 1 runs automatically and System 2 is normally in a comfortable low-effort mode . . . . When all goes smoothly, which is most of the time, System 2 adopts the suggestions of System 1 with little or no modification.”). Even the errors and biases associated with the nonconscious thought of System 1 may frequently affect our conscious System 2 mental processes. See *id.* at 28 (“Because System 1 operates automatically and cannot be turned off at will, errors of intuitive thought are often difficult to prevent. Biases cannot always be avoided, because System 2 may have no clue to the error.”).

40. John A. Bargh, *The Automaticity of Everyday Life*, in 10 *THE AUTOMATICITY OF EVERYDAY LIFE: ADVANCES IN SOCIAL COGNITION* 1, 50 (Robert S. Wyer, Jr. ed., 1997).

41. Mark Johnson enumerates five different levels at which the embodied self engages with the world: as a *biological organism*, a “flesh-and-blood creature that I call ‘my body’”; as an *ecological body* that is part of and in constant interaction with its physical environment; as a *phenomenological body* that we ourselves sense and are aware of during our daily actions and routines; as a *social body* engaged in “intersubjective relations and coordinations of experience”; and as a *cultural body* that is engaged with “cultural artifacts, practices, institutions, rituals, and modes of interaction.” MARK JOHNSON, *THE MEANING OF THE BODY: AESTHETICS OF HUMAN UNDERSTANDING* 275–77 (2007). The phenomenon of personal injury would be experienced and understood at all of these levels. See *id.*

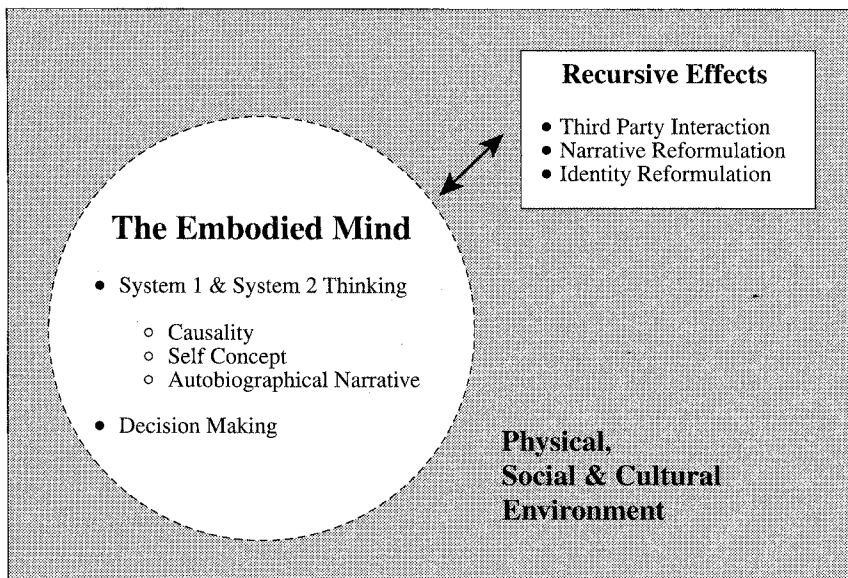
42. KAHNEMAN, *supra* note 18, at 13.

PLICIT beliefs and deliberate choices of System 2. . . . System 1 has learned associations between ideas . . . ; it has also learned skills such as reading and understanding nuances of social situations.”<sup>43</sup> The “fast thinking” of System 1 prepares and shapes the more deliberative and effortful “slow thinking” of System 2<sup>44</sup>:

The main function of System 1 is to maintain and update a model of your personal world, which represents what is normal in it. The model is constructed by associations that link ideas of circumstances, events, actions, and outcomes that co-occur with some regularity, either at the same time or within a relatively short interval. As these links are formed and strengthened, the pattern of associated ideas comes to represent the structure of events in your life, and it determines your interpretation of the present as well as your expectations of the future.<sup>45</sup>

Rather than a pyramid or decision tree, then, Figure 4 presents an alternative model of injury perception and decision making.

FIGURE 4: ALTERNATIVE MODEL OF INJURY PERCEPTION AND RESPONSE



43. *Id.* at 21–22.

44. “System 1 and System 2 . . . respectively produce fast and slow thinking.” *Id.* at 13. “System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.” *Id.* at 21.

45. *Id.* at 71.

In this model, the embodied mind carries out its rapid and automatic responses to the sensation of physical pain, its integration of the harmful event into the internal narrative of the autobiographical self, and its slower and more deliberate decision making.<sup>46</sup> In addition, this model situates the embodied mind in a physical, social, and cultural environment that provides meaning-making images and causal explanations. As we shall see, the environment plays a key role in injury perception and response, both at the nonconscious and conscious levels. Indeed, it is misleading to draw a sharp distinction between self and environment because they are mutually constitutive, which is why the boundary around the embodied mind in Figure 4 is represented by dashes rather than a solid line. Humans are quite literally the creatures of their environment, which leaves its traces in their minds and on their bodies. Two key components of the environment are the *media* and the *law*. Both can influence the physical, social, and cultural aspects of the injured self's surroundings in ways that critically affect perception and decision making.<sup>47</sup>

The injury victim does not perceive, interpret, and deliberate on her own. The alternative model depicted in Figure 4 comprises not only the self and the environment but also the social networks to which individuals belong.<sup>48</sup> An individual's spontaneous interpretation of a harmful event may be conditioned or transformed by hearing how another person views the matter, particularly if that person is a friend, family member, or coworker. Interactions with others may, even before the injury occurs, set the stage for particular kinds of nonconscious or conscious responses by the victim. After the injury, significant interpersonal interactions often reshape or even transform the injured person's thoughts, causing the autobiographical self to tell a different story about the injury that took place. There is, in other words, a *recursive* and interactional dimension to the interpretive process that takes place over time and draws third parties into the victim's processes of cognition and response to injuries.

Figure 4, then, illustrates the reimagined model of injury perception and response that serves as the basis for discussion in the remainder of this Article.

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46. See *infra* Part III.

47. See *infra* Part IV.

48. See *infra* Part V.

## III. INJURY AND THE EMBODIED MIND: EMPIRICAL INSIGHTS

Part II presented an alternative to the conventional linear, stepwise model for analyzing the responses of injury victims. The question remains, however, what light this reconceptualization can shed on one specific kind of traumatic experience—personal injury—and whether it can help to explain why the vast majority of potential tort plaintiffs engage in lumping rather than claiming. This Part asks how injury victims' automatic and nonconscious cognitive and interpretive processes might shape their conscious thoughts and decisions. By drawing together a diverse set of empirical findings, it identifies commonalities in the way individuals experience serious injuries, particularly painful ones. These include a feeling that one's identity has been transformed and that one is no longer the same person; a sense of disembodiment and even alienation from one's own body; a failure of language and an inability to communicate current perceptions and ideas even to close friends and family; an immediate effort to grasp the cause of the injury and a preference for causes that do not point clearly to the responsibility of another person; and a strong tendency toward inaction known as the "status quo bias."<sup>49</sup> The following discussion suggests how these common responses to physical injuries might lead the victim to lump rather than claim.

Perhaps the most immediate sensation of the injured person is the shocked realization of existential change: "When illness or injury strikes, physical changes occur and people experience their bodies differently. . . . As they try to adjust to extreme bodily changes, they may feel separated from their bodies (disembodied) or overwhelmed by physical sensations (especially pain)."<sup>50</sup> Injuries are not the only source of pain, but very often pain does accompany injuries. When suffering from pain, injury victims can become strangers to their own body: "the painful body emerges as 'thing-like'; it 'betrays' us and we may feel alienated and estranged from it as a consequence."<sup>51</sup> In Jean Jackson's words, "Pain exiles sufferers from their own bodies, which surface as 'strangely other.'"<sup>52</sup> Amputated limbs still seem to be there

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49. THALER & SUNSTEIN, *supra* note 26, at 34–35.

50. Mary H. Wilde, *Embodied Knowledge in Chronic Illness and Injury*, 10 *NURSING INQUIRY* 170 (2003).

51. Gillian Bendelow & Simon Williams, *Pain and the Mind–Body Dualism: A Sociological Approach*, 1 *BODY & SOC'Y* 83, 88 (1995).

