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Article 3

Radiating Effects of Torts

Anne Bloom

THE RADIATING EFFECTS OF TORTS

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INTRODUCTION

The radiating effects of torts should be of great interest.[1] What legal actors do in tort cases tends to have far-reaching cultural and political implications. The impact of the infamous McDonald's coffee case, for example, extended far beyond its litigants.[2] Not only did the rather significant verdict in the case likely deter other companies from serving coffee that is too hot, but the strongly negative public reaction to the verdict also likely deterred (and still deters) others who suffered injuries from suing. But if that were the sum of it, the radiating effects of the case would not be all that remarkable. After all, the deterrent effects of tort litigation are expected.[3] What makes the radiating effects of the McDonald's coffee case so interesting is the broader impact of the case on cultural beliefs and values.[4] The case did not simply impact the litigants and deter similarly situated actors; it became an important symbol of what is wrong with the tort system.[5]

Although the case generated a lot of attention, it is probably not the only tort case to trigger these kinds of broader social effects.[6] We have seen in other areas of the law that legal practices commonly generate normative messages that influence public discourse and behavior. Research on the radiating effects of *Brown v. Board of Education*, for example, uncovered extensive evidence of how litiga-

* Associate Dean for Faculty Scholarship and Professor of Law, the University of Pacific, McGeorge School of Law.

1. Both the title and my thesis borrow heavily from Marc Galanter's classic analysis of the "radiating effects of courts." *See* Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117 (Keith O. Boyum & Lynn Mather eds., 1983).

2. *See generally* Michael McCann, William Haltom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113 (2001).

3. *See* DAN B. DOBBS, THE LAW OF TORTS 19–21 (2000).

4. *See* McCann et al., *supra* note 2.

5. *Id.* at 175.

6. *See* David M. Engel & Michael McCann, *Introduction* to FAULT LINES: TORT LAW AS CULTURAL PRACTICE 1, 1 (David M. Engel & Michael McCann eds., 2009) [hereinafter FAULT LINES] ("[T]ort law plays a role in constituting the very cultural fabric in which it is embedded.").

tion can shape perceptions of race and social equality.[7] And, more recently, scholars have shown that the activities of courts in less well-known cases influence how people make sense of things, even when they have little exposure to legal proceedings.[8] Somewhat curiously, however, scholarly inquiry into how tort litigation may generate these types of radiating effects has been limited largely to studies of deterrence.[9]

My aim in this Article is twofold. The first is to consider how tort law influences social norms and practices in ways other than deterrence. The second is to show how greater attention to these other types of radiating effects might reveal many more instances of the kinds of broad social effects that were triggered by the McDonald's coffee case. As has been the case with other legal contexts, focusing more closely on these radiating effects may help us to uncover the ways in which tort law plays a role in shaping how we perceive the world and our place in it. And, finally, greater attention to these other radiating effects might reveal the almost entirely unexplored role of tort law in shaping social hierarchies.

My starting place is Marc Galanter's 1983 article, *The Radiating Effects of Courts*.[10] In that influential article, Galanter called for more research regarding the influence of courts on social practices.[11] Noting that a significant body of work had already demonstrated that the direct impacts of courts were limited, Galanter argued that courts likely influence social practices in more subtle ways.[12] He suggested, for example, that courts confer "bargaining" and "regulatory" endowments that influence how parties negotiate in private settings.[13] At the same time, Galanter also described a number of other indirect ef-

7. *See generally* MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010).

8. *See* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 223, 232, 244–45, 247, 249 (1998); *see also* JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 70–71, 79–80, 92 (2001); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 8–9 (1990) (discussing the increasing "flow of influence outward from the courts" to the general population).

9. *See, e.g.*, Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691, 691 (2005); *see also* DOBBS, *supra* note 3. *But see generally* FAULT LINES, *supra* note 6.

10. Galanter, *supra* note 1, at 117–18.

11. *Id.* at 118.

12. *Id.* at 121.

13. *See id.* at 121–24; *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (introducing similar concepts in the context of divorce law).

fects, including "normative validation" and "enculturation," or the influence on the construction of new cultural values.[14]

Scholars working in other fields pursued Galanter's hypotheses more aggressively than tort scholars. Their findings were especially significant in the field of civil rights. While the research found little evidence of civil rights litigation directly deterring or correcting discriminatory conduct, the research did uncover, and continues to uncover, extensive evidence of the effects of civil rights litigation on cultural discourse and perceptions of political opportunity.[15] In other words, in the civil rights context, the radiating effects of law on cultural discourse and political perceptions have been found to be *more significant* than the direct effects of the litigation on deterring or correcting discriminatory practices.[16]

Although there has been less interest in studying whether tort law has similar effects on cultural and political perceptions, it seems likely that the radiating influence of torts is similar. For one thing, tort cases tend to be litigated in state courts that typically have a much closer connection to the community than the federal courts deciding many civil rights cases.[17] Perhaps more importantly, the common law structure of tort law allows courts to play a more overtly normative role than is generally considered permissible in the statute-driven realm of civil rights.[18] For both reasons, the radiating effects of torts on cultural and political perceptions deserve much more attention.

