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PLASTIC INJURIES

*Anne Bloom**

Perceptions of injuries are culturally mediated, mutable, and plastic. In tort litigation, however, the cultural plasticity with which we perceive and experience injuries is often ignored. This Article explores the cultural plasticity with which we perceive injuries through the lens of plastic surgery litigation. It argues that determinations of injury in plastic surgery litigation turn on the culturally biased—and highly mutable—perceptions of medical professionals. More broadly, this Article argues that culture shapes perceptions of injuries in tort litigation as a whole. To make these points, this Article examines a prototypical plastic surgery case and surveys a range of historical and empirical analyses of injuries in tort litigation, which illustrate the cultural plasticity of injuries in tort practice.

This Article recommends adopting a more complex approach to injuries that takes cultural biases into account. It expresses particular concern about the privileged role of doctors in tort litigation because they play a key role in shaping cultural perceptions of injuries. While this is problematic in many tort cases, it is particularly problematic in plastic surgery litigation, where plastic surgeons act as both purveyors of the cultural demand for plastic surgery and arbiters of any injuries that may result.

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I. INTRODUCTION

Fred Korematsu (of *Korematsu v. United States*¹) underwent plastic surgery.² Not surprisingly, he wanted to look less Japanese.³ Korematsu hoped that plastic surgery would help him to pass as someone of Spanish and Hawaiian descent.⁴ But, as every law student knows, the surgery was a failure.⁵ Korematsu was not able to successfully pass as someone of Spanish and Hawaiian descent.⁶ Instead, he was arrested and placed in administrative detention along with many other Japanese-Americans.⁷

Korematsu challenged the legality of his detention, but he did not sue his plastic surgeon.⁸ His decision is understandable. Had he elected to sue, it is unlikely that he would have been successful. Judges and juries tend to be unkind to plastic surgery victims, especially those who are perceived as having inappropriately “messed with nature.”⁹ More fundamentally, the “failure to pass” is not a cognizable legal injury in plastic surgery cases.

Courts generally require plastic surgery claims to proceed as medical malpractice cases where “medical” injuries take precedence.¹⁰ In these cases, there is little to no consideration of whether the plaintiff is happy with the results.¹¹ While this way of proceeding is not all that

1. 323 U.S. 214 (1944) (challenging the constitutionality of the Japanese internment laws).

2. Daniel F. Tritter, *In the Defense of Fred Korematsu: Vox Clamantis in Deserto Curiarum*, 27 T. JEFFERSON L. REV. 255, 268 (2005).

3. See Thomas Y. Fujita-Rony, *Korematsu's Civil Rights Challenges: Plaintiffs' Personal Understandings of Constitutionally Guaranteed Freedoms, the Defense of Civil Liberties, and Historical Context*, 13 TEMP. POL. & CIV. RTS. L. REV. 51, 59 (2003); see also Tritter, *supra* note 2, at 268; *About Fred Korematsu*, FRED T. KOREMATSU INST., <http://korematsuinstitute.org/institute/aboutfred> (last visited Apr. 11, 2014).

4. *About Fred Korematsu*, *supra* note 3.

5. See Tritter, *supra* note 2, at 268.

6. Lorraine K. Bannai, *Taking the Stand: The Lessons of the Three Men Who Took the Japanese American Internments to Court*, 4 SEATTLE J. FOR SOC. JUST. 1, 10 (2005); see *About Fred Korematsu*, *supra* note 3.

7. *Korematsu v. United States*, 323 U.S. 214, 215-16 (1944); Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 309 n.8 (2006).

8. See *Korematsu*, 323 U.S. at 215-16.

9. See Susan Dennehy, *Mirror, Mirror, on the Wall*, TRIAL, Aug. 2006, at 54, 54 (“The conventional wisdom is that the party to blame for a poor outcome is not the doctor who was careless in performing surgery, but the patient who chose to tamper with nature.”); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 949 n.88 (2004); *Cosmetic Surgery Claims, Litigation Issues*, N.J. INJURY LAW. BLOG (Mar. 23, 2010), <http://www.archive.is/MT8cr>.

10. See 22 AM. JUR. 2D *Proof of Facts* § 1 (1980) (noting that litigation against plastic surgeons is treated the same as litigation against other medical specialists); Dennehy, *supra* note 9, at 54.

11. See 22 AM. JUR. 2D *Proof of Facts* § 4.

different from how other cases involving claims against doctors proceed, it is particularly problematic in plastic surgery litigation because cultural preferences—rather than medical considerations—determine whether the surgeries should take place.¹²

Perhaps more troubling, plastic surgeons play an active role in shaping the cultural preferences that lead to consumer demand for the surgery.¹³ Although Korematsu may have reached the conclusion that he needed plastic surgery on his own, many people seriously consider plastic surgery for the first time only after their general practitioners recommend it.¹⁴ Others make the decision to undergo surgery after viewing advertising.¹⁵ Moreover, plastic surgeons readily acknowledge that their own cultural preferences play a role in their surgical recommendations.¹⁶ Indeed, many plastic surgeons consider themselves artists, and recommend surgeries that reflect their own “style.”¹⁷

One of the goals of this Article is to expose the role that tort law plays in obscuring the significance of culture in plastic surgery practices. Because plastic surgery litigation typically proceeds as medical malpractice litigation, the emphasis of the litigation is on injuries that can be medically verified. The role of culture in shaping the “medical” perspectives of plastic surgeons, however, is barely acknowledged.¹⁸ This makes the pre-surgery recommendations and post-surgery assessments of plastic surgeons seem more objective than they really are.¹⁹ Additionally, the emphasis on medically verifiable injuries in plastic surgery litigation prevents consideration of other important, non-medical injuries that many plastic surgery consumers experience, like Korematsu’s failure to pass as another race.²⁰

12. For an overview of the role of cultural preferences in plastic surgery practice, see VIRGINIA L. BLUM, *FLESH WOUNDS: THE CULTURE OF COSMETIC SURGERY* 75-76 (2005). While plastic surgeons commonly employ medical terminology in their practice, the “diagnoses” for plastic surgery patients read more like cultural preferences than objective assessments of medical conditions. *Id.* It is not uncommon, for example, for plastic surgeons to consider aging to be a “deformity.” *Id.*

13. See 22 AM. JUR. 2D *Proof of Facts* § 4 (discussing some of the differences between plastic surgery litigation and other malpractice litigation); BLUM, *supra* note 12, at 7-12 (describing how plastic surgery patients rely heavily on their surgeon’s perspectives).

14. See, e.g., VIVIAN DILLER & JILL MUIR-SUKENICK, *FACE IT: WHAT WOMEN REALLY FEEL AS THEIR LOOKS CHANGE* 35 (Michele Willens ed., 2010).

15. For examples of advertising by plastic surgeons, see BLUM, *supra* note 12, at 84-85, 95.

16. *Id.* at 92-93.

17. See *id.*

18. See discussion *infra* Part II.A.2.

19. See discussion *infra* Part II.B.

20. See Anne Bloom & Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 716-17 (2011). As the medical profession acknowledges, the main benefit of plastic surgery is “psychological.” Jean Paul Meninguad et al., *Ethics and Aims of*

A broader goal of this Article is to demonstrate that cultural biases also play a role in shaping perceptions of injuries in tort litigation more generally. Because of tort law's emphasis on bodily harm, doctors play a major role in assessing injuries in many tort cases, not just plastic surgery cases.²¹ While the opinions of these medical experts may seem objective, they carry many of the same cultural biases as the expert opinions proffered in plastic surgery cases, although perhaps not as obviously.²²

Moreover, medical experts are not the only source of cultural bias in the assessment of injuries in tort litigation. Whether we perceive ourselves as injured and how we react to our injuries are influenced by what others tell us about our conditions and what we believe about how things should be.²³ Although doctors play an important role in this process, they are not the only source of information. Jurors, lawyers, the media, others in the community, and a variety of other cultural influences all play a role in shaping perceptions of injuries in tort law.²⁴

Although the significance of culture is widely acknowledged in other areas of tort doctrine—for example, in the application of the “reasonable and prudent person” standard—there is very little acknowledgement of how culture shapes perceptions of injuries in tort cases.²⁵ Instead, tort law seems to operate on the assumption that injuries

Cosmetic Surgery: A Contribution from an Analysis of Claims After Minor Damage, 19 MED. & L. 237, 245 (2000).

21. For a discussion of the role of doctors in assessing bodily harm in tort litigation generally, see Bloom & Miller, *supra* note 20, at 722-27.

22. *Id.* at 725.

23. Anne Bloom, *Zen and the Art of Tort Litigation*, 44 LOY. L.A. L. REV. 11, 20 (2010); see also Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 792 (2007) (making a similar argument in the context of hedonic damages). The converse is also true; that is, what law tells us about injury helps to broadly shape cultural perceptions of injury. 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.”); see also Anne Bloom, *The Radiating Effects of Torts*, 62 DEPAUL L. REV. 229, 238-39, 241-42 (2013).

24. For a discussion of the cultural biases of judges and jurors in tort litigation, see MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 126-28 (2010).

25. For a discussion of the role of culture in shaping tort doctrines like the “reasonable person” in negligence analysis, see Valerie P. Hans, *Juries as Conduits for Culture?*, in *FAULT LINES*, *supra* note 23, at 84, 84-85; see also VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 1-4 (1994) (describing how the rules of tort law have evolved in response to changing societal needs); Peter H. Schuck, *Introduction to TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE* 17, 17-18 (Peter H. Schuck ed., 1991) [hereinafter *TORT LAW*] (“Tort liability, more than most areas of law, mirrors the economic, technological, ideological, and moral conditions that prevail in society at any given time.”).

can be understood in some sort of “objective” and culturally-neutral way.²⁶ Perceptions of injuries, however, are not all that different from perceptions of “reasonableness.”²⁷ In both instances, the perceptions are socially constructed and vary with changing cultural norms. Put differently, perceptions of injury are “plastic”—in the sense that they can and do change in response to different cultural conditions. Instead of ignoring this plasticity, tort law should recognize the role of culture in shaping perceptions of injuries by, among other things, adopting legal practices that allow for greater interrogation of medical conceptions of injury, and making room for non-medical understandings of how injury is experienced.

The remainder of this Article proceeds in four Parts. Part II (“Plastic Injuries”) introduces readers to plastic surgery practices, the injuries that sometimes result from such practices, and tort law’s response to these injuries.²⁸ It argues that cultural biases shape plastic surgery practices, and, as a result, shape the perceptions of injuries in plastic surgery litigation.²⁹ Part III (“Injury as Cultural Construct”) argues that cultural biases shape perceptions of injuries in tort litigation as a whole.³⁰ It explains how the cultural biases of medical professionals play a key role in many tort cases, not just plastic surgery litigation.³¹ It then surveys a range of historical and empirical studies of tort law to demonstrate that perceptions of injury are always culturally mediated and, therefore, “plastic.”³² Part IV (“Plastic Solutions”) considers how to re-conceptualize injuries in tort law in a more plastic direction that takes culture into account.³³ It expresses particular concern about the privileged role of doctors in tort litigation since they play a key role in

26. See David M. Engel, *Lumping as Default in Tort Cases: The Cultural Interpretation of Injury and Causation*, 44 LOY. L.A. L. REV. 33, 62 (2010).

27. Valerie P. Hans & Nicole Vadino, *After the Crash: Citizens’ Perceptions of Connective-Tissue Injury Lawsuits*, 14-15 (Cornell Law Faculty Publ’ns, Research Paper No. 07-016, 2007).

28. See discussion *infra* Part II.

29. See discussion *infra* Part II.

30. See discussion *infra* Part III.

31. See discussion *infra* Part III.A.

32. See discussion *infra* Part III.A–B.

33. See discussion *infra* Part IV.

shaping cultural perceptions of injuries.³⁴ While this is problematic in many tort cases, it is particularly problematic in plastic surgery litigation, where doctors act as both purveyors of the demand for plastic surgery and aesthetic arbiters in litigation over the results. A better approach would place more emphasis on how plaintiffs perceive their injuries and on how those perceptions are shaped by broader cultural forces. Lastly, Part V concludes this Article, and urges a reformation of how injuries and litigation resulting from plastic surgery practices are culturally and legally perceived.³⁵

Thus, on a very practical level, this Article aims to draw attention to the problems that people with injuries stemming from plastic surgery encounter when they attempt to sue. More broadly, it focuses on plastic surgery litigation as a means to expose the plasticity of injury as a legal and cultural concept.