52. Jean E. Jackson, *Pain and Bodies*, in *A COMPANION TO THE ANTHROPOLOGY OF THE BODY AND EMBODIMENT* 370, 381 (Frances E. Mascia-Lees ed., 2011) [hereinafter *THE BODY AND EMBODIMENT*].

in phantom form,<sup>53</sup> and injured limbs that are still attached seem to be missing or no longer connected to the body.<sup>54</sup> Mary H. Wilde quotes an eloquent passage from Reynolds Price, who suffered a spinal cord injury: “*When can I live again in my body? and where am I now? As much as any specter in a ghost tale, I felt like a spirit haunting the air above his old skin that had suddenly, for no announced reason, evicted me and barred my return.*”<sup>55</sup> In some cases, years may pass before a person with a severely disabling injury can regain a stable and positive personality,<sup>56</sup> and initially the injury victim may experience strongly negative personality changes that disrupt relations with former friends:

At first, people noticed a big change in me. I mean, I was really depressed, with good reason. Maybe that’s why a *lot of my friends* got scared and stopped seeing me; they couldn’t deal with the big change they saw in my personality. I’ve pretty well got my old personality back now, and I have developed a whole new set of friends. It took a long time, but what a difference it makes to life.<sup>57</sup>

In a group of studies of individuals injured in motor vehicle accidents, summarized by Jennifer L. Lucas, as many as 50% suffered from post-traumatic stress disorder, as well as depression, fear, fatigue, and headache.<sup>58</sup> Moreover, during the years immediately following such injuries, drivers reported heightened levels of “personal safety concerns, worries about driving, trait driver stress, exhaustion, and negative physical symptoms” as compared to drivers who had not been in motor vehicle accidents.<sup>59</sup> In short, experiencing an injury produces changes in mind and body that are defined by greater levels of stress and fear, particularly with respect to the same activity—in this case driving—that led to the individual’s injury.

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53. See, e.g., Thomas Csordas, *Embodiment: Agency, Sexual Difference, and Illness*, in *THE BODY AND EMBODIMENT*, *supra* note 52, at 137, 149–50 (discussing the phenomenology of phantom limb perception).

54. See Jackson, *supra* note 52, at 381 (“Some accounts vividly describe rejection, in no uncertain terms, of the painful body part.”); see also Frédérique de Vignemont, *Embodiment, Ownership and Disownership*, 20 CONSCIOUSNESS & COGNITION 82 (2011).

55. Wilde, *supra* note 50, at 170 (quoting REYNOLDS PRICE, *A WHOLE NEW LIFE* 13 (1994)).

56. See Christine Carpenter, *The Experience of Spinal Cord Injury: The Individual’s Perspective—Implications for Rehabilitation Practice*, 74 PHYSICAL THERAPY 614, 621 (1994) (“It took at least 4 years before things began to click into place, and life goes on fairly normally.”).

57. *Id.* at 623 (quoting an interviewee identified by the pseudonym “Randy”).

58. See Jennifer L. Lucas, *Drivers’ Psychological and Physical Reactions After Motor Vehicle Accidents*, 6F TRANSPORTATION RES. 135, 137–38 tbl.1 (2003). Another study reported “immediate anxiety” as a significant response to pain. See David J. Crockett et al., *Factors of the Language of Pain in Patient and Volunteer Groups*, 4 PAIN 175, 179 (1977).

59. Lucas, *supra* note 58, at 142. According to Lucas, women appeared to be particularly susceptible to these symptoms. *Id.*

From the new world of pain, disorientation, depression, and alienation from one's own body, it becomes more difficult to communicate with others. As Elaine Scarry has observed, "Whatever pain achieves, it achieves in part through its unsharability, and it ensures this unsharability through its resistance to language."<sup>60</sup> Language often fails the injury victim:

[P]atients both pursue language—answers, names, definitions, meanings that promise reassurance and cures—and avoid it. Although they have found that language fails to represent their being-in-the-world, that promising meanings turn out to be siren-meanings, that their quest to be understood as pain-full beings remains unfulfilled, they also want to use language to escape that experience, that world. Although they report feeling profoundly misunderstood, pigeonholed, and categorized by everyday-world language, this is the language they continue to pin their hopes on.<sup>61</sup>

To sum up, an injury, particularly a painful one, transforms the identity of the victim in ways that defy his or her powers of explanation. As Bendelow and Williams observe, "[P]ain . . . is ultimately a matter of *being-in-the-world*. As such, pain reorganizes our lived space and time, our relations with others and with ourselves."<sup>62</sup> The language and logic of everyday experience are no longer applicable in this new existence. Injury victims tend to feel, initially at least, that they are no longer themselves, that they are disconnected even from intimate friends by the profound transformation that has occurred in their lives, and that their access to everyday life and its discourses may be blocked by an inability to communicate the reality of their new status. Under such circumstances, it is reasonable to speculate that a severely injured accident victim would not readily launch an effort to obtain a remedy. It is difficult to pursue a claim while alienated from self and friends, unable to rely on language to communicate one's new circumstances and needs.

Perceptions of causation that arise when an injury occurs may also create formidable obstacles to lodging a claim. Cognitive scientists report that, in response to new events, the human mind automatically and without conscious effort applies a causal logic based on concepts that "arise from human biology."<sup>63</sup> Lakoff and Johnson observe that

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60. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 4 (1985).

61. Jean Jackson, *Chronic Pain and the Tension Between the Body as Subject and Object*, in *EMBODIMENT AND EXPERIENCE: THE EXISTENTIAL GROUND OF CULTURE AND SELF* 201, 222 (Thomas J. Csordas ed., 1994) [hereinafter *EMBODIMENT AND EXPERIENCE*].

62. Bendelow & Williams, *supra* note 51, at 87.

63. See LAKOFF & JOHNSON, *supra* note 11, at 171.

humans conceptualize events in terms of causal metaphors,<sup>64</sup> which in turn derive from "everyday bodily experience," such as walking, running, pushing, pulling, throwing, and holding.<sup>65</sup> Because of the large number of causal metaphors familiar to each of us, there is neither a single, objectively "real" cause for a given event—such as an injury—nor a single logic of causation available to those who experience it. Multiple causal explanations may be triggered during System 1 thinking, and the inventory of such explanations is connected to the cultural and social environment.<sup>66</sup>

The causal framing of an injury affects the victim's tendency to seek a remedy or to lump the loss.<sup>67</sup> If a causal explanation does not point clearly to the responsibility of another party, it is unlikely that the victim will seek to hold anyone else responsible by lodging a claim. Particularly in the case of serious injuries, pain may automatically trigger certain causal associations. Jean Jackson points out that one of the most common associations with pain and suffering is the idea that the injured person must have somehow deserved his or her fate: "The Latin root for 'pain,' after all, means punishment. In a just and orderly world, our reasoning goes, innocent people would not be suffering like this, so something must be *wrong*."<sup>68</sup>

Other researchers agree that pain appears to trigger a nonconscious perception of self-blame to explain the cause of the injury.<sup>69</sup> Eva Johansson and her coauthors, for example, interviewed Swedish women with medically undefined musculoskeletal pain.<sup>70</sup> These interviewees had a pervasive tendency to adopt "self-blaming ideas" and to view their pain as punishment for their own misdeeds and shortcomings:

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64. Lakoff and Johnson observe:

Most of ordinary human thought—thought carried out by real 'rational animals'—is metaphoric, and hence not literal. It uses not only metaphor but also framing, metonymy, and prototype-based inferences. Hence it is not 'logical' in the technical sense defined by the field of formal logic. It is largely unconscious. It is not transcendent, but fundamentally embodied. Basic inference forms arise partly from the spatial logic characterized by image schemas, which in turn are characterized in terms of the peculiarities of the structures of human brains and bodies. The same is true of aspectual reasoning—reasoning about the way we structure events, which appears to arise out of our systems of motor control. Metaphorical thought, which constitutes an overwhelming proportion of our abstract reasoning, is shaped by our bodily interactions in the world.

*Id.* at 514.

65. *See id.* at 171, 183–93.

66. *See infra* Part IV.

67. *See Engel, supra* note 20, at 67–68.

68. Jackson, *supra* note 52, at 378.

69. Bendelow & Williams, *supra* note 51, at 92.

70. Eva E. Johansson et al., *The Meanings of Pain: An Exploration of Women's Descriptions of Symptoms*, 48 SOC. SCI. & MED. 1791 (1999).

Ideas about the pain emanating from wrong decisions, or even bad behavior, were presented. It concerned feelings of being insufficient, in relationships with parents-in-law, parents, husbands or children. The women talked about guilt, but also grief and shame. This might involve a period of addiction (alcohol or tranquilizers), having been sexually abused or beaten, or an abortion . . . .<sup>71</sup>

Similarly, Richard Schulz and Susan Decker interviewed individuals with spinal cord injuries and found that a remarkable 43% blamed themselves to some extent for causing their injury.<sup>72</sup> Furthermore, 56% believed they could not have done anything to avoid it.<sup>73</sup> Neither perception—self-blame or inevitability—is likely to lead the victim to view another party as the cause and seek to hold him or her responsible.<sup>74</sup>

The existing literature thus provides scattered insights and suggestions about the imagery of causation that may be triggered by an injury. Clearly, we need more studies of the potential links between the causal perceptions of injury victims and their tendency to lump rather than claim. Nevertheless, considerable evidence points to the existence of victim-blaming causal imagery—the assumption that the victims should have taken greater care, that they somehow deserve the harm that befell them, and that the injury itself was fated to happen or may even have been a form of cosmic punishment.<sup>75</sup> Assuming that such imagery is in fact widespread, it is likely to be deeply embedded

71. *Id.* at 1795.