The remainder of this Article proceeds in three Parts. Part II draws upon Galanter and other scholars to explore how law influences cultural values and perceptions of political opportunity. It shows how research in other fields has expanded our understanding of the radiating effects of courts. It also argues that, to the extent that courts have these effects, they play a role in shaping social hierarchies. Part III considers the radiating effects of torts, with particular emphasis on effects other than deterrence. It surveys some recent empirical research on how tort litigation shapes social norms and political hierarchies in a few discrete areas, such as tobacco policy and asbestos

14. Galanter, *supra* note 1, at 125–27.

15. *See, e.g.*, MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 4–6, 48 (1994); SUSAN M. OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS, at xiii (1984).

16. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (concluding that legal tactics offer political activists little more than a hollow hope of reform).

17. *See* David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551, 553–54 (1984).

18. *Cf.* O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

compensation, and argues that tort law likely plays a powerful role in shaping norms in other areas as well. It also speculates on the radiating effects of torts on identity, particularly as they relate to disability and sex. Finally, Part III argues that the radiating effects of torts are also likely to help shape social hierarchies, including those that function to further marginalize already disempowered groups. Part IV briefly concludes.

II. How Law Influences Social Norms and Hierarchies

In *The Radiating Effects of Courts*, Galanter urged legal scholars to look more closely at the "flow of influence *outward* from courts."[19] He urged particular attention to both the normative messages transmitted by courts and how those messages were received and translated in the "wider world."[20] Because an increasingly significant body of work demonstrated that the "automatic penetration" of courts' messages could not be assumed, Galanter suggested that the main contribution of courts might be to provide a "background of norms and procedures" against which private negotiations take place.[21] Along similar lines, Galanter argued that the activities of seemingly nonlegal actors, like the school principal or the Commissioner of Major League Baseball, were structured, at least in part, by the normative messages of legal rules and practices.[22]

Today, a wealth of scholarship supports these claims. One of the best examples is William Forbath's study of law and the American labor movement.[23] In this comprehensive analysis of the relationship between courts and the strategies of the American labor movement, Forbath showed how a series of anti-labor legal rulings sapped the strength of the American labor movement and resulted in American labor activists adopting a more "laissez-faire" conception of rights than their European counterparts.[24] Because Forbath's analysis focused primarily on how courts provided the normative messages that structured the private negotiations, it is an excellent illustration of the radiating effects of courts on social norms and practices.

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19. Galanter, *supra* note 1, at 118 (emphasis added).

20. *Id.*

21. *Id.* at 118, 121.

22. *Id.* at 122.

23. William E. Forbath, Law and the Shaping of the American Labor Movement 134–35 (1991) (arguing that legal rulings deeply affected the ideology and strategies of the American labor movement).

24. *See id.*

Other research found even more evidence of the radiating effects of courts.[25] A study by Francine Sanders, for example, traced the radiating effects of the ruling in *Brown v. Board of Education* to a change in judicial behavior in the lower courts.[26] Remarkably, Sanders was able to show that the normative messages of *Brown* remained influential, even as the legal rulings in the case failed to have much impact on the desegregation of schools.[27]

Many other studies reached similar conclusions in a variety of contexts. Michael McCann's study of the pay equity movement, for instance, concluded that the radiating effects of even adverse legal rulings helped to build this movement, primarily by providing pay equity activists a discourse with which to articulate their demands.[28] Similarly, Patricia Ewick and Susan Silbey found that courts influence meaning making and perceptions of opportunities, even among individuals who have little exposure to legal proceedings.[29]

Very little of this work considers the radiating effects of tort litigation.[30] Nevertheless, the insights from research in other fields appear to be fully applicable to tort rulings and practices, which also transmit normative messages. Indeed, to some extent, research on deterrence already assumes that the normative messages of tort litigation have broader social significance. In these debates, it is widely accepted that the prospect of tort liability can influence behavior.[31] Moreover, research suggests that the effects of deterrence are increased when courts articulate clear norms of expected behavior.[32] While the precise mechanism of the relationship is not well understood, it seems likely that deterrence is improved when courts articulate clear norms

25. *See, e.g.*, OLSON, *supra* note 15, at 9, 12 (noting the role of legal rulings in shaping the strategies of disability activists); HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 70–75, 161–62, 166–67 (1996) (describing the role of legal discourse in shaping the perceptions of animal rights activists).

26. Francine Sanders, Brown v. Board of Education*: An Empirical Reexamination of Its Effects on Federal District Courts*, 29 LAW & SOC'Y REV. 731, 731–32, 734 (1995).

27. *See id.* at 744–45.

28. *See, e.g.*, OLSON, *supra* note 15, at 9, 12; MCCANN, *supra* note 15, at 48 (concluding that pay equity litigation served as an important resource for pay equity activists because it provided the activists with a discourse with which to articulate their demands).

29. *See* EWICK & SILBEY, *supra* note 8.