II. PLASTIC INJURIES

Perceptions of injuries in tort litigation are culturally constructed. As an example of how culture shapes perceptions of injuries, this Part explores the role of cultural bias in plastic surgery practices, and the assessments of injuries that sometimes result.³⁶ This Part argues that cultural biases shape plastic surgery protocols and that, as a result, cultural biases also play an important role in shaping how plastic surgery injuries are perceived in the legal proceedings that arise from plastic surgeries.³⁷

A. *The Art of Faking*

*Now, in strict truth, the art of faking is essentially a clandestine art, and its mastery is confined to a few expert exhibitors who guard the secrets of the craft with all the diligence of the members of a cabalistic society.*³⁸

34. See discussion *infra* Part IV.A.

35. See discussion *infra* Part V.

36. See discussion *infra* Part II.A.2–B.

37. See discussion *infra* Part II.B.

38. GEORGE R. SCOTT, THE ART OF FAKING EXHIBITION POULTRY: AN EXAMINATION OF THE FAKER'S METHODS AND PROCESSES WITH SOME OBSERVATIONS ON THEIR DETECTION 24 (1934). I am indebted to the magician Ricky Jay's wonderful book, CELEBRATIONS OF CURIOUS CHARACTERS (2011), for bringing *The Art of Faking Exhibition Poultry*—and its relevance for understanding faking in the human context—to my attention.

Plastic surgery³⁹ is a multi-billion dollar industry in the United States,⁴⁰ and the number of procedures performed annually is on the rise.⁴¹ In 2012, 14.6 million cosmetic plastic surgery procedures were performed, a five percent increase from 2011.⁴² Most of the surgeries are performed on women, but men, ethnic minorities, and people with disabilities are also undergoing surgery at increasing rates.⁴³

Cultural reactions to this uptick in plastic surgery practices are mixed. On the one hand, “faking” of physical attributes has become so widespread that it is almost viewed as a kind of “moral duty,” especially for women.⁴⁴ But while faking is ubiquitous, the acceptable possibilities for faking are also quite constrained.⁴⁵ In the case of aging women, for example, it is not culturally acceptable to fake looking older. Instead, the demand is to look “naturally” young and healthy, even as women’s bodies naturally age and decay.⁴⁶ Plastic surgery offers a way of negotiating the impossibility of this demand. When the surgery is

39. Plastic surgery is usually divided into two categories: “plastic” surgeries, involving repair or reconstruction of a perceived bodily defect or deficit; and “cosmetic” surgeries, involving enhancement of a “normal” body. Melvin A. Shiffman, *Medical Liability Issues in Cosmetic and Plastic Surgery*, 24 MED. & L. 211, 211 (2005) (“Plastic surgery is the repair of defects and deficits while cosmetic surgery is surgery to beautify.”); see also SANDER L. GILMAN, MAKING THE BODY BEAUTIFUL: A CULTURAL HISTORY OF AESTHETIC SURGERY 12 (1999) (noting and questioning the different designations of surgeries as “reconstructive,” “plastic,” “cosmetic,” or “aesthetic”). According to this conventional distinction, the focus of this Article is on “cosmetic” surgery. See GILMAN, *supra* at 12. However, one of the key contentions of this Article is that the distinction between “plastic” and “cosmetic” surgeries is itself “plastic” and culturally constructed. *Id.* at 4 (“[T]he line between ‘reconstructive’ and ‘aesthetic’ procedures . . . is blurry.”). For this reason, I use the term “plastic” to refer to both types of surgeries.

40. See generally ALEX KUCZYNSKI, BEAUTY JUNKIES: INSIDE OUR \$15 BILLION OBSESSION WITH COSMETIC SURGERY (2005) (discussing the multi-billion dollar cosmetic surgery industry); 2011 Plastic Surgery Statistics Report: Quick Facts, Cosmetic Plastic Surgery Demographic Trends, AM. SOC’Y AESTHETIC PLASTIC SURGEONS, http://www.plasticsurgery.org/Documents/news-resources/statistics/2011-statistics/2011_Stats_Quick_Facts.pdf (last visited Apr. 11, 2014) [hereinafter 2011 Demographic Trends] (providing statistics on trends in cosmetic and reconstructive surgeries).

41. 2011 Demographic Trends, *supra* note 40.

42. 2012 Plastic Surgery Statistics Report: Quick Facts, Cosmetic Plastic Surgery Demographic Trends, AM. SOC’Y AESTHETIC PLASTIC SURGEONS, <http://www.plasticsurgery.org/Documents/news-resources/statistics/2012-Plastic-Surgery-Statistics/plastic-surgery-trends-quick-facts.pdf> (last visited Apr. 11, 2014) [hereinafter 2012 Demographic Trends].

43. The American Society for Aesthetic Plastic Surgery reports that ninety-one percent of the more than fourteen million “cosmetic” procedures performed in the United States in 2012 were performed on women. *Id.* These statistics also show an uptick in surgeries by men and racial minorities. *Id.*; see also KATHY DAVIS, DUBIOUS EQUALITIES EMBODIED DIFFERENCES: CULTURAL STUDIES ON COSMETIC SURGERY 1 (2003) (“Potential targets of the ‘surgical fix’ have expanded . . . to include men, ‘ethnic minorities,’ or the disabled.”).

44. BLUM, *supra* note 12, at 76.

45. *Id.* at 76-77.

46. See *id.* at 77.

successful, the body is able, through artifice, to appear more “naturally” youthful than it really is. Plastic surgery that does not appear “natural,” on the other hand, does not result in a younger appearance, and is generally frowned upon.⁴⁷

Contrast these cultural views with the practices of the French artist Orlan, who uses her body as a medium for her art.⁴⁸ Orlan is undergoing multiple plastic surgeries to make parts of her body look more like the body parts that are portrayed in famous works of art.⁴⁹ Instead of making her look younger (or more “Western”), Orlan’s surgeries will give her the “forehead of da Vinci’s *Mona Lisa* and the chin of Botticelli’s *Venus*.”⁵⁰ Moreover, instead of trying to look “natural,” Orlan views her faking as a struggle against nature.⁵¹

Orlan’s employment of plastic surgery as art distinguishes her from ordinary plastic surgery consumers in two key ways. First, unlike most plastic surgery consumers, Orlan acknowledges—and, indeed, celebrates—the plasticity of the practice.⁵² Like some contemporary feminist thinkers, Orlan believes that it is not possible for a body to be natural.⁵³ Instead, for Orlan, the body is like an artificial “costume” that may be altered to achieve different expressions of individual identity.⁵⁴ Because of this, Orlan is not concerned with whether her body is culturally acceptable or appears natural, and there are no illusions about what is going on.⁵⁵ Everyone knows that they are watching a performance, and that this performance involves some amount of faking.⁵⁶ Secrecy is both unnecessary and undesirable. Instead, the

47. See, e.g., Søren Askegaard et al., *The Body Consumed: Reflexivity and Cosmetic Surgery*, 19 PSYCHOL. MKTG. 793, 806 (2002) (presenting findings of research on women who underwent plastic surgery, and concluding that most viewed “natural” looking results positively and “unnatural” negatively, but also noting the slippage between “natural” and “artificial” in the interviewees’ discussions of different procedures).

48. For a discussion of Orlan’s art, see DAVIS, *supra* note 43, at 106-11, 113-14.

49. *Id.* at 107.

50. *Id.*

51. *Id.* at 108.

52. *Id.* (describing Orlan’s view that “modern technologies have made any notion of a ‘natural’ body obsolete”); see also SUSIE ORBACH, *BODIES* 134-36 (2009) (noting that Orlan’s work also exposes the physical pain and destruction of plastic surgery).

53. See DAVIS, *supra* note 43, at 108-09.

54. See *id.* at 108-09, 111-13 (discussing the relationship of Orlan’s art to feminist utopian theory).

55. *Id.* at 108-11.

56. See Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357, 359-61 (2010) [hereinafter Bloom, *To Be Real*] (describing drag performances in a similar way).

whole point of Orlan's plastic surgery performances is to expose—and celebrate—the plasticity of the human form.⁵⁷

Second, the plastic identities that Orlan sought to achieve through cosmetic surgeries defy cultural expectations, rather than comply with them.⁵⁸ Unlike most consumers of plastic surgery, she is not seeking to look more “naturally” like a celebrity or otherwise conform to contemporary understandings of feminine beauty.⁵⁹ Instead, the surgeries enable her to corporeally depict her resistance to these expectations.⁶⁰

But there is one important way in which Orlan's artistic practice is not so different from the practices of ordinary plastic surgery consumers: Orlan emphasizes that she views the surgeries as a way of becoming more fully herself.⁶¹ Interviews with plastic surgery consumers indicate that they view their own surgeries in a similar way.⁶² Most people undergoing plastic surgery say that they are undergoing surgery to feel more “‘at home’ in their bodies.”⁶³ Like Orlan, they view their surgeries as vehicles of self-determination.⁶⁴ Ordinary plastic surgery consumers, however, are not presented with the same array of options as Orlan.

Although Orlan was ultimately successful in finding surgeons to perform the surgeries she sought, most plastic surgeons would not agree to do such surgeries even though she is a well-known artist.⁶⁵ That is because the particular aesthetic result that Orlan sought to achieve—body parts that resemble those portrayed in famous works of art—does not correspond with the range of aesthetic procedures that are considered acceptable to most plastic surgeons.⁶⁶ Instead, the prevailing view is that, as one medical journal put it, when a patient comes in hoping to have a

57. DAVIS, *supra* note 43, at 107, 109-10.

58. *Id.* at 106-07, 110-11.

59. *Id.* at 109 (noting that, while Orlan draws on different iconic works of art for inspiration, she does not seek to look like any one of them, or to otherwise conform to cultural conceptions of beauty).

60. *Id.*

61. *Id.*; see also Askegaard et al., *supra* note 47, at 802, 806 (presenting the findings of research on women who underwent plastic surgery who claimed that they underwent surgery for reasons of self-determination and control over their bodies).

62. DAVIS, *supra* note 43, at 110.

63. *Id.*

64. *Id.* at 109-10; see also ORBACH, *supra* note 52, at 135 (noting that plastic surgery is also viewed as a tool for economic survival or advancement).

65. See DAVIS, *supra* note 43, at 109 (noting that most male plastic surgeons refused to perform the surgeries, and that Orlan ultimately turned to a female plastic surgeon who identified as a feminist to get the work done).

66. See AESTHETIC SURGERY 302-11 (Angelika Taschen ed., 2005) (providing examples of surgeons refusing to perform surgeries that they considered inappropriate); see also BLUM, *supra* note 12, at 7-8, 85 (describing the role of the plastic surgeon as an “aesthetic expert” and suggesting that some plastic surgeons may view a patient's aesthetic preferences as improper interference with the surgeon's artistry).

particular nose that will not fit with the patient's face, the doctor should explain "that a nose must be in harmony with the face."⁶⁷ In other words, because the aesthetic result that Orlan sought does not comport with medical protocols for what is culturally desirable, it was not easy for her to find a plastic surgeon to do the work.⁶⁸

In short, although most people undergoing plastic surgery seek, like Orlan, to employ plastic surgery as a means of self determination, in practice, plastic surgeons exercise enormous cultural control and influence over what types of bodily self determination are possible. So that readers may better understand both the cultural biases of plastic surgeons, and how these biases are imposed on plastic surgery consumers, the remainder of this Subpart examines some of the history of plastic surgery, and provides more detail about how plastic surgeons select patients for surgery and limit their surgical options.⁶⁹ As will be shown, plastic surgeons do not simply respond to cultural preferences for certain types of bodily features, but actively help to shape those preferences through medical diagnoses and other practices that redefine what is "normal" in ways that reflect the surgeon's own cultural biases about what bodies should look like.

1. A Brief History of Plastic Surgery

Historically, plastic surgery practices have focused primarily on "normalizing" bodies with culturally unacceptable differences.⁷⁰ However, the line between what is a "culturally unacceptable" condition that requires "normalization" and what constitutes inappropriately "messing with nature" has never been clear.⁷¹ Some of the earliest plastic surgeries, for instance, were developed to rebuild the noses of sixteenth century syphilitics so that the symptoms of the disease would be less visible.⁷² While most plastic surgeons were willing to perform the

67. Meningaud et al., *supra* note 20, at 245.

68. A less extreme example of surgeons refusing to perform aesthetically "unacceptable" surgeries involves the so-called "feline" look, in which plastic surgery consumers seek to look more like a cat. Many plastic surgeons in the United States refuse to perform the surgery because the "feline" look is not considered aesthetically desirable in the United States. See AESTHETIC SURGERY, *supra* note 66, at 310; see also Anthony Youn, *Body Modification -- or Mutilation?*, CNN HEALTH, http://www.cnn.com/2013/11/07/health/youn-body-modification/index.html?hpt=hp_c3 (last updated Nov. 7, 2013) (commenting on how many plastic surgeons will not perform "extreme" surgeries, like the "feline" look).

69. See discussion *infra* Part II.A.1–2.

70. See, e.g., AESTHETIC SURGERY, *supra* note 66, at 182 (quoting surgeon Dai M. Davies, as stating that "[his] aim is not to create beauty but normality"); see also GILMAN, *supra* note 39, at xvii–xviii (describing the history of plastic surgery as motivated by the desire to "pass").