72. Richard Schulz & Susan Decker, *Long-Term Adjustment to Physical Disability: The Role of Social Support, Perceived Control, and Self-Blame*, 48 J. PERSONALITY & SOC. PSYCHOL. 1162, 1166 (1985).

73. *Id.*

74. In an intriguing but somewhat ambiguous national survey, D.C. Girasek discusses the problem of victim-blaming when accidents occur. Research suggests that the prospects for a more sympathetic view of accident victims may be “bleak.” See D.C. Girasek, *How Members of the Public Interpret the Word Accident*, 5 INJ. PREVENTION 19, 23 (1999). Girasek explored popular interpretations of the concept of “accident” by polling persons who had not necessarily suffered injuries themselves. He found that 26.1% of the randomly selected interviewees believed that accidents are caused by fate, and only 25.1% thought they are predictable. *Id.* at 21 fig.2. Presumably, injury victims would have to perceive their accidents as predictable before they could conclude that someone else might be responsible for failing to take adequate precautions. The fact that only one in four Americans view accidents as predictable by anyone—the victim or the injurer—therefore appears to be consistent with the broad-based tendency not to lodge a complaint against the injurer in most cases. On the other hand, 82.8% of Girasek’s respondents believed accidents were “preventable,” a concept he associates with the popular perception that accident victims can and should take better precautions to protect themselves from harm. See *id.*

75. See, e.g., BEATRICE A. WRIGHT, *PHYSICAL DISABILITY—A PSYCHOSOCIAL APPROACH* 64 (2d ed. 1983) (explaining that persons without disabilities unconsciously believe that “the cripple has committed some evil act”); Douglas H. Cook, *A Faith-Based Perspective on Tort Causation*, 16 ST. THOMAS L. REV. 455, 462 (2004) (noting a common perception that injuries are part of God’s plan, except when the defendant clearly sinned by choosing to disobey God).

in the cognition of individuals who suffer an injury and triggered non-consciously in the moments after they suffer harm. When the initial System 1 perception of causation is framed in terms of fate or personal shortcoming, it is exceedingly difficult to dislodge and replace it with a view of another person as the responsible causal agent.<sup>76</sup>

Even if the injury victim does attribute causation and blame to another person, the *status quo bias* may still inhibit claiming.<sup>77</sup> Human cognition and decision making are subject to inertia. We are biased in favor of staying with what we have, even when a rational balancing of costs and benefits might lead us to act in order to change our circumstances. Indeed, Thaler and Sunstein argue that the status quo bias is so significant a factor in human behavior that it can serve as the basis for "soft" policy practices, which they refer to as "nudging."<sup>78</sup> Instead of mandating a particular behavior, they contend, the government needs only to designate it as the default option and leave it to individuals to choose other options that policymakers deem less desirable. Human inertia will then cause many to accept the officially preferred default rather than take the initiative to select some other course of action.<sup>79</sup>

Applying the status quo bias to the behavior of injury victims is a bit tricky, and much depends on how the situation is framed.<sup>80</sup> When an individual suffers an injury, what exactly does he or she perceive as the status quo—the situation beforehand or afterward? The difference could be significant. If an injury victim understands the post-injury situation to be the status quo, then that fact alone could influence her to lump rather than act affirmatively to change her circumstances. If, however, she understands the status quo to be her situation before the injury, then she may be more inclined to pursue a claim in order to restore the status quo ante and avoid suffering a loss.

As Kahneman observes, "Animals, including people, fight harder to prevent losses than to achieve gains. . . . Loss aversion is a powerful conservative force that favors minimal changes from the status quo in

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76. Kahneman notes that System 2 is not efficient in correcting the errors or biases of System 1. See KAHNEMAN, *supra* note 18, at 28. Moreover, a general "confirmation bias" leads people to test hypotheses by "seek[ing] data that are likely to be compatible with the beliefs they currently hold." *Id.* at 81.

77. See generally William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988).

78. See THALER & SUNSTEIN, *supra* note 26.

79. See *id.* at 5–6.

80. See Samuelson & Zeckhauser, *supra* note 77, at 8 ("[S]tatus quo framing was found to have predictable and significant effects on subjects' decision making.").

the lives of both institutions and individuals.”<sup>81</sup> Without further research, it is difficult to say which perception of the status quo predominates in the mind of most injury victims. It may be relevant to note, however, that in their much-cited article on status quo bias, Samuelson and Zeckhauser found that the inertia effect persisted even when a particular condition was *imposed*—as is the case for injury victims.<sup>82</sup> Even under those involuntary circumstances, the subjects tended to adopt an “irrational” preference for leaving things as they were rather than making the effort to change them. It is therefore plausible to theorize that the status quo bias, like the sense of identity transformation and disembodiment, the failure of language, and the perception of causation, operates to encourage lumping rather than claiming by injury victims.

#### IV. INJURY AND ENVIRONMENT

Part III pointed the way to a reconceptualization of claiming and lumping in injury cases. Rather than accepting the conventional model of stepwise decision points navigated by rational injury victims, it proposed a different model of the injured self. In this new conceptualization, the traumatized and wounded body is itself the “seat of subjectivity,”<sup>83</sup> and the processes of perception and response occur, for the most part, without conscious awareness. As we have seen, recasting victims’ decision making in this way provides us with a preliminary understanding of why lumping occurs so much more often than claiming.

Yet any model that focuses on the self in isolation is radically incomplete. The next step is to place the injured self in its environment—that is, in the physical, social, and cultural surroundings in which humans live their lives and conduct their affairs. As Mark Johnson has observed, contemporary scholarship challenges not only the dualism of mind and body but also the related and equally untenable dualism of self and environment:

There is no body without an environment, no body without the ongoing flow of organism–environment interaction that defines our realities. Once again, the trick is to avoid the dualism of organism and environment, a dualism that falsely assumes the existence of

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81. KAHNEMAN, *supra* note 18, at 305.

82. See Samuelson & Zeckhauser, *supra* note 77, at 39–40.

83. “The possibility . . . that the body might be understood as a seat of subjectivity is one source of challenge to theories of culture in which mind/subject/culture are deployed in parallel with and in contrast to body/object/biology.” Thomas J. Csordas, *Introduction: The Body as Representation and Being-in-the-World*, in EMBODIMENT AND EXPERIENCE, *supra* note 61, at 1, 9.

two independent entities, each bringing its own structure and preestablished identity into the interactions. Instead, we must think of organism (or body) and environment in the same way that we must think of mind and body, as aspects of one continuous process. . . . We are thus left with the somewhat counterintuitive idea that the body is not separate from its environment and that any boundaries we choose to mark between them are merely artifacts of our interests and forms of inquiry.<sup>84</sup>

Human subjectivity defines and shapes our environment, just as the environment defines and shapes our bodies and our self-understandings.<sup>85</sup> The interaction of self and environment molds perceptions, thoughts, and decisions in both the rapid and automatic System 1 thinking and the slower and more deliberate System 2 thinking. This Part considers some of the ways in which the environment—physical, social, and cultural—may encourage individuals to lump injuries rather than assert claims. As in Part III, the discussion here combines empirical insights with informed speculation, because we still await systematic empirical research on many of these questions. It also suggests that the distinction between *physical* aspects of the environment, and *social* or *cultural* aspects, although convenient for purposes of exposition, is artificial and even misleading, because much of our physical surroundings and all of our perceptions of them are shaped by culture. The notion that there is some objective physical world “out there”—outside of culture—is itself a cultural artifact.

### A. *The Physical Environment*

Why might injuries that objective observers consider tortious appear innocent or natural to the victims? Why might the victims view their injuries as a normal consequence of the world in which they live and not assign blame to the potential defendant? The taken-for-granted arrangements of the physical environment can shape the interpretation of injuries and make them seem natural rather than the product of intentional or negligent behavior by another. A model that views the embodied self in relation to its physical environment may therefore help to explain the tendency to lump injuries rather than assert claims against an injurer.

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84. JOHNSON, *supra* note 41, at 276.

85. See, e.g., MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* 499–500 (Colin Smith trans., Routledge & Kegan Paul 1958) (1945) (“The world is inseparable from the subject, but from a subject which is nothing but a project of the world, and the subject is inseparable from the world, but from a world which the subject itself projects. The subject is a being-in-the-world and the world remains ‘subjective’ since its texture and articulations are traced out by the subject’s movement of transcendence.”).

Lakoff and Johnson suggest that movement of the body through space plays a primary role in forming the conceptual structures of the mind.<sup>86</sup> But the nature of the spaces through which people habitually move must also be considered, as well as the technologies that facilitate and constrain such movement. Consider stairways. The ability to move between lower and higher locations seems a “natural” part of life, and humans have created stairs to facilitate such movement. Of course, there is nothing natural about stairs—they are an entirely human creation, although stair-like formations may exist in nature on hillsides or mountain slopes. Viewed from one perspective, stairs enable movement from one level to another; but viewed from another perspective, they prevent it. For wheelchair users or persons with limited motor skills, stairs are barriers that make movement impossible. Yet the physical environment can be changed to eliminate stairs by designing one-level, ranch-style houses, for example, or by constructing ramps rather than stairways, thereby enabling movement rather than obstructing it.