30. For an important exception, see Engel, *supra* note 17, at 574–77.

31. *See* Galligan, Jr., *supra* note 9 (citing DOBBS, *supra* note 3). *But see* Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 121–27 (1993) (arguing that much of deterrence analysis wrongly assumes that human behavior is rational).

32. *See* Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 464 (2004).

due to the radiating effects of torts on public discourse and perceptions.[33]

Of particular relevance to deterrence theorists, Galanter specifically identified "threats" and "stigma" as distinct radiating effects of courts.[34] But, in contrast to the assumptions underlying contemporary deterrence theory, Galanter suggested that the radiating effects of courts have cultural resonance *even when they have little connection to the prospect of liability or punishment.*[35] According to Galanter, such effects are possible because law "affects us primarily through communication of symbols."[36] In other words, Galanter's model of law's influence emphasizes "the dissemination of messages rather than the pronouncement of authoritative decisions."[37]

Galanter also described several ways in which communications from courts influence social values and practices. Two of the most important mechanisms of influence are the processes of "enculturation" and "normative validation."[38] Enculturation occurs when the normative messages of legal tactics prompt people to change their moral assessments and, by extension, their cultural values and practices.[39] Normative validation, on the other hand, involves the somewhat less dramatic effect of legitimating or intensifying existing attitudes.[40] How much, or how little, the processes of enculturation and normative validation affect people depends on the particular conditions of reception.[41]

Michael McCann's study of the radiating effects of pay equity litigation provides an illustration of how the processes of normative validation and enculturation work in practice.[42] McCann's research design

33. *See* Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183, 186–87 (2011/2012); *see also* Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 208 (2010) ("Tort law sends the message—both to the specific tortfeasor and to potential tortfeasors—that there are certain values that society is not willing to compromise. Imposing liability warns the tortfeasor that if the behavior exhibited . . . is not consistent with societal values, there will be appropriate legal sanctions."); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 363 (1990) (stating that establishing a cause of action in tort for harassment sends an unmistakable normative message).

34. Galanter, *supra* note 1, at 127.

35. *See id.*

36. *Id.*

37. *Id.* at 135. Robert Cover made a similar argument in Nomos *and Narrative. See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4 (1983) ("[The] formal institutions of law [are] but a small part of the normative universe that ought to claim our attention.").

38. Galanter, *supra* note 1, at 125.

39. *Id.*

40. *Id.*

41. *Id.* at 126.

42. *See* MCCANN, *supra* note 15, at 58.

drew heavily on *The Radiating Effects of Courts* and, in particular, on Galanter's insight that "law should be analyzed more capaciously 'as a system of cultural and symbolic meanings than a set of operative controls.'"[43] Thus, instead of measuring the direct impacts of legal rulings, McCann focused on the radiating effects of the litigation on public discourse and the perceptions of activists. After conducting hundreds of interviews and undertaking extensive analyses of media coverage and other materials, McCann concluded that the legal messages generated by the pay equity litigation influenced public discourse and perceptions in surprising and important ways.[44]

First, McCann noted that legal tactics shaped the political perceptions and identities of the activists themselves.[45] Specifically, similar to Forbath, McCann found that the litigation shaped the activists' perceptions of political opportunity.[46] However, McCann also found that the litigation helped to alter "the broader terms of relational power."[47] Notably, this was so even among those who had little involvement in or even knowledge of the litigation.[48] Perhaps the most striking of McCann's findings, however, was that these effects did not depend on a favorable outcome in court.[49] Instead, a mixed record of wins and losses appeared adequate "to shape the discursive terms of developing struggles for a decade."[50] In short, as Galanter had predicted, law's normative messages had cultural resonance, even when they had little connection to the prospect of liability or punishment.[51]

McCann's research on the pay equity litigation empirically demonstrated the "indirect, 'radiating' effects" of courts over time.[52] David Engel and Frank Munger's research on disability rights provided further evidence of these effects.[53] One of the key focuses of their research was the radiating effects of courts on identity.[54] Specifically, Engel and Munger sought to understand how perceptions of identity evolved in response to the invocation of disability rights claims.[55] By

43. *Id.* at 6 (quoting Galanter, *supra* note 1, at 127).
44. *Id.* at 17, 284.
45. *Id.* at 284.
46. *Id.*
47. *Id.*
48. MCCANN, *supra* note 15, at 284.
49. *Id.* at 285.
50. *Id.*
51. *See* Galanter, *supra* note 1, at 127.
52. MCCANN, *supra* note 15, at 285.
53. *See* DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 250 (2003).
54. *Id.* at 13, 250.
55. *See id.* at 13.

utilizing a complex research design that allowed them to trace the effects of the normative messages of the Americans with Disabilities Act (ADA) over time, they were able to capture the ways in which legal norms combined with other factors—such as class, race, gender, and religion—to influence identity construction.[56] Like McCann, they found extensive evidence that rights litigation shapes perceptions of identity.[57] And, as Galanter hypothesized, they concluded that the radiating effects of the legal tactics on identity may have been *more significant* than the impacts on social practices that flowed directly from the litigation.[58]