71. AESTHETIC SURGERY, *supra* note 66, at 182.

72. *Id.* at 66.

surgery, others criticized the practice because it allowed those who underwent the surgery to disguise their exposure to the disease.⁷³

The earliest abdominoplasties, or “tummy tucks,” had a similar aim and faced similar criticism.⁷⁴ Plastic surgeons performed the first abdominoplasties in an attempt to eradicate the supposedly telltale signs of a “Jewish woman’s body”—at the time, stereotyped as obese.⁷⁵ Although the surgeons performing the surgeries considered the work to be another way of “normalizing” culturally unacceptable bodies,⁷⁶ many expressed concern that plastic surgery was permitting Jews—and other cultural outsiders, like Irish Americans—to erase the markers of cultural difference.⁷⁷

Many plastic surgeons in the United States also refused to perform surgeries that might allow an individual to fake “race.”⁷⁸ As one historian explained, “[n]o reputable surgeon . . . wanted to be seen as facilitating crossing the color bar in the age of post-Reconstruction ‘Jim Crow’ and ‘miscegenation’ laws.”⁷⁹ In each of these instances, the main complaint was that the surgeries permitted people to “fake” their identities in ways that improved their social and economic status beyond what they could have experienced “naturally.”⁸⁰

For others, however, that was the whole point of plastic surgery. In a 1926 book, *La Chirurgie esthétique, son rôle social*, the first female aesthetic surgeon, Suzanne Noël, described the “bitter need” for anti-aging surgery.⁸¹ As she explained, many of her clients begged for the surgeries to help them retain their jobs.⁸² The facelifts she performed erased the evidence of aging that marks older women as culturally “different” and unemployable.⁸³ Thus, Noël argued, the anti-aging surgeries were a “social necessity,” especially for women.⁸⁴

73. *See id.*

74. *Id.* at 83-84.

75. *Id.* at 83.

76. *See id.* at 83-84.

77. *Id.* at 112.

78. *See id.* at 119.

79. *Id.*

80. *See id.*

81. DAVIS, *supra* note 43, at 25-28. *See generally* SUZANNE NOËL, *LA CHIRURGIE ESTHÉTIQUE, SON RÔLE SOCIAL* (1926).

82. AESTHETIC SURGERY, *supra* note 66, at 88 (noting that Noël was the first female plastic surgeon); *see also* DAVIS, *supra* note 43, at 26-28 (explaining that Noël believed that the surgeries were necessary for economic reasons).

83. *See generally* DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* (2010) (discussing the importance of appearance).

84. DAVIS, *supra* note 43, at 28.

Not all of Noël's colleagues agreed with her conclusions about the social necessity of anti-aging surgery.⁸⁵ As was the case with surgeries aimed at faking other physical attributes, there were—and remain—ongoing debates about whether these surgeries are necessary to hide culturally unacceptable differences or are inappropriate “messing with nature.”⁸⁶ Plastic surgery treatments today, which seek to “Westernize” the eyes of Asian-American teenagers, and “normalize” the faces of children with Down syndrome, trigger similar debates.⁸⁷ The rationale offered for these surgeries is similar to that offered by Noël on the “social necessity” of anti-aging surgery for women.⁸⁸ In a world where Western conceptions of beauty are increasingly dominant, parents believe that a child with Asian-appearing eyes will have fewer economic or social opportunities.⁸⁹ Similarly, some argue that children with Down syndrome are less likely to experience discrimination if they look more like children without the condition.⁹⁰ But for others the surgeries are inappropriately “messing with nature,” and even offensive.⁹¹

By most accounts, World War I marked a turning point in plastic surgery, since it gave plastic surgeons more opportunities to perfect their techniques.⁹² It also marked a turning point in the cultural acceptance of plastic surgery, since the individuals undergoing surgery were no longer perceived as attempting to fake different identities or youth, but were seeking to reconstruct their bodies to their “natural” state after being injured in battle.⁹³ In recognition of this cultural development, after World War I, plastic surgeons began to distinguish between “plastic” and “cosmetic” surgery.⁹⁴

85. See *id.* (critiquing Noël's views about the social necessity of anti-aging surgery).

86. See *id.* at 6-8 (discussing some of the debates in contemporary plastic surgery practice).

87. *Id.* at 7 (discussing eye surgeries on Asian-American teenagers); *id.* at 17, 135-38 (discussing facial surgery on children with Down syndrome); see Paul Miller, *Toward Truly Informed Decisions About Appearance-Normalizing Surgeries*, in *SURGICALLY SHAPING CHILDREN: TECHNOLOGY, ETHICS, AND THE PURSUIT OF NORMALITY* 211, 219 (Erik Parens ed., 2006) (discussing limb-lengthening surgeries on Little People); see also Bloom, *To Be Real*, *supra* note 56, at 406-08 (discussing sex assignment surgeries on intersex infants).

88. See, e.g., DAVIS, *supra* note 43, at 136-38.

89. See ORBACH, *supra* note 52, at 135 (noting that plastic surgery is a means of economic advancement); see also AESTHETIC SURGERY, *supra* note 66, at 130 (noting that some patients who undergo surgery to obtain “Western” eyes are motivated by a desire to increase their income and marriage prospects).

90. DAVIS, *supra* note 43, at 135-40.

91. *Id.* at 140-41.

92. *Id.* at 25.

93. *Id.*

94. *Id.*

Generally speaking, “plastic” surgeries repair damaged or missing body parts that either existed or, in a doctor’s view, should have existed “naturally.”⁹⁵ Surgeries to rebuild or replace body parts after traumatic injury and disease are classic examples.⁹⁶ “Cosmetic” surgeries, in contrast, focus more on the enhancement or maintenance of an already “normal” appearance.⁹⁷ The most common examples of this type of plastic surgery include breast augmentation, liposuction, nasal surgery, eyelid surgery, and abdominoplasty.⁹⁸

For plastic surgery consumers, the difference between cosmetic and plastic surgery is an important one. Cosmetic surgical practices gain more cultural currency, and typically qualify for insurance coverage, when they are reclassified as plastic and linked with a medical diagnosis.⁹⁹ The best example is the growing acceptance of the legitimacy of sex change surgery.¹⁰⁰ Cultural acceptance of the surgeries, and the willingness of insurers to fund them, has resulted from the medical field’s diagnoses of many transsexuals with gender identity or body dysmorphic disorders, for which sex change surgeries are a recommended plastic—rather than cosmetic—treatment.¹⁰¹

The distinction between cosmetic and plastic surgeries, however, is itself quite plastic. We can see some evidence of this plasticity in the fact that the very same procedure is designated as plastic in some cases, but

95. See Shiffman, *supra* note 39, at 211; *About ABPS: Description of Plastic Surgery*, AM. BD. PLASTIC SURGERY, <https://abplsurg.org/ModDefault.aspx?section=AboutDPS> (last visited Apr. 11, 2014).

96. See *About ABPS: Description of Plastic Surgery*, *supra* note 95.

97. See Shiffman, *supra* note 39, at 211 (noting that “cosmetic surgery is surgery to beautify”).

98. See *2012 Cosmetic Plastic Surgery Statistics*, AM. SOC’Y PLASTIC SURGEONS, <http://www.plasticsurgery.org/Documents/news-resources/statistics/2012-Plastic-Surgery-Statistics/Cosmetic-Procedure-Trends-2012.pdf> (last visited Apr. 11, 2014).

99. See, e.g., Healthwise Staff, *Cosmetic Surgery and Procedures*, CIGNA, <http://www.cigna.com/healthwellness/hw/medical-topics/cosmetic-surgery-and-procedures-aa64111> (last updated July 31, 2013) (noting that elective cosmetic surgery is not usually covered by insurance).

100. See Lisa Leff, *Transgender Surgery Covered by Growing Number of U.S. Companies*, HUFFINGTON POST (Feb. 21, 2011, 1:31 PM), http://www.huffingtonpost.com/2011/02/22/transgender-surgery-cover_n_826385.html.

101. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576-77 (4th ed. 1994) [hereinafter DSM-IV] (defining gender identity disorder); HARRY BENJAMIN INT’L GENDER DYSPHORIA ASS’N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 18 (6th ed. 2001), available at <http://www.ct.gov/shp/lib/shp/pdf/harrybenjamingenderdisorder.pdf> (setting out the recommended treatments for sex reassignment patients). There is no category (yet) in the medical diagnostic manuals for psychological problems associated with aging, but it is no longer impossible to imagine. See DILLER & MUIR-SUKENICK, *supra* note 14, at 30 (noting that there are diagnostic categories for almost every other transition in life); ORBACH, *supra* note 52, at 105 (noting that cosmetic surgery is covered by health insurance plans in Argentina).

cosmetic in others.¹⁰² Breast augmentation surgery, for example, is “reconstructive” on a woman with two 32A breasts, but “cosmetic” on a woman with two 32B breasts. This is because a woman with two 32A breasts is considered unnaturally flat chested, while a woman with two 32B breasts is considered “normal.”¹⁰³ But, since this assessment of what is “natural” and “normal” has no real medical basis, the distinction between “plastic” and “cosmetic” hardly seems firm.¹⁰⁴

The history of blepharoplasty, or “eye lifts,” provides another example of the cultural plasticity of terms like “cosmetic,” “plastic,” and “natural” in plastic surgery practice.¹⁰⁵ The Japanese physician M. Mikamo pioneered blepharoplasty in 1896, during a time of remarkable Western influence in Japan.¹⁰⁶ At first, Mikamo focused on blending Western and Japanese aesthetic ideals to perfect what was initially seen as a purely cosmetic procedure.¹⁰⁷ Over time, however, Mikamo began to argue that the lids of his Japanese patients were physical “defects” that were not natural and needed to be corrected.¹⁰⁸ Although Mikamo was ultimately unsuccessful in reclassifying all of his Japanese patients’ eyelids as unnatural defects, the idea that blepharoplasty can be a treatment for an unnatural condition has gained cultural traction over the years.¹⁰⁹

Today, the question of whether blepharoplasty is considered cosmetic or plastic depends on the patient.¹¹⁰ In some instances, a doctor will classify the patient’s eyelids as unacceptably “droopy,” in which

102. See Julie M. Spanbauer, *Breast Implants as Beauty Ritual: Woman’s Sceptre and Prison*, 9 YALE J.L. & FEMINISM 157, 182-83 (1997).

103. See Kerith Cohen, *Truth, Beauty, Deception Disfigurement: A Feminist Analysis of the Breast Implant Litigation*, 1 WM. & MARY J. WOMEN & L. 149, 169 (1994); Spanbauer, *supra* note 102, at 167.

104. Indeed, the distinction is sometimes rejected by plastic surgeons and insurance companies, who focus instead on the distinction between medically necessary and elective surgeries. See, e.g., Healthwise Staff, *supra* note 99.

105. See Yukio Shirakabe et al., *The Double-Eyelid Operation in Japan: Its Evolution as Related to Cultural Changes*, 15 ANNALS PLASTIC SURGERY 224, 224 (1985).

106. See *id.*

107. *Id.*

108. See *id.* In support of his claim that single-eyelids were an anatomical defect, Mikamo noted that most people have double-eyelids, and that a single lid can result from disease. See Samuel M. Lam, *Perspective: Mikamo’s Double-Eyelid Blepharoplasty and the Westernization of Japan*, 4 ARCHIVES FACIAL PLASTIC SURGERY 201, 201 (2002) (citing M. Mikamo, *Plastic Operation of the Eyelid*, 17 J. CHUGAI JISHIMPO 1197 (1896)).

109. See Laura Accinelli, *Eye of the Beholder*, L.A. TIMES, Jan. 23, 1996, at E1 (describing the growing number of Asian Americans undergoing eyelid surgery in Los Angeles).

110. See Am. Soc’y for Aesthetic Plastic Surgeons, *Eyelid Surgery*, SURGERY.ORG, <http://www.surgery.org/media/procedure-facts/eyelid-surgery> (last visited Apr. 11, 2014); *Clinical Policy Bulletin: Ptosis Surgery*, AETNA.COM, http://www.aetna.com/cpb/medical/data/1_99/0084.html (last visited Apr. 11, 2014).

case the patient has a medical condition that requires surgical correction.¹¹¹ In those cases, the surgery is considered plastic (or reconstructive).¹¹² But, in other cases, the plastic surgeon determines that, while the patient would benefit from the surgery, it is not medically necessary.¹¹³ In those cases, the surgery is considered cosmetic.¹¹⁴

As these examples illustrate, the difference between cosmetic and plastic surgery has changed over time as medical practitioners change their views about what “natural” or “normal” bodies should look like. Meanwhile, debates over the need for particular types of surgery continue. Notably, the battle lines of yesteryear are not all that different from today: whether anti-aging surgery is a social necessity for women remains a question of considerable debate, and the same is true for surgeries aimed at hiding indicators of disability or ethnicity.¹¹⁵

2. The Cultural Influence of Plastic Surgeons

Plastic surgeons control the surgical options that are available to plastic surgery consumers, and, as a result, they help to shape cultural preferences for bodies with particular attributes and particular types of surgery.¹¹⁶ While it could be argued that plastic surgeons are simply responding to pre-existing cultural biases and demand for particular bodily features, many women seriously consider plastic surgery for the first time only after their family doctors recommend it.¹¹⁷ Others may learn about their surgical options from an aesthetic consultant, who receives “membership fees” from plastic surgeons in exchange for keeping those doctors on the consultant’s referral list.¹¹⁸

111. See *Clinical Policy Bulletin: Ptosis Surgery*, *supra* note 110 (discussing Aetna’s policies for coverage of “medically necessary” blepharoplasty); see also, e.g., AbiK, *Harsh Reality: Elective Cosmetic Surgery vs Medical Malpractice*, LAW. & SETTLEMENTS: THE BLOG (Apr. 6, 2011), <http://www.lawyersandsettlements.com/blog/harsh-reality-elective-cosmetic-surgery-vs-medical-malpractice-07484.html>; *infra* notes 162-97 (discussing the case of Marilyn Leisz).