Much of the “of course” nature of the physical environment turns out to be the product of human choice. For Sara Lane, who used a wheelchair much of her life, it seemed obvious during her childhood that libraries with stairways were places she could never go.<sup>87</sup> Sara’s exclusion from libraries seemed natural and unexceptional to her. As an adult, however, she came to view barriers to physical accessibility in her workplace as evidence of discriminatory decisions by her employers.<sup>88</sup> The human choices that shape the physical environment are often hidden from view or are so obvious that we never think to question them, and our surroundings tend to take on a deceptively natural appearance until alternative arrangements become imaginable.

Such choices may also create or prevent injuries. In the case of stairways, for example, safety engineers estimate that approximately one million Americans per year suffer injuries when they ascend or descend stairs.<sup>89</sup> Are these injuries caused by the architect’s initial decision to use the technology of the stairway rather than a ramp, es-

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86. See LAKOFF & JOHNSON, *supra* note 11, at 19 (“Our abilities to move in the ways we do and to track the motion of other things give motion a major role in our conceptual system.”).

87. See DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* 23 (2003).

88. See *id.* at 26–27.

89. See Patricia L. Jackson & H. Harvey Cohen, *An In-Depth Investigation of 40 Stairway Accidents and the Stair Safety Literature*, 26 J. SAFETY RES. 151, 151 (1995) (“The U.S. Consumer Product Safety Commission estimates that approximately 1 million stair-related accidents occurred in 1990 alone.”).

calator, or elevator, or are they accidents that inevitably accompany human movement from place to place? Or do people fall down stairs because of their own physical shortcomings or carelessness? Because stairs seem such a normal and natural part of our physical environment, it would rarely occur to injury victims to blame their mishap on the designers who chose to install the staircase rather than some other mode of ascent and descent. It is far more likely that injury victims would view their misfortune as purely accidental (fate), or as the result of their own mistakes or incapacities (self-blame).<sup>90</sup>

Yet safety engineers and ergonomics specialists have come to realize that the risks associated with stairway accidents are not inevitable and can, in fact, be significantly reduced. For example, accidents are less likely if stairs are designed with broader treads and shorter risers,<sup>91</sup> and accidents can also be prevented by specifying that treads and risers must be even rather than uneven in dimension.<sup>92</sup> From an engineering point of view, the most significant cause of injury on stairways—because it is the cause that is most amenable to risk-reduction—may not be the victim's carelessness, age, frailty, or disability, but the design of the stairs themselves: "The findings . . . suggest that anyone who investigates stairway falls should use an ergonomics-based systems safety approach. This study indicates that stairway users are too often blamed for injuries that result from stairway and environmental factors."<sup>93</sup>

Thus, some aspects of the physical environment that humans take for granted and view as natural are actually the product of design decisions that may carry a greater or lesser risk of injury. To the extent that such decisions are not apparent to injury victims, lodging a claim after suffering harm becomes unlikely. The naturalization of designed risk represents a powerful factor favoring lumping. This is actually an oft-told story in the history of American tort law. When factories and railroads proliferated in the nineteenth century, they produced an unprecedented spate of injuries to industrial workers and others who came in contact with the dangerous machines and production

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90. *See id.* at 153.

91. *See id.* at 157.

92. *See id.* at 156 ("We believe from examining our data and the literature that the strongest pattern for stairway accidents lies in dimensional inconsistency within stairways.").

93. Joseph Cohen et al., *Stairway Falls: An Ergonomics Analysis of 80 Cases*, PROF. SAFETY, Jan. 2009, at 27, 32; *see also* Jackson & Cohen, *supra* note 89, at 156 ("From a review of our data and prominent stairway safety literature, we have found that many personal variables and external stairway characteristics may not play as great a role in stairway accidents as previously thought.").

processes.<sup>94</sup> Although these injuries could have been viewed as the product of human choice, observers such as Holmes employed imagery comparing them to such natural risks as being struck by lightning.<sup>95</sup> To the extent that injuries are seen as an unavoidable result of the way things are, tort law would seem to have little to offer, and lumping appears the only rational response.

The concept of the embodied self, then, takes shape within a physical environment that defines what is natural and beyond human choice—even if such definitions can be deconstructed by critical analysis. The field of products liability law offers countless examples of technologies whose risks once appeared normal and natural, yet later proved to be unnecessary when different design decisions were made. For example, at one time it appeared inevitable that automobile passengers in a violent collision might be thrown from the car or through the windshield, but today a car that lacks seatbelts and airbags to prevent “second impacts” is considered defective.<sup>96</sup> Similarly, until recently the general public would not tend to blame the manufacturers of motor vehicles for the 228 deaths and approximately 17,000 injuries caused each year by vehicles backing up.<sup>97</sup> Yet nowadays there is a growing consensus that vehicles are defective and unsafe if they lack a rearview camera to guard against such risks.<sup>98</sup> And, of course, there is the infamous McDonald’s case, in which it was widely considered absurd for the victim to blame the restaurant when she was burned by hot coffee that she spilled on herself.<sup>99</sup> Only later did it become apparent—to some observers at least—that the injury was the product of

94. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 362 (3d ed. 2005).

95. See O. W. HOLMES, JR., *THE COMMON LAW* 96 (1881) (“Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.”). Holmes assumed that tort liability should not be assigned merely because of the original decision to build a factory or railroad, but that defendants should be held responsible only if they committed a particularized act of misconduct that posed an unreasonable and foreseeable risk of injury to the plaintiff. See *id.*

96. For a discussion of the cultural shifts associated with safety standards concerning the “second collision” in automobiles, see Carol A. MacLennan, *From Accident to Crash: The Auto Industry and the Politics of Injury*, 2 *MED. ANTHROPOLOG. Q.* 233, 239–45 (1988).

97. See Nick Bunkley, *U.S. Rule Set for Cameras at Cars’ Rear*, *N.Y. TIMES*, Feb. 28, 2012, at A1 (noting that 44% of the fatalities involve children under the age of five).

98. The National Highway Traffic Safety Administration had planned to issue a rule on February 29, 2012 requiring that all passenger vehicles come equipped with a rearview camera by 2014, but later postponed its action to the end of the year. Currently, 45% of vehicles in the 2012 model year offer such a camera as standard equipment. *Id.*; see also Nick Bunkley, *U.S. Delays Rule on Rearview Car Cameras*, *N.Y. TIMES*, Feb. 29, 2012, at B9.

99. For a comprehensive overview of the McDonald’s hot coffee case as portrayed by popular media, see HALTOM & MCCANN, *supra* note 1, at 183–226.

a human decision to sell the coffee at an unusually high temperature, a decision that carried known risks of serious harm that could have been prevented by safer production practices.<sup>100</sup>

Sara Lachlann Jain argues that “unequally distributed physical injury”<sup>101</sup> associated with consumer products should not be viewed as accidental, but rather as a reflection of design decisions that encode deeper cultural understandings about whose lives and bodies should be valued or exposed to risk:

Design decisions ineluctably code danger and injury at the outset of the production process. Products anticipate the agents that will animate them temporally and statistically; products and humans simulate imagined relationships and worlds. In this sense, Pintos and cheeseburgers are not so dissimilar, as they both demonstrate how American injury culture injures as a matter of course. . . . Elucidating the issues in this way raises the question of how human wounding counts, who “owns” health, and how it is to count as a social good.<sup>102</sup>

Although injuries appear to be “exceptional” events that randomly strike a few unlucky individuals, Jain argues that they are actually the consequence of “cultural work . . . which distributes goods and bads (such as risk, health, mobility, and injury) and also naturalizes cross-cutting relations of subordination.”<sup>103</sup>

In sum, many aspects of the physical environment are created or modified by humans; yet, at the same time, the environment shapes human bodies and minds, and naturalizes certain human activities and expectations. For this reason, injury victims tend to view many injuries as the inevitable result of living in their familiar environment, even though a tort law specialist—or critical scholar—might find good reason to assign blame to someone else for the harm they have suffered. Thus, many potentially actionable injuries are automatically and nonconsciously perceived as the result of fate, bad luck, or the victim’s own fault. In such cases, lumping appears the only sensible response, and lodging a claim is all but inconceivable.

### *B. The Social and Cultural Environment*

Individuals experience injuries in an environment defined not only by the physical spaces and objects they encounter in their day-to-day activities but also by the cultural meanings and practices through

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100. *See id.* at 189–90.

101. SARAH S. LOCHLANN JAIN, *INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES* 151 (2006).

102. *Id.* at 56.