Another empirical project illustrates how the radiating effects of courts can also operate to construct and to enforce social hierarchies. John Gilliom's *Overseers of the Poor* provided an account of his research on the radiating effects of welfare law. After conducting extensive interviews with numerous welfare recipients, Gilliom concluded that the messages transmitted by welfare law provided normative support for steadily increasing the surveillance and regulation of welfare mothers over time.[59] In other words, Gilliom found that the indirect effects of legal norms and practices helped to legitimate a restructuring of power relations in a direction that led to further marginalization of an already disempowered social and economic class.[60]

In each of these studies, researchers found that the radiating effects of courts included distinct impacts on how litigants, activists, and others perceived both themselves and others in the context of particular social and political hierarchies. McCann's study of the pay equity litigation found that the legal tactics helped pay equity activists to feel more empowered, even when pay equity plaintiffs lost their cases. Engel and Munger's study of disability rights litigation reached more equivocal conclusions, but nevertheless emphasized the role that rights litigation played in restructuring identity. And Gilliom's research uncovered the ways in which the radiating effects of legal tactics can lead to further disempowerment for those both directly and indirectly involved in welfare cases.

How does law have these effects? Galanter referred to the translation of law's messages into the restructuring of private orderings as a "kind of legal alchemy."[61] A few years later, Patricia Williams used

56. *Id.* at 18–19, 250–51.
57. *Id.* at 250–51.
58. *See id.* at 103, 250.
59. *See* GILLIOM, *supra* note 8, at 70–71.
60. *See id.* at 92.
61. Galanter, *supra* note 1, at 123.

almost identical language to make a similar claim in the context of racial hierarchies.[62] In *The Alchemy of Race and Rights*, Williams described how the mere invocation of legal rights shapes identity and perceptions of political opportunity, even when there is no hope of those rights actually being vindicated. This is because the assertion of legal rights acts like a "magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power."[63] As Williams explained, law can work this "magic" because the invocation of legal rights delineates who is, and who is not, a member of a rights-bearing community.[64] Thus, the radiating effects of courts are inextricably linked with the construction and reproduction of identity and, ultimately, social hierarchy.

III. BEYOND DETERRENCE: THE RADIATING EFFECTS OF TORTS

If the radiating effects of courts influence cultural norms, shape identity, and restructure power relations in the civil rights context, might something similar be happening with torts? Most tort scholars and practitioners assume that the radiating effects include deterrence.[65] A considerable body of tort scholarship focuses on the comparative efficiencies of different approaches in tort law for purposes of achieving optimal deterrence.[66] The underlying assumption is that the prospect of tort liability motivates people to take steps to avoid accidents or other wrongful conduct.[67] Some argue that tort law overdeters beneficial conduct while others claim that it underdeters.[68] The research is inconclusive,[69] but the ongoing debate over deterrence

62. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 163 (1991) ("To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before . . . . The making of something out of nothing took intense alchemical fire—the fusion of a whole nation and the kindling of several generations.").

63. *Id.* at 164.

64. *See id.* at 159.

65. *See* Galligan, Jr., *supra* note 9, at 691 ("The idea that liability or the prospect of liability can shape human behavior through deterrence has become one of the practical and theoretical foundations of tort law."); *see also* DOBBS, *supra* note 3, at 19.

66. *See* Galligan, Jr., *supra* note 9, at 691.

67. *See id.*

68. For an argument on the overdeterrence claim, see David D. Haddock et al., *An Ordinary Rationale for Extraordinary Legal Sanctions*, 78 CALIF. L. REV. 1, 8–9 (1990). For an argument that tort law underdeters, see Galligan, Jr., *supra* note 9, at 691.

69. For an excellent overview of the literature on the deterrent effects of tort law, including a discussion of some of the key challenges of its study, see ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 141–44 (2001). *See also id.* at 144 ("Overall, therefore, the spotty existing evidence suggests that American tort law has an erratic effect on safety."); Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence*

is indicative of the extensive interest in this particular radiating effect in both academia and the broader public policy arena.[70]

Yet, *The Radiating Effects of Courts* teaches us that there are other effects of tort law that should also be of interest to scholars and policymakers. In addition to deterrence, Galanter identified a host of other likely radiating effects of courts,[71] including the effects of enculturation and normative validation discussed in Part II. While these types of effects may not directly influence behavior, research in other fields suggests that the potential long-term consequences of these effects are significant and should be more seriously considered. Moreover, while research in the torts context is a bit thin, a small body of work appears to confirm what has been found in other fields.

As in other contexts, preliminary research on the radiating effects of torts has uncovered evidence of the legal messages from tort cases operating to influence and shape cultural values.[72] Research also reveals some of the ways in which tort litigation can play a role in resetting public agendas and restructuring power in particular political settings.[73] Finally, there is some evidence that tort litigation may also play a role in shaping cultural perceptions of bodily identity, particularly as they relate to disability, sex, and race.[74]

One of the earlier studies on the radiating effects of torts remains one of the most important. In *The Oven Bird's Song*, David Engel researched the relationship between law and community in a rural American county and discovered that perceptions of personal injury litigation influenced how members of the community delineated between "insiders" and "outsiders."[75] In most instances, those who pur-

for Malpractice Reform, 80 TEX. L. REV. 1595, 1604 (2002) (noting the paucity of empirical research on the deterrent effects of tort law).