112. See Healthwise Staff, *supra* note 99 (describing how reconstructive surgery is “typically done to improve a visible scar, skin condition, or malformed body part caused by an injury, a surgery, a disease, or a birth defect”).

113. See, e.g., LucyC, *Botched Procedure: When Corrective Surgery Doesn’t Correct*, LAWYERS AND SETTLEMENTS: THE BLOG (Apr. 5, 2011), <http://www.lawyersandsettlements.com/blog/botched-procedure-when-corrective-surgery-doesnt-correct-07514.html> (discussing how Leisz’s doctor did not first suggest surgery when alternative methods were available to correct her ptosis); see also *infra* notes 162-97 (providing detailed information about Leisz’s case and surgery).

114. See Shiffman, *supra* note 39, at 211 (discussing how “cosmetic surgery is surgery to beautify”).

115. See *supra* notes 78-91 and accompanying text.

116. See BLUM, *supra* note 12, at 7-12 (describing the role of the surgeon as an “aesthetic expert” who determines what surgeries are appropriate).

117. See, e.g., DILLER & MUIR-SUKENICK, *supra* note 14, at 35.

118. See Alyssa Shelasky, *The Plastic Surgery Dealer*, N.Y. MAG. (Oct. 2, 2012), <http://nymag.com/thecut/2012/10/plastic-surgery-pimp.html> (describing the relationship between

Plastic surgery is big business, and the marketing strategies of plastic surgeons reflect this reality.¹¹⁹ Like salespeople for drug manufacturers, in-house marketing specialists help plastic surgeons to develop relationships with primary care doctors and others, who refer their patients to them.¹²⁰ Through advertising and other “educational” efforts, plastic surgeons also help to create demand for more plastic surgeries.¹²¹ Typical advertising by plastic surgeons includes press releases, before-and-after photographs, infomercials, brochures, and even books that promote the plastic surgeon as an “expert.”¹²² These materials emphasize that surgeries will result in a physical appearance that looks and seems “natural.” Most of these materials also note the social and psychological harms that individuals experience when their bodies do not live up to social expectations, such as low self-esteem, fewer social opportunities, and less attractive job prospects.¹²³

The website of the American Society of Aesthetic Plastic Surgery illustrates how plastic surgeons sell the ideal body.¹²⁴ This website features a picture of a woman (Botticelli’s depiction of Venus), which visitors to the website can click on and peruse the various surgical options that are available to “improve” the appearance of a particular body part.¹²⁵ There are multiple options for each body part, and altogether, well over a hundred surgical options for aesthetic improvement are suggested on the website.¹²⁶ Because of all the options, the website makes it seem like plastic surgery candidates have a lot of choices. But, in reality, these choices are actually quite limited.¹²⁷

so-called “beauty brokers” and some of the plastic surgeons to whom brokers refer clients).

119. See KUCZYNSKI, *supra* note 40, at 4.

120. Sometimes the contact is initiated by someone in the primary care doctor’s office, seeking to expand into the more lucrative field of cosmetic treatments. A recent issue of PLASTIC SURGERY NEWS discusses some of the ethical issues involved. See Mike Stokes, *Plastic Surgery’s Eternal Quest for Truth, Clarity and Patient Education*, PLASTIC SURGERY NEWS, Apr.—May 2011, at 1, 38-39.

121. See SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY 246-48 (2003).

122. See KUCZYNSKI, *supra* note 40, at 151, 157, 159-61 (describing the marketing strategies of plastic surgeons).

123. *Id.* at 153-54, 159-64. The claim that plastic surgery will increase the size of your paycheck is not entirely without basis. See generally Rhode, *supra* note 83 (discussing different bases for the claim that plastic surgery will increase one’s profitability).

124. The website of the American Society of Aesthetic Plastic Surgery is available at SURGERY.ORG, <http://www.surgery.org/consumers/procedures> (last visited Apr. 11, 2014).

125. See *id.*

126. See *id.*

127. See ORBACH, *supra* note 52, at 14 (“Today only a few aspirational and idealized body types . . . are taking the place of differing forms of embodiment.”).

In part, these choices are limited due to the screening procedures employed by plastic surgeons to determine whether a person is an appropriate candidate for plastic surgery. One of the key things that plastic surgeons assess during this screening process is the appropriateness of the patient's bodily desires.¹²⁸ If the patient wants to look like Orlan, or seek some other socially unacceptable bodily modification, the patient will probably not succeed in getting past this initial screening.¹²⁹ On the other hand, if the patient does get past this initial screening, they will be shown photos that display a relatively narrow range of potential surgical outcomes.¹³⁰ Sometimes, for example, surgeons use celebrity photographs to display the range of available options.¹³¹ Interestingly, because so many celebrities have themselves undergone plastic surgeries, the surgical options presented frequently include other plasticities, even though the looks that the advertising materials promise always appear "natural." However, the options do not include the faces of people like Orlan, whose multiple surgeries have caused her to look quite different than current culturally-dominant conceptions of beauty.

How do plastic surgeons decide which options may be selected? Although some plastic surgeons maintain that beauty is impossible to define,¹³² there is a robust plastic surgery literature that attempts to set out the parameters of "objective" beauty.¹³³ One article, entitled *What Makes Buttocks Beautiful? A Review and Classification for the Determinants of Gluteal Beauty and the Surgical Techniques to Achieve Them*, provides a particularly enlightening (and amusing) example.¹³⁴ In

128. E.g., Meninguad et al., *supra* note 20, at 245 (advising plastic surgeons to refuse to perform surgery on patients with inappropriate desires); see BLUM, *supra* note 12, at 22 (quoting a plastic surgeon who claims to only perform nose surgeries on people with "real honkers"); see also AESTHETIC SURGERY, *supra* note 66, at 197 (quoting a surgeon as saying that he would not perform an operation he considered "aesthetically wrong").

129. See BLUM, *supra* note 12, at 22-23; discussion *supra* notes 48-68 and accompanying text.

130. See BLUM, *supra* note 12, at 92-93.

131. See, e.g., Seung Chul Rhee et al., *Photogrammetric Facial Analysis of Attractive Korean*, 33 AESTHETIC PLASTIC SURGERY 167, 168 (2009) (describing how photographs of famous Korean entertainers are used to obtain measurements and calculations of beauty standards). But see E. Holland, *Marquardt's Phi Mask: Pitfalls of Relying on Fashion Models and the Golden Ratio to Describe a Beautiful Face*, 32 AESTHETIC PLASTIC SURGERY 200, 204, 207 (2008) (criticizing the practice of relying on celebrities to determine beauty standards).

132. See, e.g., AESTHETIC SURGERY, *supra* note 66, at 182, 187, 193, 197 (relaying several plastic surgeons' responses to the question: "[W]hat is your concept of beauty?").

133. See, e.g., *Aesthetic Plastic Surgery*, SPRINGER LINK, <http://link.springer.com/journal/266> (last visited Apr. 11, 2014).

134. See generally Ramon Cuenca-Guerra & Jorge Quezada, *What Makes Buttocks Beautiful? A Review and Classification of the Determinants of Gluteal Beauty and the Surgical Techniques to Achieve Them*, 28 AESTHETIC PLASTIC SURGERY 340 (2004) (analyzing and reviewing factors and surgeries that make buttocks beautiful).

the article, the authors begin by noting that buttocks occupy a “major place in the concept of beauty recognized by most cultures.”¹³⁵ Despite this, the authors note, there are no “aesthetic analyses of the gluteal region . . . that indicate what signs of beauty should be spared or recreated.”¹³⁶ To remedy this knowledge gap, the authors asked six certified plastic surgeons to review 2400 photographs of the nude backs of twenty to thirty-five year old women “to identify each of the features and anatomic elements that create harmony and beauty.”¹³⁷ The authors then applied their findings to develop standards for diagnosing women with bodies that differ from ideal bodies, and to recommend surgical techniques for treatment.¹³⁸ For example, “Type 4” women, identified in the article as “[u]sually sportswomen,” are recommended, by the authors, to obtain “a wide-based, high profile implant.”¹³⁹ For “Type 5” women, usually “in their fifties,” however, the authors state that gluteal implants and liposuction will likely not be enough—instead, the authors find that, “in most cases, it will be necessary to perform some type of wide dermocutaneous adjustment.”¹⁴⁰ After a discussion of the surgical techniques, the authors conclude that they hope that their research will “make it possible to achieve better postsurgical results that will lead to the well-being and satisfaction of patients.”¹⁴¹

There are several remarkable aspects of the article. The first is the authors’ decision to use the aesthetic judgments of “six certified plastic surgeons” to determine the markers of beauty.¹⁴² Although relying on the judgments of plastic surgeons or medical students seems to be fairly common in this type of medical research, the limitations of such practitioners’ judgments seem fairly obvious.¹⁴³ In this particular study, for example, there were no controls for gender, race, ethnicity, disability, or sexual orientation.¹⁴⁴ And, since most plastic surgeons are male, it is

135. *Id.* at 340.

136. *Id.*

137. *Id.* at 340–41.

138. *See id.* at 342–43.

139. *Id.* at 343.

140. *Id.*

141. *Id.* at 347.

142. *Id.* at 341.

143. For similar studies, see generally Ramon Cuenca-Guerra et al., *Calf Implants*, 33 AESTHETIC PLASTIC SURGERY 505 (2009) (reporting the aesthetic judgments of eight certified plastic surgeons). Notably, many such studies also rely on images of entertainers and fashion models to guide their analyses. *See, e.g.*, Rhee et al., *supra* note 131, at 168 (relying on the photographs of “[fifteen] famous Korean female entertainers and [fifteen] famous Korean male entertainers”). *But see* Holland, *supra* note 131, at 203–07 (critiquing research that relies on the bodily characteristics of celebrities to set surgical standards).

144. *See* Cuenca-Guerra & Quezada, *supra* note 134, at 340.

likely that the aesthetic judgments were male-oriented.¹⁴⁵ Thus, the focus of the research was typically on the male response to the image, rather than the (usually female) patients' desires or responses.¹⁴⁶

However, not all plastic surgery research focuses on plastic surgeons' aesthetic judgments. Some plastic surgeons realize that their patients do not always share their perceptions.¹⁴⁷ For example, a 1976 article by Julien Reich, entitled *Aesthetic Judgment in the Surgery of Appearance*, begins:

An observation that has frequently puzzled me is that my pleasure at an obviously superior aesthetic result of a surgical alteration in appearance is sometimes not shared by the patient. Conversely, a result that leaves much to be desired from a purely aesthetic point of view is sometimes greeted with elation by the patient. Consideration of these facts led to the realization that the results of a surgical alteration in appearance are subject to several different judgments, namely, that of the surgeon, that of the patient, and those of the latter's daily contacts.¹⁴⁸

Perhaps as a result of this realization, there are a number of attempts to use "scientific" observation (like the research conducted by the authors of *What Makes Buttocks Beautiful?*) and other methods to determine "objective" standards of beauty for plastic surgeons to use as guidelines.¹⁴⁹ Some research looks to art, literature, and history to identify beauty standards for "every era."¹⁵⁰ Others seek to identify standards of attractiveness that cross cultural boundaries,¹⁵¹ while still others have attempted to develop an analytical method for determining parameters of beauty that account for race, ethnicity, gender, and age.¹⁵²

145. See BLUM, *supra* note 12, at 87 (noting that eighty-five percent of board-certified plastic surgeons are men).

146. For a discussion of different ways that the law has conditioned women to aim for an unrealistic ideal, see generally Reena N. Glazer, *Women's Body Image and the Law*, 43 DUKE L.J. 113 (1993).

147. See, e.g., Julien Reich, *Aesthetic Judgment in the Surgery of Appearance*, 1 AESTHETIC PLASTIC SURGERY 35, 35 (1976).