103. *Id.* at 152.

which humans understand important events in their lives. Clifford Geertz's frequently quoted definition of culture is particularly suggestive in this context, as his imagery portrays an embodied person suspended like a spider in a contextual web of human-created ideas and images: "Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs."<sup>104</sup> As already noted, even the physical environment is imbued with cultural meaning and is, in a sense, part of the social and cultural environment. The discussion in this Part, however, emphasizes aspects of culture and society that are not necessarily physical in nature, and suggests how they shape the interpretation of injuries and the pervasive tendency to lump rather than claim.

Injuries are not objective facts; rather, they are events that humans perceive and interpret within ideational frameworks that reflect a deep interaction between self and culture. Many injuries are painful, and one might think that the sensation of pain, at least, represents a universal constant regardless of culture or social setting. Researchers have demonstrated, however, that, although nearly all humans are susceptible to pain, they experience and interpret it differently in different social and cultural contexts.<sup>105</sup> In this sense, pain itself is a cultural construct, and the cognition of pain connects the individual mind and body to the social environment of which it is a part:

As with bodies in general, the painful body simultaneously produces and is produced by culture, reflecting and reproducing it. . . .

. . . .

. . . Traditional notions of pain-as-sensation in which a unidirectional nociceptive<sup>106</sup> input from the body travels up the dorsal horn of the spinal cord and is processed by the central nervous system have been replaced by two-way flows along multiple pathways involving cognitive, emotional, and behavioral inputs that shape a nociceptive signal.<sup>107</sup>

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104. Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 3, 5 (1973).

105. See Mary Moore Free, *Cross-Cultural Conceptions of Pain and Pain Control*, 15 *BAYLOR U. MED. CTR. PROC.* 143, 143 (2002) ("[W]hile the stimulation of pain fibers to tell the brain that something is wrong is the same among all human beings, the perceptions and control of pain vary from society to society.").

106. "Nociceptive" means "pertaining to a nociceptor," which is defined as a receptor for pain caused by injury to body tissues; the injury may be from physical stimuli such as mechanical, thermal, or electrical stimuli, or from chemical stimuli such as the presence of a toxin or an excess of a nontoxic substance. Most nociceptors are in either the skin . . . or the walls of viscera . . . .

DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1298 (31st ed. 2007).

107. Jackson, *supra* note 52, at 372, 374.

Perceptions and interpretations of pain vary across social and cultural contexts. Such variation is also characteristic of injuries, which are more complex social experiences than the mere sensation of pain and, therefore, even more susceptible to cultural framing and definition. The significance for claiming should be obvious: If individuals interpret potentially "justiciable problems"<sup>108</sup> as not being injuries at all, then it is highly unlikely that they will assign responsibility to an injurer or seek a remedy. Lumping in such situations is not a deliberate choice; it is the only conceivable response to a human experience, and no alternative response is even imaginable.

Two examples may demonstrate how particular social and cultural frames can define the same event as an injury or as something quite different. The traditional Chinese practice of foot binding imposed pain and permanent bodily disfigurement on young girls.<sup>109</sup> From one perspective, this was an injury, particularly because it led to a lifelong mobility impairment. From another perspective, however, bound feet were not only considered by some to be beautiful but were also a sign of nobility. As long as servants were available to carry high-ranking females from place to place, the inability to walk was not disabling, although it would become so in any other social setting.<sup>110</sup> Another, more contemporary example, is male circumcision. According to the Jewish and Islamic religions, circumcision of young males is a sacred tradition conferring on boys the right of membership in the adult religious community. When viewed through a different cultural lens, however, the same act may appear to be a cruel and painful mutilation forced on a powerless subject and might represent not only a tort but also a human rights violation.<sup>111</sup> Thus, the very existence of an injury

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108. See GENN ET AL., *supra* note 6, at 5 (surveying the frequency of "justiciable problems" in the United Kingdom and affected individuals' responses to them).

109. See generally HOWARD S. LEVY, *CHINESE FOOTBINDING: THE HISTORY OF A CURIOUS EROTIC CUSTOM* (1966). According to Levy, "Evidence that the child suffered intensely during the early stages [of binding her feet] is overwhelming." *Id.* at 26. The "virtual crippling" caused by footbinding, which was initiated in early childhood, resulted in the physical confinement and seclusion of "upper-class ladies" and "rendered [them] immune from the social disease of conjugal infidelity." *Id.* at 30; see also C. Fred Blake, *Foot-Binding in Neo-Confucian China and the Appropriation of Female Labor*, 19 *SIGNS* 676 (1994).

110. See WRIGHT, *supra* note 75, at 11 ("[Bound feet] symboliz[ed] nobility [and] did not interfere with the functions required of such women and therefore, presumably, was not an obstacle to their goals."). Foot binding ended rapidly in China during the first decade of the twentieth century as a result of dramatic shifts in social and cultural norms, as well as legal prohibitions. See Gerry Mackie, *Ending Footbinding and Infibulation: A Convention Account*, 61 *AM. SOC. REV.* 999, 1001 (1996).

111. See William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 *J. FAM. L.* 337, 338 (1984-1985); Eric K. Silverman, *Anthropology and Circumcision*, 33 *ANN. REV. ANTHROPOLOGY* 419 (2004).

cannot be taken as a given, but must be perceived as such within particular social and cultural settings.

Social and cultural contexts also provide interpretive frames for perceiving the salience of an injury. Broken bones and lacerations may seem very serious to an office worker or a classroom teacher but less so to a farmer<sup>112</sup> or a rugby player,<sup>113</sup> for whom they are a normal and expected hazard of everyday activities. Some American soldiers in World War II required less than usual amounts of pain medication for their injuries because they positively associated their wounds with a "ticket home with honor."<sup>114</sup> The perceived severity of an injury is directly relevant to claiming behavior by the victim. In social or cultural contexts in which a given injury is viewed as less severe, or even as eufunctional, pursuit of a claim is less likely.<sup>115</sup>

As we have seen, the experience of injury instantly triggers a cognitive process that associates the harm with one or more causes.<sup>116</sup> Ideas about causation, however, are also embedded in worldviews that vary dramatically across social and cultural settings. Causal concepts derive not only from metaphors of bodies moving and acting in space but also from religious, philosophical, scientific, and other perspectives that provide distinctively patterned explanations of why injuries happen.<sup>117</sup> When an automobile struck a woman and broke her leg in Thailand, for example, she told several different causal stories, almost in the same breath: she injured the driver in a previous life and her karma caught up with her; she had beaten a dog and broken *its* leg; a malevolent ghost selected her as its victim; her stars were misaligned; the driver was negligent; he failed to treat a medical condition that affected his driving; she failed to protect herself against the oncoming

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112. See David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551, 558 (1984) (noting that farmers in "Sander County" recounted many serious injuries caused by dangers associated with their way of life and that they believed "injuries were an ever-present possibility"); see also Adarsh Kumar et al., *Equipment-Related Injuries in Agriculture: An International Perspective*, 7 INJ. CONTROL & SAFETY PROMOTION 175 (2000) (discussing the frequency and severity of agricultural injuries across societies and cultures, as well as the tendency to associate such injuries with the conduct of the workers rather than consider modification of their working conditions or equipment).

113. See P. David Howe, *An Ethnography of Pain and Injury in Professional Rugby Union: The Case of Pontypridd RFC*, 36 INT'L REV. FOR SOC. SPORT 289 (2001).

114. Jackson, *supra* note 52, at 372 (citing Henry K. Beecher, *Pain in Men Wounded in Battle*, 123 ANNALS SURGERY 96 (1946)).

115. See Frederick C. Dunbar & Faten Sabry, *The Propensity to Sue: Why Do People Seek Legal Actions?*, BUS. ECON., April 2007, at 31, 37; see also Frank A. Sloan & Chee Ruey Hsieh, *Injury, Liability, and the Decision to File a Medical Malpractice Claim*, 29 LAW & SOC'Y REV. 413, 426, 431 (1995).

116. See *supra* text accompanying notes 63–76.

117. See LAKOFF & JOHNSON, *supra* note 11, at 13.

car; and she had failed to perform a merit-making ceremony.<sup>118</sup> Such causal explanations are culturally specific, although their analogues may be found elsewhere and may appear in different idioms.

Concepts of causation are inseparable from concepts of responsibility. Indeed, there is reason to think that preexisting assumptions about who in society should bear responsibility for injuries can affect how injury victims attribute causation.<sup>119</sup> If a cancer patient is predisposed to think that factory owners should be held more stringently accountable for environmental pollution, he may search for a cause of his illness that connects it to toxic exposure from manufacturing plants. If, on the other hand, the same cancer patient is predisposed to think that most illnesses arise from individual spiritual or dietary imbalances, then he will be more likely to conclude that his illness was caused by his own perceived failures. Moreover, as Janice Nadler's research demonstrates, our preconceptions about the moral character of the injurer are likely to influence our inclination to blame him or her for a mishap—an injury caused by a person of good character is less likely to lead to blame attribution than an identical injury caused by a person of bad character.<sup>120</sup> In short, social and cultural concepts and values become entangled in numerous complex ways with perceptions of the causes of injuries and the attribution of responsibility for them.