70. *See* Galligan, Jr., *supra* note 9, at 692.

71. *See* Galanter, *supra* note 1, at 125.

72. *See, e.g.*, Engel, *supra* note 17, at 554–56.

73. *See, e.g.*, Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 919–20 (1998).

74. *See, e.g.*, Anne Bloom with Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 731 (2011) (discussing disability); Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 363–64 (2010) (discussing sex); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 27 (2010) (discussing race).

75. Engel, *supra* note 17, at 554. For an even earlier study, with more emphasis on deterrent effects, see Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51 (1967). In this groundbreaking work, Friedman and Ladinsky traced how changes in the law of industrial accidents—from reliance on tort law to statutory systems of workers' compensation—both reflected and contributed to changes in local safety practices. *Id.* at 50. After reviewing extensive historical evidence, the authors concluded that a mutually constitutive relationship exists between law and social change: "If the proper societal demands are made, wide-reaching changes in law inevitably come about; and the process of

sued personal injury litigation were viewed as geographic or social "outsiders" even before the litigation began.[76] Involvement in litigation served to reinforce this "outsider" perception and, in the case of "social outsiders," exacerbated their status as "second-class" citizens.[77] Moreover, views of personal injury litigation were very negative in the community, in part because many people in the community adopted the rhetoric of the tort reform movement as a means of resisting the growing presence of perceived "outsiders."[78]

Engel's case study illustrates how processes of normative validation and enculturation can extend the radiating effects of torts well beyond the immediate and more direct effects of the litigation on the litigants themselves and, perhaps, others who are similarly situated. In the community studied by Engel, personal injury litigation and rhetoric about personal injury litigation propagated by the tort reform movement not only shaped how people in the community perceived each other, but also ultimately helped constitute the structuring of a social hierarchy based on perceived "insiders" and "outsiders." While those associated with tort litigation were designated as "outsiders," those who did not pursue litigation either retained their "insider" status or refrained from litigation in an attempt to achieve that status.[79]

The Oven Bird's Song also provides empirical support for Galanter's claim that the reception of legal messages matters as much as the messages themselves.[80] While legal victories provided some normative validation to "outsiders" who chose to go to court, the normative messages transmitted by the courts in these cases were not well received. Engel emphasized that this was because the community in his study was undergoing significant change in response to globalization.[81] In Engel's assessment, the community's responses to those changes influenced how they perceived tort litigation and the litigants involved.[82]

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change in the law, despite enormous diversities, produces noticeable regularities of behavior." *Id.* at 82. Notably, Galanter relied heavily upon studies like this to support his argument on the radiating effects of courts. *See generally* Galanter, *supra* note 1. However, then, as now, research on the radiating effects of torts was relatively rare.

76. Engel, *supra* note 17, at 568–70.

77. *See id.*

78. *See id.* at 580–81.

79. *Id.* at 568 (describing the fears of a Mexican immigrant's wife about "creat[ing] more trouble for themselves" as a result of her husband filing a tort suit).

80. *See* Galanter, *supra* note 1, at 123–24.

81. Engel, *supra* note 17, at 573–74.

82. *Id.* at 574–75, 580. Randolph Bergstrom reached a similar conclusion. *See* RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870–1910, at 168 (1992). After examining a sampling of legal judgments over a forty-year period, Bergstrom con-

While Engel focused on the radiating effects of tort litigation on social stratification, other research explored the radiating effects of torts on the shaping of public discourse and institutions. Research on the tobacco litigation, for example, discovered that the normative messages generated by the litigation helped to reframe policy debates[83] and contributed to the formation of new social norms.[84] Ultimately, the normative messages generated by the litigation proved helpful in resetting the policy agenda[85] and empowered "a new set of players in the tobacco policy game."[86]

More recent scholarship paints a clearer picture of the tobacco litigation's radiating effects. It seems that changes in the framing of the litigation did not simply reset the agenda among policymakers, but also triggered a fundamental shift in public perceptions about tobacco regulation.[87] Specifically, the authors found that as the litigation began framing the lawsuits as more "criminal" in nature, media coverage soared and public perceptions of the tobacco industry became more negative.[88] As a result, the radiating effects of the litigation included a significant increase in public support for the litigation and a concomitant drop in "public trust" in the tobacco industry.[89]

Jeb Barnes described other types of radiating effects in the context of asbestos policy. In *Dust-Up: Asbestos Litigation and the Failure of Commonsense Policy Reform*, Barnes explained how asbestos litigation changed the institutional landscape by dividing interests among and across the various stakeholders.[90] In other words, as in the tobacco context, asbestos litigation seems to have altered the balance of power in the asbestos policymaking setting. Other studies have tracked the radiating influence of U.S. tort law on the institutional

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cluded that, while injury law itself changed very little in New York City during that time, social attitudes toward injuries changed significantly. These changes in social attitudes, in turn, prompted an uptick in legal filings, as litigants increasingly blamed others for causing their injuries. *See id.* at 172.