148. *Id.*

149. See, e.g., Cuenca-Guerra & Quezada, *supra* note 134, at 340.

150. See, e.g., Sharon Romm, *The Changing Face of Beauty*, 13 AESTHETIC PLASTIC SURGERY 91, 91-93, 95 (1989) (discussing the idea of classical beauty and how it was portrayed in different eras). See generally James J. Lee & Ewart Thomas, *Comparing the Eyes Depicted in Japanese Portraits of Beautiful Women: The Meiji and Modern Periods*, 36 AESTHETIC PLASTIC SURGERY 504 (2012) (comparing historic and current standards of Japanese beauty).

151. See, e.g., Seung Chul Rhee & Soo Hyan Lee, *Attractive Composite Faces of Different Races*, 34 AESTHETIC PLASTIC SURGERY 800, 800 (2010) (describing computer-generated "composite" faces).

152. See, e.g., Dominik K. Feser et al., *Attractiveness of Eyebrow Position and Shape in Females Depends on the Age of the Beholder*, 31 AESTHETIC PLASTIC SURGERY 154, 155-56 (2007)

Some studies, for example, explore the different standards for beauty in Asia.¹⁵³ Still, even this research usually acknowledges that, while aesthetic standards arguably differ along cultural lines, the dominant conception of beauty—at least for the purposes of plastic surgery—is that of Caucasian, Western people.¹⁵⁴ It is also clear that plastic surgeons play a highly influential role in shaping the aesthetic desires of plastic surgery consumers, and, ultimately, cultural expectations about what bodies should look like.¹⁵⁵

In sum, the art of faking through plastic surgery involves collaboration between surgeons and patients, with plastic surgeons playing the dominant role in determining which types of faking are permissible and which consumers are proper candidates for surgery. Unless you are a well-known performance artist like Orlan, it is unlikely that you will have complete freedom in your aesthetic plastic surgery choices. Instead, these choices are largely guided and controlled by the aesthetic judgments of plastic surgeons, which generally defer heavily to cultural biases about what bodies should look like. At the same time, plastic surgeons help to shape those cultural biases, through strategic reclassification of procedures and the refusal to operate on certain types of people.

B. *The Legal Framework of Plastic Surgery Litigation*

Even though plastic surgeons in the United States perform millions of plastic surgeries each year,¹⁵⁶ there appear to be relatively few

(concluding that age plays a role in determining aesthetic preferences for eyebrows); Lee & Thomas, *supra* note 150, at 504-06, 508 (comparing different standards of beauty in both the Meiji and modern periods in Japan); Rhee et al., *supra* note 131, at 167-68, 170 (determining parameters for beauty standards based on famous Korean entertainers).

153. E.g., Yukio Shrakabe et al., *A New Paradigm for the Aging Asian Face*, 27 AESTHETIC PLASTIC SURGERY 397, 400-01 (2003); see also Marke Dobke et al., *Facial Aesthetic Preferences Among Asian Women: Are All Oriental Asians the Same?*, 30 AESTHETIC PLASTIC SURGERY 342, 343, 345-46 (2006) (studying the aesthetic preferences of Korean and Japanese women, and noting some significant differences in preferred beauty features).

154. See Martin Gründl et al., *The Blue-Eyes Stereotype: Do Eye Color, Pupil Diameter, and Scleral Color Affect Attractiveness?*, 36 AESTHETIC PLASTIC SURGERY 234, 234 (2011) (discussing the stereotype that blue eyes are more attractive); Wen-Chieh Liao et al., *Balanced Rhinoplasty in an Oriental Population*, 31 AESTHETIC PLASTIC SURGERY 636, 636 (2008) (“Although aesthetic concepts vary for different races, the current concept of nasal and facial beauty shows a tendency to correspond to that for white people.”); see also Lee & Thomas, *supra* note 150, at 505-08, 510 (comparing historic and current standards of Japanese beauty and concluding that Westernization has brought about changes in Japanese standards for beautiful eyes).

155. See BLUM, *supra* note 12, at 7-9 (describing the role of the plastic surgeon as “aesthetic expert”); *id.* at 93 (noting that surgeons tend to impose their own aesthetic “style” on patients, so that it is possible to determine which doctor operated on which patient).

156. See *2012 Demographic Trends*, *supra* note 42.

reported lawsuits involving plastic surgery. Part of the problem may be that plaintiffs' attorneys are not taking many cases.¹⁵⁷ Although there are no firm statistics, it is telling that the American Association for Justice, the trade association of the plaintiffs' bar, does not have a plastic surgery litigation group among its 120 or so special practice sections.¹⁵⁸

From the perspective of plaintiff's lawyers, plastic surgery cases are both expensive and difficult to win.¹⁵⁹ They are expensive because they typically proceed as medical malpractice cases, which require the presentation of expert testimony.¹⁶⁰ They are difficult to win because jurors typically blame the plaintiffs for electing to have the surgery.¹⁶¹ Unless the individual's injuries are extremely serious (for example, death), or the result is, as one attorney put it, "extreme," the claims are generally not pursued.¹⁶²

A case from New Jersey provides an illustration of some of the problems plaintiffs face when pursuing plastic surgery litigation.¹⁶³ Marilyn Leisz sued her plastic surgeon after plastic surgery left her unable to close her eyes—ever.¹⁶⁴ The surgery Leisz's doctor performed was blepharoplasty.¹⁶⁵ It is an extremely common procedure, especially among people of Asian descent and older women.¹⁶⁶ Several hundred thousand blepharoplasties are performed in the United States each year.¹⁶⁷ Blepharoplasty creates a fold in the eyelid, resulting in a more "Western" look.¹⁶⁸ Plastic surgeons often recommend blepharoplasty to

157. See Dennehy, *supra* note 9, at 54 ("Cosmetic surgery cases are the shunned stepchild of the medical malpractice bar.").

158. See *Litigation Groups*, AM. ASS'N FOR JUSTICE, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/1150.htm> (last visited Apr. 11, 2014) (listing all litigation groups available through the American Association for Justice).

159. See Dennehy, *supra* note 9, at 54.

160. See *id.* at 54, 56.

161. See *id.* at 54 ("The conventional wisdom is that the party to blame for a poor outcome is not the doctor who was careless in performing surgery, but the patient who chose to tamper with nature.").

162. Telephone Interview with Attorney (Mar. 29, 2011) (omitting the attorney's name and place of employment as per the discretion of the author) (on file with *Hofstra Law Review*).

163. See Seamus McGraw, *Woman Can't Close Her Eyes After Plastic Surgery*, TODAY (Apr. 1, 2011, 10:16 AM), http://www.today.com/id/42374009/ns/today-today_health/t/woman-cant-close-her-eyes-after-plastic-surgery/#.UT41z9Ypy4g.

164. *Id.*

165. *Id.*; see also Am. Soc'y for Aesthetic Plastic Surgeons, *supra* note 110 (explaining blepharoplasty).

166. See Accinelli, *supra* note 109 (describing the popularity of blepharoplasty).

167. See Mikaela Conley, *New Jersey Woman Sues, Can't Fully Blink After Eyelid Surgery*, ABC NEWS (Mar. 31, 2011), <http://abcnews.go.com/Health/nj-woman-close-eyes-sues-plastic-surgeon/story?id=13259843>.

168. See AESTHETIC SURGERY, *supra* note 66, at 122; Accinelli, *supra* note 109.

women, and increasingly men, who want to look younger.¹⁶⁹ It is, in fact, the very procedure that Korematsu had done.¹⁷⁰

Plastic surgeons performed blepharoplasty on Leisz's eyes three different times.¹⁷¹ The first surgery was considered reconstructive.¹⁷² Leisz had been diagnosed with a congenital eye condition known as "ptosis," or, in lay terms, droopy eyelids.¹⁷³ The second surgery was considered "cosmetic," and left bumps along her eyelid creases.¹⁷⁴ Unhappy about the bumps, Leisz consulted Peter Parker, a board-certified plastic surgeon who had performed more than ten thousand procedures before assessing Leisz.¹⁷⁵ At first, Parker recommended that Leisz use a cream to smooth the bumps.¹⁷⁶ According to Leisz, she was happy with the results from the cream, but Parker encouraged her to do a third blepharoplasty.¹⁷⁷ Part of Parker's rationale was that Leisz would be happier with the results of the surgery "in a few years" because, without the surgery, Leisz's lids would further sag with age.¹⁷⁸ Following Parker's recommendation, Leisz underwent the procedure a third time.¹⁷⁹ When she recovered, she discovered that she could not close her eyes.¹⁸⁰ Leisz now uses a mask to sleep at night to avoid scratching her corneas, can no longer enjoy swimming or spend prolonged periods of time outdoors, experiences almost constant pain, and has a greater risk of developing glaucoma and eventually losing her eyesight.¹⁸¹

A jury awarded Leisz \$115,000.¹⁸² It sounds like a lot of money, but Leisz called it a "joke," and plaintiffs' lawyers in the area agree.¹⁸³ Apparently, the amount was not sufficient to pay a typical plaintiff's

169. See Marylin Haddrill, *Eyeid Surgery (Blepharoplasty) for a More Youthful Appearance*, ALL ABOUT VISION, <http://www.allaboutvision.com/cosmetic/blepharoplasty.htm> (last updated May 2013).

170. See *About Fred Korematsu*, *supra* note 3.

171. See McGraw, *supra* note 163.

172. See Conley, *supra* note 167.

173. *Id.*

174. *Id.*

175. *Id.*; see also McGraw, *supra* note 163.

176. Conley, *supra* note 167.

177. *Id.*

178. *Id.*

179. See *id.*

180. See *id.*

181. *Id.*

182. McGraw, *supra* note 163.

183. Conley, *supra* note 167; see also *Botched Surgery Victim Unhappy with \$115K Award*, CBS NEWS (Apr. 1, 2011, 10:51 AM), <http://www.cbsnews.com/news/botched-surgery-victim-unhappy-with-115k-award>.

basic litigation expenses in a plastic surgery case.¹⁸⁴ Readers of Leisz's story have little sympathy for her.¹⁸⁵ Many people blame Leisz for her predicament (arguing, for example, that "[h]er vanity has led her to this point").¹⁸⁶ A few also blame the doctor for operating on someone who is "obviously" mentally ill (seemingly, because she elected to have the surgery).¹⁸⁷

But Leisz's story of how she came to undergo plastic surgery is actually fairly typical. Like many plastic surgery consumers, Leisz says that she decided to undergo surgery on the recommendation of her doctor.¹⁸⁸ Indeed, Leisz's doctor designated her first surgery as "reconstructive"—that is, medically necessary.¹⁸⁹ Although Leisz's second two surgeries were considered "cosmetic," the line between cosmetic and reconstructive surgery is not particularly clear in blepharoplasty, and, in any event, highly-qualified physicians recommended surgery in both instances.¹⁹⁰ Nevertheless, jurors and online readers of Leisz's story seemed to blame Leisz, and to a lesser extent her doctor, for the decisions to undergo multiple surgeries.¹⁹¹

This leads to an important question: why did Leisz agree to undergo multiple surgeries on her eyes? Some online commentators suggested that Leisz must be mentally ill.¹⁹² But these commentators ignore the fact that three different plastic surgeons each recommended the surgeries to Leisz as a way to improve her appearance. It is unlikely that these surgeons would have recommended the surgeries if Leisz was mentally ill.¹⁹³ It is also unlikely that Leisz underwent the surgeries solely because she wanted to look younger, as many online commentators assumed.¹⁹⁴

184. See AbiK, *supra* note 111; Conley, *supra* note 167.

185. See, e.g., StevieRayHalen, Comment to *Woman Can't Close Her Eyes After Botched Plastic Surgery*, GAWKER (Mar. 30, 2011, 1:24 PM), <http://gawker.com/5787236/woman-cant-close-her-eyes-after-botched-plastic-surgery>.

186. *Id.*

187. See, e.g., Bill Ding, Comment to *Woman Can't Close Her Eyes After Botched Plastic Surgery*, GAWKER (Mar. 30, 2011, 1:24 PM), <http://gawker.com/5787236/woman-cant-close-her-eyes-after-botched-plastic-surgery>.

188. Conley, *supra* note 167.

189. See *id.*

190. See, e.g., *id.* (presenting the viewpoints different physicians have about the necessity of Leisz's surgeries).

191. See, e.g., Bill Ding, *supra* note 187; see also *Cosmetic Surgery Claims, Litigation Issues*, *supra* note 9 ("If the jurors perceive that the original surgery [was] unnecessary or undertaken solely as a result of the vanity of the plaintiff, the jury may not be sympathetic to the plaintiff's claims.").

192. See, e.g., *supra* note 191 and accompanying text.

193. See Meninguad et al., *supra* note 20, at 244-45 (providing guidance to plastic surgeons on when to reject a patient's request for surgery).

194. See, e.g., Sufferfoolsgladly, Comment to *Woman Can't Close Her Eyes After Botched Plastic Surgery*, GAWKER (Mar. 30, 2011, 1:24 PM), <http://gawker.com/5787236/woman-cant-close-her-eyes-after-botched-plastic-surgery>.