Perceptions of causation and responsibility are driven not only by differences in worldview but also by differences in social status and power. In *Why the "Haves" Come Out Ahead*, Marc Galanter points out that torts are one of the few forms of litigation in which "one-shot" plaintiffs sue "repeat player" defendants, in contrast, for example, to landlord-tenant litigation (repeat player v. one-shotter) or divorce litigation (one-shotter v. one-shotter).<sup>121</sup> In part, the distinctive configuration of tort litigation results from the obvious fact that "have-not" one-shotters generally have shallow pockets and do not make good tort defendants as compared to repeat player "haves." But it has also been demonstrated that injuries are unequally distributed across social groups. Persons with less wealth are more likely to suffer injuries,<sup>122</sup> and their injuries often come at the hands of those

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118. See ENGEL & ENGEL, *supra* note 6, at 21–32.

119. See Engel, *supra* note 20, at 60 ("American tort law is full of examples illustrating the conflation of ideas about responsibility and causation, notwithstanding the fact that causation is theoretically a separate and independent element of an injury case.").

120. See Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, LAW & CONTEMP. PROBS., 2012, at 1, 2.

121. See Galanter, *supra* note 8, at 107–10.

122. HENSLEY ET AL., *supra* note 5, at 49 tbl.3.18.

with greater wealth who launch risk-creating enterprises or activities. Consequently, because of this important structural difference, “haves” and “have-nots” may tend to hold different views of causation and responsibility for injuries. “Haves” may tend to endorse views of injuries as inevitable, nobody’s fault, or the result of the injury victim’s own carelessness. “Have-nots,” who feel less able to avoid harm or to pay for it when it occurs, may tend to view injuries as the result of unnecessary risks imposed on them by others.

If social status and power can affect fundamental assumptions about causation and responsibility, one might expect lumping behavior to vary depending on whose view prevails in a given social setting. For example, my research in rural “Sander County,” Illinois revealed that the views of the “haves,” which emphasized stoic endurance rather than claiming as an appropriate response to injuries, tended to prevail among lawyers, judges, and jurors, over the contrary views of the local “have-nots.”<sup>123</sup> Consequently, injury victims rarely asserted claims or consulted lawyers. Changing social and political circumstances, however, can bring a shift in the predominance of one perspective over the other. Even in Sander County in the 1970s, there were preliminary signs that the influx of “outsiders”—mostly blue-collar workers who found jobs in a new industrial plant—had begun to challenge the ethos of self-sufficiency in the face of injuries, and that a contrary view emphasizing accountability and interpersonal responsibility had started to assert itself.<sup>124</sup> Randolph Bergstrom provides another example of such a shift over time, suggesting that social and political changes in New York City from 1870 to 1910 brought a different perspective on causation and responsibility for injuries.<sup>125</sup> This change in perspective, according to Bergstrom, led to a sharp increase in tort litigation at the turn of the twentieth century.<sup>126</sup>

Of course, socially marginalized or disempowered persons who fear personal or social consequences may avoid claiming even when they perceive themselves to be the victims of injustice and want to pursue the matter. Individuals who are injured in the workplace may conclude that lumping is safer than complaining, which could place their job or career prospects in jeopardy. These concerns may become particularly acute when the victims fear biased reactions based on their

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123. See Engel, *supra* note 112, at 560, 565, 567; accord CAROL J. GREENHOUSE ET AL., *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994).

124. Engel, *supra* note 112, at 578.

125. RANDOLPH E. BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1910*, at 168 (1992).

126. *Id.* MacLennan, *supra* note 96, tracks a comparable shift in perception of the causes and prevention of automobile injuries from 1920 to the present.

gender, race, cultural difference, or sexual orientation.<sup>127</sup> Rape in the workplace is a form of personal injury known to result in lumping precisely because of these concerns, as well as the often-justified fear that the victim will not be believed and will be viewed as a liar and troublemaker.<sup>128</sup> Similar considerations may prevail when injuries occur in other social settings. In Sander County, a Latina woman whose husband was injured expressed her opposition to his pursuit of a legal remedy in the following terms: "I was afraid that maybe they'd say our kind of people are just trying to get their hands on money any way we could."<sup>129</sup> In cases such as these, inequalities or discrimination in the social environment can affect perceptions and decision making, and can lead injury victims to lump otherwise actionable harms.

Consideration of the social and cultural environment in relation to injury perception requires some attention to specific geographical locales or social fields in which values and world views are held. It is not enough to speak of American or Japanese culture, as if the boundaries of a nation-state somehow enclose a homogeneous population in which values and modes of cognition are universally shared. Researchers must also take into account the "local knowledge" that can be found in particular human communities.<sup>130</sup> Nevertheless, in contemporary mass societies, there are forces in the environment that cut across communities and produce broad-based images and understandings of injury. Two of the most powerful of these environmental forces are the media and the law.

Media coverage of tort law can have a significant impact on individual cognition, as was dramatically illustrated by the McDonald's coffee case. William Haltom and Michael McCann demonstrate that newspaper reporting of Stella Liebeck's serious injury followed a dis-

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127. Some studies of sexual harassment in the workplace (not necessarily involving personal injuries) note that women who have been victimized by such misconduct may resist bringing a legal challenge for fear of blame, retaliation, and other negative repercussions. See, e.g., L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 724-25 (2007); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII As a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008).

128. Hebert, *supra* note 127, at 725 n.69, 727 n.85.

129. Engel, *supra* note 112, at 568 (internal quotation marks omitted).

130. See generally CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1982) ("Like sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by the light of local knowledge."). Arthur Kleinman makes a related point, relevant in particular to injury cognition, by emphasizing that those who study the perception and interpretation of pain must take into account the "local moral worlds" in which the body experiences it. See Arthur Kleinman, *Pain and Resistance: The Delegitimation and Relegitimation of Local Worlds*, in *PAIN AS HUMAN EXPERIENCE: AN ANTHROPOLOGICAL PERSPECTIVE* 169, 170 (Mary-Jo DelVecchio Good et al. eds., 1992).

tinctive and selective pattern.<sup>131</sup> The media tended to privilege the narrative of litigiousness and personal irresponsibility that the tort reform movement was promoting at that time, with substantial backing from the insurance industry. From initial media reports to subsequent editorials, cartoons, talk shows, and sitcoms, the hot coffee story disseminated by print and electronic media reached millions of Americans and residents of many other countries as well.<sup>132</sup> The effects on individual perceptions of injuries and injury law soon became obvious to plaintiffs' attorneys across the country, who found that they had to address the tort reform message and attempt to overcome potential jurors' anti-plaintiff biases and preconceptions in every case they litigated.<sup>133</sup> Haltom and McCann suggest that, through their communication of false or distorted "tort tales," the media have played a key role in what the authors call "the social production of legal knowledge,"<sup>134</sup> and have consistently promoted a politics of individual responsibility over an ideology of risk reduction and corporate responsibility. This perspective has become part of the social and cultural environment, and it appears to many (including injury victims) to be self-evident and "true."

Finally, the law itself exerts a significant influence on the environment within which injuries are experienced and interpreted. Marc Galanter wrote many years ago about "the radiating effect of courts,"<sup>135</sup> a concept that is taken for granted by mainstream doctrinal legal scholars, but was somewhat overlooked in law and society scholarship at the time. In the 1970s and 1980s, a great deal of effort had gone into studying the factors that led individuals to use or avoid the law, but less empirical attention had been given to the effect of law itself on problem perception and dispute behavior. At the same time, legal scholars, judges, and policymakers tended to accept law's influence uncritically and overestimated the extent to which legal rules affected the behavior and consciousness of everyday actors. By now, however, there is a substantial and diverse body of research and the-

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131. See HALTOM & MCCANN, *supra* note 1, at 203-06.

132. Several years ago, after I finished delivering a lecture on American tort law in Chiangmai, Thailand, a young student in the back of the lecture hall raised her hand and asked (in Thai), "But what about that woman who sued McDonalds after spilling coffee on herself?"

133. See, e.g., Stephen Daniels & Joanne Martin, "The Impact that It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers, 50 DEPAUL L. REV. 453, 473-74 (2000).

134. HALTOM & MCCANN, *supra* note 1, at 1, 5-6.

135. Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117, 118 (Keith O. Boyum & Lynn Mather eds., 1983) ("Instead of the centripetal movement of cases into courts, I want to look at the flow of influence outward from courts to the wider world of disputing and regulating.").

ory that explains when and how law matters.<sup>136</sup> Law and society are seen as mutually constitutive. Thus, it is uncontroversial to assert that law can—at least under some circumstances—powerfully shape social and cultural environments, even as it is shaped by them. For example, Anne Bloom and Paul Steven Miller suggest that tort law's depiction of plaintiffs' disabilities tends both to draw on and reinforce distorted and prejudicial understandings of persons with disabilities in American culture.<sup>137</sup> Similarly, caps on pain and suffering are undoubtedly the product of anti-litigation forces in the social and cultural environment;<sup>138</sup> at the same time, caps affect the social and cultural environment by communicating the message that claims for intangible injuries are problematic and less consequential than tangible physical harms.<sup>139</sup> In a more general sense, the creation of such caps reinforces the message that personal injury claimants will seek every opportunity to take advantage of hapless defendants unless they are restrained by the law. This negative message, heard often enough, can filter back to the perceptual and interpretive processes that operate nonconsciously from the moment an injury is experienced.