83. *See* Mather, *supra* note 73, at 919–20, 929 (describing how tobacco litigation narratives helped to repaint the public perception of tobacco executives as "bad guys").

84. *Id.* at 919–21.

85. *Id.* at 922–23.

86. *Id.* at 934.

87. *See* Michael McCann et al., *Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States*, LAW & SOC. INQUIRY 1, 5–6 (2011), http://onlinelibrary.wiley.com/doi/10.1111/j.1747-4469.2011.01270.x/pdf.

88. *Id.* at 18.

89. *See id.* at 27.

90. JEB BARNES, DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM 84–86 (2011).

landscape of foreign regimes.[91] And an entirely different body of work traces the radiating effects of changes in tort law on the institutional practices of the legal profession.[92]

Together, these studies suggest that the potentially vast radiating effects of torts extend well beyond deterrence. Not only have legal actors in tort cases provided politically important normative validation for the views of the litigants, but the normative messages articulated in tort law have also found a receptive audience in key institutional actors, such as Congress and federal regulators. Moreover, in the tobacco context, the significant changes in public opinion, which took place at about the same time, evidence more widespread enculturation of the messages generated by the litigation. Ultimately, these changes in cultural values seem to have prompted a fundamental reordering of power.[93] Thus, consistent with the findings in other legal contexts, preliminary research on the radiating effects of torts indicates that their broader impacts include normative validation, enculturation, and, in some instances, the reshaping of political hierarchies.

More encompassing research might lead to even more revealing findings about the radiating effects of torts. In the civil rights context, for example, research by McCann, as well as Engel and Munger, found that legal norms played a role in shaping identity.[94] Do the norms articulated in tort law have similar effects? While there is very little scholarship on this question, Engel's case study of how personal injury litigation helped to constitute "insiders" and "outsiders" in one community suggests that this is likely a promising line of inquiry.

In my own work, I have pursued this inquiry by exploring the role that tort litigation plays in shaping conceptions of bodily identity. To understand how the narratives generated in tort litigation could influence conceptions of bodily identity, it is important to consider the

91. *See, e.g.*, Lewis N. Klar, *The Impact of U.S. Tort Law in Canada*, 38 PEPP. L. REV. 359, 360 (2011).

92. *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, 453–57 (2000); Stephen Daniels & Joanne Martin, *"We Live on the Edge of Extinction All the Time:" Entrepreneurs, Innovation and the Plaintiffs' Bar in the Wake of Tort Reform*, *in* LEGAL PROFESSIONS: WORK, STRUCTURE, AND ORGANIZATION 149, 157–58 (Jerry Van Hoy ed., 2001); Mary Nell Trautner, *Tort Reform and Access to Justice: How Legal Environments Shape Lawyers' Case Selection*, 34 QUALITATIVE SOC. 523, 524 (2011).

93. *See also* Allen Rostron, *Lawyers, Guns & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46 SANTA CLARA L. REV. 481, 483–86 (2006) (book review) (arguing that tort litigation against the gun industry influenced institutional actors, even though it did not succeed in the courts).

94. *See* MCCANN, *supra* note 15, at 284; ENGEL & MUNGER, *supra* note 53, at 13.

types of messages that litigation produces. Because tort claims almost always require some sort of bodily injury for recovery,[95] many of the narratives generated by tort litigation involve normative assessments of bodily conditions.[96] For example, a recurring theme in tort litigation is that a plaintiff's disabling injuries are "tragic."[97] Certain types of torts, like claims for wrongful birth, convey this normative message by the mere fact that they are recognized as claims.[98] But the message that "disability is tragic" is also commonly articulated in more run-of-the-mill cases, such as negligence or strict liability, when plaintiffs' lawyers present, and judges describe, these plaintiffs as "tragedies."[99]

Contrary to popular belief, however, most people with disabilities do not consider their bodies to be "tragic" or otherwise undesirable.[100] Thus, when legal actors in tort cases repeatedly transmit the message that "disability is tragic," they reproduce and reinforce an offensive cultural stereotype.[101] Worse, it is likely that this messaging also plays a harmful role in the construction of disability identity. It would not be surprising to find, for example, that recurring exposure to messages like these has some negative impact on litigants' understanding of what it means to live with a disability. And when messages like these are regularly repeated (in tort practices and in the media), it is likely that others who are exposed to the messages will internalize the social prejudice as well.[102] When this occurs, the radiating effects of tort litigation extend to what Galanter called "enculturation"—the structuring of value systems—with important implications for how people understand disability identity well beyond the courthouse doors.[103]

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95. *See* Bloom & Miller, *supra* note 74, at 716–17 (2011) (describing tort litigation's focus on the body).

96. *See id.* at 731 (discussing the normative messages tort litigation transmits about disabilities).