While this may have been part of Leisz's motivation, it is also likely that, like other plastic surgery consumers, Leisz underwent plastic surgery because there are very real cultural benefits associated with the surgical production of a more culturally-acceptable corporeal self.¹⁹⁵ As the literature from plastic surgeons' offices emphasize, there are very real social and economic benefits associated with looking younger, particularly for aging women.¹⁹⁶ Like Korematsu, Leisz probably underwent the procedures because she hoped that the surgeries would allow her to pass in ways that would enable her to lead a better life.¹⁹⁷

Such cultural realities appear to have been forgotten or ignored by these commentators. This is also typical. When plastic surgery fails, the injury is perceived as a blow to the plaintiff's vanity, rather than as the plaintiff's failure to pass—and the subsequent loss of all the benefits that passing brings.¹⁹⁸

1. The Framing of Injuries as "Medical"

Why do the cultural realities surrounding plastic surgery practices seem to count for so little in plastic surgery litigation? The answer lies, in part, in the way that the litigation is structured. Some readers may be surprised to learn that plastic surgery cases typically go forward as medical malpractice claims.¹⁹⁹ Although it may seem that plastic surgery cases should proceed as breach of contract claims—the surgeon promises a result and fails to deliver—medical malpractice actions are the most common legal recourse for injuries stemming from plastic surgery.²⁰⁰ Law students and professors invariably cite the infamous "Hairy Hand" case, *Hawkins v. McGhee*²⁰¹—a staple of first-year law students' contracts classes—to argue that plastic surgery cases *should* proceed as breach of contract cases.²⁰² In practice, however, it is

195. See Askegaard et al., *supra* note 47, at 804 (explaining that some women undergo plastic surgery because they feel that they have no other choice); John W. Schouten, *Selves in Transition: Symbolic Consumption in Personal Rites of Passage and Identity Reconstruction*, 17 J. CONSUMER RES. 412, 412-13, 422-23 (1991) (detailing an empirical study's conclusion that plastic surgery is motivated by, among other things, a desire to improve social marketability).

196. Schouten, *supra* note 195, at 419.

197. See ORBACH, *supra* note 52, at 135 (citing the desire for improved social and economic circumstances as a motivation for undergoing plastic surgery); Schouten, *supra* note 195, at 412-13.

198. See Dennehy, *supra* note 9, at 54 (explaining the belief that plastic surgery patients assume all risks when they choose to tamper with nature).

199. *Id.*; see also 22 AM. JUR. 2D *Proof of Facts* § 1 (1980).

200. See 22 AM. JUR. 2D *Proof of Facts* § 4.

201. 146 A. 641 (N.H. 1929).

202. See *id.* at 642-44 (holding that plaintiff was entitled to recover for breach of contract the difference between the value of what plaintiff was promised to receive—a "[one] hundred per cent good hand"—and what plaintiff received—a hairy hand); see also Sullivan v. O'Connor, 296 N.E.2d 183, 189 (Mass. 1973) (recovering, on a breach of contract theory, for failure to achieve a

relatively unusual for a plastic surgery case to proceed as a breach of contract claim, rather than a medical malpractice claim.²⁰³

The structuring of plastic surgery litigation as medical malpractice litigation has the effect of emphasizing the “medical” aspects of the plaintiffs’ injuries, and precluding consideration of other injuries. In plastic surgery litigation, the injuries can be roughly classified into two types: (1) “objective” injuries, where doctors would agree that an injury has occurred (also called “medical injuries”); and (2) “subjective” injuries, where the plaintiff is unhappy with the surgical results.²⁰⁴

Leisz’s case involved both types of injuries, although, as her case illustrates, the difference between injuries that are “objective” and “subjective” is often unclear in the plastic surgery context. On the one hand, Leisz could not close her eyes.²⁰⁵ Most doctors would consider that an “objectively” bad result from plastic surgery, albeit one about which the consumer is typically warned.²⁰⁶ On the other hand, Leisz was also “subjectively” unhappy with how she looked.²⁰⁷ Depending on the doctor evaluating her, this type of plastic surgery injury might be considered “objective” or “subjective.” It is an “objective” injury if the results were so bad that other doctors would conclude that the performing doctor violated the standard of care. It is a “subjective” injury if only the patient was dissatisfied.

Generally, the structure of medical malpractice litigation allows courts to focus only on the seemingly objective medical injuries.²⁰⁸ This is because, in a medical malpractice case, the key question is whether the doctor violated the applicable standard of care, which is typically defined by the professional customs of other doctors.²⁰⁹ In Leisz’s case, for example, her attorney argued that other plastic surgeons would not

particular result).

203. There are several reasons for this. First, some judges view a plaintiff’s attempt to pursue a breach of contract claim in this context as an improper attempt to circumvent the requirements (and limitations, such as damage caps) of a medical malpractice case. See *Cosmetic Surgery Claims, Litigation Issues*, *supra* note 9. Second, these days, most plastic surgeons have legal counsel who advise them not to promise any specific results, and to have their patients acknowledge in writing that nothing has been promised to them. See, e.g., Shiffman, *supra* note 39, at 214-15 (advising doctors on procedures to follow to avoid a lack of informed consent claim).

204. See *Cosmetic Surgery Claims, Litigation Issues*, *supra* note 9.

205. McGraw, *supra* note 163.

206. See *Botched Surgery Victim Unhappy with \$115K Award*, *supra* note 183.

207. See *id.*

208. See Shiffman, *supra* note 39, at 221.

209. *Id.* at 220-21.

have operated on Leisz.²¹⁰ In other words, they argued that Leisz's doctor made an objectively bad decision to perform the surgery at all.

Thus, in plastic surgery litigation, what matters is whether the plastic surgeon's practices deviated significantly from the practices of other plastic surgeons in the same field.²¹¹ Assessment of a plastic surgeon's performance rarely involves serious consideration of the surgeon's failure to achieve the plaintiff's desired result.²¹² Indeed, in a medical malpractice case, a bad result alone is usually not sufficient to make a claim.²¹³ While the plaintiff may be unhappy with the result, the assessment of the surgical results is considered unavoidably subjective.²¹⁴ Instead, liability is predicated on the presentation of evidence indicating that the surgeon's actions were not sufficient to satisfy professional standards.²¹⁵ In any event, the doctor will typically claim that the surgery was a success.²¹⁶ And most juries will defer to doctors' judgments.²¹⁷

In sum, the structuring of plastic surgery litigation as medical malpractice claims has the practical effect of making plastic surgery plaintiffs' subjective desires or disappointments, including unhappiness with the result, irrelevant.²¹⁸ Instead, the plaintiffs' injuries are viewed

210. *Woman Unable to Close Eyes Now Suing Plastic Surgeon*, CBS NEWS (Mar. 29, 2011, 9:10 PM), <http://newyork.cbslocal.com/2011/03/29/woman-unable-to-close-eyes-now-suing-n-j-plastic-surgeon>.

211. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 32–33 (5th ed. 1984) [hereinafter PROSSER & KEETON] (explaining how the professional custom standard of care for medical negligence allows physicians to set their own standards of conduct). Some U.S. courts have abandoned the professional custom standard for a "reasonable physician" test. See, e.g., *Vassos v. Roussalis*, 625 P.2d 768, 772 (Wyo. 1981) (holding that the standard of care for malpractice cases is that a physician must exercise the care that would reasonably be exercised under similar circumstances by members of the profession in good standing and in the same line of practice).

212. See Shiffman, *supra* note 39, at 220–21. This is because the standard of care does not ensure a particular result—which the surgeons are very careful not to guarantee—but rather requires adherence to established practices that are aimed at achieving a particular result. See *id.*

213. See *id.* at 221.

214. PROSSER & KEETON, *supra* note 211, § 33; see also Meninguad et al., *supra* note 20, at 245; *Cosmetic Surgery Claims, Litigation Issues*, *supra* note 9.

215. PROSSER & KEETON, *supra* note 211, § 33; Anna Mavroforou et al., *Medical Litigation in Cosmetic Plastic Surgery*, 23 MED. & L. 479, 484 (2004) ("An unsuccessful result is not necessarily related to malpractice as long [as] the physician can prove that he or she acted as a reasonably prudent person performing 'lege-artis' a method technique that is acceptable within the medical community and validated in clinical practice as derived from published reports."); see also *Cosmetic Surgery Claims, Litigation Issues*, *supra* note 9.

216. See *Cosmetic Surgery Claims, Litigation Issues*, *supra* note 9.

217. See *id.* (explaining that jurors in cosmetic surgery claims will often give the doctor the benefit of the doubt when it comes to determinations of malpractice); see also *supra* note 9.

218. Shiffman, *supra* note 39, at 221 ("It is generally accepted that a bad result of treatment in itself is not evidence of negligence.").

primarily in medical terms that are assumed to be more objective than the plaintiffs' own judgments. If a plastic surgeon's performance is determined by other doctors to violate the standards of the profession, then that plaintiff has a chance of recovery.²¹⁹ Otherwise, that plaintiff's injuries are not legally cognizable.²²⁰

The implications of these circumstances are significant. The fact that most plastic surgery cases proceed as medical malpractice cases effectively enables the medical profession to assume the role of creating the cultural demand for plastic surgery, and then acting as arbiters in litigation over the results. While deferring to doctors may make sense in cases that involve, at least ostensibly, purely medical judgments, there is no reason to defer to the judgments of doctors for what are essentially questions of cultural preference.²²¹

This is not to say that there is no "medicine" involved in plastic surgery. Clearly, there are both medical and cultural components to plastic surgery. The point is simply that, even when medicine is involved, plastic surgery litigation places doctors in the role of serving as both the producers and arbiters of procedures aimed primarily at achieving cultural preferences.²²² While plastic surgeons receive some training in aesthetics, it seems odd to view them as uniquely well qualified to assess cultural preferences, or to otherwise rely *solely* on them to assess injuries in this context, where culture clearly plays a role in shaping the plaintiff's experience of injury.

219. See *id.* at 220-21.

220. *Id.* at 221 ("Ordinarily, a physician has not been held responsible for a mistake in judgment unless the mistake was so gross that it made the professional conduct substandard.").

221. Meningaud et al., *supra* note 20, at 248 ("Cosmetic surgery is moving progressively further away from the field of medicine to become a purely commercial activity.").

222. To some extent, this dual role helps doctors prevent litigation from being brought in the first place. As one article advising on medical liability issues in plastic surgery explained, "[t]he patient who . . . has unrealistic expectations for surgical results . . . should be avoided before performing surgery." Shiffman, *supra* note 39, at 212. The same article also explains that patients with "dysmorphic" personalities—patients who "see[] defects in their appearance when there are none"—should also be avoided. *Id.* In other words, doctors avoid potential litigation by refusing to perform surgery on consumers who seek bodily modifications that the surgeons consider "unrealistic" or unnecessary. See Mavroforou et al., *supra* note 214, at 482 ("Most malpractice claims in cosmetic plastic surgery are not consequences of technical faults but because of inadequate patient selection criteria and lack of adequate communication between patient and surgeon.").

III. INJURY AS CULTURAL CONSTRUCTION

*No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.*²²³

The preceding Parts explored some of the ways that culture mediates perceptions of injuries in plastic surgery litigation.²²⁴ The role that culture plays in mediating perceptions of injuries, however, is not unique to plastic surgery litigation. Although plastic surgery litigation provides a revealing window into how culture shapes perceptions of injuries in tort practice, culture mediates perceptions of injuries in other types of tort cases, as well.

We can see the role that culture plays in mediating perceptions of injuries in tort cases more generally in the recent critiques of tort law that employ a critical disabilities perspective.²²⁵ In these critiques, scholars have shown how cultural biases about disabilities color perceptions of injuries in tort cases in a number of troubling ways.²²⁶ For example, legal actors in tort litigation commonly present disabling injuries as “tragic.”²²⁷ While this presentation may seem “normal” or even “objective” to people who do not identify as persons with disabilities, the equation of disability with tragedy is a culturally biased perspective that is deeply offensive to many people with disabilities.²²⁸

Legal scholars operating from a critical disabilities perspective have also noted that people with disabling impairments are frequently assumed to have experienced hedonic injury (or a loss of pleasure in their lives) in tort litigation, even without the presentation of evidence that shows such a loss.²²⁹ But, such an assumption is also culturally biased in offensive ways. Equating disabling injury with hedonic loss only makes sense if you believe that life with a disability is inherently less pleasurable than life without one—a cultural belief most people with disabilities reject.²³⁰

223. Robert M. Cover, *The Supreme Court 1982 Term - Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

224. See *supra* Parts I–II.

225. See Bagenstos & Schlanger, *supra* note 23, at 769–72 (2007) (arguing that many tort cases embrace the so-called medical model of disability, which tends to reinforce troubling cultural stereotypes about people with disabilities); Bloom & Miller, *supra* note 20, at 718–19.

226. See Bagenstos & Schlanger, *supra* note 23, at 769–72; Bloom & Miller, *supra* note 20, at 718–19.

227. See Bloom & Miller, *supra* note 20, at 735–36.

228. *Id.* at 733–34, 743.