In sum, the environment of the embodied mind plays a critically important role in the process of cognition and decision making that follows an injury. Indeed, the environment shapes the very perception that an injury has occurred and, further, that the injury can be associated with another human actor. Even when the causal connection seems clear, social and cultural factors can influence the perception that the injurer should or should not bear responsibility, as well as the willingness of the victim to take the matter forward. Moreover, the self and the environment are not distinct entities but are organically linked. The environmental factors we have discussed in this Part are not outside the embodied mind, but actually constitute it and become active even in the automatic System 1 processing that is crucial to the interpretation of harmful experiences.

Of course, this view of the embodied mind and its environment does not in itself explain why lumping predominates over claiming among injury victims. It does, however, provide a starting point for analysis. The discussion in this Part points to a number of environ-

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136. See, e.g., *HOW DOES LAW MATTER?* (Bryant G. Garth & Austin Sarat eds., 1998).

137. See Anne Bloom with Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 712–13 (2011).

138. See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 170–72 (2010); see also HALTOM & McCANN, *supra* note 1, at 96; Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1267–68 (2004).

139. See CHAMALLAS & WRIGGINS, *supra* note 138, at 170–82.

mental factors that could lead an injured person to absorb the harm without taking any action against another person or entity. Some of them pertain to the naturalization of injury and the hidden nature of human choices that underlie the creation of risk in society. Others have to do with predominant value systems, backed by law, religion, or community norms that tend to valorize self-sufficiency and even stoicism over the demand for a remedy. Still others point to disparities in social or political power and the unequal capacity to create and disseminate norms and concepts of responsibility. Some of these factors have already been identified and discussed by researchers, but their influence on the overwhelming tendency to lump serious injuries still awaits systematic study.

## V. AUTOBIOGRAPHY, FEEDBACK, AND RECURSIVITY

The preceding Parts of this Article have sketched a model of injury cognition and response that situates the “embodied mind” in its physical, social, and cultural environment. A key element of the embodied mind is the *autobiographical self*, an internal narrative that runs continually in our minds, like a television set that is never turned off.<sup>140</sup> The autobiographical self operates nonconsciously and automatically, but it can also become the focus of slower and more self-aware System 2 thinking. At such moments, we deliberately explain our experiences by narrating portions of our lives to ourselves or to others. In this sense, the autobiographical self has an important social and interactional aspect. The self is, to use Jerome Bruner’s term, “distributed” throughout one’s relational networks:

[P]sychologists began to ask whether the wider circle of people about whom any person cares or in whom he or she confides might also be complicit in our narratives and our Self-constructions. Might not the complicit circle, then, be something like a “distributed Self,” much as one’s notes and looking-up procedures become part of one’s distributed knowledge. And just as knowledge thereby gets caught in the net of culture, so too Self becomes enmeshed in a net of others.<sup>141</sup>

These narratives of the self are never fixed. They constantly change in response to new events. Furthermore, we tell these stories differently depending on our purpose, our audience, and our state of mind. The autobiographical accounts we create for ourselves and others are not just a record of the past; they are also maps for the future. If I tell

140. See DAMASIO, *supra* note 32, at 210.

141. JEROME BRUNER, *ACTS OF MEANING* 113–14 (1990).

my life story to bolster my identity as *this* kind of person, I prepare myself for *that* course of action.<sup>142</sup>

What are the implications of the autobiographical self for injury perception and response? How might it help to explain the prevalence of lumping over claiming? A personal injury would undoubtedly become a significant event in most people's autobiographical narrative. The embodied mind would integrate this event instantly and nonconsciously into its life story, and the injury victim would very likely describe the injury to others, including friends, family, and co-workers, as well professional service providers. Each retelling would provide the injured person with an opportunity for revision, and each listener might offer comments or reactions that alter the original perception and, recursively, help to create a revised narrative the next time around. In this process, then, we may find keys to the predominant tendency to absorb a potentially tortious injury without lodging a complaint or seeking a remedy.

There can be little doubt that interactions with third parties are capable of substantially changing one's thoughts and self-conceptions concerning important matters, including how to respond to a personal injury. As Kenneth Gergen has observed: "[M]ere differences in the physical appearance of a bystander were often sufficient to trigger changes in the person's self conceptions. People were also frequently responsive to others' reactions, altering their conceptions of self as others communicated their positive or negative reactions to them."<sup>143</sup> In part, social interactions can affect interpretive processes because they are linked to the "cognitive biases" catalogued by Kahneman and others, many of which originate in the effect third persons have on human subjectivity. For example, the *priming effect* leads people to perceive, form judgments, or act in ways that reflect their prior exposure to images, concepts, or ideas, even if such exposure occurs subconsciously or is seemingly irrelevant to the matter at hand.<sup>144</sup> People are so suggestible that implanting a concept in their minds, such as the

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142. See ENGEL & MUNGER, *supra* note 87, at 45 ("The ever-changing stories people tell themselves and others about who they are alternate with 'new living action.' That is, narratives of the self follow and explain past experiences, but they also *precede* new experiences in which individuals attempt to act out the selves they have narrated and the desires and aspirations associated with those selves . . ."); see also George C. Rosenwald, *Conclusion: Reflections on Narrative Self-Understanding*, in STORIED LIVES: THE CULTURAL POLITICS OF SELF-UNDERSTANDING 265, 274 (George C. Rosenwald & Richard L. Ochberg eds., 1992) ("New living action follows a new story partly as a way of catching the life up to the account of the life and partly to express what is missing from the story.").

143. KENNETH J. GERGEN, *TOWARD TRANSFORMATION IN SOCIAL KNOWLEDGE* 17 (2d ed. 1994) (citations omitted).

144. KAHNEMAN, *supra* note 18, at 52-54.

concept of old age, can lead them unconsciously to walk down the hall like an elderly person.<sup>145</sup> It is easy to imagine that injury victims could be primed by their interpersonal networks to adopt a negative perspective toward asserting claims for compensation, since disapproval of claiming behavior is widespread within many social groups.

A second cognitive bias mentioned by Kahneman is the *mere exposure effect*, which produces a favorable response to familiar words or images only because the individual has experienced them previously, even if the exposure occurred subconsciously.<sup>146</sup> This type of bias, too, could be associated with the individual's interpersonal interactions. Certain ideas or concepts repeatedly expressed within one's relational network could affect cognition of new events such as injuries: for example, by instilling the ethical notion that injury victims should be stoic in the face of pain and suffering and should not be quick to assert claims.

A third cognitive bias is the *availability heuristic*, which, according to Kahneman, leads people to make judgments about the frequency of a category based, illogically, on how easy it is for them to retrieve examples from their memory.<sup>147</sup> Thus, we might imagine that if injury victims have friends who repeatedly talk about greedy injury victims and nonmeritorious lawsuits, they would tend to estimate that frivolous personal injury litigation is very common regardless of the evidence to the contrary. The individuals' interpersonal networks could, in this way, create a bias against taking any action that might associate them with what is perceived as an epidemic of reprehensible tort claimants.

Interactions with third parties can trigger cognitive biases, and they can also change the reasoning and the formation of moral judgments that follow in the wake of important events such as injuries.<sup>148</sup> As Jonathan Haidt observes:

We make our first judgments rapidly, and we are dreadful at seeking out evidence that might disconfirm those initial judgments. Yet friends can do for us what we cannot do for ourselves: they can challenge us, giving us reasons and arguments . . . that sometimes trigger new intuitions, thereby making it possible for us to change our minds. . . . For most of us, it's not every day or even every month that we change our mind about a moral issue without any prompting from anyone else.

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145. *Id.* at 53 (citing an experiment by John Bargh and colleagues).

146. *Id.* at 66–67.

147. *Id.* at 129.

148. See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 47–48 (2012) (citations omitted).

Far more common than such private mind changing is social influence.<sup>149</sup>

The question remains, however, why social interactions might tend to have an asymmetrical influence, encouraging injury victims to lump more than to claim. Here, it is important to recognize that such interactions occur in social contexts in which the anti-litigation ideology of individual responsibility often predominates.<sup>150</sup> Interactions with third parties can pressure individuals to conform to dominant social values or ideologies. Pierre Bourdieu suggests that particular episodes of "*interaction* and mutual adjustment" are not isolated social events, but take place in an environment that already possesses certain "objective structures which have produced the dispositions of the interacting agents."<sup>151</sup> These social interactions are, according to Bourdieu, structured by powerful ideas, images, values, and norms in society, which they tend to replicate.<sup>152</sup> The direction of influence is neither random nor symmetrical. In Bourdieu's words, "the system of dispositions . . . tends to perpetuate itself into the future by making itself present in practices structured according to its principles."<sup>153</sup> In each encounter, dominant ideas, frameworks, and ideologies—such as the ideology of individual responsibility and anti-litigiousness—impress themselves on the perceptions and decisions of individual actors, including injury victims, and structure their thoughts.