97. *See* Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 748–49 (2007); *see also* Bloom & Miller, *supra* note 74, at 716–17 (arguing that tort litigation sends a message that disability is undesirable).

98. *See* Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 154–56 (2005) (discussing how courts ignore the benefits of raising children with disabilities in wrongful birth claims).

99. *See, e.g.*, John C. Shea, *Trial Themes for the Injured Plaintiff*, MARKS & HARRSION, 16, http://www.marksandharrison.com/pdf/Trial%20Themes.pdf (last visited Feb. 21, 2013) (recommending that plaintiffs' lawyers compare the client's life to that of a "prisoner"); *see also* Bagenstos & Schlanger, *supra* note 97, at 752 (arguing that lawyers' arguments for hedonic damages stigmatize people with disabilities); *id.* at 757 (citing examples of court rulings equating disability with "lost enjoyment of life").

100. *See* Bloom & Miller, *supra* note 74, at 729.

101. *Id.* at 732.

102. *Id.* at 735.

103. *See id.* at 731.

Although it is somewhat more difficult to see, the radiating effects of torts also touch on cultural understandings of bodily identity as they relate to sex. Some tort cases, for example, send the message that "sex is determined at birth."[104] While this message may seem uncontroversial, for many people sex is not determined at birth, as evidenced by the widespread practices of sex reassignment surgery in adulthood and sex assignment surgery in infancy.[105] When courts send messages that suggest otherwise, they provide normative validation for cultural misunderstandings about how sex identity is experienced and produced.

The radiating effects of *Littleton v. Prange* provide a good illustration.[106] In *Littleton*, the plaintiff had a wrongful death claim against her husband's doctor in her capacity as the surviving spouse.[107] The doctor defended against the charge on the ground that the plaintiff could not legitimately file a claim as the surviving spouse of a state-recognized heterosexual marriage because she had undergone sex reassignment surgery.[108] The trial court entered summary judgment for the doctor.[109] On appeal, the Texas Court of Appeals affirmed, stating that sexual identity is "immutably fixed by our Creator at birth."[110]

An interesting post-*Littleton* story illustrates the sometimes unexpected ways in which the radiating effects of legal messages can influence values and public discourse. Not long after *Littleton* was decided, two lesbians, one of whom was a male-to-female-transsexual, married. To the surprise of same-sex marriage advocates, prominent opponents of same-sex marriage supported the marriage. Citing *Littleton*, those opponents explained that they supported the marriage because the lesbians were "legally a man and a woman."[111]

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104. Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 363–64 (2010) (arguing that tort litigation sends a message that sex is naturally binary).

105. *See* Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 2–3 (2000) ("Over the past four decades, early surgical intervention for infants who are born with ambiguous genitalia or who suffer traumatic genital injury often has been recommended as standard procedure."); *see generally* Julie A. Greenberg, *Legal Aspects of Gender Assignment*, 13 ENDOCRINOLOGIST 277 (2003).

106. Littleton v. Prange, 9 S.W.3d 223 (Tex. Ct. App. 1999).

107. *Id.* at 225.

108. *Id.*

109. *Id.*

110. *Id.* at 224, 231.

111. *See* Michele Kurtz, *Lesbian Wedding Allowed in Texas by Gender Loophole*, SEATTLE POST-INTELLIGENCER, Sept. 7, 2000, at A3.

Some tort cases also provide normative validation for the widespread cultural assumption that sex identity is naturally divided into two, easily distinguishable sexes. There is extensive medical evidence to the contrary,[112] however, which puts legal actors in tort cases in the somewhat strange position of influencing cultural norms in a direction that is at odds with the views of the medical and scientific experts to whom they typically defer.[113] And, as is the case with references to disability, at times the messages can be deeply offensive. In *Malone v. Stewart*, for example, the court heard a slander case involving an allegation of intersexuality.[114] After concluding that it is slander per se to falsely accuse someone of being intersexed, the court explained that making such an allegation "unsexes" the victim and "converts her into a monster, whose very existence is shocking to nature."[115]

Because of the radiating effects of courts, when legal actors transmit these messages, they provide normative validation for the values expressed by the messages in society at large. Ultimately, these messages may shape our own perceptions of who and what we are in unnecessarily limiting ways.[116] Of course, the normative messages transmitted in tort litigation are not the only narratives playing this role.[117] But because of the significance of bodily injury in tort litigation, the normative messages of torts may play a particularly influential role in shaping broader social beliefs about disability and sex.[118] These beliefs, in turn, may operate to marginalize already disempowered groups.[119]

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112. *See generally* Bloom & Miller, *supra* note 74, at 717–18 (discussing the social construction of disability as tragic); Bloom, *supra* note 104, at 418 (arguing that the social construction of sex as naturally binary).