229. See Bagenstos & Schlanger, *supra* note 23, at 769–72 (discussing the assumption of hedonic loss in tort cases where the plaintiffs allege disabling injuries).

230. See *id.* at 763–65.

The critical disabilities perspective on tort litigation also exposes the ways in which tort litigation almost always entails culturally influenced assessments of bodily conditions.²³¹ In the typical tort case, medical experts offer testimony about how the plaintiff's body varies from cultural expectations about what "normal" bodies should look like and how they should function.²³² And, in most cases, medical experts also play a key role in suggesting what legal relief is necessary to ensure that the plaintiff's body comes as close as possible to meeting such cultural expectations.²³³ In each instance, the medical experts rely upon seemingly neutral, "objective" criteria to determine injury.²³⁴ However, as illustrated by plastic surgery litigation, the criteria employed by medical experts in tort litigation are neither objective nor neutral.²³⁵ Instead, medical experts propound their own perspectives, which are also heavily influenced by cultural biases.

Moreover, the underlying assumption of tort law's approach to injury—that the body is "naturally" capable of complying with the "optimal" criteria that medical experts rely upon to evaluate bodily injury—is false. Plastic surgery practices—and the claims that sometimes result—provide a particularly compelling counterpoint to this assumption. The growing number of people undergoing plastic surgery indicates that very few people (or, possibly, no one) can "naturally" live up to these "optimal" criteria. For tort law to continue to employ these standards as a baseline for determining injury—through medical experts and otherwise—ignores the cultural reality, and, as a result, is highly problematic.

In sum, critical disabilities analyses of tort law suggest that the culturally biased approach to assessing injuries in plastic surgery litigation is not unique. Cultural biases influence perceptions of injuries in many tort cases, particularly when legal experts rely on medical experts to guide the assessments. To further illustrate the influence of culture on perceptions of injury in tort practice, the remainder of this Part examines two other sources of information about the role of culture in shaping how injury is understood in tort law: Subpart A considers historical evidence of how perceptions of injuries in tort law have changed over time; and Subpart B reviews empirical studies of how injuries are perceived in tort law.²³⁶

231. See Bloom & Miller, *supra* note 20, at 731-34.

232. *Id.* at 722-26.

233. *Id.* at 726.

234. *Id.* at 725.

235. See *supra* Part II.B.1.

236. See *infra* Part III.A-B.

A. *Historical Studies of Injuries in Tort Law*

A wealth of historical evidence provides further support for the notion that conceptions of injuries are culturally mediated in tort law.²³⁷ Among other things, extensive research has uncovered widespread evidence that tort law has historically undervalued—and continues to undervalue—the kinds of injuries that are more commonly experienced by women and minorities.²³⁸ For example, according to nineteenth century courts, women “lost nothing of permanent value” when their husbands committed adultery.²³⁹ The injuries that men experienced as a result of their wives’ adulteries, on the other hand, were recognized and compensated.²⁴⁰ Similarly, courts in early “nervous shock” cases refused to recognize the injuries of women who alleged that a defendant’s conduct caused them to suffer a miscarriage or stillbirth.²⁴¹ And once courts did begin to recognize these injuries, they only did so for white women because courts did not believe it was possible for women of color to be injured in this way.²⁴² This differential treatment exposes the historical biases of courts against claims brought by women and minorities. It also illustrates the extent to which injuries are themselves cultural constructs, deeply colored by the lens of our experiences and biases.

A 2001 article by David Engel comparing conceptions of injuries and identities in three different settings and time periods—Tibet in the 1940s, Wisconsin in the 1800s, and Thailand in the 1960s—provides further evidence of the role of culture in shaping understandings of injuries.²⁴³ Engel emphasized that concepts of injury are socially constructed, and “vary significantly across different social settings.”²⁴⁴ But, importantly, he also noted considerable variations within single social settings.²⁴⁵ Moreover, he concluded that these differing and

237. David M. Engel, *Injury and Identity: The Damaged Self in Three Cultures*, in BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES 3, 3 (David Theo Goldberg et al. eds., 2001) [hereinafter Engel, *Injury and Identity*].

238. See Jennifer B. Wiggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007*, 27 REV. LITIG. 37, 53-58 (2007) (noting that tort law undervalues the injuries of racial minorities). See generally Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814 (1990) (discussing how tort law undervalues the injuries of women with regard to damages and recovery).

239. CHAMALLAS & WRIGGINS, *supra* note 24, at 39.

240. *Id.* at 38-39.

241. *Id.* at 39, 47.

242. See *id.* at 48.

243. Engel, *Injury and Identity*, *supra* note 237, at 3.

244. *Id.*

245. *Id.*

sometimes conflicting perspectives on injury have “significant implications for the role and meaning of law.”²⁴⁶

Historical research also shows how conceptions of injury can change over time in a single culture.²⁴⁷ For example, in thirteenth century England, injuries were primarily understood in terms of damage to honor and reputation.²⁴⁸ This was largely a product of the broader cultural emphasis on status and rank that became paramount in the eleventh and twelfth centuries.²⁴⁹ Over the course of the thirteenth century, however, English Royal Courts began to place less emphasis on the “insult,” and more emphasis on the physical and economic aspects of the injury.²⁵⁰ This important shift in the concept of injury—which survives to this day—appears to have been the result of an increased number of personal injury claims in the Royal Courts. As compared with the local courts, the Royal Courts had “no interest at all in the personal honor of the king’s subjects,” and, as a result, the concept of injury began to focus more on economic and physical harm, rather than honor.²⁵¹

Further evidence of how culture shapes conceptions of injury in law can be found in Lisi Oliver’s *The Body Legal in Barbarian Law*.²⁵² In this comprehensive analysis of personal injury claims and compensation in Barbarian law, Oliver uncovered many instances of cultural influences on both the recognition and valuation of injuries.²⁵³ Among other things, she found extensive evidence that the laws governing compensation for personal injuries were not always structured by a particular people’s own legal history, but were sometimes deeply influenced by other cultures.²⁵⁴ For example, Oliver found that the laws governing compensation for personal injuries among Germanic peoples from the sixth to ninth centuries were not a product of ancient Germanic traditions, but were instead deeply influenced by Roman law, probably as a result of

246. *Id.*; see also John S. Beckemann, *Adding Insult to Iniuria: Affronts to Honor and the Origins of Trespass*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 178-79* (Morris S. Arnold ed., 1981) (describing the evolution of the concept of injury from one based on damage to the victim’s honor and social status to one based on damage to the body in thirteenth- and fourteenth-century England).

247. See generally Beckemann, *supra* note 246 (discussing ways that English conceptions of injury, with regard to the laws of trespass, changed over time).

248. *Id.* at 173.

249. *Id.* at 162.

250. *Id.* at 159.

251. *Id.* at 180-81.

252. LISI OLIVER, *THE BODY LEGAL IN BARBARIAN LAW* (2011).

253. See, e.g., *id.* at 8-10 (2011) (describing the Roman influence on Germanic peoples).

254. See, e.g., *id.*

Germanic peoples living under Roman rule for several centuries.²⁵⁵ While it is hardly surprising that the laws generally governing Germanic peoples were influenced by their conquerors, it is interesting to consider that the influence extended beyond structural and political considerations to matters that would seem to be more a matter of local concern—like how a community perceives and compensates personal injuries.²⁵⁶

Oliver's research also uncovered a number of fascinating cultural differences in how jurisdictions defined and determined injuries.²⁵⁷ Apparently, some jurisdictions considered occupation in determining injury, while others did not. Late-Frisian injury laws, for example, provided special compensation for "injuring the hand of a harpist or goldsmith."²⁵⁸ Other jurisdictions, however, did not consider occupation at all in such determinations.²⁵⁹

Another cultural difference in Barbarian personal injury law discovered by Oliver had to do with the valuation of different body parts. Certain jurisdictions recognized that injuries to some fingers were more serious than to others, while different jurisdictions treated all fingers the same.²⁶⁰ With respect to the nose, some jurisdictions focused on the loss of smell as the key injury, while others did not consider the loss of smell and determined injury solely on whether the nose had lost the physical capacity to contain mucus.²⁶¹ Likewise, some jurisdictions understood mouth injuries in terms of damage to the ability to speak, while others concentrated on whether the mouth could still cover the teeth or control saliva.²⁶²

Oliver's study also uncovered the cultural importance of hair in Barbarian injury law.²⁶³ It seems that, at the time, long hair designated higher social status, and certain styles of haircuts were less favored than others in different cultures, giving rise to different awards for personal injuries that involved damage to hair.²⁶⁴ For example, in the Alfred jurisdiction, the personal injury award was tripled if you cut someone's hair "like a priest's."²⁶⁵ Apparently, this was because haircuts were a key

255. *See id.* at 8.

256. *Id.* at 10.

257. *See, e.g., id.* at 74-76, 112-14 (discussing cultural differences in how jurisdictions defined and valued injuries to the head, torso, and extending limbs).

258. *Id.* at 51.

259. *Id.*

260. *See, e.g., id.* (noting that, in the Alfred jurisdiction's laws, injuries to the "scytelfinger" resulted in greater compensation, while other jurisdictions treated all fingers the same).

261. *Id.* at 93.

262. *Id.* at 95-96.

263. *See id.* at 108-11.

264. *Id.* at 108-09.

265. *Id.* at 108.

signal of one's place in the social hierarchy.²⁶⁶ Thus, to cut someone's hair "like a priest's" was to make one appear to be of a different rank than the person really was, which was culturally unacceptable at the time.²⁶⁷

Unfortunately, there is very little research on how perception and compensation of injuries differ across cultural borders in our own time. As a result, we know relatively little about how culture shapes perceptions of injuries today. It is interesting to note, however, that there appear to be some similarities between contemporary cultural considerations and the cultural concerns shaping perceptions of injuries during Barbarian times. In both Barbarian Frisia and contemporary tort practice in the United States, the occupation of the claimant is considered relevant in determining the amount of the award.²⁶⁸ And, as was the case in Barbarian times, it remains culturally problematic to change one's appearance in ways that blur social hierarchies or otherwise make someone appear to be something that they are not.²⁶⁹ In Barbarian times, this cultural transgression resulted in treble damage awards against the transgressors.²⁷⁰ In contemporary plastic surgery litigation in the United States, transgressors are not penalized with treble damages, but they do have a more difficult path to sue and be compensated for their injuries.

B. Empirical Studies of How Legal Actors and Others Perceive Injuries in Tort Law

In addition to the historical research, a burgeoning body of empirical research provides further evidence of how culture shapes perceptions of injuries. Empirical research on perceptions of injuries in rural American counties, for example, found that cultural narratives about globalization influenced how local people perceived injuries and the plaintiffs who brought injury claims.²⁷¹ Specifically, concerns about globalization prompted local people to be less sympathetic to the injury claims of perceived outsiders to the community.²⁷²

266. *Id.*

267. *Id.* at 108-10.

268. *See id.* at 51; Bloom & Miller, *supra* note 20, at 727-28.

269. *See, e.g.,* OLIVER, *supra* note 252, at 108.

270. *See id.* at 109.

271. *See generally* David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1984) (discussing the social, cultural and economic factors that affected perceptions of injury in Sander County, Illinois).

272. *Id.* at 553-55, 570-71.

Research on injury law in Thailand has also looked at how cultural narratives shape perceptions of legal injuries.²⁷³ The conclusions from such research, however, emphasized the importance of religious narratives for understanding injury.²⁷⁴ The research found, for example, that many people in Thailand blamed bad luck or karma for their injuries.²⁷⁵ It also discovered that perceptions of injury in Thailand greatly influence the decision of whether to make a legal claim.²⁷⁶ For example, if the individual believed the injuries were caused by “bad luck or bad stars,” then the individual would be more likely to conclude that some sort of ritual or apology would be the appropriate remedy, rather than a lawsuit.²⁷⁷

Other empirical research provides interesting insights into how cultural norms and understandings shape jurors’ views of injuries.²⁷⁸ It is generally assumed that jurors are an important source of social norms and cultural understandings in tort law, since legal doctrines like the “reasonable person” standard seem to invite jurors to interpret the law in light of changing social values and norms.²⁷⁹ But it is also generally assumed that jurors are more culturally biased than judges.²⁸⁰ Empirical research on juries and judges, however, suggests that juries and judges share many of the same cultural biases, and that, in the vast majority of cases, judges and juries would reach the same verdict.²⁸¹ In short, cultural biases influence both juries’ and judges’ views of litigation in significant ways.

Other research has uncovered extensive evidence of how cultural norms influence media coverage of prominent litigation, and how this coverage, in turn, shapes perceptions of injuries in future cases.²⁸² An emphasis on cultural narratives of personal responsibility in media reports on the McDonald’s coffee case, for example, shaped perceptions of the injuries in that case, and even injuries in future cases.²⁸³ Thus, the

273. DAVID M. ENGEL & JARUWAN S. ENGEL, TORT, CUSTOM, AND KARMA: GLOBALIZATION AND LEGAL CONSCIOUSNESS IN THAILAND 6-11 (2010).