It is reasonable, then, to suggest that interactions with third parties would tend to have an asymmetrical effect, causing injury victims to reshape their autobiographical narratives to conform to values associated with lumping rather than claiming. Unfortunately, researchers have not directly tested this hypothesis,<sup>154</sup> although community-based

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149. *Id.* at 47.

150. See HALTOM & McCANN, *supra* note 1, at 28–29; see also Engel, *supra* note 112, at 558–59 (noting the predominance in Sander County, Illinois, of a type of individualism that emphasizes self-sufficiency rather than rights and remedies in injury cases).

151. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 81 (Richard Nice trans., Cambridge University Press 1977) (1972).

152. *Id.* at 80–82.

153. *Id.* at 82.

154. Researchers have documented the influence of social interactions on lumping and claiming by injury victims in one specialized context that does not, strictly speaking, involve third parties. Rather, these are cases in which the injurers themselves offer an explanation and apology to the injured person. Jennifer K. Robbenolt conducted a scenario study involving an injury caused by a bicyclist–pedestrian collision. See Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 484 (2003). She found that a full apology expressing sympathy and taking responsibility for the accident had a powerful effect on her subjects. The apology led them to attribute positive moral qualities to the injurer, to believe he would be more careful in the future, to decrease their anger, and to feel sympathy for him. In addition, her subjects were much more receptive to a settlement offer in the full apology scenario. See *id.* at 485–88. Robbenolt's research thus demonstrates how significantly

ethnographic research suggests that the injured person's social and cultural surroundings can create an influential moral ethos extolling self-sufficiency rather than the pursuit of compensation.<sup>155</sup> Informed speculation, however, would suggest that discussing an injury with a friend or family member could operate in several quite specific ways to increase lumping and diminish the likelihood that an injury victim would lodge a claim:

(1) It seems likely that the injured person would talk less with third parties about an incident that she had already decided to lump and put behind her, but would communicate more often about an incident in which she was undecided or was considering lodging a claim. Third parties would therefore have less opportunity to reverse a "closed" lumping decision than an "open" potential claiming decision, thereby increasing the overall frequency of lumping.

(2) It is likely, for the reasons already discussed, that a third party would share the predominant social and cultural norms concerning claiming behavior in response to injuries. As we have seen, in many social settings those norms favor lumping and not claiming. Therefore, the third party may more often attempt to cool off the occasional "hot-headed" response by an injury victim rather than challenge a modal response to lump.

(3) Discussion with a third party could make the injury victim more aware of negative social stereotypes associated with injury victims who claim or sue, since the third party would take a more objective "external" view of the matter rather than focusing like the victim on unique details of the accident that had just occurred.<sup>156</sup>

(4) If the third party is a close friend or family member, she may adopt a protective attitude toward the injury victim and attempt to offer cautionary advice that would shield her from social opprobrium or even retaliation by the injurer, both of which may be more evident to an observer who is not personally involved in the accident and can adopt a more distanced perspective.

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injury victims can be influenced by others to reformulate their autobiographical narratives and absolve the injurers of responsibility.

155. See GREENHOUSE ET AL., *supra* note 123, at 128–29. The influence of the dispute audience is discussed by Jeffrey Fitzgerald and Richard Dickins, as well as Lynn Mather and Barbara Yngvesson. See Jeffrey Fitzgerald & Richard Dickins, *Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law*, 15 LAW & SOC'Y REV. 681, 695–96 (1980–1981); Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1980–1981).

156. Cf. Dan Lovallo & Daniel Kahneman, *Delusions of Success: How Optimism Undermines Executives' Decisions*, HARV. BUS. REV., July 2003, at 56, 61, 63 (noting that taking an "outside view" tends to produce more objective and reliable judgments than "internal views" that are overly focused on the specifics of one's own situation).

Whether interactions with third parties actually operate in these ways to reinforce lumping rather than claiming is admittedly speculative. One might imagine just the opposite effect—that third parties could encourage rather than discourage claiming by offering information about sources of legal advice.<sup>157</sup> More research is clearly needed to explore the dynamics of narrative and response involving injury victims and third parties. Yet there can be little doubt of the general importance of third-party interactions in reformulating the injury victim's internal autobiographical narrative. A conceptual model of injuries based on the embodied mind cannot confine its attention to the injury victim alone, but must also consider the recursive effects that take place when narratives are shared with others, whose reactions influence future telling of the same event.

## VI. CONCLUSION

The fact that approximately nine out of ten injury victims lump their losses rather than make any effort to lodge a claim has far-reaching consequences for tort law. Most obviously, it means that the vast majority of injury victims forego a remedy. If they cannot pay for their losses themselves, then they must somehow make do without compensation—by borrowing from friends and family, incurring personal debts, undergoing bankruptcy, or accessing government welfare. Lumping has substantial social consequences. The predominance of lumping also affects the mix of cases that cross the threshold of tort law and thereby shape the field. A tendency to lump some kinds of personal injuries, such as injuries on stairways, more frequently than others, such as automobile injuries, can determine the doctrinal contours of tort law and can thus open doors to certain types of claims while closing doors to others. We need to understand which cases are lumped in comparison to those that become claims or even lawsuits: their relative strengths and weaknesses, the different types of injuries involved, the characteristics of the parties, and much more. Yet, despite the fact that lumping is enormously consequential for tort law and society, researchers have done little more than note its existence and its predominance among injury victims.<sup>158</sup>

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157. See, e.g., Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 J. AM. MED. ASS'N 1359, 1361 (1992) (noting that 33% of families that filed medical malpractice claims following perinatal injuries cited advice by knowledgeable acquaintances as a significant factor in their decision).

158. Cf. Saks, *supra* note 2, at 1174. Saks wrote twenty years ago about the importance of the "base" (which includes cases of lumping as well as claiming) in understanding the behavior of the entire tort law system: "Despite the indispensability of this ingredient to making sense of the

This Article suggests that lumping can be better understood if it is not viewed merely as the first in a series of rational decision points or as the inevitable product of some vaguely defined cultural imperative. These forms of explanation can be helpful, but they are inadequate in themselves and should be incorporated into a broader conceptual framework that takes into account contemporary research on human cognition and decision making, as well as more sophisticated forms of sociocultural interpretation.

Lumping in personal injury cases reveals the way in which the “embodied mind” responds to painful and traumatic events, both consciously and nonconsciously. Moreover, the embodied mind operates in an environment that is organically connected to both brain and body. To understand the prevalence of lumping, therefore, we must consider how physical, social, and cultural features of the environment become key features of an interpretive process that results in inaction far more often than action. To the extent that aspects of the environment (including the media and the law itself) lend themselves to perceptions of injuries as natural, inevitable, fated, or the fault of the victim, lumping may appear to be not just the better choice but the only conceivable response. And, as we have seen, social or political arrangements in particular social settings may persuade injury victims not to lodge claims even when they perceive that another party is responsible and want to pursue a remedy.

Finally, this Article suggests that a fully developed conceptual framework must also take into account the interactions between injury victims and those with whom they may discuss their experience. A key feature of the “embodied mind” is the autobiographical narrative that individuals convey during their interpersonal encounters. In sharing these narratives with other people, individuals define a self that can and should act in certain ways or refrain from action. Yet by “distributing”<sup>159</sup> these narratives within their relational networks, individuals also open themselves to feedback and alternative framing of important events such as injuries. Thus, social interactions can recursively transform one’s autobiographical narrative and point the individual toward different behavioral options. These recursive effects must be considered in a reconceptualization of lumping, and we must ask whether and how they are likely to increase the likelihood of inaction in response to personal injury. This Article speculates that inter-

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behavior of the system, direct consideration of injury base rates is absent from virtually all commentary and analysis of the tort litigation system.” *Id.*

159. See BRUNER, *supra* note 141, at 114 (discussing his own concept of the “distributed Self”).

personal interaction could enhance lumping for several reasons, including asymmetries in the kinds of cases that are shared with confidants, the moderating influence of the "external view," and the probability that friends and family would reflect social and cultural values opposed to claiming. Further, the confidants' awareness of such values might cause them to discourage claiming in order to shield the injury victim from stigmatization or retaliation by others.

Although existing research does not provide a comprehensive explanation of the predominance of lumping in personal injury cases, it unequivocally points to more promising theoretical models and avenues of inquiry. Sociolegal scholarship has illuminated many features of the tort law system in recent years, but the disposition of the vast majority of injury cases before the victim takes any action still remains shrouded in mystery. A thoughtful and methodologically broad-based exploration of the cases in which the victim lumps rather than claims can tell us a great deal about the workings of tort law in society and the areas of social life it does not reach.