113. For a discussion of cases in which the message that sex identity is naturally binary is transmitted, see Bloom, *supra* note 104, at 368 nn.47–49 (quoting Dasarai Harish & B.R. Sharma, *Medical Advances in Transexualism and the Legal Implications*, 24 AM. J. FORENSIC MED. & PATHOLOGY 100, 103–04 (2003)). For a discussion of the medical evidence contradicting the claim that sex is naturally binary, see *id.* at 405–06. *See also id.* at 364 n.40 (citing statistics estimating the intersex birth rate at somewhere between 1% and 4% of the population); *id.* at 385 n.168 (describing the difficulty of designating sex on the basis of chromosomes).

114. *See* Malone v. Stewart, 15 Ohio 319, 319 (1846) (involving allegations that Stewart had falsely referred to Malone as a "hermaphrodite").

115. *Id.* at 320.

116. *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 87 (rev. and updated 10th Anniversary ed. 2006) ("Law thus defines, while seeming only to reflect, a host of social relations, from class to gender, from race to sexual identity.").

117. *See* ENGEL & MUNGER, *supra* note 53, at 46.

118. *Cf.* SARAH S. LOCHLANN JAIN, INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES 7 (2006) (arguing that injury laws reproduce material difference).

119. *See* Ann Scales, *"Nobody Broke It, It Just Broke": Causation as an Instrument of Obfuscation and Oppression*, *in* FAULT LINES, *supra* note 6, at 269, 270.

As Galanter noted in *The Radiating Effects of Courts*, the "indirect 'educative' effects" of legal messages structure and provide support for particular distributions of power.[120] We can see some evidence of this in the torts context in Lawrence Friedman's study of tort cases in Alameda County in the late 1800s.[121] Friedman found that most of the cases he studied resulted in little or no damage awards to the plaintiffs.[122] Instead, the litigation seemed to operate as an indirect subsidy of industry. In this way, the radiating effects of torts likely helped to shape power relations between industry and workers more broadly.

The radiating effects of torts also likely help to enforce and construct social hierarchies along the lines of gender and race.[123] Martha Chamallas and Jennifer Wriggins, for example, have tracked the way in which social biases structure contemporary tort law, especially with respect to gender and race.[124] But, very likely, the opposite is also true.[125] When tort law privileges certain types of claims while restricting others, it does more than simply reproduce social prejudice—it helps to construct it. Thus, when social biases are incorporated into legal rulings, they help to both enforce *and construct* social hierarchies.

The radiating effects of torts would also seem to construct and reproduce certain types of bodily hierarchies, particularly as they relate to disability and sex.[126] We can see this in the stories that tort litigation tells about disabilities and sex identity. It is difficult to feel empowered when you are repeatedly exposed to the idea that your bodily condition is "tragic," "monstrous," or otherwise undesirable. At the very least, these types of messages help to place certain types of bodies in a more privileged social and economic position.[127]

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120. Galanter, *supra* note 1, at 135; *see also* MCCANN, *supra* note 15, at 284; GILLIOM, *supra* note 8, at 105.

121. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 357 (3d ed. 2005).

122. *Id.*

123. *See* Scales, *supra* note 119, at 278; CHAMALLAS & WRIGGINS, *supra* note 74, at 183.

124. *See* CHAMALLAS & WRIGGINS, *supra* note 74, at 27.

125. *See* Martha Chamallas, *Exploring the Gap Between Civil Rights and Tort Discoveries*, *in* FAULT LINES, *supra* note 6, at 119, 120.

126. *See* Anne Bloom, *Speaking "Truth" to Biopower*, 41 SW. U. L. REV. 241, 251 (2012); *see also* Scales, *supra* note 119, at 278.

127. *See* Bloom & Miller, *supra* note 74, at 751 n.246 (citing PAUL HUNT, A CRITICAL CONDITION (1966)); *see also* Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638–39 (1999) (making a similar argument in the context of race). As I have argued elsewhere, the normative messages produced in tort litigation also privilege doctors, pharmaceutical companies, and others in the medical field. *See* Bloom, *supra* note 126, at 246–47.

Finally, it is worth noting that tort law's messages about sex identity are particularly problematic for women. Women, more than men, rely heavily upon artifice to comply with the cultural demands of bodily (and especially sex) identity. As a result, tort plaintiffs in products liability lawsuits are disproportionately female.[128] When the normative messages of tort litigation help to enforce and reproduce these demands, the radiating effects are almost certainly disempowering for women as well.

IV. CONCLUSION

Although Galanter's discussion of the radiating effects of courts seemingly referred to all areas of law, much of the scholarship that followed focused on the radiating effects of civil rights litigation. McCann's research on pay equity and Williams's grounded theorizing on race are typical of the field. Only recently have scholars turned their attention to the radiating effects of torts beyond deterrence. What this more recent scholarship suggests is that tort litigation plays an active role in shaping cultural norms and values in ways that extend far beyond deterrence. As a result, the radiating effects of torts are potentially vast. In addition to the likely effects on public policy debates and institutions, the radiating effects of torts may influence perceptions and constructions of bodily identity, particularly as they relate to disability and sex. For all of these reasons, the radiating effects of torts may also play a role in the construction and reproduction of social hierarchies.

128. *See* Scales, *supra* note 119, at 278.