274. *See id.* at 82-87.

275. *Id.* at 81-82, 89-91.

276. *See, e.g., id.* at 81, 89-90, 108-09.

277. *Id.*

278. *See, e.g.,* Hans, *supra* note 25, at 80-81, 83, 87-88.

279. *See id.* at 80-81, 84-85.

280. *See id.* at 84.

281. *Id.* at 93.

282. WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS 216, 220-21 (2004).

283. *Id.* at 216-22; *see* Liebeck v. McDonald’s Restaurants, P.T.S., Inc., CV-93-02419, 1995 WL 360309, at *1 (D.N.M. Aug 18, 1994), *vacated*, Liebeck v. Restaurants, No. CV-93-02419, 1994 WL 16777704 (D.N.M. Nov. 28, 1994).

media are also an important player in the production and reproduction of legal and cultural “knowledge” about tort cases, including what we think we know about the injuries involved.²⁸⁴

From this survey of historical and empirical studies of how culture shapes perceptions of injuries in tort law, it is clear that cultural biases shape perceptions of injuries in virtually all tort cases in a variety of different ways. While the cultural biases of medical professionals are a particularly important influence on perceptions of injuries, they are not the only cultural narratives that shape perceptions of injuries in tort. Religious and other narratives, like local narratives about globalization, also play a role, as do the efforts of the media, which is a key translator of cultural narratives about injuries through its coverage of tort cases.

IV. PLASTIC SOLUTIONS

Plastic surgery litigation provides a revealing window into how culture shapes perceptions of injuries in tort practice. As we saw in Part III, however, culture mediates perceptions of injuries in a variety of other types of tort cases, as well.²⁸⁵ In other areas of tort doctrine, the role of culture in shaping the parameters of tort litigation and outcomes is widely acknowledged. Concepts like “the reasonable person” in negligence law, for example, rely on the notion of a shared sense of community values.²⁸⁶ The role of culture in tort law, in such an instance, is not only acknowledged, but also frequently praised as a key component of tort law’s much-vaunted flexibility—as community norms of what is “reasonable” change, the law changes as well.²⁸⁷

When it comes to understanding injuries, however, tort law tends to ignore the role of culture. Instead, tort law operates on the assumption that injuries can be understood in some sort of objective and culturally neutral way.²⁸⁸ The heavy reliance on medical experts to determine both whether an injury has occurred and the cause of the injury, for example, signals that the evaluation of what constitutes injury is an objective

284. William Haltom & Michael McCann, *Framing Fast Food Litigation: Tort Claims, Mass Media, and the Politics of Responsibility in the United States*, in *FAULT LINES*, *supra* note 23, at 97, 114-15.

285. See discussion *supra* Part III.

286. See *supra* note 276 and accompanying text.

287. For a discussion of the role of culture in shaping tort doctrines, like the “reasonable person” in negligence analysis, see Engel & McCann, *supra* note 23, at 2; see also JOHNSON & GUNN, *supra* note 25, at 1-3 (describing how the rules of tort law have evolved in response to changing societal needs); Schuck, *supra* note 25, at 18 (“Tort liability, more than most areas of law, mirrors the economic, technological, ideological, and moral conditions that prevail in society at any given time.”).

288. See, e.g., *supra* notes 230-33 and accompanying text.

endeavor, best left to scientific experts.²⁸⁹ But, as we have seen, scientific experts also approach injuries with cultural biases.²⁹⁰

Instead of continuing to ignore the presence of these biases, it makes sense to pay closer attention to them and to contemplate the interplay between culture and conceptions of injuries in tort doctrine and tort practice. This requires further research—perhaps along the lines of Oliver’s fascinating investigation of historical cultural variation in conceptions of injuries—but it also requires greater attentiveness to the existence of cultural biases in tort practice.²⁹¹

In other areas of tort law, there is movement toward attempting to eliminate the role of cultural biases in tort practice. For example, many legal rules now operate to restrict the role of the jury in tort litigation, and, in particular, to limit the jury’s ability to interpret the law in light of their own social beliefs.²⁹² These developments, however, operate on the mistaken belief that it is possible to eradicate bias from our perceptions. As we see from research on judge and juror bias, it is wrong to think that specialized training can eradicate bias. A more realistic approach would seek to adopt practices that acknowledge the impossibility of getting “outside” of culture, and would instead focus on techniques that permit legal actors to consider a broader array of cultural perspectives.

In the following Subparts, I recommend two ways that tort litigation could begin to better recognize the role that culture plays in shaping perceptions of injury, and simultaneously allow for greater diversity of perspectives on how injuries are experienced.²⁹³ The first suggestion is to rethink, and perhaps place some limits on, the deference to medical experts in tort litigation of all kinds, but especially in plastic surgery litigation.²⁹⁴ The second recommendation is to place greater emphasis on evidence about the cultural aspects of the injuries involved.²⁹⁵

289. See *supra* Part II.A.2.

290. CHAMMALLAS & WRIGGINS, *supra* note 24, at 127 (noting how expert opinions are shaped by a “normality bias”); see also Carol J. Gill, *Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Empirical Evidence and Reply to Batavia*, 6 PSYCHOL. PUB. POL’Y & L. 526, 530 (2000) (describing the disability biases of medical experts).

291. See *supra* notes 251-68 and accompanying text.

292. Hans, *supra* note 25, at 86-87.

293. See *infra* Part IV.A-B.

294. See *infra* Part IV.A.

295. See *infra* Part IV.B.

A. *Less Deference to Medical Experts*

In plastic surgery litigation, doctors act as both purveyors of the demand for plastic surgery and arbiters in litigation over the results. In other types of tort cases, medical experts also play a role in generating the cultural demand for bodies with particular attributes by, among other things, declaring some bodies “injured” and in need of repair. In this respect, a plaintiff’s attempt to prove injury in tort cases is not unlike going to the plastic surgeon’s office. Plaintiffs whose bodies are assessed by medical professionals as being “abnormal,” or “less than whole,” as a result of the actions of a defendant will successfully prove injury.²⁹⁶ Those whose injuries lack a medical imprimatur, on the other hand, will be less likely to succeed.

The views of medical experts, however, are subject to the same types of cultural biases that shape the views of others in society.²⁹⁷ We can see this with clarity in plastic surgery cases, but it is also true of other types of tort cases, in which medical experts rely upon culturally influenced bodily norms to determine whether an injury has occurred.²⁹⁸ Because of the existence of these biases, tort litigation would do well to rely less heavily on the testimony of medical experts to determine injury. This is particularly true in plastic surgery cases where, as we have seen, the medical protocols rely upon subjective criteria to determine whether surgery is appropriate, and later, “objectively” evaluate the results as medical experts if the consumer is unhappy with her post-surgery appearance. But it is also true in a variety of other types of tort cases where medical testimony plays a prominent role.

Moving away from the heavy reliance on medical narratives of injury seems particularly appropriate in plastic surgery cases that involve allegations of bad results. While medical protocols may dictate the range of acceptable results, an assessment of the injuries stemming from a bad

296. See Bloom & Miller, *supra* note 20, at 722, 728-29 (describing the notion of “make-whole” relief in tort law, and its limitations). These practices, in turn, reflect a broader cultural trend of placing much greater emphasis on the “optimization” of bodies. NIKOLAS ROSE, *THE POLITICS OF LIFE ITSELF: BIOMEDICINE, POWER, AND SUBJECTIVITY IN THE TWENTY-FIRST CENTURY* 6 (2007); see also Askegaard et al., *supra* note 47, at 794 (noting the growing cultural interest in the body and its perceived flaws). Some say that this growing emphasis on the optimization of bodies has led to “a new form of capital—biocapital.” See, e.g., ROSE, *supra*, at 6; CHRIS SHILLING, *THE BODY AND SOCIAL THEORY* 127-28 (1993) (arguing that physical capital can be traded for social or economic capital); see also 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 140-41 (Robert Hurley trans., Pantheon Books 1978) (1976) (discussing the operations of “bio-power” and its implications for capitalism). For a detailed discussion of bio-power, see Anne Bloom, *Speaking “Truth” to Biopower*, 41 SW. U. L. REV. 241, 246-52 (2012).

297. See Bloom, *To Be Real*, *supra* note 56, at 411-13 (discussing the problem of cultural bias in medical assessments).

298. Bloom & Miller, *supra* note 20, at 724-26, 728-31.

result in plastic surgery has as much to do with personal and cultural preferences as it does with medicine. Certainly, there may be instances where medicine is limited in what results it can achieve, and doctors would be particularly well qualified to testify on this particular point. But the question of what results are possible is a separate inquiry from the assessment of the result itself. With respect to the latter, the doctor has no special cultural expertise.

For similar reasons, courts should also encourage more examination of the underlying cultural beliefs driving experts' views. In plastic surgery cases, this might encourage judges (and others) to see these cases as involving something other than purely medical claims. And, in other tort cases, greater interrogation of the cultural biases influencing medical experts' testimony may allow for a more complex understanding of the injuries involved.

B. More Evidence on the Cultural Aspects of the Injuries

Another important step would be to make space for other types of testimony about the injuries involved, as a way of balancing the emphasis on "optimal" bodily performance and appearance that so colors the practice of contemporary medicine. While medicine clearly has a role to play in tort litigation, other types of evidence—including testimony from cultural experts, who can provide important testimony about the broader context in which plaintiffs experience their injuries—deserve to be heard as well.²⁹⁹

Testimony from others who have experienced similar injuries is likely to prove particularly beneficial for the plaintiffs and fact-finders.³⁰⁰ Research on injuries suggests that third parties who have experienced similar injuries can provide more recently injured people with helpful information about how they will likely experience their injuries in the future.³⁰¹ Moreover, people with similar injuries also have valuable testimony to offer about the cultural aspects of such injuries. Obtaining this form of testimony would provide an important balance to the testimony offered by medical experts, which tends to place too great an emphasis on the physical—rather than the cultural—aspects of the injuries involved.

299. See *id.* at 735-37, 739-41.

300. *Id.* at 739-40.

301. See, e.g., DANIEL GILBERT, *STUMBLING ON HAPPINESS* 185-88 (2006) (summarizing research and concluding that experience provides uniquely valuable information about injuries); *id.* at 114-16 (noting that people with prior experience with an injury typically provide the best information about the injury's likely future impact on people with similar injuries).

Testimony from comparative injuries experts would also offer valuable information about the harms involved.³⁰² Placing the injuries in a broader comparative context will reveal alternative ways of viewing the injuries, their causes, and their cultural repercussions. This information is likely to prove helpful to plaintiffs, and will provide yet another check on seemingly “objective” testimony on injury that is offered by medical experts. Testimony on cross-cultural differences in bodily expectations, for example, is likely to reveal subjective bias in the medical assessments.

V. CONCLUSION

This Article encourages a fundamental rethinking of the way that tort litigation conceptualizes injuries.³⁰³ It explores the cultural plasticity of injuries through the lens of plastic surgery practices and litigation, and argues that perceptions of injuries in plastic surgery litigation are culturally mediated.³⁰⁴ It then argues that the cultural biases that plastic surgery plaintiffs encounter when they attempt to sue for their injuries are not all that different from the biases operating in other tort cases.³⁰⁵

Through a survey of historical and empirical studies of tort law, this Article provides extensive evidence of how cultural biases have shaped conceptions of injuries in different historical periods, and how cultural biases continue to shape tort practices today.³⁰⁶ Historically, these biases have operated in ways that have made tort law particularly slow to recognize injuries that are commonly experienced by relatively disempowered populations, such as women, racial minorities, and people with disabilities. But, even today, cultural misunderstandings color the supposedly “objective” expert assessments of injuries on which tort litigation so heavily relies. As a result, many injuries are not recognized at all, and others receive inadequate attention.

To remedy this problem, this Article recommends adopting an approach to injuries that takes culture into account.³⁰⁷ More specifically, this Article argues that, instead of deferring so greatly to the expert opinions of doctors, tort litigation should include more testimony on the role of culture in shaping our perceptions and experiences of injuries.³⁰⁸

302. See Bloom & Miller, *supra* note 20, at 740 (describing how experiential experts assist plaintiffs with disabilities in understanding their disabilities).

303. See *supra* notes 281-90 and accompanying text.

304. See *supra* Part II.B.1.

305. See *supra* notes 223-34 and accompanying text.

306. See *supra* Part III.A.

307. See *supra* Part IV.

308. See *supra* notes 281-90 and accompanying text.

While many people might disagree with Koretmasu's conclusion that his surgery was necessary for his social and economic survival, it is impossible to understand his decision—or the injuries that he experienced when the surgery failed—without considering the particular cultural situation. The same is true for today's plastic surgery consumers. To fully understand these injuries, it is important for tort litigation to recognize the role of culture in shaping perceptions of injuries, and how they are experienced.